



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report Relating to the Definition of “Harm” in the Child Endangerment Statute – N.J.S. 2C:24-4(a)

November 09, 2020

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **January 18, 2021**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

Samuel M. Silver, Deputy Director
New Jersey Law Revision Commission
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: sms@njlrc.org
Web site: <http://www.njlrc.org>

Executive Summary

New Jersey’s Child Endangerment statute, N.J.S. 2C:24-4(a)(2), provides that, “[a]ny person who has a legal duty to care for a child [...] who **causes the child harm** that would make the child an abused or neglected child [...] is guilty of a crime of the second degree.”¹

In *State v. Fuqua*² the New Jersey Supreme Court considered whether the State must prove that a child suffered “actual harm” in order to convict a defendant under the State’s child endangerment statute, N.J.S. 2C:24-4(a)(2).³

In a split decision, the *Fuqua* Court determined that a child’s exposure to an “imminent danger and a substantial risk of harm” is sufficient to convict a defendant of second-degree child endangerment and the range of behavior contemplated by each.⁴

The Commission recommends the modification of New Jersey’s Child Endangerment Statute to clarify that the “harm” component includes the exposure of a child to imminent danger and a substantial risk of harm.

Background

As part of a narcotics investigation by the Middlesex County Prosecutor’s Office, officers surveilled a local motel where defendants Tyrell Johnson and Danyell Fuqua were residing.⁵ The State obtained a search warrant and officers subsequently searched the suspects’ room.⁶ After gaining entry to the motel room, officers found the suspects, six children, and an assortment of illegal and easily accessible drugs including: marijuana and pills on the kitchen table; a lockbox with a key still inserted containing 653 packets of heroin and 1 large bag of cocaine; and, a black plastic bag containing 201 packets of heroin and 14 bags of cocaine next to the children’s toys.⁷ In addition, on a nearby windowsill, officers found “a digital scale covered in white cocaine residue....”⁸ Finally, the officers found nearly \$4,000 in cash and 5 cellphones.⁹

Johnson later pled guilty to drug distribution and was convicted by a jury of endangering the welfare of children pursuant to N.J.S. 2C:24-4(a).¹⁰ His motion for a judgment of acquittal was denied by the trial court, which found that the State did not have to prove actual harm to children to convict under the statute.¹¹ The trial court determined that the State was only required

¹ N.J. STAT. ANN. § 2C:24-4(a)(2) (West 2020) (Emphasis added).

² *State v. Fuqua*, 234 N.J. 583 (2018).

³ *Id.* at 587.

⁴ *Id.* at 595.

⁵ *State v. Fuqua*, 234 N.J. 583, 587 (2018).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 588.

⁹ *Id.* at 588-89.

¹⁰ *Id.* at 588.

¹¹ *Fuqua*, 234 N.J. at 588.

to prove that the defendant subjected children to a risk of harm in order to secure a conviction.¹²

The Appellate Division affirmed the denial of the motion, finding that, under N.J.S. 2C:24-4(a), the phrase “causes harm” refers to actions resulting in actual harm as well as those which unreasonably subject children to a substantial risk of harm.¹³ In Johnson’s case, the Court held that the children faced a substantial risk of harm since that they were in a small motel room and exposed to a large quantities of drugs easily within their reach.¹⁴

The New Jersey Supreme Court granted certification.¹⁵

Analysis

The issue before the New Jersey Supreme Court was whether “actual harm” to a child is required to convict under N.J.S. 2C:24-4(a).¹⁶ The Court noted that “... the incorporation by reference of N.J.S. [] 9:6-8.21 in N.J.S. [] 2C:24-4(a)(2), does not require that any act or omission of the parent result in specific harm to the child.”¹⁷ The Court said that “[t]he focus is on the conduct of the parent which exposes the child to a ‘substantial risk’ of death or physical harm”.¹⁸ In light of the express incorporation, the Court interpreted the statute to include actual harm and conduct that creates a substantial risk of harm.¹⁹

In addition to the plain language of the statute, the Court noted that state appellate courts over the last three decades have “unanimously held that the State is not required to prove actual harm to a child to convict under N.J.S.A. 2C:24-2(a)(2).”²⁰ Rather, they have consistently held that a “substantial risk of harm is sufficient to sustain a conviction.”²¹ If the Legislature wanted to require proof of actual harm, it could have amended the statute.²² Given that the Legislature had not taken any action to address this specific portion of the statute despite amending it on three separate occasions since 1992, the Court presumed legislative acquiescence to the judiciary’s interpretation.²³

The New Jersey Supreme Court affirmed the Appellate Court’s conclusion that N.J.S. 2C:24-2(a)(2) punishes conduct exposing children to a substantial risk of harm and upheld defendant’s conviction.²⁴ Three justices joined the majority opinion.²⁵

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *State v. Fuqua*, 230 N.J. 560 (2017).

