Admissibility of Indicated, Unfounded and Expunged Reports of Child Abuse or Neglect and Their Use by Attorney for the Childs in Custody Litigation

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Completed to fulfill the requirement of the Attorney for the Child Externship, SUNY Buffalo Law School, Prof. Susan Vivian Mangold

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I. INTRODUCTION

Reports of child abuse and neglect can be particularly influential in litigation for child custody and visitation. One or both parties may have been the subject of previous abuse or neglect investigations by the Department of Social Services (hereinafter DSS). One or both parties may allege abuse or neglect by the opposing party. In both situations, the Attorney for the Child representing the child must be prepared to address the admissibility of the resulting investigation reports.

There are three classifications of reports of child abuse and maltreatment, each with its own rule for admissibility as evidence. A report supported by some credible evidence is classified as “indicated.” An indicated report is admissible in custody litigation. A report that is not supported by some credible evidence is classified as “unfounded.” An unfounded report is generally inadmissible in custody litigation, but it is admissible in civil litigation involving false allegations of child abuse or maltreatment and in criminal prosecution for the reporting of false allegations. Indicated and unfounded reports are expunged after a specified period of time has lapsed. In addition, indicated and unfounded reports can be expunged where there is insufficient evidence to support the report. Expunged reports are inadmissible as evidence.

In addition to addressing the admissibility of the reports, the Attorney for the Child must be prepared to argue the significance, or insignificance of the reports introduced as evidence. The significance of reports of abuse or maltreatment varies depending upon several factors, including the ability of DSS to find evidence to support the report; the level of family intervention following the report, and the
existence of subsequent reports involving the same subject or children named in the report. A thorough understanding of these factors will enable the Attorney for the Child to educate the court about the relevance of the admissible reports as well as the weight of that evidence in litigation for child custody and visitation.

This paper will expound on each of these topics. First, it will outline the process by which a person reports child abuse and neglect and the subsequent investigation by DSS. Second, it will discuss the admissibility of unfounded reports as evidence and the limited exceptions to that general rule. Finally, it will discuss the process of expungement of indicated and unfounded reports as well as the inadmissibility of expunged records as evidence.

A. Reports and Investigations of Child Abuse and Maltreatment

The vast majority of children entering the child welfare system do so because there are allegations of abuse or neglect by a parent. The child first becomes “known” to DSS when a person reports the abuse or maltreatment to the agency. DSS maintains a toll-free telephone hotline to receive reports of abuse and maltreatment.¹ Anyone suspecting abuse or maltreatment may report to this hotline, but certain persons are mandated to report when they have “reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or considered a maltreatment child.”² They are also required to report the abuse or maltreatment when a parent or guardian “comes before them in their professional or official capacity and states from personal knowledge

¹ N.Y. Soc. Serv. 422 (Consol. 2014).
² N.Y. Soc. Serv. 413 (Consol. 2014).
facts...which, if correct, would render the child an abused or maltreated child.” The statute lists the mandated reporters, to include: physicians, registered nurses, social workers, psychologists, school officials, childcare workers, and law enforcement officials. Mandated reporters have immunity from liability if they make a report in good faith. However, if a mandated reported willfully fails to report child abuse or maltreatment, “he shall be guilty of a class A misdemeanor” and “shall be civilly liable.”

Upon receipt of the allegations of abuse or neglect, DSS determines whether the acts alleged, “could reasonably constitute a report of child abuse or maltreatment.” If so, DSS refers the case to the appropriate local agency for investigation. This investigation must be completed within 60 days to determine whether the report is “indicated” or “unfounded.” A report is ‘indicated’ if the local agency finds some credible evidence to support the report of abuse or maltreatment. The indicated report is placed on the State Central Register of Child Abuse and Maltreatment (Central Register). If the local agency finds that there is no credible evidence to support the report of abuse or maltreatment, the report is determined to be unfounded. Although the unfounded report is placed on the central register, “all information identifying the subjects of the report and other

3 Id.
4 Id.
5 N.Y. Soc. Serv. 419 (Consol. 2014.).
6 N.Y. Soc. Serv. 420 (Consol. 2014.)
8 Id.
12 N.Y. Soc. Serv. Law 412(6) (Consol 2014.)
persons named in the report shall be legally sealed forthwith by the central register and any local protective services or state agency which investigated the report.” 13

The subject of the indicated report may request that the report be amended as unfounded or expunged.14 As the subject of the report progresses through the levels of administrative and judicial review, the standard of review increases, requiring stronger evidence to support the agency’s finding that the report is indicated. Therefore, as the higher standards of review are applied, a once-indicated report may be deemed to be unfounded due to a stronger evidentiary standard, and that justifies the expungement of the report.

