

Memorandum in Support, with Amendments

COMMITTEE ON CHILDREN AND THE LAW

Children #7

June 4, 2014

S. 7497

By: Senator Savino

A. 8342-A

By: M. of A. Weinstein

Senate Committee: Children and Families

Assembly Committee: Codes

Effective Date: On the 90th day after it shall
have become a law

AN ACT to amend the domestic relations law and the family court act, in relation to child custody forensic reports.

LAW AND SECTIONS REFERRED TO: Sections 70, 241 of the domestic relations law; section 251, 651 of the family court act.

THE COMMITTEE ON CHILDREN AND THE LAW SUPPORTS THE BILL IF AMENDED

Up until approximately thirty years ago, parents in custody cases who could afford to hire expert witnesses often hired mental health professionals to testify concerning their views regarding which custody/visitation arrangements would be in the best interests of children. Although these "battles of the experts" still exist in many states, in New York it has become common for judges to appoint so-called "neutral" mental health professionals to provide custody evaluations.

Because most issues concerning custody evaluations have not been addressed by statute or court rule, individual courts and individual judges have been forced to determine on their own what practices they will follow concerning many complex questions. Consequently, New York State is a patchwork of different and sometimes contradictory practices.

One exceptionally confusing issue is who may have a copy of the custody evaluator's report or other access to it. Some judges allow all attorneys and litigants to have a copy. Some judges limit distribution of the report to the attorneys and may or may not allow an unrepresented party to have a copy. Some judges prohibit even the attorneys from having copies, requiring them to read the report in the courthouse and take handwritten notes.

When the attorneys are given copies, some judges allow the parties to read their attorneys' copies, while some judges instruct the attorneys to divulge only the gist of the reports to the clients. Some judges allow unrepresented parties to have copies of the reports, but other judges only permit a party to read the report in the courthouse.

In New York City, most judges allow the attorneys, but not the litigants, to have copies of the reports; the litigants may only read the reports in their attorneys' offices or, if unrepresented, in court under supervision. Outside of New York City, the practices, generally, are not uniform.

S.7497 and A.8342-A would give the litigants, their counsel, if any, and the attorney for the child in child custody and visitation cases the right to obtain a copy of the forensic report and the underlying data. In addition, this proposal enables a party to provide a copy of the forensic report and the underlying data to professionals retained to help with the case, including e.g. an expert to rebut the contents of a forensic report. At each step, the court has the ability to issue a protective order limiting or conditioning access to the forensic report or the evaluator's file. In addition, the court has the authority to hold violators (willful violators under A.8342-a) of their court orders directing such limitations or conditions in contempt of court. The court is also required to provide clear notice to the parties and counsel that a violation (willful violation under A.8342-a) of a court order conditioning or limiting disclosure shall be contempt of court which may include punishment of a fine or imprisonment or both. The proposal also provides that the admissibility into evidence of the forensic report must be subject to the rules of evidence and the right of cross-examination.

The New York State Bar Association Committee on Children and the Law has grave concerns regarding both the Senate and the amended Assembly version of the bill unless amended to prevent litigants from receiving a copy of the forensic report to take out of the court. Both versions of the bill are neither uniform nor sufficiently protective of children. The Committee's primary concern is the opportunity for both willful and inadvertent revelation of the frequently adverse information regarding a parent to a child who is the subject of a custody proceeding. Despite the ability of the court to hold a willful violator in contempt, at the point of an application for contempt, the damage is already done to the child at a time when he or she is already dealing with the stress of a divorce or separation between his or her parents. The Committee supports the need to provide much needed structure to this process. However, to require the court to determine whether a protective order is necessary to safeguard the report and underlying information from misuse on a case-by-case basis will not provide uniformity, but will foster continued uncertainty. Children are often cannon fodder in bitter custody disputes. The bill must be amended to provide the uniformity needed to protect children from misuse of this delicate information before the harm occurs, by restricting litigant access to forensic reports to access supervised by the litigant's attorney or at the court with supervision that makes certain there is no access to any type of copying machine or device, including a cell phone that could be used to photograph a report. If the litigant is pro se and reads the report in the court, the litigant should have his or her own copy of the report, which will be kept at the court, so that the litigant can make notes on the report

and can use his or her own copy of the report at trial. The Committee on Children and the Law believes that with these amendments, these changes will go far in reducing the harm to children occasioned by the misuse of such information while protecting the due process rights of the litigants.

Based on the foregoing, the New York State Bar Association's Committee on Children and the Law **SUPPORTS** this legislation, with amendments.

Betsy Ruslander, Chair
Committee on Children and the Law

Kathleen DeCataldo, Chair
Legislative Response Subcommittee