¹⁶ *Fuqua*, 234 N.J. at 587 (2018).

¹⁷ *Id.* at 594.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 593.

²¹ *Id.*

²² *Fuqua*, 234 N.J. at 594.

²³ *Id.*

²⁴ *Id.* at 595.

²⁵ *Id.* at 598

Dissenting Opinions

Justice Albin’s dissent, joined by Justice LaVecchia, said that the Court’s decision ran contrary to the endangering statute’s text and legislative history, failed to apply the doctrine of lenity, and “erased all distinctions” between civil and criminal statutes.²⁶

Justice Albin noted that the majority’s definition of harm disregarded its “customary, well-understood, and common-sense definition”²⁷ and suggested that “[t]here [was] a difference between a child who is permitted to run through traffic (substantial risk of harm) and a child who is struck while doing so (harm).”²⁸

The legislative history indicates that the Criminal Law Revision Commission reluctantly endorsed a 1971 draft version of the statute which did not include a harm requirement.²⁹ The Legislature ultimately embraced a “narrower” version of the statute, and enacted N.J.S. 2C:24-4 in 1979.³⁰

Justice Albin also suggested that the majority violated the doctrine of lenity.³¹ Given that this statute is subject to two reasonable interpretations, he said that statutory ambiguities should have been resolved in favor of the defendant, not the State.³² Finally, Justice Albin discussed the apparent criminalization of the civil abuse and neglect statute by Title 2C,³³ suggesting that a parent or guardian who commits civil abuse and neglect would also be guilty of second-degree child endangerment.³⁴ Since second-degree child endangerment carries with it maximum of ten years in prison, he expressed skepticism that the Legislature intended such an “absurd result.”³⁵

Writing separately in dissent, Chief Justice Rabner was unpersuaded that the legislative history cited by the majority and Justice Albin resolved the issue before the Court.³⁶ He did, however, agree with Justice Albin’s view that the Court was faced with two reasonable interpretations of a criminal statute which required the Court to apply the rule of lenity.³⁷ In his view, it was unclear “whether the Legislature intended a narrow definition of actual harm or a broader meaning that includes substantial risk of harm.”³⁸ Given this ambiguity, the Chief Justice suggested defendant’s conviction could not stand.³⁹ Finally, the Chief Justice opined that

²⁶ *Id.* at 599, 604.

²⁷ *Id.* at 601.

²⁸ *Fuqua*, 234 N.J. at 601.

²⁹ *Id.* at 602.

³⁰ *Id.*

³¹ *Id.* at 604.

³² *Id.*

³³ *Id.* at 605.

³⁴ *Fuqua*, 234 N.J. at 605

³⁵ *Id.*

³⁶ *Id.* at 606.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

“[g]oing forward, the Legislature, of course, could amend and clarify the statute if it wished to.”⁴⁰

50 State Survey

In New Jersey, the courts are “...adjured to follow an analytical approach by which the level of clarity required of the language of the enactment depends on the nature of the activity that is sought to be regulated.”⁴¹ The likelihood, as well as the consequences, of any misunderstanding dictate that enactments with criminal penalties must be drafted with greater precision than their civil counterparts.⁴² When examining a criminal statute, the New Jersey Supreme Court has made it clear that, “[t]he test is whether the statute gives a person of ordinary intelligence fair notice that his conduct is forbidden and punishable by certain penalties.”⁴³

The Commission requested that Staff undertake an examination whether and how the other 49 states utilize the term “substantial risk of harm” and the range of behavior contemplated by use of this term.⁴⁴

• *Statutory Terminology*

All fifty states, and the District of Columbia, have enacted statutes to punish those who either injure, or expose a child to the risk of injury.⁴⁵ The statutory terminology for this offense

⁴⁰ *Id.*

⁴¹ *Binkowski v. State*, 322 N.J. Super. 359 (App. Div. 1999).

⁴² *Id.* (Observing that “[G]reater imprecision can be tolerated in enactments with civil rather than criminal penalties because of differences in the likelihood, as well as in the consequences, of any misunderstanding.” [internal citations omitted] (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 298-99 (1982)).

⁴³ *In re DeMarco*, 83, N.J. 25, 37 (1980).

⁴⁴ NEW JERSEY LAW REV. COMM’N (2019) ‘Child Endangerment’. *Minutes of NJLRC meeting 21 Mar. 2019*, Newark, N.J.

