

Unfounded ACS Reports in Custody Cases

A discussion of whether New York's sealing of unfounded ACS reports unfairly restricts access to information that may be relevant in child custody disputes.

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There is an obvious interplay between the issues presented in investigations by the Administration for Children's Services (ACS) and those raised in subsequent child custody proceedings involving the same parties.

In the adversarial landscape of child custody litigation, it is commonplace for one party or the other to seek to use the results of a prior investigation to bolster her or his case against the other party—for instance, by claiming that an indicated report is evidence of unfitness to be a custodial parent, or by asserting that the other parent's allegedly baseless report to ACS precipitated an unnecessary investigation that was ultimately unfounded.

In the case of *unfounded* reports, Social Services Law §422 provides that such reports shall be sealed, and

...may only be unsealed and made available:

- (i) to the office of children and family services for the purpose of supervising a social services district;*
- (ii) to the office of children and family services and local or regional fatality review team members for the purpose of preparing a fatality report pursuant to section twenty or four hundred twenty-two-b of this chapter;*
- (iii) to a local child protective service, the office of children and family services, or all members of a local or regional multidisciplinary investigative team or the justice center for the protection of people with special needs when investigating a subsequent report of suspected abuse, neglect or maltreatment involving a subject of the unfounded report, a child named in the unfounded report, or a child's sibling named in the unfounded report pursuant to this article or article eleven of this chapter;*
- (iv) to the subject of the report; and*
- (v) to a district attorney, an assistant district attorney, an investigator employed in the office of a district attorney, or to a sworn officer of the division of state police, of a city, county, town or village police department or of a county sheriff's office when such official verifies that the report is necessary to conduct an active investigation or prosecution of a*

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Accordingly, the parent who was *not* the subject of the investigation has no right to access the unfounded report (and, presumably, the underlying documentation of ACS's investigation) in connection with a child custody matter. *See Jennifer B. v. Mark WW.*, 159 A.D.3d 1087 (3d Dept. 2018) (upholding the trial court's decision to exclude the contents of an unfounded report from evidence); *Humberstone v. Wheaton*, 801 N.Y.S.2d 868 (4th Dept. 2005) (upholding the trial court's decision to exclude the unfounded report of sexual abuse against the child from evidence in a decision that ultimately awarded custody to the subject party).

The subject parent, on the other hand, has the right to access the report and the underlying documentation concerning the investigation, and to introduce these documents into evidence in the proceeding to establish a claim that a false report was made (presumably by the other parent) to ACS. *See Michael S. v. Dawn S.*, 212 A.D.3d 493 (1st Dept. 2023).

While this imbalance may seem equitable at first blush, in light of the underlying allegations being ultimately determined to be unfounded, it bears further examination, and may be an area where the law is ripe to be developed further by the legislature.

It can come as no surprise to any practitioner in the field that (perhaps with the best intentions) child protective services do not always get it right.

Consider, for example, the following [New York Post article](#), in which an anonymous caseworker at ACS played whistleblower and raised alarms about ACS changing its standards to exclude caretaker substance abuse and criminal activity in the home from its criteria for investigations.

For another example somewhat further from home, see the following [New York Magazine article](#) detailing the gross parental neglect that resulted in the death of 8-year-old Raylee Browning in West Virginia, following numerous child protective services investigations precipitated by reports from Raylee's mother, school and a concerned neighbor, which nonetheless left Raylee in the care of her grossly neglectful father and stepmother.

In such circumstances, it is worth considering if the potential for prejudice that could result from making an unfounded report available to the adverse party in a child custody litigation is outweighed by the need to ascertain all relevant information that may bear upon the wellbeing of the subject child.

To further complicate matters, as of Jan. 1, 2022, the Social Services Law was amended to provide that the standard for indication of a report of abuse or neglect be elevated from "some credible evidence" to a "fair preponderance of the evidence." While there are solid grounds for holding ACS to a higher standard in indicating reports, the end result is that in some situations where there is a reasonable amount of credible evidence (but not a preponderance) that a parent is guilty of abuse or neglect, the report will ultimately be unfounded.

In these cases, should the other parent not have the opportunity to access information that may be pertinent to the child's wellbeing, and should the court not have the opportunity to weigh this evidence?

This is particularly the case when third parties are the reporters, where the non-subject parent may not have access to the report or the underlying facts. Notably, ACS investigations do not operate like court proceedings, where evidence is put to a neutral test.

Instead, they are often black boxes, and the findings of the investigation that lead to an unfounded report are left inscrutable.

It also bears noting that the subject of an unfounded report has the ability to access the report and the underlying documentation for purposes of establishing that a false claim of abuse or neglect has been made by the other parent. *See, e.g., Youngbok Lim v. Sangbom Lyi*, 299 A.D.2d 763 (3d Dept. 2002) (“Although unfounded child abuse reports are required to be sealed such reports may be introduced into evidence ‘by the subject of the report where such subject ... is a plaintiff or petitioner in a civil action or proceeding alleging the false reporting of child abuse or maltreatment’”).

This being the case, one wonders if there is a due process concern with the parent who made the report being unable to confront the evidence being offered against her or him (particularly if there was credible evidence, but not a preponderance, to support the report).

Parties to child custody litigation already place many private and intimate aspects of their lives at issue when these issues bear upon the best interests of the child. For instance, parties have access to forensic reports issued by custody evaluators, as well as the evaluators’ notes, albeit with some guardrails to prevent dissemination outside the litigation. Might a similar structure be instituted with respect to unfounded ACS reports?

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