Women's Bar Association

OF THE STATE WBASNY OF NEW YORK

Written Testimony Submitted on October 31, 2019 to
Assembly Standing Committee on Judiciary
Assembly Standing Committee on Social Services
Assembly Standing Committee on Children and Families

In response to Public Hearing on the rights of children in court
Held on October 24, 2019
Assembly Hearing Room 1923
250 Broadway, 19th Floor, New York, NY

Thank you to the Chairs and members of the Assembly Committees on Judiciary, Social Services and Children and Families for the opportunity to provide Women's Bar Association of the State of New York ("WBASNY") a forum to express our views on the important topic of children's rights in court cases involving custody, visitation and child support cases.

WBASNY is an organization of nearly 4,300 members with 20 chapters representing all parts of New York State dedicated to protecting the rights of women and children. Although we have taken positions on many issues regarding children and families, for this testimony we have tried to select a few of the most significant issues currently affecting children about which we have strong views.

First, regarding forensic reports specifically mentioned in the Assembly Notice, we believe that the process by which forensic reports are utilized by the courts in making custody and visitation determinations should be consistent throughout the state. We support legislation to ensure fair access by the parties to such reports. **However, we strongly oppose those portions of A.5621 (Weinstein) / S.4686 (Biaggi) introduced this past session which would release forensic reports, notes and raw data to the parties, including pro-se litigants.** We are particularly concerned about the great potential for irreparable harm that will result from intentional or unintentional dissemination of the contents of forensic reports, notes and raw data to the parties, their children and the public. Contempt is not enough of a deterrent and will have no impact on the irreparable harm to parents and children resulting from release of such information via the internet and/or social media. See the full text of our Position Statement on this bill which is included as an Appendix to this testimony.

The Position Statement points out that it is not a violation of due process to have pro se litigants and parties read the report in court or an attorney's office. Viewing such reports in this manner provides significant access to the report which will allow the litigant to defend or set forth the report, while avoiding the damage that might result from releasing the report without adequate safeguards. *See* the recent Second Department decision confirming this view in *Raymond v. Raymond* (2019 Slip Op. 05546) (2d Dept. 2019). As currently written, WBASNY disagrees that "adequate safeguards" are provided in the bill to avoid an abusive party from distributing the report to harm the other party and any children that are involved in the custody and visitation determinations. The mere threat of contempt of court or order from the judge will not elevate the mental capacity of an abuser to comply with the law.

It goes without saying that proper qualification of experts and substantiation of the basis for recommendations is necessary in all cases. But allowing unlimited access to forensic reports and raw data and notes to parties and pro se litigants will do nothing to ensure the quality of the reports. It is also clear that the prompt resolution of custody cases is important to the best interests of children. If cases take years to resolve, children's lives remain in limbo, with resulting psychological consequences. As stated in our Position Statement, we object to those portions of A. 5621 / S.4686 which state that the admission of the forensic report shall be subject to objection pursuant to the rules of evidence. Allowing such objections will result in unnecessary and lengthy delays and expenses. We note that existing court rule 22 NYCRR section 202.16(g) gives the court discretion to admit the report under oath, but requires the evaluator to be present and subject to cross-examination at trial. To alter this rule will only result in greater delays in custody cases.

Protecting the privacy of the information in the report, promotes the best interest of children by preventing them from discovering psychologically damaging information about themselves and/or their parents and ensuring that courts can continue to utilize the valuable tool of forensic reports in their decisions on custody and visitation. Requiring busy courts to issue protective orders in every case in order to protect the confidentiality of the information in the reports, may discourage the use of such reports thereby denying the court of valuable information about the parties which may protect the children. Even if courts do order forensic reports with protective orders, there may be substantial delays as a result.

We do, however, support that portion of the bill that would release the forensic evaluator's entire file to counsel only, and to pro se litigants for review in court prior to litigation, without any need for a CPLR 3120 demand. Release of the entire file is important to ensuring the quality of the forensic report and should not be a "black box" as stated in our Position Statement.

A second issue of major concern to WBASNY involving the rights of children in court is regarding the balancing of the desire of adoptees for information about their birth parents against the birth mother's expectation of privacy. **In this regard, WBASNY opposed legislation that would allow adult adoptees to receive a certified copy of their original long form birth certificate (A.5494, Weprin / S.3419, Montgomery). A copy of WBASNY's Position Statement is included as an Appendix to this testimony.**

Notwithstanding our opposition, this legislation passed both houses this past session. **WBASNY has urged Governor Cuomo not to sign the legislation as it is currently written. WBASNY respectfully requests the Governor condition any approval of this legislation with an amendment that would provide for its application prospectively and mandate an acknowledgement by birth mothers of the potential disclosure to the child upon reaching majority of identifying information about birth parents.** Such an amendment would protect birth mothers who choose not to be known while allowing for adoptees to access birth information. Studies have shown that a breach of expected privacy could result in severe psychological damage to the birth mother, even more so in cases where the child is conceived through sexual assault or coercion and is placed for adoption. Moreover, as we pointed out in our Position Statement, we believe that the current law adequately protects the rights of children through State procedures by allowing adoptees to access their records for good cause and through the Adoption Registry which has been greatly improved by recent changes which give birth parents notice and an opportunity to register at the time of consent or surrender.