There are several levels of administrative and judicial review of the determinations that the report is indicated. First, DSS determines whether there is some credible evidence that the child was abused or neglected by the subject of the report.15 If some credible evidence supports the report, the subject can request an administrative hearing.16 At the administrative hearing, the agency has the burden to show by the preponderance of the evidence that the subject of the report has abused or neglected the child.17 If the administrative Law judge determines that the report is indicated, “the subject of the report may commence a proceeding pursuant to CPLR article 78 to challenge the decision”.18 In the article 78 hearing, the

14 N.Y. Soc. Serv. 422(8)(a) (Consol. 2014).
17 Lee v. TT, 87 N.Y. 2d at 712.
18 Id at 705.
standard of review is “whether the determination is rational and supported by substantial evidence.”

**Indicated Report**

When Child Protective Services has investigated the allegations of maltreatment and the report has been “indicated,” this report of child abuse or neglect may be admissible in conjunction with custody litigation. An “indicated report” is defined as a report of alleged abuse or maltreatment supported by some credible evidence. Some credible evidence means that there exists evidence of the act or acts that gave rise to the report committed by the subject of that report, usually the child’s parent. It is appropriate to use the “some credible evidence” standard to determine whether a report made to the Central Registrar should be marked as indicated.

Section 422(5)(c) of New York Social Services Law provides that “the record of the indicated report to the central register shall be expunged [e.g. completely destroyed] ten years after the eighteenth birthday of the youngest child named in the report.” In addition, the subject of the report has the right to see the expungement of this indicated report within the time frame set forth in section 422(8)(a)(i) of the New York Social Services Law. This provision limits the time for requesting expungement of an indicated report to 90 days after the accused is.

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19 *Gerald G. v. State Dep’t of Soc Serv.,* 248 A.D.2d 918 (3rd Dept 1998.)
notified by the local agency that the report has been indicated.\textsuperscript{22} If that request is denied, the subject has the right to a fair hearing.\textsuperscript{23}

**Indicated Report-Admissible as Evidence**

Once a report of child abuse or neglect has been indicated by Child Protective Services, the report may be admissible as evidence in custody litigation. Admissibility of the indicated report depends on whether it complies with the business record exemption to the hearsay rule and provided that the “indicated,” report was not overturned by state officials.\textsuperscript{24}

The New York Family Court Act 651-a requires that a foundation be laid for the admissibility of Central Register reports in a custody proceeding. In *In re Nicole VV*, the Court stated the indicated report should be introduced into evidence, but this report alone, “without any corroboration, is not sufficient evidence for the court to determine that the parent has abused or neglected the child.\textsuperscript{25} However, any other evidence supporting the reliability of the report would allow the court to determine that a parent has maltreated the child.”\textsuperscript{26} Maltreatment of a child by a parent is powerful evidence in a custody or visitation dispute.\textsuperscript{27}

If the indicated report is not admitted into evidence, a caseworker’s testimony about the report’s content remains inadmissible hearsay. In order to

\textsuperscript{22} *Jannie “CC” v Kaladjian*, 189 A.D.2d 56 (3\textsuperscript{rd} Dept. 1993).
\textsuperscript{24} N.Y. Family Ct. Act 651- a; (Practice Insights, Margaret A. Burt Esq. (See https://www.nycourts.gov/ip/cwcip/Trainings/subGuard/cslaw2010-2011.pdf)
\textsuperscript{25} *In re “Nicole VV”,* 296 A.D.2d 608 (3\textsuperscript{rd} Dept. 2002).
\textsuperscript{26} N.Y. Family Ct. Act 651-a (Consol. 2014)
\textsuperscript{27} *Id.*
allow the indicated report into evidence the attorney for the child must argue that
this report is an exception to hearsay and falls under the business record exception.
This business records exception requires that evidence seeking to be admitted must
be a “writing or record” made in the regular course of business, contemporaneously
with the transaction, occurrence or event described therein (see, CPLR 4518).28

The Attorney for the Child can choose to use an indicated report against one
of the parties; probably the most effective way to accomplish this is to “subpoena
the investigation child protective caseworker to testify about the investigation. The
results of the investigation should be admissible if counsel uses a judicial subpoena
under SSL 422(4)(A)(e).”29 New York Family Ct. Act 651- allows for the subpoenaed
indicated report to be admissible as a business record.

