



## **NEW JERSEY LAW REVISION COMMISSION**

### **Draft Final Report Relating to**

### **Hearsay Evidence In Child Abuse and Neglect Proceedings**

**September 9, 2019**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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## Introduction

In the case of *New Jersey Division of Child Protection and Permanency v. T.U.B.*<sup>1</sup>, 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. That provision is broader than the ordinary Evidence Rule 803(c)(27) STATEMENTS BY A CHILD RELATING TO A SEXUAL OFFENSE.<sup>2</sup> The issue was whether the provision applies in Title 30 cases involving the termination of parental rights.

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 applied only in Title 9 cases. 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. As the opinion is based on the opening language of the section, “In any hearing under this act,” the effect is limiting all the special rules in subsection (a). The subsection in question includes a number of special evidentiary rules for abuse and neglect proceedings:

- 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

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

<sup>2</sup> **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.

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 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.<sup>3</sup>

In its 2014 Final Report relating to Title 9 Child Abuse and Neglect, the Law Revision Commission included this provision without substantive change.<sup>4</sup> 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.

As the result of *Division of Child Protection and Permanency v. T.U.B.*, the Commission reconsidered whether the special evidentiary rules should apply only to child abuse and neglect proceedings or to termination of parental rights proceedings as well. 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 require special protections.<sup>5</sup> As a result, the Commission decided that the special evidentiary rules should apply only in child abuse and neglect proceedings. To make that limitation clear, the Commission recommends amendment of the opening language of N.J.S. 9:6–8.46 and of section 9:27-26 of its 2014 Report.

In addition, cases have held that the special rule (3) relating to business records is substantively identical to the ordinary business record exception in the rules of evidence,

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<sup>3</sup> N.J.S. 9:6–8.46(a)(4).

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

<sup>5</sup> *DYFS v. AW and RW*, 103 N.J. 591, 599 (App. Div. 2016).

N.J.R.E. 803(c)(6).<sup>6</sup> As applied to child abuse and neglect proceedings, that identity is further supported by Court Rule 5:12-4(d) which applies specifically to reports of the Division of Child Protection and Permanency.<sup>7</sup> 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.<sup>8</sup> To make that judicial interpretation clear, the Commission recommends replacing the bulk of special rule (3) with a reference to the applicable Rule of Evidence.

### **Proposed Amendments**

*The proposed amendment to N.J.S. 9:6–8.46 is:*

- a. In any hearing under this act relating to child abuse and neglect, 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 as provided in the Rules of Evidence including N.J.R.E. 803 9c)(6) ~~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 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~~

<sup>6</sup> See, e.g. *DYFS v. M.C. III*, 201 N.J. 328, 346-347 (2010).

<sup>7</sup> (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), reports by staff personnel or professional consultants. Conclusions drawn from the facts stated therein shall be treated as prima facie evidence, subject to rebuttal.

<sup>8</sup> *DYFS v. M.C. III, supra*.

~~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.

*The proposed amendment to the Commission's 2014 Report is:*

#### **9:27-26. Evidence**

a. In any hearing under this chapter relating to child abuse and neglect or child in need of services, 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) 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 as provided in the Rules of Evidence including N.J.R.E. 803 9c(6) 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.<sup>9</sup>

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