Although the bill applies to adoptees upon reaching the age of eighteen, we are concerned about the chilling effect this legislation will have on young children awaiting adoption in the already overburdened foster care system. Children could be deprived of loving homes if prospective parents are discouraged from adopting children due to the potential future involvement of biological parents. This legislation also has the potential to deter and discourage birth mothers from choosing adoption when circumstances indicate adoption would be in the child and birth mother's best interest. Thus, this legislation is clearly not in the best interest of some of the most vulnerable children in our society. Any legislation signed must balance the rights of all parties – adoptive parents, birth parents, adoptees, and potential adoptees. The current bill, as written, fails in this regard.

The third issue affecting the rights of children in court is that of assigned counsel fees in custody and visitation cases where adult parties are unable to afford counsel or where private counsel is not available to represent children. WBASNY is greatly concerned about the adequacy of such representation in Family Court for children pursuant to Family Court Act section 249, for adult parties pursuant to Family Court Act section 262, and for both children and adult parties in appeals of such matters pursuant to Family Court Act section 1120, as well as in Supreme Court in divorce cases involving such issues pursuant to Judiciary Law section 35. [1] It is well known that attorneys earn hourly rates far greater when they are hired privately, especially in counties such as New York County, where we understand that some attorneys have simply ceased serving on panels to accept assigned counsel work because the rates are so low. WBASNY is concerned that children and adult parties will not be properly represented in these matters because the statutorily mandated rate of compensation is so low. **The best interests of the children cannot be addressed if cases are not properly presented or defended. The current assigned counsel rate is $75 per hour with a representation cap of $4,400. We urge you to consider increasing this rate this year. This rate was set in 2004 and cannot be increased without amending Article 18-B of the County Law.**

The New York State Bar Association ("NYSBA") House of Delegates supported a resolution on June 16, 2018 to support a report by their Criminal Justice Section and Committee on Mandated Representation which expressed similar concerns not only with respect to representation of children and adults in custody and visitation matters, but also with respect to criminal matters (the report can be found at www.nysba.org/workarea/DownloadAsset.aspx?id=85662). We agree with the New York State Bar Association that rates should be increased pursuant to a formula keyed to increases in salaries of elected officials or pursuant to a cost of living increase. We also agree that whatever rate is adopted should be subject to annual increase pursuant to a formula and should be paid out of the state budget rather than through unfunded mandates to the localities. Commensurate increases in funding should also be considered for organizations that provide Attorneys for Children services. Increasing the rates of attorney compensation in these matters will ensure that the rights of children and families are protected by competent and engaged attorneys.

We thank the Assembly Committees for considering our views on matters which affect the most vital issues affecting children. We look forward to working with you on these matters.

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[1] *We note that the Assembly Hearing Notice requested testimony on children's rights in court in child support cases as well as in custody and visitation cases. We note that only noncustodial parents are entitled to representation in child support cases. Assigned Counsel for Custodial Parents in child support cases is a separate issue which should also be addressed.*

WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK

P.O. Box 936, Planetarium Station
New York, New York 10024-0546
(212) 362-4445
(212) 721-1620 (fax)
info@wbasny.org

Position Statement -2019

A.5621 / S.4686

Oppose

WBASNY strongly opposes those portions of A.5621/S-4686 that provide for release of forensic reports, notes and raw data to the parties, including pro se litigants. We are particularly concerned about the great potential for the irreparable harm that will result from intentional or unintentional dissemination of the contents of forensic reports, notes and raw data to the parties' children and the public. Contempt is not enough of a deterrent and will have no impact on this irreparable harm to parents and children resulting from the release of such information via the Internet and/or social media. In addition, this will create a very real potential for editing and falsifying the evaluation. A contempt proceeding, if any, will only add to the cost and delay of custody litigation which is not in the best interest of children and their families.

We are particularly concerned that victims of domestic violence will be targeted and further harmed by this Bill. If parties are given copies of forensic reports, an abuser can easily inflict more abuse on the victim with threats and actual disclosure of the forensic report to employers, relatives and other members of the public.

Providing forensic evaluation reports to parents directly will have a chilling effect on the formulation and use of forensic evaluations, which are an important tool in custody matters, because courts will be reluctant to order forensic reports knowing how they may be misused and parties will be reluctant to be open and honest with evaluators. The bill will burden already overburdened courts with the need to issue protective orders and delay cases, which will harm children and families.

It is not a violation of due process to have pro se litigants and parties read the report in court or an attorney's office. This is still significant access to the report. There has been a history of extreme caution in protecting the report. The forensic reports have always been part of a court record that is sealed and not available to the public. This Bill could result in public disclosure of those sealed court files without a court Order. Since a pro se litigant has a right to defend or put forth the report, then he/she has a right to view it - but that should be done with safeguards recognizing that both parties and pro se litigants can sometimes lose sight of their children's interests in favor of their own and use the report in wholly unintended and inappropriate ways, including posting on the Internet.