In addition to the indicated report itself, courts have allowed the admission
of the entire case file of the child protective agency into evidence. For example, In
the Matter of R (anonymous),30 a proceeding to extend the placement of children, the
Second Department held that the family Court properly admitted the entire case file
of the child protective agency into evidence.

The agency established a proper foundation for admission of the file into
evidence as a business record by establishing that it consisted of entries may by case
workers who were under a business duty to timely record all matters relating to the
welfare of the subject children. Furthermore, as required by principals of

28 In re “Nicole VV”, 296 A.D.2d at 613.
29 N.Y. Family Ct. Act 651-a (Consol. 2014).
“fundamental fairness”, the appellant’s counsel was afforded the opportunity to review the case file prior to its admission into evidence.\textsuperscript{31}

Likewise, in Chautauqua County \textit{Dept of Soc. Serv. V Ann W. (in re Raychael L.W.)}, the Appellant’s claim that the Family Court error in receiving into evidence the entire case file of petitioner on the grounds that the file contained inadmissible hearsay was rejected.\textsuperscript{32} The court concluded that “fundamental fairness is not violated by the admission in evidence of an entire care file where the opposing attorney has had the opportunity to review the case file before its admission in evidence.”\textsuperscript{33}

Thus, a Attorney for the Child seeking to have an entire case file admitted into evidence should be able to do so provided they first establish a proper foundation for the file as a business record. This foundation may be established by showing that the contents of the file were made by caseworkers under a business duty to document issues concerning the welfare of the subject child. Next, in order to satisfy the principals of “fundamental fairness”, the Attorney for the Child must afford opposing counsel the opportunity to review the case prior to its admission into evidence.

\textbf{D. Child’s Out of Court Statements Regarding Abuse Admissible}

\textsuperscript{31} \textit{Id.} at 423-24; 3-40 New York Trial Guide 40.50.
\textsuperscript{32} \textit{Dept of Soc. Serv. V Ann W. (in re Raychael L.W.)}, 298 A.D.2d930, 931 (4\textsuperscript{th} Dept. 2002).
\textsuperscript{33} \textit{See Matter of R. Children}, 264 A.D.2d 423, 424; Matter of Rosemary D., 78 A.D.2d 889, lv denied 52 N.Y. 2d 703, Matter of Melanie Ruth JJ., 76 A.D. 2d 651 (3\textsuperscript{rd} Dept. 1998). (fundamental fairness not violated when a party has an opportunity to examine the case fail, either prior to or during the trial).
In addition to admitting an indicated report, statements by the child that he or she had been abused or neglected by a parent can be compelling evidence to support the Attorney for the Child’s position. A number of Third Department cases have ruled, “out-of-court hearsay statements of a child about being neglected are admissible in private custody cases.”34 “The hearsay exception regarding prior statements made by children relating incidents of abuse and neglect encompassed in Family Court Act 1046 (a)(vi) applies since the gravamen of petitioners’ case involves child abuse.”35

Opposing Admission of Indicated Report

Opposing the admission of an indicated report may be somewhat more difficult although not entirely impossible. According to the Practice Insights noted in Family Court Act 651-a, “if counsel is trying to oppose admission of the indicated investigation the best argument may be that the report’s allegations are not corroborated.” However, corroboration seems to be easily satisfied by having the caseworker testify as to their findings. Another possible argument to oppose the admission of an indicated report is that the weight of the findings may not be significant, especially if “the child protective worker indicated the case, but took no actual action, such as bringing a neglect petition, against the parent.”36 This type of

34 N.Y. Family Ct Act 651-a (Consol. 2014).
35 Pratt v Wood, 210 A.D.2d 741, 742 (3rd Dept. 1994.) See also “In Re Nicole VV”, 296 A.D.2d at 612 (Numerous witnesses testified to statements made to them by children describing mother’s abusive conduct; statements properly admitted under Family Court Act article 2 as out-of-concern statements of children; statements were amply corroborated).
36 N.Y. Family Ct Act 651-a (Consol 2014)
situation may arise where the perpetrator of the abuse is no longer in contact with the child, or if the indicated parent accepts the services offered by DSS in an effort to deal with the abuse. In such cases there may be no court action and the matter may stay entirely within DSS.