⁴⁵ For purposes of this Memorandum, the statutes that follow will be collectively be referred to as “the endangerment statutes.” Where a distinction is necessary, the appropriate statutory distinction will be made. ALA. CODE § 13A-13-6 (2020); ALASKA STAT. ANN. § 11.51.100 (West 2020); ARIZ. REV. STAT. ANN. § 13-3623 (2020); ARK. CODE ANN. § 5-27-205 (West 2020); CAL. PENAL CODE § 273a (West 2020); COLO. REV. STAT. ANN. § 18-6-401 (West 2020); CONN. GEN. STAT. § 53-21 (West 2020); DEL. CODE ANN. tit. 11 § 1102 (West 2020); D.C. CODE § 22-1101 (2020); FLA. STAT. ANN. § 827.03 (West 2020); GA. CODE ANN. § 16-5-70 (West 2020); HAW. REV. STAT. § 709-903.5 (West 2020); IDAHO CODE ANN. § 18-1501 (West 2020); 720 ILL. COMP. STAT. 5 / 12C-5 (West 2020); IND. CODE ANN. § 35-46-1-4 (West 2020); IOWA CODE ANN. § 726.3 (West 2020); KAN. STAT. ANN. § 21-5601 (West 2020); KY. REV. STAT. ANN. § 530.060 (West 2020); LA. REV. STAT. ANN. § 93 (2020); ME. REV. STAT. ANN. tit. 17-A § 554 (2020); MD. CODE ANN., CRIM. LAW § 3-601 (2020); MASS. GEN. LAWS ANN. ch. 265 § 13L (West 2020); MICH. COMP. LAWS ANN. § 136b (West 2020); MINN. STAT. ANN. § 609.378 (West 2020); MISS. CODE ANN. § 97.5-39 (West 2020); MO. REV. STAT. § 568.060 (West 2020); MONT. CODE ANN. § 45-5-622,628 (2020); NEB. REV. STAT. § 28-707 (2020); NEV. REV. STAT. ANN. § 200.508 (West 2020); N.H. REV. STAT. ANN. § 639:3 (2020); N.J. STAT. ANN. § 2C:24-4 (West 2020); N.M. STAT. ANN. § 30-6-1 (2020); N.Y. PENAL LAW § 260.10 (2020); N.C. GEN. STAT. ANN. § 14-318.4 (West 2020); N.D. CENT. CODE § 19-03.1-22.2 (West 2020); OHIO REV. CODE ANN. § 2919.22 (West 2020); OKLA. STAT. tit. 21 § 852.1 (West 2020); OR. REV. STAT. ANN. § 163.575 (West 2020); PA. CONS. STAT. § 4304 (West 2020); R.I. GEN. LAWS § 11-9-5 (West 2020); S.C. CODE ANN. § 63-5-70 (2020); S.D. CODIFIED LAWS § 26-8A-2 (2020); TENN. CODE ANN. § 39-15-401 (West 2020); TEX. PENAL CODE ANN. § 22.041 (West 2020); UTAH CODE ANN. § 76-5-112.5 (2020); VT. STAT. ANN. tit. 13 § 1304 (West 2020); VA. CODE ANN. § 18.2-371.1 (West 2020); WASH. REV. CODE ANN. § 9A.42.020 (West 2020); W. VA. CODE ANN. § 61-8D-3 (West 2020); WIS. STAT. ANN. § 948.21 (West 2020); WYO. STAT ANN. § 6-4-403 (West 2020). See Fig. 1 which sets forth each state in alphabetical order along with the corresponding endangerment statute.

is not nationally uniform, and there is not a commonly accepted “child endangerment” statute. Thus, the examination of this topic involved a review of state statutes involving child endangerment, abuse, neglect, cruelty, and the mistreatment of children.

Of the fifty-one statutes examined, 25 utilize a form of the word “endanger”.⁴⁶ In addition, there are 16 statutes that refer to the harm of a child as either abuse, neglect or both.⁴⁷ The statutes of four states, and the District of Columbia, recognize acts of “cruelty” committed against a child.⁴⁸

- *Causes Harm*

The plain language of the statutes of two states, New Jersey and Washington, requires that the defendant’s conduct cause the child harm in order for the State to secure a conviction.⁴⁹ It is unclear whether actual harm must be the outcome of the defendant’s behavior. Neither statute specifies whether physical or emotional harm are required in order to obtain a conviction. Both are unclear about whether placing a child “in a situation in which harm *could* result” is a criminal act.

Despite the plain language of each statute requiring harm for conviction, courts in both New Jersey and Washington have determined that the exposing a child to a substantial risk of harm is sufficient to secure a conviction under the endangerment statute.⁵⁰ The State of Washington has enacted a statute that provides that, “[a] person is guilty of the crime of endangerment with a controlled substance if the person knowingly or intentionally permits a [...] child to be exposed to...” any of the drugs enumerated in the statute.⁵¹ This statute appears to address the factual situation that faced the *Fuqua* Court.⁵²

- *Substantial Risk of Physical Injury*

In six states and the District of Columbia, actual physical harm need not occur for a

⁴⁶ See Fig. 2. There are three statutory references that utilize terms from two categories. See MINN. STAT. ANN. § 609.378 (West 2020) (Neglect or endangerment of a child); NEV. REV. STAT. ANN. § 200.508 (West 2020) (Abuse, neglect or endangerment of child); and, R.I. GEN. LAWS § 11-9-5 (West 2020) (Cruelty to or neglect of child). The statutes with the word endanger in them have been placed in the endangerment category because it is the focus of this Memorandum. The remaining dual reference has been placed in the category in which the first common term appears.

