

**REPORT ON LEGISLATION BY
THE MATRIMONIAL LAW COMMITTEE AND
THE CHILDREN AND THE LAW COMMITTEE**

**A.5621
S.4686**

**M. of A. Weinstein
Sen. Biaggi**

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

THIS BILL IS OPPOSED

The Matrimonial Law and Children and the Law Committees of the New York City Bar Association (the “Committees”) write to provide feedback on the proposed legislation which would amend the Family Court Act and the Domestic Relations Law regarding the use of reports from court-appointed forensic evaluators (“forensics”) in child custody disputes. The Matrimonial Practice Advisory and Rules Committee of the Office of Court Administration has proposed a similar but not identical bill (OCA 27-2019).¹

The Committees support the approach taken in OCA 27-2019 with a few minor changes and clarifications detailed below. Although A.5621/S.4686 contains several valuable elements, it goes too far in guaranteeing parties access to forensic reports. We believe that OCA 27-2019 strikes a better balance among the competing interests.

When custody of, or access to, minor children is disputed, the report of the neutral forensic becomes a critical piece of evidence. As Prof. Timothy M. Tippens has argued for years,² due process requires that counsel have access not only to the forensics’ reports but also to their notes in order to cross-examine the forensic thoroughly and explore any omissions or possible bias. Courts, however, have recognized that right only inconsistently. Both legislative proposals would establish a right for attorneys to access forensics’ “entire file related to the proceeding,” unless a protective order under CPLR §3103 provides otherwise. The Committees welcome that change, with the understanding that all files will be redacted to prevent dissemination of confidential information that could compromise the safety of a domestic violence victim.

¹ See “Report of the Matrimonial Practice Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of New York,” Jan. 2019 at 34, <https://www.nycourts.gov/LegacyPDFS/IP/judiciary/legislative/pdfs/2019-Matrimonial.pdf> (“Previously-Endorsed Legislative Proposal #3).

² See, e.g., “Custody Forensics: Reform on the Horizon?”, N.Y. Law J., March 7, 2013.

REASONS FOR SUPPORTING OCA 27-2019

A difficult issue in drafting these legislative proposals is the pro se litigants' access to forensic reports. On that issue, in March 2013, after much discussion and internal debate, the City Bar concluded that:

“[G]iven the harm that can be done by providing parents with a copy of the report (harm that would not be undone by any sanction nor prevented by any affirmation/affidavit), the court rule should not allow parents to receive a copy of the forensic report. Instead, the court rule should allow represented litigants to review the report in their attorneys' offices, and should allow unrepresented parties to review the report in the courthouse and to have access to the report in the courtroom during trial.”³

As the Children's Law Center in Brooklyn recently noted, parents who gain possession of forensic reports have shared them inappropriately and used them to attack children and each other.⁴

The Committees are pleased that OCA 27-2019 follows our recommendation. A.5621/S.4686, however, presumptively gives represented parties the right to copies of the forensic report. In the age of smartphones and social media, that will make it all too easy for distraught parents to publicize the very personal and embarrassing information that must often be included in forensics' reports.

OCA 27-2019 also provides more extensive mechanisms for ensuring the confidentiality of forensic reports. In particular, attorneys and others who receive access to forensic reports would be required to sign affidavits promising to not disseminate the reports without permission. Such procedures should be included in any legislation enacted on this issue.

Another difference between OCA 27-2019 and A.5621/S.4686 is that OCA 27-2019 limits judges' ability to read a forensic report before the parties have presented an agreement on child custody for judicial approval or before a trial or hearing has commenced. A.5621/S.4686 includes no such restrictions. The Committees believe that restrictions on when judges can read forensic reports are unnecessary and potentially harmful. Judges appropriately seek to avoid contested trials or hearings on custody disputes. In order to bring the parties to a compromise on such matters, judges need to read the forensic report. And if there is to be a trial or hearing, the judge should be able to prepare for it by reviewing the forensic report in advance.

³ Comment on Office of Court Administration's Proposal Regarding Access to Forensic Evaluation Reports in Child Custody and Visitation Cases, at 1, <http://www2.nycbar.org/pdf/report/uploads/20072434-ForensicReportsinChildCustodyMatters.pdf>.

⁴ Karen P. Simmons et al., "Parties Deserve to See Forensic Evaluations" (letter to the editor), N.Y. Law J., Mar. 22, 2017.

SUGGESTED CHANGES TO OCA 27-2019

The Committees recommend some small changes to OCA 27-2019. First, OCA 27-2019 appropriately allows experts who have been retained to assist counsel to review independent forensics' reports and notes. However, the bill provides that such access will be “[u]pon application” to the court.⁵ The problem is that applications to the court must generally be on notice to all parties. If one side wishes to use an expert to review the forensics' report and advise counsel about it, the application will disclose that expert's name. The contemplated procedure will therefore impinge on the traditional right of counsel to consult with non-testifying experts in total confidence. Currently, most judges will allow another expert to access a forensic report after the retaining attorney presents that expert informally in the judges' chambers. Any legislation on forensic reports should clarify that such an ex parte procedure suffices as an “application” with regard to a non-testifying expert.⁶

The Committees also recommend the language in OCA 27-2019 be clarified to allow self-represented litigants to review forensic reports at a courthouse “or other location.” We recognize that in rural counties of the State, courthouses may be inconveniently located. We are not sure, however, where else any measures could be effectively taken to prevent a self-represented litigant from copying the report.

We appreciate the effort that the Matrimonial Practice Advisory and Rules Committee put into keeping material in forensic reports from being disseminated as part of other documents, which must be shared with the parties. In particular, OCA 27-2019 prohibits litigants from quoting forensics' reports in any “motions, pleadings or other documents.” We doubt, however, that the effort will succeed. Counsel will still be allowed to quote forensic reports in hearings or trials. It will be difficult to make arguments, and impossible to cross-examine forensics, without such quotes. Once that happens, anyone present in the courtroom (which cannot be closed during testimony) will be able to hear the contents of the report. The quotes will also appear in the court reporter's transcript. Furthermore, information in the forensic evaluation can sometimes play a crucial role in motion practice that implicates the safety of a party or child. We therefore recommend omitting that provision of the bill.

Finally, OCA 27-2019 requires that reports be returned to the court upon conclusion of the litigation. We suggest that this provision be modified so that the attorneys be permitted to maintain the document in their files, confidentially, for use in any appeals or subsequent, related litigation.

CONCLUSION

In sum, the Committees recommend that the Legislature give further consideration to the enactment of OCA 27-2019, with the minor changes discussed above, rather than

⁵ This language also appears in A.5621/S.4686.

⁶ OCA 27-2019 refers to such experts retained by counsel or parties as “independent licensed forensic evaluators.” That term could be misleading, because there is no particular “license” such experts might have. We recommend that “person retained to assist counsel,” as in A.5621/S.4686, or another general term be used instead.

A.5621/S.4686. The Committees remain happy to work with OCA and the Legislature on the topic further.

Children and the Law Committee
Sara Hiltzik, Chair

Matrimonial Law Committee
Dylan S. Mitchell, Chair
Matthew A. Feigin, Member (mfeigin@katskykorins.com)

Updated and Reissued June 2019