**B. Unfounded Reports**

In contrast to indicated report of abuse or maltreatment, unfounded reports are unavailable to Attorney for the Childs and are generally inadmissible as evidence. The policy for the unavailability and inadmissibility of unfounded reports is the protection of the subject’s names in the reports when there is insufficient evidence to support the allegations contained therein.

An unfounded report is a report of child abuse or maltreatment in which the investigation determines that there was not some credible evidence of the abuse or maltreatment.37 Before the Child Protective Services Reform Act of 1996, known as Elisa’s Law, unfounded reports were expunged.38 Under Elisa’s Law, the unfounded report is maintained by the Central Register, but “all information identifying the subjects of the report and other persons named in the report shall be legally sealed forthwith by the central register and any local protective services or state agency which investigated the report.”39 The Central Register maintains unfounded reports for supervisory purposes. It can also be used in subsequent investigation of abuse or

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38 N.Y. Soc. Serv. 422 (former 5); L 1996, ch. 12, 8-12.
maltreatment involving the same subject, child, or the child’s siblings.\textsuperscript{40} Ten years after the receipt of the report, “the unfounded report is expunged.”\textsuperscript{41}

The Appellate Division, Third Department, upheld Elisa’s Law, which requires that the Central Register maintain unfounded reports for subsequent investigations of abuse or maltreatment.\textsuperscript{42} For two reasons, the Court held that Elisa’s Law does not violate the due process rights of the subject of the report. First, the plaintiffs failed to prove the stigma plus test. Although they established that there is a low level of stigma attached to an unfounded report, the subjects of the reports experience no employment deprivation because employers do not have access to the reports.\textsuperscript{43} Second, “maintaining the sealed, unfounded reports for purposes of DSS’ subsequent investigations is rationally related to the community interest of improving the safety of children in both family and institutional settings.”\textsuperscript{44} “The principal purpose of [Elisa’s Law] was to help child protective workers detect and investigate a pattern of abuse revealed by unfounded reports previously expunged, since an unfounded report does not always indicate that a child has not been abused.”\textsuperscript{45} An Attorney for the Child will find Elisa’s Law especially useful in the limited cases mentioned below in which unfounded reports are admissible because Elisa’s Law recognizes that an unfounded report is not necessarily an untrue report.

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\item\textsuperscript{40} \textit{Id.}
\item\textsuperscript{41} N.Y. Soc. Serv. 422(6) (Consol. 2014.).
\item\textsuperscript{42} \textit{Mary L. v. State Dept. of Social Services}, 244 A.D.2d. 133(3rd Dept. 1998).
\item\textsuperscript{43} \textit{Id} at 136.
\item\textsuperscript{44} \textit{Id} at 137.
\item\textsuperscript{45} \textit{Id} at 135.
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Access to unfounded reports is strictly limited. First, the Office of Children and Family Service has access to unfounded reports for supervisory purposes.46 Second, “for the purpose of preparing a fatality report,” the Office of Children and Family Services and a fatality review team have access.47 Third, the local child protective services agency and the office of children and family services have access to unfounded reports “when investigating a subsequent report of suspected abuse or maltreatment involving a subject of the unfounded report, a child named in the unfounded report, or a child’s siblings named in the unfounded report.”48 Fourth the subject of the report has access.49 Finally, the district attorney, sheriff, and police officers have access to unfounded reports “when such official verifies that the report is necessary to conduct an active investigation or prosecution of false reporting of abuse or neglect under New York Penal Law 240.55(3).50 In addition, the commissioner of DSS may disclose information about an unfounded report if the disclosure does not interfere with the best interest of the child.51 However, the commissioner may only disclose that “the investigation has been completed, and the report has been unfounded.”52 It should be noted that an Attorney for the Child is not authorized by New York Social Services Law 422(5)(a) to have access to an unfounded report.