⁴⁷ See Fig. 2.

⁴⁸ *Id.*

⁴⁹ See N.J. STAT. ANN. § 2C:24-4 (2020) (providing that any person who “causes the child harm” is guilty of child endangerment in the second degree); and, see WASH. REV. CODE ANN. § 9A.42.020 (West 2020) (providing that a person who “causes great bodily harm to a child [...] by withholding any of the basic necessities of life [...]” is guilty of criminal mistreatment in the first degree).

⁵⁰ See discussion of *State v. Fuqua*, 234 N.J. 583 (2018) *supra*; and see *State v. Perez*, 137 Wash. App. 97 (2007) (evidence that defendant fired BB gun at target held by four-year-old child was sufficient to support conviction for reckless endangerment, even though child was wearing safety goggles and his injuries were slight).

⁵¹ WASH. REV. CODE ANN. § 9A.42.100 (West 2020).

⁵² See discussion of *State v. Fuqua*, 234 N.J. 583 (2018) *supra*.

defendant to be convicted under the state’s child endangerment statute.⁵³ Instead, a defendant may be convicted if he or she creates a “substantial risk of physical injury” to a child.⁵⁴ Creating a risk of “death or serious physical [or bodily] injury” is required for an endangerment condition in Arkansas and West Virginia.⁵⁵ The District of Columbia requires the State to prove that an individual has engaged in conduct “which creates a grave risk of bodily injury to a child, and thereby causes bodily injury.”⁵⁶ Circumstances involving the risk of “bodily injury” are addressed in the statutes of both Maine⁵⁷ and Massachusetts.⁵⁸

- *Circumstantial or Situational Exposure to Harm (Physical or Emotional)*

In *Fuqua*, the Court opined that, “[t]he [statutory] focus is on the conduct of the parent which exposes the child to a ‘substantial risk’ of death or physical harm”.⁵⁹

Criminal endangerment statutes can be drafted to prohibit two types of behavior: (1) deliberate indifference to, acquiescence in, or the creation of situations inimical to the child’s moral or physical welfare, and (2) acts deliberately perpetrated on children and injurious to their moral or physical well-being.⁶⁰ The majority of the state statutes relating to child endangerment, 34 in total, have been drafted to effectuate that goal.⁶¹ These statutes criminalize behavior that exposes a child to a “situation” or “circumstances” in which the “person” or “health” of the child is endangered.⁶²

- *Range of Criminal Behavior*

⁵³ See ALASKA STAT. ANN. § 11.51.100 (West 2020); ARK. CODE ANN. § 5-27-205 (West 2020); D.C. CODE § 22-1101 (2020); MASS. GEN. LAWS ANN. ch. 265 § 13L (West 2020); ME. REV. STAT. ANN. tit. 17-A § 554 (2020); N.C. GEN. STAT. ANN. § 14-318.4 (West 2020); and W. VA. CODE ANN. § 61-8D-3 (West 2020).

⁵⁴ See ALASKA STAT. ANN. § 11.51.100 (West 2020); N.C. GEN. STAT. ANN. § 14-318.4 (West 2020).

⁵⁵ See ARK. CODE ANN. § 5-27-205 (West 2020); and W. VA. CODE ANN. § 61-8D-3 (West 2020).

⁵⁶ D.C. CODE § 22-1101 (2020). *But see Lee v. U.S.*, 831 A.2d 378 (2003) (the statute which prohibits cruelty to children requires that an individual create a grave risk of bodily injury, not a risk of grave bodily injury; thus, the correct focus is on the likelihood of injury, rather than the degree of injury sustained).

⁵⁷ ME. REV. STAT. ANN. tit. 17-A § 554 (2020).

⁵⁸ MASS. GEN. LAWS ANN. ch. 265 § 13L (West 2020).

⁵⁹ *State v. Fuqua*, 234 N.J. 583, 594 (2018).

⁶⁰ See *Dubinsky v. Black*, 196 A.3d 870 (Conn. App. 2018).

