

Memorandum in Support

FAMILY LAW SECTION

FLS # 6

May 29, 2015

A. 290

By: M. of A. Weinstein

Assembly Committee: Judiciary

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

AN ACT to amend Domestic Relations Law §70 and §240-1, as follows: 1) to provide that all parties, their counsel and the attorney for the child shall have a right to a copy of the court-ordered forensic report and a copy of the forensic evaluator's file in child custody cases, subject to the issuance of a protective order pursuant to Section 3101 of the Civil Practice Law and Rules ("CPLR"); and 2) upon application to the court, any person retained to assist counsel or any party shall be provided with a copy of the forensic report, again subject to the issuance of a protective order; and 3) to amend §251(c) and (d) and §651 of the Family Court Act to provide that Sections 3101 and 3103 of the CPLR apply to pre-trial discovery of court-ordered forensic reports in child custody cases.

SECTION OF LAW REFERRED TO: DRL §70 and §240; FCA §251 and §651

THE FAMILY LAW SECTION SUPPORTS THIS LEGISLATION

The Memorandum in Support justifies the bill as follows: This bill will help provide uniformity in the law of New York State with respect to access to court-ordered forensic reports in child custody cases and ensure parents' due process rights to adequately challenge such reports are protected.

Presently there is no uniformity in the law as between the First, Second, Third and Fourth Departments with regard to access to court-ordered forensic reports in child custody cases. The Bill seeks to provide such uniformity and address longstanding due process concerns about not allowing parents to obtain copies of forensic reports.

Without the ability to obtain and review a copy of the forensic report, it is questionable at best whether parents involved in child custody litigation are afforded complete due process. Enabling parents, their counsel and the attorney for the child to obtain a copy of the forensic report better equips all parties and counsel concerned to effectively challenge the forensic report. In the same vein, the Bill goes the extra step of allowing (with leave of the court) anyone retained by a party or his or her counsel to review the report. If a professional with expertise in the subject matter addressed in the

forensic report can obtain access to the report, this will further assist the party who retained such professional in helping to determine whether the data presented in the report is accurate, biased, complete, etc. Heightened access to forensic reports and the evaluator's file will also facilitate more informed preparation for cross-examination of the forensic evaluator at trial. Blocking or severely limiting a parent's right to access the forensic report is inconsistent with a parent's well-settled, fundamental interest in the care and custody of his or her child as outlined by the United States Supreme Court in Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000).

Although the Bill does empower the courts to issue protective orders limiting or conditioning access to forensic reports, there remains legitimate concerns about the possibility that one or both litigants in a child custody case might show the report to the subject child, or children, and the negative effects of such exposure could be irreparably harmful. To enhance its effectiveness and make the courts more informed, the Bill should also provide that in child custody modification proceedings, the presiding Justice and the attorney for the child may obtain a copy of the forensic report from the underlying custody matter to help determine how the initial custody determination was made. The Family Law Section also recommends that the Bill include a directive prohibiting the courts from reading/reviewing the forensic report prior to its receipt, if any, in evidence at trial unless the parties and their counsel agree otherwise in a written stipulation submitted to the Court.

Based upon the foregoing, subject to the above recommendations, the Family Law Section **SUPPORTS** this legislation.

Memorandum prepared by: Alan Feigenbaum, Esq.

Chair of the Section: Alton L. Abramowitz, Esq.