50 N.Y. Soc. Serv. 422(5)(a)(v) (Consol 2014)
51 N.Y. Soc. Serv. 422(5)(a)(i) (Consol 2014).
Unfounded Reports—Inadmissible as Evidence

With limited exceptions, an unfounded report is inadmissible as evidence. “An unfounded report shall not be admissible in any judicial or administrative proceeding or action.”53 The Family Court Act particularly excludes unfounded reports as admissible evidence in custody or visitation proceedings.54 The party seeking the admission of an unfounded report cannot subpoena a caseworker to testify to the contents of the inadmissible report. In Humberston, the Appellate Division, Fourth Department, held the respondent does “not fall within any statutory provision allowing her to introduce into evidence an unfounded report of sexual abuse of the parties’ daughter...and because the unfounded report was inadmissible,” the Court held that the author of the unfounded report could not testify to its contents.55 In People v LV, the Supreme Court of Rensselaer County held that an unfounded report couldn’t be made available to the District Attorney in a criminal case concerning an incident described in the report unless the crime is making false allegations of child abuse or maltreatment.56 The Court held that the District Attorney couldn’t subpoena the caseworker “to, in effect, recreate the inadmissible record.”57 “Counsel should further argue for exclusion of all other proof which flows from an unfounded investigation, “although there is not a statute excluding such evidence.58

Exceptions

54 N.Y. Family Ct. Act 651-a (McKinney 2014).
56 People v LV, 182 Misc.2d 912,915 (N.Y. Sup Ct. 1999).
57 Id at 916.
There are three exceptions to the general rule that unfounded reports are inadmissible as evidence. First, "an unfounded report 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." A civil action would include an action against respondent for falsely reported abuse or neglect by the other parent.

In *Lim v Lyi*, the Appellate Division, Third Department, held that one parent’s false allegations of abuse against the other parent are evidence that custody to the accusing parent is not the best interests of the child. After DSS determined that petitioner’s report of child abuse by the respondent was unfounded, the petitioner sought sole custody of the child. Respondent cross-petitioned for sole custody. The Court held that “the admission of the unfounded report is proper” because respondent alleged in his cross-petition that petitioner falsely accused him. Therefore, he was considered a petitioner in his cross-petition for sole custody. The false allegations are evidence that the accusing parent intentionally interfered with the other parent’s relationship with the child and placed her needs above the child’s needs by subjecting the child to unnecessary investigation. Similarly, the Appellate Division, Fourth Department, upheld the modification of custody based on

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60 *Lim v Lyi*, 299 A.D.2d 7764 (3rd Dept 2002).
61 *Id* at 765.
62 *Id*.
63 *Id* at 767.
64 *Id*.
65 *Id* at 764, 766.
false allegations of child abuse.\textsuperscript{66} The Court held that there was “sound and substantial basis in the record “ to uphold the trial court’s decision to modify custody for petitioner.\textsuperscript{67} Even after the respondent had been “convicted of two counts of attempted falsely reporting an incident in the second degree in connection with those false allegation of abuse,” she filed another false report against petitioner.\textsuperscript{68} The Court supported the trial court’s finding “that respondent’s behavior and actions were not in the best interest of the child...and the several investigations associated with those false reports of abuse were traumatic for the child.”\textsuperscript{69}

It is unclear whether the entire unfounded report is admissible in civil actions involving false allegations of abuse or neglect. It is possible that only the portion of the report concerning the false allegation is admissible. New York Social Services Law 422(5)(b)(i) does not specify whether the entire unfounded report is admissible, and case law has not specified whether the entire report or only portions are admissible. Often the courts simply refer to “unfounded reports” as evidence without more description of the admissible or inadmissible portions.

From a small group of cases offering greater descriptions of the admissible unfounded reports, it can be inferred an admissible unfounded report includes, at least, the statement that the report was determined to be unfounded and the information found during the investigation that justifies that determination. For example, in \textit{Ciannarnea v McCoy}, the Appellate Division, Third Department, referred

\textsuperscript{66} \textit{Beyer v Tranelli-Ahse}, 195 A.D.2d 972 (4\textsuperscript{th} Dept. 1993).
\textsuperscript{67} \textit{Id} at 973.
\textsuperscript{68} \textit{Id}.
\textsuperscript{69} \textit{Id}.
to “the report of a sexual abuse evaluation procured by [DSS]’ as evidence supporting the trial court’s modification of custody in favor of the respondent.\textsuperscript{70} The report found the petitioner’s allegations to be inconsistent with the cluster of symptoms and dynamics of sexual abuse, and the child protective report was unfounded.\textsuperscript{71} The court admitted the report on the sexual abuse evaluation and the unfounded report, but did not say whether the reports were admitted in their entirety.