⁶¹ See ARIZ. REV. STAT. ANN. § 13-3623 (2020); CAL. PENAL CODE § 273a (West 2020); COLO. REV. STAT. ANN. § 18-6-401 (West 2020); CONN. GEN. STAT. § 53-21 (West 2020); DEL. CODE ANN. tit. 11 § 1102 (West 2020); FLA. STAT. ANN. § 827.03 (West 2020); IDAHO CODE ANN. § 18-1501 (West 2020); 720 ILL. COMP. STAT. 5 / 12C-5 (West 2020); IND. CODE ANN. § 35-46-1-4 (West 2020); IOWA CODE ANN. § 726.3 (West 2020); KAN. STAT. ANN. § 21-5601 (West 2020); MD. CODE ANN., CRIM. LAW § 3-601 (2020); MICH. COMP. LAWS ANN. § 136b (West 2020); MINN. STAT. ANN. § 609.378 (West 2020); MO. REV. STAT. § 568.060 (West 2020); MISS. CODE ANN. § 97.5-39 (West 2020); MONT. CODE ANN. § 45-5-622,628 (2020); NEB. REV. STAT. § 28-707 (2020); NEV. REV. STAT. ANN. § 200.508 (West 2020); N.H. REV. STAT. ANN. §639:3 (2020); N.M. STAT. ANN. §30-6-1 (2020); N.Y. PENAL LAW § 260.10 (2020); N.D. CENT. CODE § 19-03.1-22.2 (West 2020); OHIO REV. CODE ANN. § 2919.22 (West 2020); PA. CONS. STAT. § 4304 (West 2020); R.I. GEN. LAWS § 11-9-5 (West 2020); S.C. CODE ANN. § 63-5-70 (2020); S.D. CODIFIED LAWS § 26-8A-2 (2020); TENN. CODE ANN. § 39-15-401 (West 2020); TEX. PENAL CODE ANN. § 22.041 (West 2020); UTAH CODE ANN. § 76-5-112.5 (2020); VT. STAT. ANN. tit. 13 § 1304 (West 2020); VA. CODE ANN. § 18.2-371.1 (West 2020); WYO. STAT ANN. § 6-4-403 (West 2020).

⁶² *Id.*

Throughout the United States, endangering statutes have been interpreted to cover a wide variety of behavior.⁶³ The following are examples of prohibited conduct under various child endangering statutes: maintaining a residence with a leaking portable toilet, allowing children to sleep in close proximity to diseased animals, scrap metal auto parts, and other discarded items, and keeping children barefoot in the presence of protruding nails and animal feces⁶⁴; threatening a child with physical harm in order to compel him to urinate in public in a dark area of a vacant building⁶⁵; allowing children to witness, either by sight or sound, the aggravated menacing of another individual⁶⁶; carrying a two-year-old child while conducting multiple drug transactions⁶⁷; attempting to evade the police with as four children rode in the truck cab;⁶⁸ setting fire to one's home and placing an 18-month-old child in the backyard in close proximity to the fire⁶⁹; allowing a child to live in a house where drug paraphernalia and cocaine were found⁷⁰; exposure to a domestic crime – i.e. threatening another with a machete⁷¹; leaving a child unattended in a car for a prolonged period of time⁷²; discharging a firearm in the direction of a child care center at 10 a.m. on a school day⁷³; pointing a handgun at a child to her stop crying⁷⁴; and, inaccessibility of a parent or guardian due to intoxication.⁷⁵

- *Actual Physical or Mental Pain*

Two states, Georgia and Louisiana, require the victim to suffer actual physical or mental pain.⁷⁶ In Georgia, a person is guilty of cruelty to a child if he or she “maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.”⁷⁷

- *Enumerated List*

There are six states that either list prohibited behaviors or cross-reference other statutes to

⁶³ See Fig. 3.

⁶⁴ *State v. Deskins*, 152 Ariz. 209 (App. Div.2 1986).

⁶⁵ *State v. Payne*, 669 A.2d 582 (1995), *certif. granted in part* 673 A.2d 112, *aff'd* 695 A.2d 525.

⁶⁶ *Bussey v. State*, 159 A.3d 713 (2017), *post-conviction relief denied* 2019 WL 2613109.

⁶⁷ *Thompson v. State*, 139 So.3d 377 (2014), *reh'g denied, mandamus dismissed* 151 So.3d 1230, *post-conviction relief denied* 2015 WL 13723887.

⁶⁸ *State v. Anspach*, 627 N.W.2d 227 (2001).

⁶⁹ *State v. Abdullah*, 348 P.3d 1 (2015), *rehearing denied, certiorari denied* 136 S.Ct. 1161.

⁷⁰ *State v. Christian*, 795 N.W.2d 702 (2011).

⁷¹ *State v. Mendez-Osorio*, 900 N.W.2d 776 (2017).

⁷² *Hannon v. Commonwealth*, 803 S.E.2d 355 (2017). See *People v. Rudell*, 78 N.E.3d 541 (2017) (conviction for child endangerment where a baby was left unattended in a car for approximately one hour). Compare *State v. Tice*, 686 N.W. 2d 351 (App. 2004) (dismissal of child neglect and endangerment charges in which children were left alone in a locked automobile in a retail parking lot with engine running for 40 minutes finding that the term “likely” in the statute requires proof that the situation is “more likely than not” to cause substantial harm to children).

⁷³ *State v. Herndon*, 379 P.3d 403 (2016).

⁷⁴ *Duckworth v. State*, 594 A.2d 109 (1991).

