

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

MEMORANDUM

Executive Summary

In the case of *New Jersey Division of Child Protection and Permanency v. T.U.B.*¹, the Appellate Division considered the whether 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 corroborated allegations of abuse or neglect, likewise applies in Title 30 guardianship cases involving the termination of parental rights.²

The Appellate Division found that it did not, after recognizing that it had been so applied in prior cases, and noted that the Legislature was empowered to adopt a curative amendment if it chose to do so.³

Background

Calvin was born in May 2008 to mother T.U.B. and father, J.E.C. (J.E.C. is referred to below as the defendant). The Division of Child Protection and Permanency (‘the Division’) experienced issues with Calvin’s mother, T.U.B., prior to Calvin’s birth because of allegations that T.U.B. was abusing her other eight children.⁴ The defendant was initially given physical custody of Calvin, and ultimately, T.U.B. voluntarily surrendered her custody over Calvin completely.⁵

While Calvin was living with the defendant, his girlfriend T.C., and T.C.’s two daughters, Sandy and Jenny, in the latter part of 2010, Jenny (11 years old) made allegations against the defendant to a teacher, caseworker, and hospital staff.⁶ Jenny described the abuse differently each time she recounted it, initially saying the defendant raped her and her sister and later claiming that the defendant had only touched her over her clothing.⁷ By June 2012, the defendant had been ordered to stay out of T.C.’s home, and the Division had been awarded the care and supervision of T.C.’s children, but was not aware that Calvin was also residing in T.C.’s home. Due to the issues with Calvin’s living arrangements, T.U.B. went to T.C.’s home looking to take custody of Calvin on June 22, 2012. The East Orange police responded to the situation, and a

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

² *Id.* at 213.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 216.

⁶ *Id.*

⁷ *Id.*

Dodd removal was conducted to remove Calvin from T.C.'s residence.⁸ T.U.B. told authorities that she had seen messages between the defendant and Sandy, which indicated that they were in a relationship and that Sandy had been pregnant and had an abortion. After the East Orange police got involved, the Division was granted custody of Calvin, with T.U.B., the defendant, and T.C. allowed weekly supervised visitation.⁹

In August 2012, Calvin was evaluated at the Metro Regional Diagnostic and Treatment Center ("RDTC") at the Children's Hospital of New Jersey. The RDTC reported that Calvin was "developmentally delayed in communication skills, fine motor skills, problem solving skills, and personal social skills," and also had "significant emotional and behavioral problems including temper tantrums, defiance, and oppositionality."¹⁰ In November 2012, a Division supervisor, Ines Perez-Nin, interviewed Jenny and Sandy. Both girls reported that the defendant was residing in their home against court orders, and that the sexual abuse had continued. The defendant was evaluated by Dr. Barry Katz, who claimed there was "sufficient evidence to conclude that there [were] concerns regarding the risk that [defendant] may pose to a child in his care" and also that "[if] the children's reports [were] accurate, then it would indicate that [defendant was] a moderate risk offender" in July 2013.¹¹

By April 2014, the defendant had stopped complying with his parenting skills classes, individual therapy, and supervised visitations; because of this, the Division planned to terminate the parental rights of the defendant and T.U.B. under Title 30 proceedings. The guardianship trial took place over ten trial days. The Division presented expert and factual testimony, and none of the testifying witnesses had any personal knowledge regarding the truth of the sexual abuse allegations.¹²

The defendant's counsel objected to the admission of the hearsay allegations of sexual abuse by Jenny and Sandy contained in four of the Division's exhibits, but the Division countered that the girls' hearsay allegations were admissible under N.J.S. 9:6-8.46(a)(4), and that they had been sufficiently corroborated. The Judge agreed with the Division, and reasoned that Title 9 and Title 30 should be "construed together as a unitary and harmonious whole," and therefore the Title 9 hearsay exception was application to the termination proceeding.¹³ Dr. Katz's testimony acknowledged that there was "non-corroborating information" in Jenny's initial sexual abuse reports, but ultimately explained that Sandy's medical records, which Katz had not

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 218.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

reviewed for his 2013 report, did “corroborate Sandy’s report and contract the defendant’s report” as well as support her allegations of sexual abuse.¹⁴

The Trial Court concluded that the Division had met its burden by clear and convincing evidence to satisfy all four prongs for termination set forth in N.J.S. 30:4C–15.1(a). One factor cited by the Trial Court in terminating defendant’s parental rights was that the defendant was a “substantiated perpetrator of sexual abuse” who failed to visit Calvin and attend parenting classes.¹⁵