In \textit{John A. v. Bridget}, the Family Court of New York admitted an unfounded report into evidence and described the investigation included in the report.\textsuperscript{72} The Court related that “The investigation included interviews of the children on two separate dates. At the initial interview on April 29, 2003, one twin told the child protective specialist that “Pammy told me daddy touched my peepee.” The other child, however, made no mention of being touched. The Children’s statements on the second interview were mostly related to the court case, which left the child protective specialist with the impression that the children had been coached.\textsuperscript{73}

The evidence of the entire unfounded report or portions thereof would also be subject to evidentiary rules of relevance and whether the probative value substantially outweighs the prejudicial effect. These rules could require the admission of only portions of the report.

In custody or visitation cases involving allegations of false reports of abuse or neglect, the Attorney for the Child will use the unfounded report to support her

\textsuperscript{70} \textit{Ciannarnea v McCoy}, 306 A.D.2d 647, 648 (3rd Dept. 2003).
\textsuperscript{71} \textit{Id} at 649.
\textsuperscript{72} John A. v. Bridget, 4 Misc. 3d 1022A (Fam. Ct. 2004).
\textsuperscript{73} \textit{Id}. 

position that one parent should have custody over the other. Perhaps the Attorney for the Child perceives that it is in the child’s best interest for the parent with an unfounded report against her to have custody. In that scenario, the parent with the unfounded report would introduce the unfounded report as evidence that the other parent made false allegations of abuse or maltreatment against her. The parent with the unfounded report and the Attorney for the Child would argue that this evidence demonstrates that by making false reports, the other parent subjected the child to unnecessary investigation, interfered with the child’s relationship with the parent, and placed his needs above the child’s needs.

In another scenario, the Attorney for the Child perceives that it is in the child’s best interest for the parent making unfounded allegations of abuse or neglect against the other parent to have custody. In that scenario, the parent with the unfounded reports against her would introduce the reports as evidence for the same reasons described in the first scenario; but the Attorney for the Child should remind the court that an unfounded report is not necessarily an untrue report. Such was the premise of Elisa’s Law, which required that the Central Register maintain unfounded reports for the purpose of investigations of subsequent reports involving the same subject or children named in the reports. Multiple unfounded reports could help child protective workers identify a pattern of abuse. When such a pattern of abuse is present, the Attorney for the Child would strongly oppose that the parent named in the report receive custody of her child.

The second exception to the general rule of inadmissibility is the criminal prosecution for false reporting of abuse or neglect. New York Social Services Law
422(5)(a)(v) allows the district attorney, police department, and sheriff’s office to access the unfounded report “when such official verifies that the report is necessary to conduct active investigation or prosecution” for false allegations of abuse or maltreatment, and unfounded reports are admissible in criminal cases prosecuting the false allegations of child abuse or maltreatment under New York Penal Law 240.55(3). New York Services Law 422(5)(a)(v) states that the official must verify that the report is necessary, which would indicate that a verification is required to obtain an unfounded report. The Justice Court of New York held that a subpoena ducès tecum was sufficient to access the unfounded report because the subpoena ducès tecum is a “declaration that the information sought is necessary to the investigation or prosecution of the matter” and the District Attorney could be disciplined if he issued an unnecessary subpoena. Again, it is not clear from the statute or the case law whether the entire report or only the portion concerning the false allegation is admissible, the report would be subject to evidentiary rules of relevance and probative value. Other courts have allowed a subpoena ducès tecum for the production of unfounded reports, although the issues of the cases were not whether the subpoena was sufficient to satisfy the statute.