⁷⁵ *In re N.K.*, 169 N.H. 546 (2016).

⁷⁶ GA. CODE ANN. § 16-5-70 (West 2020), LA. REV. STAT. ANN. § 93 (2020).

⁷⁷ GA. CODE ANN. § 16-5-70 (West 2020). See *Banta v. State*, 282 Ga. 392 (2007) (the conscious disregard of a substantial and unjustifiable risk that the defendant's act or omission will cause the harm at issue or endanger the safety of the other person).

define behavior that constitutes a danger to a child.⁷⁸ The failure to exercise reasonable diligence to prevent a child from becoming “dependent”, “delinquent” or “neglected” are omissions that can constitute endangerment.⁷⁹

The remaining four states provide a list of prohibited behaviors such as: knowingly permitting the physical or sexual abuse of a child⁸⁰; permitting a child to be present at a location where controlled dangerous substances are being manufactured⁸¹; permitting a child to be present in a vehicle in which the operator is under the influence of alcohol or another intoxicant⁸², or in violation of the motor vehicle statute⁸³; inducing, causing or permitting an unmarried person under 18 years of age to witness an act of sexual conduct⁸⁴; permitting a person under 18 years of age to enter or remain in a place where unlawful activity involving controlled danger substances or cannabis is maintained or conducted⁸⁵; inducing or permitting a child to participate in gambling⁸⁶; selling controlled dangerous substance delivery systems⁸⁷; allowing another person to inflict serious or substantial bodily injury on a minor⁸⁸; causing or permitting a minor to ingest a controlled dangerous substance⁸⁹; and, failure to provide necessities to a minor.⁹⁰

Conclusion

The proposed revisions, contained in the attached Appendix, are intended to clarify that the definition of “harm” in N.J.S. 2C:24-4(a)(3) includes the exposure of a child to imminent danger and a substantial risk of harm.

⁷⁸ See ALA. CODE § 13A-13-6 (2020); KY. REV. STAT. ANN. § 530.060 (West 2020); OKLA. STAT. tit. 21 § 852.1 (West 2020); OR. REV. STAT. ANN. § 163.575 (West 2020); HAW. REV. STAT. § 709-903.5 (West 2020); WIS. STAT. ANN. § 948.21 (West 2020). These statutes do not utilize the term “include”, “includes”, or “including” when setting forth the prohibited behavior. These statutes leave it to the litigants and the courts to determine whether or not a behavior not enumerated constitutes child endangerment.

⁷⁹ See ALA. CODE § 13A-13-6 (2020); KY. REV. STAT. ANN. § 530.060 (West 2020).

⁸⁰ OKLA. STAT. tit. 21 § 852.1(A)(1) (West 2020).

⁸¹ *Id.* at § 852.1(A)(2).

⁸² *Id.* at § 852.1(A)(3).

⁸³ *Id.* at § 852.1(A)(4).

⁸⁴ OR. REV. STAT. ANN. § 163.575(1)(a) (West 2020).

⁸⁵ *Id.* at § 163.575(1)(b).

⁸⁶ *Id.* at § 163.575(1)(c).

⁸⁷ *Id.* at § 163.575(1)(d)(A) – (G).

⁸⁸ HAW. REV. STAT. § 709-903.5 (1)(a) (West 2020).

⁸⁹ *Id.* at § 709-903.5(1)(a).

⁹⁰ WIS. STAT. ANN. § 948.21 (2)(a)-g) (West 2020) (including necessary care, food, clothing medical care, shelter, education, or protection from exposure to the distribution or manufacture of controlled dangerous substances).

Appendix

The relevant text of N.J.S. 2C:24-4, including proposed modifications (proposed additions are shown with underline, and proposed deletions with ~~striketrough~~), follows:

OPTION #1*

a. [...]

(2) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who knowingly causes the child harm, or exposes the child to a substantial risk of harm, that would make the child an abused or neglected child as defined in R.S.9:6-1, R.S.9:6-3, and section 1 of P.L.1974, c. 119 (C.9:6-8.21) is guilty of a crime of the second degree.

(3) Any other person who engages in conduct or who causes harm, or a substantial risk of harm, to a child as described in ~~this paragraph~~ subsection a.(2) to a child is guilty of a crime of the third degree.

* * *

OPTION #2

a. [...]

(2) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child, is guilty of a crime of the second degree if he or she who knowingly

(A) causes the child harm that would make the child an abused or neglected child as defined in R.S.9:6-1, R.S.9:6-3, and section 1 of P.L.1974, c. 119 (C.9:6-8.21); or,

(B) exposes the child to a substantial risk of harm that would make the child an abused or neglected child as defined in R.S.9:6-1, R.S.9:6-3, and section 1 of P.L.1974, c. 119 (C.9:6-8.21).

~~is guilty of a crime of the second degree.~~

(3) Any other person who engages in conduct or who causes harm to a child, or exposes a child to a substantial risk of harm, as described in ~~this paragraph~~ subsection a.(2) to a child is guilty of a crime of the third degree.