We firmly believe that the Bill should require counsel and retained experts who receive forensic reports and files to execute confidentiality agreements acceptable to the Court. This is the practice in many courts and should be a uniform rule throughout New York State.

We oppose the Bill's provision that admissibility of forensic reports and files shall be subject to objection pursuant to the rules of evidence and subject to cross-examination. Such a provision will result in trial delays and additional expense.

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We do, however, support that portion of the Bill that allows for the release of a forensic examiner's entire file to counsel only, and to pro se litigants for review in Court prior to litigation. We do not believe that a CPLR 3120 demand is necessary; the forensic examiner's notes and raw data should be as available to counsel as the report itself. Decisions from Nassau and Westchester counties have directed the release of the entire file to counsel with strong pronouncements in favor of such release: "Custody determinations should not be made based upon a black box. All of the underlying information, which is unquestionably relevant and material, must be provided to counsel, who must be fully equipped to cross-examine the forensic evaluator and establish for the Court, as trier of fact, the credibility and reliability of the opinions and conclusions expressed by the neutral forensic evaluator." K.C. v. J.C., 50 Misc.3d 892, 25 N.Y.S.3d 798 (Supreme Court, Westchester Co. 2015). We are in favor of a codification of the holding in K.C. v. J.C., and J.F.D. v. J.D., 45 Misc.3d 1212(A) (Supreme Court, Nassau Co. 2014).

Custody determinations are made to promote the best interests of children. There is no argument as to due process since the restriction is only as to the actual possession of a physical copy of the forensic report and raw data. In all circumstances, there should not be a restriction to the access and review of the forensic report and raw data under court or attorney supervision. Accordingly, all court procedures and rights should be fashioned so as not to interfere with achieving a result that is in the best interests of children in New York State.

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Position Statement - 2019

2019 A.5494 (Weprin) / S.3419 (Montgomery)

Access to Identifying Information of Birth Parents

Oppose

This legislation would allow adult adoptees to receive a certified copy of their original long form birth certificate if 18 years of age or older. WBASNY opposes this legislation in its entirety because it mandates the disclosure of identifying information of birth parents without first securing their consent. The proposed legislation fails to adequately account for the right of birth parents, specifically birth mothers, to decide whether to keep such identifying information confidential.

At the time of adoption, the State implied confidentiality of the biological parents in the absence of written consent. There was an expectation that privacy would be maintained. To alter this scheme would be to breach a promise made to these individuals.

Although most adoptions today have some measure of openness, there are still cases in which privacy is necessary to protect the safety and identity of the birth parent. In particular, when a child is conceived through sexual assault or coercion and is placed for adoption, the birth mother should have a reasonable expectation of privacy. Disclosure of the birth mother's identifying information is tantamount to identifying and outing the victim of rape, without her consent, which is entirely inconsistent with current state laws regarding protecting the identity of victims, particularly when the victim is a minor.

Justification for this proposed law has had particular focus on the dissipation of the stigma of out of wedlock births. While much of the stigma surrounding out of wedlock births has dissipated, there remain many who would be greatly harmed if an out-of-wedlock pregnancy were disclosed after the fact.

Recent studies discuss the unique trauma and impact, of placing a child for adoption, on the birth mother. Forced identification 18 or more years after the adoption could trigger profound psychological reactions by the birth mother. While much of the debate around this issue centers on the psychological impact and "civil right" of adoptees, the psychological impact and civil rights of the birth parents should not be ignored.

WBASNY also opposes this legislation because the adoption information registry already permits birth parents to disclose information should they choose to do so. Recent amendments requiring that birth parents receive information about the registry and have an opportunity to register at the time of giving a consent or surrender, have increased the reliability of the registry making it more successful. Further, the State also has a process in place for adoptees to access their original birth certificates when good cause can be demonstrated.

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The current process appropriately balances the interests of adoptees, birth parents, and adoptive parents. It protects the woman's right to retain anonymity, if she chooses, regarding what likely was a painful and troubling decision many years ago, and ensures her life is not now unexpectedly and unwantedly disrupted.

WBASNY proposes that any legislation which would permit the disclosure of a birth parent's identification be applied prospectively, so that the State is not placed in the position of breaching its promises to biological parents. WBASNY further suggests that any legislation is also modified to include a written acknowledgment by the birth parent of such potential disclosure, such as modification of current adoption forms to include a clause stating that identifying information regarding the birth parents may be disclosed.

Lastly, WBASNY has concerns over the potential conflict this legislation would have with key provisions and intent of the proposed Child-Parent Security Act, which we collectively support.

As an organization comprised of attorneys and judges across the state in private practice, government, academia, and the courts dedicated to the advancement of women in law and society, WBASNY strongly opposes the legislation as currently written.