At least two complications have arisen concerning the admission of unfounded reports as evidence in criminal cases for false reporting of child abuse or neglect. The first complication arises when incriminating evidence unrelated to an unfounded report is contained within that report against defendant. In People v

75 People v Trester, 190 Misc.2d 46, 47-48 (N.Y. Justice Ct. 2002).
76 People v. LV, 182 Misc.2d at 916, People v McFadden, 178 Misc.2d 343, 344 (N.Y. Sup. Ct. 1998).
The defendant was charged with making a false report of abuse or neglect.\textsuperscript{77} The people argued that the defendant was the subject of an unfounded report and during the investigation of that report, “the defendant made some allegedly incriminating statements...probative of the fact that he later made a false report regarding a neighbor family.”\textsuperscript{78} Those statements were contained in the unfounded report against defendant.\textsuperscript{79} The City of New Rochelle held that DSS must produce the unfounded report for an \textit{in camera} review by the court to “determine whether any of the information contained therein may be probative of the charges levied by the People against the defendant.”\textsuperscript{80} The Court reasoned, “the sealing of DSS unfounded reports is meant to shield those falsely accused of child abuse or neglect, or those individuals accused of knowingly making false accusations.”\textsuperscript{81} Although New York Social Services Law 422(5)(b) forbids the admission of unfounded reports as evidence (with the two exceptions), the Court allowed the People to introduce into evidence the portion of he unfounded report against defendant concerning his incriminating statements about making false allegations against a third party.\textsuperscript{82} That portion of the unfounded report has no connection to the allegations of abuse against defendant within the report.

The second complication arises when false allegations of abuse or neglect are not charged in the criminal case but part of the defense. In \textit{People v McFadden}, the defendant was charged with multiple counts of sodomy, rape, sexual abuse, and

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\textsuperscript{77} \textit{People v Berliner}, 179 Misc.2d 844, 845 (N.Y. City Ct. 1999).
\textsuperscript{78} \textit{Id} at 847.
\textsuperscript{79} \textit{Id}.
\textsuperscript{80} \textit{Id} at 851.
\textsuperscript{81} \textit{Id}.
\textsuperscript{82} \textit{Id} at 852.
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endangering the welfare of a child. The defendant requested a judicial subpoena *duces tecum* for the production of unfounded reports against him. He claimed that the unfounded report contained proof of false allegations of sexual abuse made against him by the victim of the presently alleged crimes. His defense was that the victim falsely accused him of the crimes. To resolve the “tension between the right of a defendant to a fair trial and the right of the State to maintain confidentiality of certain records,” the court ordered DSS to produce the unfounded reports for an *in camera* review. The court held that “if the defendant can demonstrate that the prohibition provided for in the applicable portion of section 422 (5) of the Social Services Law would deprive him of material necessary for his defense, such prohibition must be negative, and the appropriate information must be admitted at trial.”

The third exception to the general rule of inadmissibility is the proceeding under the Family Court Act Article 10. The subject of the unfounded report may introduce into evidence when “such subject is a respondent in a proceeding under article ten of the Family Court Act.” Again, the Attorney for the Child would present the same argument in support of or in opposition to the unfounded reports as she would in litigation for custody or visitation.

To introduce an unfounded report into evidence when it fits within the above-mentioned exceptions, counsel must establish the foundation of the evidence

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83 *People v McFadden*, 178 Misc.2d at 344.
84 *Id.*
85 *Id.*
86 *Id* at 346, 348.
87 *Id* at 348.
and then submit it as a business record exception to hearsay rule. Family Court Act 651-a states that if an unfounded report were admissible, it would be admitted as a business record.89

The New York Social Services Law is unclear about whether the entire unfounded report is admissible within the exceptions, but the introduction of either the complete report or portions thereof would be subject to other evidentiary rules such as relevance and whether the probative value significantly outweighs the prejudicial effect. In People v LV the court held, people seeking an order to unseal the report to permit disclosure of information concerning the facts and circumstances underlying the unfounded incident of abuse or maltreatment will be denied.90

C. Expungement—Indicated Reports

As previously discussed, the subject of an indicated report has a right to request an expungement of this report within 90 days after the accused is notified by the local agency that the report had been indicated.91 And if that request is denied, the subject has the right to a fair hearing.92 Due process protections require a heightened standard of proof in order to uphold an indicated finding during an administrative expungement hearing.