* * *

Comments

Clarification

To achieve more consistent interpretations of N.J.S. 2C:24-4(a)(2)⁹¹, the proposed modifications are drafted to capture the intent of the New Jersey Legislature, reflect more clearly the incorporation of Title 9 provisions into the statute, and acknowledge thirty years of judicial precedent.⁹²

Knowingly

As enacted, N.J.S. 2C:24-4, specifically subsection a. (2), does not clearly set forth the mental element required for a defendant to be found guilty of child endangerment. The statute relies upon the “gap filler” statute, that provides that when no mental state is specified in a criminal statute, the mental state of “knowingly” shall be deemed the required mental element.⁹³ The proposed revision to the statute explicitly sets forth the mental element of the crime.

References to Title 9

• *Explicit Incorporation*

There are three subsections of Title 9 that were incorporated by the Legislature into N.J.S. 2C:24-4(a)(2).⁹⁴ In N.J.S. 9:6-1 the Legislature set forth eight actions that constitute child abuse. Acts of cruelty and neglect are set forth in N.J.S. 9:6-3. The term “abused or neglected” is defined in N.J.S. 9:6-8.21. The New Jersey Legislature expressly incorporated each of these statutes into N.J.S. 2C:24-4 to protect children from “harm” and “a substantial risk of harm.”

• *Judicial Interpretation*

For decades, the judiciary has unanimously held that the State is not required to prove actual harm to a child to convict under N.J.S. 2C:24-4(a)(2).⁹⁵ Since its enactment in 1978, N.J.S. 2C:24-4 has been amended on ten separate occasions.⁹⁶ The Legislature has not amend the statute to require proof of actual harm.⁹⁷

• *Statutory Overlap*

⁹¹ *State v. Fuqua*, 234 N.J. 583, 593 (2018) (Rabner, CJ., dissenting).

⁹² *State v. Fuqua*, 234 N.J. 583 (2018).

⁹³ See N.J. STAT. ANN. § 2C:2-2(c)(3); See also, *State v. Bryant*, 419 N.J. Super. 15 (App. Div. 2011) (providing that the endangerment statute, N.J. STAT. ANN. § 2C:24-4(a) contained no mental element and that “knowingly was the required mental element).

⁹⁴ N.J. STAT. ANN. §§ 9:6-1, 9:6-3 and 9:6-9.21 (West 2020).

⁹⁵ *State v. Fuqua*, 234 N.J. 583, 593 (2018).

⁹⁶ L.1979, c. 178, § 46, eff. Sept. 1, 1979 (technical amendments, prohibits child participation in pornography); L.1983, c. 494, § 1, eff. Jan. 17, 1984 (fortifies the child pornography law); L.1992, c. 2, § 1, eff. April 2, 1992 (makes possession of child pornography a 4th degree crime); L.1992, c. 6, § 1, eff. May 13, 1992 (increases the penalties for endangering the welfare of a child in certain instances); L.1995, c. 109, § 1, eff. June 1, 1995 (clarifies that the manufacture, sale and possession of computer programs or video games containing child pornography are crimes under the child pornography statute); L.1998, c. 126, § 1, eff. May 1, 1999 (clarifies that depiction and dissemination of images or simulations on the Internet of child pornography constitutes crime; establishes enhanced penalties); L.2001, c. 291, § 1, eff. Dec. 28, 2001, retroactive to May 1, 1999 (technical corrections); L.2013, c. 51, § 13, eff. July 1, 2013 (redefines child as someone under 18); L.2013, c. 136, § 1, eff. Aug. 14, 2013 (reorders sec. a. and adds subsection (1) & (2)); L.2017, c. 141, § 1, eff. Feb. 1, 2018 (establishes additional penalties related to child pornography and expands crime to include portrayal of child in sexual manner; establishes crime of leader of child pornography network).

⁹⁷ *Fuqua*, 234 N.J. at 594-595.

It is not uncommon for criminal statutes to overlap in prohibiting the same basic act.⁹⁸ In such situations, the State, in the sound exercise of discretion, may proceed under either act.⁹⁹ The New Jersey Supreme Court has also addressed the availability of disparate penalties under separate statutory schemes.¹⁰⁰ Under such circumstances, “the decision to proceed under either or both of the statutes is traditionally the State’s.”¹⁰¹

*** For ease of reference N.J.S. 9:6-1, N.J.S. 9:6-3, and section 1 of N.J.S. 9:6-8.21 have been reproduced herein:**

9:6-1. Abuse, abandonment, cruelty, and neglect of child; what constitutes

Abuse of a child shall consist in any of the following acts: (a) disposing of the custody of a child contrary to law; (b) employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb, or contrary to the laws of this State; (c) employing or permitting a child to be employed in any occupation, employment or vocation dangerous to the morals of such child; (d) the habitual use by the parent or by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language; (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child; (f) permitting or allowing any other person to perform any indecent, immoral or unlawful act in the presence of the child that may tend to debauch or endanger the morals of such child; (g) using excessive physical restraint on the child under circumstances which do not indicate that the child's behavior is harmful to himself, others or property; or (h) in an institution as defined in section 1 of P.L.1974, c. 119 (C. 9:6-8.21), willfully isolating the child from ordinary social contact under circumstances which indicate emotional or social deprivation.