On appeal, the defendant argued that the trial court’s basis for termination was flawed for numerous reasons, but a key point was that the court should not have admitted or relied on the hearsay allegations of sexual abuse conveyed by T.C.’s minor daughters, Jenny and Sandy. The defendant claimed that the hearsay exception adopted by the Legislature and codified at *N.J.S.A.* 9:6–8.46(a)(4) applies only in child abuse-or-neglect proceedings litigated under Title 9. He contends that the hearsay exception does not apply to termination of parental rights cases litigated, as here, under Title 30, since in this context, the stakes for a parent are significantly higher and the Division’s burden of proof is more stringent.¹⁶

The Division and Law Guardian claimed that that the Legislature did not intend to confine the hearsay exception in N.J.S. 9:6–8.46(a)(4) to Title 9 proceedings, and that the provision equally applies to Title 30 guardianship matters. They asserted that Title 9 and Title 30 are to be construed “in pari materia.”¹⁷ The Division urged that the special hearsay exception designed to ease the Division’s evidentiary burden in Title 9 cases should logically apply in Title 30 guardianship proceedings. Respondents also pointed out that New Jersey trial and appellate courts have applied the Title 9 hearsay exception to termination cases in several prior unreported opinions. The Division contended that if the Title 9 exception is not applied to Title 30 cases, it will impose undue burdens on the Division and the abused children, since the children will be forced to testify in court at Title 30 trials.¹⁸

Statutes

N.J.S. 9:6-8.46

- 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.),

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 227.

¹⁷ *Id.*

¹⁸ *Id.* at 227-228.

(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

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(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.¹⁹

N.J.S. 30:4C-15.1

- a. The division shall initiate a petition to terminate parental rights on the grounds of the “best interests of the child” pursuant to subsection (c) of section 15 of P.L.1951, c. 138 (C.30:4C-15) if the following standards are met:
- (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
 - (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
 - (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
 - (4) Termination of parental rights will not do more harm than good.²⁰

The hearsay provision contained in N.J.S. 9:6-8.46(a) is not mentioned in N.J.S. 30:4C-15.1(a).

The Appellate Division noted that “where there is more than one plausible interpretation, or where a literal reading of the statute would yield an absurd result, a court may turn to extrinsic evidence to assist in its interpretation of legislative intent.”²¹

The Legislature has repeatedly addressed abuse or neglect proceedings, and proceedings to terminate a parent’s rights, separately. For example, in 1939, the Legislature amended Title 9 to enable entities other than prosecutors, such as school boards, municipalities, and private child

¹⁹ N.J.S. 9:6-8.46(a).

²⁰ N.J.S. 30:4C-15.1(a).

²¹ *New Jersey Division of Child Protection and Permanency v. T.U.B.*, 450 N.J. Super. 210, 230 (2017).

welfare organizations, to “prefer a complaint” for suspected child abandonment, abuse, neglect, or cruelty; there were no changes made to Title 30 to go along with it.²² Similarly, Chapter 119, which was adopted in 1974, contained 56 sections to create or modify portions of Title 9, but made no reference to Title 30 guardianship proceedings.²³ Finally, when the Legislature redefined child abuse standards in Title 9 and passed the Comprehensive Child Abuse Prevention and Treatment Act, it again did so with minimal reference to Title 30.²⁴

The Appellate Division suggested that it would be illogical to read N.J.S. 9:6–8.46(a) as applicable to Title 30 guardianship proceedings because if the hearsay exception in the subsection is extended to termination proceedings under Title 30, the language in subsection (a)(1) would seemingly allow uncorroborated statements to be used to establish that termination is in the best interests of a child pursuant to N.J.S. 30:4C–15.1(a), while prohibiting the use of such uncorroborated statements to establish abuse or neglect in a Title 9 proceeding.²⁵

Finally, the Appellate Division noted that the New Jersey Supreme Court has not held that Title 9 and Title 30 must be read, for all purposes, in “*pari materia*.”²⁶ In fact, in *New Jersey Division of Youth and Family Services v. R.D.*, the Court explained that:

Title Nine proceedings differ from Title Thirty proceedings in three fundamental respects: Title Nine proceedings are intended to be started and completed quickly, while Title Thirty proceedings stress a more deliberative and comprehensive approach; Title Nine proceedings are geared towards an interim form of relief—removal of the child from immediate harm, with permanent placement to be considered at a later date—while the relief sought in Title Thirty proceedings is the permanent termination of parental rights that will allow the child to become eligible for adoption by another; and, most importantly, the differing standards of proof applicable to those disparate proceedings highlight a fundamental difference between the two.²⁷

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether modifying N.J.S. 30:4C-15.1 (or another portion of Title 30) would aid in interpreting the statute and potentially obviate the need for additional litigation regarding the issue addressed in *New Jersey Division of Child Protection and Permanency v. T.U.B.*

²² *Id.* at 231.

²³ *Id.*

²⁴ *Id.* at 233.

²⁵ *Id.* at 234.

²⁶ *Id.* at 235.

²⁷ *New Jersey Division of Youth and Family Services v. R.D.*, 207 N.J. 88, 118 (2011).