

Memorandum in Opposition

FAMILY LAW SECTION

FLS # 1-A

March 17, 2020

A. 5621

By: M. of A. Weinstein

S. 4686

By: Senator Biaggi

Assembly Committee: Codes

Senate Committee: Children and Families

Effective Date: 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 SECTION REFERRED TO: DRL §70 and §240; FCA §251 and §651.

THE FAMILY LAW SECTION OPPOSES THIS BILL

The Family Law Section supported the previous version of the Bill (A08342) introduced in the 2013-2014 legislative session. However, at that time, the Family Law Section had concerns about inappropriate use of forensic reports by litigants in custody proceedings, and believed that there were other ways in which the Bill could be improved. Unfortunately, those concerns have not been addressed in the current version of the Bill.

While the Bill seeks to provide uniformity in the law with respect to access to court-ordered forensic reports in custody cases, and protect a litigant's due process rights to adequately challenge such reports, the Bill gives litigants (including *pro se* litigants) unfettered access to the reports with insufficient safeguards. Furthermore, while the Bill seeks to address longstanding due process concerns about prohibiting litigants from obtaining copies of forensic reports, the procedural provisions are unclear and lack specificity.

Our issues with the Bill are summarized below:

First, there remain legitimate concerns about a litigant in a child custody case – especially a *pro se* litigant – showing the report to the subject children or others, and the negative effects of such exposure could be irreparably harmful. While the Bill allows a motion for a protective order to be made in order to preserve the confidentiality of the forensic examiner's report and raw data, the Bill fails to address the specific logistical process and timing for doing so. Once the report is disseminated, it may be too late for a protective order to serve its intended purpose. Moreover, it

is questionable whether the prospect of a possible contempt finding will be a sufficient deterrent to prevent a *pro se* litigant from improperly disseminating the forensic report.

Second, the Bill requires an application to the court in order for a party or attorney to provide a retained expert a copy of the report and the raw data file of the examiner. Since each party will likely retain the services of an expert to review the examiner's report and raw data, there is no logical rationale to require the parties to apply to the court for permission to give the report and data to a retained expert. This will only result in costly motion practice and delay. The Bill should allow for the right of retained experts to review the report and data of the examiner subject to signing a confidentiality agreement.

Third, to enhance the Bill's effectiveness and ensure a better-informed court, any revised Bill should include a provision authorizing the court to obtain a copy of the forensic report from a prior custody proceeding involving the same parties and child(ren). Such a provision will assist the court in understanding how the initial custody determination was made.

Finally, the Family Law Section recommends that any revised Bill include a directive prohibiting a court from reading/reviewing the forensic report until it is received in evidence at trial, unless otherwise agreed-to by the parties and their counsel in a written stipulation submitted to the Court.

Based upon the foregoing, the NYSBA's Family Law Section **OPPOSES** this legislation.