Due to the high risk of error produced by the “some credible evidence” standard used in administrative expungement hearings, due process protection

89 N.Y. Family Ct. Act 651-a (Consol 2014).
90 People v. LV, 182 Misc. 2d 912, 701 N.Y.S.2d 685 (Sup. Ct., Rensselaer County 1999).
91 Jannie “CC” v Kaladjian, 189 A.D.2d at 56.
92 N.Y. Soc. Serv. Law 422 (8)(a)-(b) (Consol. 2014) and Lee “TT” v. Dowling, 211 A.D.2d at 46.
warrants a replacement thereof with the higher “preponderance of the evidence” standard. Such determinations, however, does not undermine the use of the “some credible evidence” standard for an initial determination to indicate a report or for an initial administrative review of that determination to expunge or amend such report.93

In the administrative hearing pursuant to New York Social Services Law 422(8)(b) to determine expungement, the standard is the preponderance of the evidence and the burden is on DSS.94

If after an administrative hearing the report is not expunged, the subject of the report may commence a proceeding pursuant to CPLR article 78 to challenge the decision.”95 The standard of review in this article 78 proceeding is “whether the determination is rational and supported by substantial evidence.”96

**Expungement—Unfounded Reports**

In addition to the provisions for expungement of indicated reports, section 422(5)(c) of the New York Social Services Law provides that the subject of an unfounded report may also request that the matter be completely expunged and not just sealed.97 “Theoretically, a sealed unfounded report is not available to the public, but mistakes have been known to be made. The client for whom a disclosure of even

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95 *Id* at 705.
96 *Gerald G. v State Dept of Soc Serv.*, 248 A.D.2d at 919.
97 N.Y. Soc. Serv. 422 (5)(c) (Consol 2014).
an unfounded report would be devastating—such as a pediatrician—should consider seeking to have the records destroyed.”

The subject of an unfounded report who wishes to have this report expunged is not entitled to a hearing. Section 422(5)(c) of the New York Social Services Law provides that a request for expungement of an unfounded finding may be made to the State Office of Child and Family Services which, in its discretion, may grant a request to expunge an unfounded report where:

“(i) the source of the report was convicted of a violation of subdivision three of section 240.55 of the penal law in regard to such report; or

(ii) the subject of the report presents clear and convincing evidence that affirmatively refutes the allegation of abuse or maltreatment; provided however, that the absence of credible evidence supporting the allegations of abuse or maltreatment shall not be the sole basis to expunge the report.”

Examples that present clear and convincing evidence that affirmatively refute allegations of abuse or maltreatment may include situations where the attorney for the accused provides witness statements and medical reports that a child’s injuries were accidental or where the local Child Protective Services investigator takes the position that the report was totally without merit. If this request to expunge an unfounded report is successful, the state will order the county to completely destroy the subject’s file.

**Conclusion**

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98 *Id.*

99 *Id.*
Child custody litigation often involves allegations of child abuse or maltreatment by the parties. Moreover, in many instances one or both parents may have been the subject of previous abuse or neglect investigation by DSS. Attorneys for the Child will often see these reports as a critical tool in their cases. In order for an Attorney for the Child to best represent a child client, a Attorney for the Child must address the admissibility of the resulting investigative reports. If the report is admitted, the Attorney for the Child must argue as to the weight of that evidence. The indicated report is admissible. The Attorney for the Child could argue that the indicated report is evidence that it is not in the best interest of the child to give custody to the parent subject of the report. The Attorney for the Child could alternatively argue that the allegations of the indicated report were either not severe enough to preclude a parent from having custody, or the abuse or neglect was sufficiently remedied to allow custody to that subject parent. An unfounded report is generally inadmissible but is admissible in civil actions involving false allegations of abuse or neglect, criminal prosecution for reporting false allegation and for proceedings under Family Court Act Article 10. In civil actions involving false allegations, the Attorney for the Child can argue that the unfounded report is a false allegation by a parent who places his needs above the child’s needs, interferes with the child’s relationship with the other parent, and subjects the child to unnecessary investigations. Or the Attorney for the Child can argue that unfounded reports are not necessarily untrue reports and that a series of unfounded reports could be indicative of a pattern of abuse by the subject parent. Finally, an expunged report is inadmissible under all circumstances. An understanding of these rules of
admissibility of indicated, unfounded, and expunged reports will enable a Attorney for the Child to best serve her child client.