

To: New Jersey Law Revision Commission
From: John Cannel
Re: Hearsay Exception in Title 9 and Title 30 - *New Jersey Division of Child Protection and Permanency v. T.U.B.* and N.J.S. 9:6-8.46(a)(4)
Date: November 5, 2018

MEMORANDUM

In the case of *New Jersey Division of Child Protection and Permanency v. T.U.B.*¹, the Appellate Division considered the special evidentiary provision for Title 9 cases as established in N.J.S. 9:6-8.46(a)(4), which allows the admission of certain hearsay statements by children about allegations of abuse or neglect. The issue was whether the provision applies in Title 30 cases involving the termination of parental rights.²

In the *T.U.B.* case, while recognizing that the provision had been applied to Title 30 actions in prior cases, the Appellate Division found that it only applied in Title 9 cases. The Appellate Division opinion is based primarily on the words of the provision rather than the differences between the two kinds of action; Title 9 governs findings of child abuse or neglect that can lead to custody orders; Title 30 actions can result in permanent termination of parental rights. The provision in question is:

a. In any hearing under this act, including an administrative hearing held in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), (1) proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the responsibility of, the parent or guardian and (2) proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or guardian shall be prima facie evidence that a child of, or who is the responsibility of such person is an abused or neglected child, and (3) any writing, record or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding of any hospital or any other public or private institution or agency shall be admissible in evidence in proof of that condition, act, transaction, occurrence or event, if the judge finds that it was made in the regular course of the business of any hospital or any other public or private institution or agency, and that it was in the regular course of such business to make it, at the time of the condition, act, transaction, occurrence or event, or within a reasonable time thereafter, shall be prima facie evidence of the facts contained in such certification. A certification by someone other than the head of

¹ *New Jersey Division of Child Protection and Permanency v. T.U.B.*, 450 N.J. Super. 210 (App. Div. 2017).

² *Id.* at 213.

the hospital or agency shall be accompanied by a photocopy of a delegation of authority signed by both the head of the hospital or agency and by such other employees. All other circumstances of the making of the memorandum, record or photograph, including lack of personal knowledge of the making, may be proved to affect its weight, but they shall not affect its admissibility and **(4) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect.**

b. In a fact-finding hearing (1) any determination that the child is an abused or neglected child must be based on a preponderance of the evidence and (2) only competent, material and relevant evidence may be admitted.

c. In a dispositional hearing and during all other stages of a proceeding under this act, only material and relevant evidence may be admitted.³

In its 2014 Final Report relating to Title 9 Child Abuse and Neglect, the Law Revision Commission included this provision without substantive change.⁴ The opening language of that provision is, "In any hearing under this chapter." The chapter in question is chapter 27 which applies to actions relating to child abuse and neglect and child in need of services, not to termination of parental rights, which is the subject of chapter 30. There is no provision on evidence in chapter 30 either applying provisions similar to those in chapter 27 or denying their applicability.

Thus, the Commission Report presents the same issue decided in *Division of Child Protection and Permanency v. T.U.B.* The decision in that case presumably would control interpretation of the Commission provision. However, the case allows the Commission to reconsider the issue and either change or clarify its proposed provision. The Commission's provision is:

9:27-26. Evidence

a. In any hearing under this chapter, including an administrative hearing held in accordance with the "Administrative Procedure Act,"

(1) proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the responsibility of, the parent or other custodian;

(2) proof that injuries sustained by a child or that the condition of a child is of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other custodian shall be evidence that a child is an abused or neglected child; and

³ N.J.S. 9:6-8.46(a)(4).

⁴ NJLRC Final Report relating to Title 9 Child Abuse and Neglect, p. 21 Section 9:27-26. Evidence

(3) any writing, record or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect or child in need of services proceeding of any hospital or any other public or private institution or agency shall be admissible in evidence in proof of that condition, act, transaction, occurrence or event, if the judge finds that it was made in the regular course of the business of any hospital or any other public or private institution or agency, and that it was in the regular course of such business to make it, at the time of the condition, act, transaction, occurrence or event, or within a reasonable time thereafter, shall be evidence of the facts contained in the certification. A certification by someone other than the head of the hospital or agency shall be accompanied by a photocopy of a delegation of authority signed by both the head of the hospital or agency and by such other employees. All other circumstances of the making of the memorandum, record or photograph, including lack of personal knowledge of the making, may be proved to affect its weight, but they shall not affect its admissibility and