Abandonment of a child shall consist in any of the following acts by anyone having the custody or control of the child: (a) willfully forsaking a child; (b) failing to care for and keep the control and custody of a child so that the child shall be exposed to physical or moral risk without proper and sufficient protection; (c) failing to care for and keep the control and custody of a child so that the child shall be liable to be supported and maintained at the expense of the public, or by child caring societies or private persons not legally chargeable with its or their care, custody and control.

Cruelty to a child shall consist in any of the following acts: (a) inflicting unnecessarily severe corporal punishment upon a child; (b) inflicting upon a child unnecessary suffering or pain, either mental or physical; (c) habitually tormenting, vexing or afflicting a child; (d) any willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, is caused or permitted to be inflicted on a child; (e) or exposing a child to unnecessary hardship, fatigue or mental or physical strains that may tend to injure the health or physical or moral well-being of such child.

⁹⁸ *Id.* at 596.

⁹⁹ *Id.* citing *State v. States*, 44 N.J. 285, 292 (1965). See *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979)

¹⁰⁰ *State v. Reed*, 34 N.J. 554, 556 (1961).

¹⁰¹ *Id.* at 573.

Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child: (a) willfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being. Neglect also means the continued inappropriate placement of a child in an institution, as defined in section 1 of P.L.1974, c. 119 (C. 9:6-8.21), with the knowledge that the placement has resulted and may continue to result in harm to the child's mental or physical well-being.

Credits: Amended by L.1987, c. 341, § 1, eff. Dec. 24, 1987.

9:6-3. Cruelty and neglect of children; crime of fourth degree; remedies

Any parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be guilty of a crime of the fourth degree. If a fine be imposed, the court may direct the same to be paid in whole or in part to the parent, or to the guardian, custodian or trustee of such minor child or children; provided, however, that whenever in the judgment of the court it shall appear to the best interest of the child to place it in the temporary care or custody of a society or corporation, organized or incorporated under the laws of this State, having as one of its objects the prevention of cruelty to children, and the society or corporation is willing to assume such custody and control, the court may postpone sentence and place the child in the custody of such society or corporation, and may place defendant on probation, either with the county probation officers or an officer of the society or corporation to which the child is ordered, and may order the parent, guardian or person having the custody and control of such child to pay to such society or corporation a certain stated sum for the maintenance of such child. When, however, a child is so placed in the custody of such society or corporation, and defendant fails to make the payments as ordered by the court, the court shall cause the arrest and arraignment before it of such defendant, and shall impose upon the defendant the penalty provided in this section.

Credits: Amended by L.1944, c. 196, p. 711, § 1; L.1990, c. 26, § 5, eff. Aug. 19, 1990.

9:6-8.21. Definitions

As used in P.L.1974, c. 119 (C.9-8.21 et seq.), unless the specific context indicates otherwise:

[...]

c. "Abused or neglected child" means a child less than 18 years of age whose parent or guardian, as herein defined, (1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; (2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which

would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; (3) commits or allows to be committed an act of sexual abuse against the child; (4) or a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so, or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court; (5) or a child who has been willfully abandoned by his parent or guardian, as herein defined; (6) or a child upon whom excessive physical restraint has been used under circumstances which do not indicate that the child's behavior is harmful to himself, others, or property; (7) or a child who is in an institution and (a) has been placed there inappropriately for a continued period of time with the knowledge that the placement has resulted or may continue to result in harm to the child's mental or physical well-being or (b) who has been willfully isolated from ordinary social contact under circumstances which indicate emotional or social deprivation.

A child shall not be considered abused or neglected pursuant to paragraph (7) of subsection c. of this section if the acts or omissions described therein occur in a day school as defined in this section.

No child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall for this reason alone be considered to be abused or neglected.

[...]

Credits: L.1974, c. 119, § 1, eff. Oct. 10, 1974. Amended by L.1977, c. 209, § 1, eff. Sept. 7, 1977; L.1987, c. 341, § 6, eff. Dec. 24, 1987; L.1994, c. 58, § 39, eff. July 1, 1994; L.1999, c. 53, § 55, eff. March 31, 1999; L.2004, c. 130, § 27, eff. Aug. 27, 2004; L.2005, c. 169, § 1, eff. Aug. 5, 2005; L.2006, c. 47, § 47, eff. July 1, 2006; L.2012, c. 16, § 31, eff. June 29, 2012.