(4) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect.

b. In a fact-finding hearing (1) any determination that the child was abused or neglected or is in need of services must be based on a preponderance of the evidence and (2) only competent, material and relevant evidence may be admitted.

c. In a dispositional hearing and during all other stages of a proceeding under this act, only material and relevant evidence may be admitted.⁵

The primary issue presently before the Commission is whether to follow the holding of *Division of Child Protection and Permanency v. T.U.B* applying the evidence provision narrowly or to revise the 2004 Report to broaden section 9:27-26 to apply broadly including to termination of parental rights. That issue in the case involves subsection a(4) allowing a hearsay exception for statements made by the child. Whichever position the Commission takes, it would be wise to adjust 9:27-26 to make that position clear.

There are policy reasons that support the *T.U.B.* limitation. While a finding of child abuse is very serious, any disposition of the case involves orders that are temporary and subject to revision with changed circumstances. A finding terminating parental rights is permanent and has broad consequences. While both kinds of cases have a Constitutional dimension, the implications of termination of parental rights are so serious that termination of parental rights proceedings

⁵ NJLRC Final Report relating to Title 9 Child Abuse and Neglect, p. 21 Section 9:27-26. Evidence

require special protections.⁶ In addition, the implications of following T.U.B. are reduced by a provision in the ordinary evidence law. If the special child abuse provision does not apply, the narrower Evidence Rule N.J.R.E 803(c)(27) may be applicable:

[803(c)](27) STATEMENTS BY A CHILD RELATING TO A SEXUAL OFFENSE. A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement at such time as to provide the adverse party with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

There are two main differences between the evidence rule and N.J.S. 9:6-8.46(a)(4). First, the evidence rule applies only to sexual misconduct rather than the full range of child abuse and neglect. Second, evidence rule exception applies only when the declarant is under the age of 12. Even with those limitations, the evidence rule would apply in most situations where there is strong reason not to require testimony by the child. For example, the evidence rule exception would have applied in the facts of *New Jersey Division of Child Protection and Permanency v. T.U.B.* There, the children were 8 and 12 and the allegation was of sexual abuse.

Another part of proposed 9:27-26 also merits reconsideration. Subsection a(3), again, is just a continuation of existing law, N.J.S. 9:6-8.46(a)(3). The provision establishes a business record hearsay exception applicable to child abuse and neglect proceedings. However, in this instance, the standard for admission of evidence under this provision has been held to be equivalent to the ordinary business record exception in the rules of evidence, N.J.R.E. 803(c)(6).⁷ Of course, the Evidence Rule is applicable to cases generally, not just to child abuse and neglect matters.

Subsection a(3) also overlaps with a Court Rule , 5:12-4(d):

(d) Reports. The Division of Child Protection and Permanency (the "Division") shall be permitted to submit into evidence, pursuant to N.J.R.E. [803\(c\)\(6\)](#) and [801\(d\)](#),

⁶ *DYFS v. AW and RW*, 103 N.J. 591, 599 (App. Div. 2016).

⁷ See, e.g. *DYFS v. M.C. III*, 201 N.J. 328, 346-347 (2010).

reports by staff personnel or professional consultants. Conclusions drawn from the facts stated therein shall be treated as prima facie evidence, subject to rebuttal.

The Rule is applicable to termination of parental rights cases as well as proceedings to establish child abuse or neglect. The standard for admission of evidence is the same under all three provisions.⁸

As a result of the Evidence Rule and the Court Rule, subsection a(3) has no real purpose. Without that provision, the same evidence may be admitted with the same requirements under both the Evidence Rule, N.J.R.E. 803(c)(6) and the Court Rule, R. 5:12-4(d). The statement at the beginning of subsection (a) that a(3) is applicable to “any hearing under this chapter”, while true, is deceptive. The statement implies that a different rule applies in other proceedings, such as actions to terminate parental rights, while, in fact, the business record provisions are the same in all of these cases. Clarity supports deletion of what is now 9:27-26a(3) in the Commission Report.

⁸ *DYFS v. M.C. III, supra.*