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VIA REGULAR MAIL AND EMAIL

May 23, 2023

The Honorable Glenn A. Grant
Administrative Director of the Courts
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Re: Proposed Amendments to R. 5:12-4

Dear Director Grant:

The Office of Parental Representation (OPR) is an arm of the Public Defender's Office tasked with providing legal services to parents interacting with the child welfare system. We respectfully request that the Court consider our comments on the proposed amendments to R. 5:12-4.

OPR appreciates the Court's concern for parents' due process rights and shares the goal of avoiding an "open-ended abuse and neglect action hanging over a parent's head." Div. of Youth and Family Services v. I.S., 214 N.J. 8, 39 (2013). It is certainly important that these matters move through the court system in an efficient and fair manner. It is OPR's position that

parents should generally have a right to resolution of the Title 9 allegation before a court considers the Title 30 allegations. However, that right should be waivable by the parent after consultation with their attorney. OPR attorneys are uniquely qualified and ethically bound to counsel parents in a way that aligns with their litigation goals, and these goals may require a waiver of the applicable non-statutory time limits for trial.

In matters of alleged abuse and neglect, the Children in Court Operation Manual at Chapter 1601.5 instructs our courts to try the Fact-Finding Hearing at 120 days in cases where DCPD has taken custody of the parent's children and at 180 days in cases where the children remain with their parent. However, at that point in the litigation, sometimes a parent benefits from consenting to Title 30 jurisdiction or proceeding to a trial on the Title 30 allegations rather than contesting the Title 9 allegations at that time. The parent's attorney, in consultation with the parent, is best suited to determine what will benefit the parent on an individual basis. Factors OPR attorneys consider include:

1. Maintaining a cooperative environment with the State when the parent agrees there are issues that need remediating, while disputing that they abused or neglected the child. This can be of vital importance in reaching an earlier conclusion that results in faster family reunification.
2. Leverage in negotiations with the State to reduce substantiated findings of abuse and neglect against parents. If DCPD must litigate a matter quickly, it will often rely on early impressions of parents in a state of turmoil, resulting in higher rates of findings of abuse and neglect. These findings against a parent can hinder job opportunities and damage family relationships, while resulting in lifetime inclusion as a child abuser in a Statewide database without any ability for expungement. Conversely, if given more

time many parents participate in beneficial services and enter recovery. Once this occurs, DCPD can often observe positive changes in the parent and is thereafter more amenable to a mutually beneficial settlement that avoids lifetime registration for the parent.

3. In more complicated Title 9 matters, OPR attorneys may require more than 180 days of preparation to give parents the greatest chance of success at trial. For example, in cases where a child suffers an unexplained injury alleged to have been caused by the parent, there is often the need for extensive discovery and consultation with defense experts from across the country. If the delay in trying the Title 9 case does not prejudice the speed of reunification, an OPR attorney's best practice may be to try the Title 30 case first so that the parent can avoid the lifelong repercussions of an adverse abuse finding. It should be noted here that there is no statutory obligation for the Division to turn over exculpatory information, as R. 5:12-3 merely directs counsel to seek inspection of the file at the Division offices. Significantly, the original electronic file in NJ Spirit is not accessible to defense counsel and only the printed versions are allowed for inspection. Often there is no certification that the printed file is the complete file, and no way to determine whether privileged information has been removed, since no privilege log accompanies this file review process. This imbalance alone is cause for defense counsel to seek the most beneficial outcome for the family by using whatever litigation tools are available to them to correct the imbalances fraught in this system.
4. In cases where there are corollary criminal charges a parent may be better guided by trying or consenting to the Title 30 case first. If the Title 9 trial must be according to

the handbook's required timeline, there is a chance that the parent will be deprived of the opportunity to testify in his or her own defense. Where criminal charges are still pending, the parent may be dissuaded from testifying at the Title 9 trial to avoid risking the testimony later being used against the parent in the criminal trial. In such cases the inability to waive the right to a speedy Title 9 trial abrogates the parent's right to present valid defenses.

OPR is grateful for any rule change designed to protect parents from unnecessary delays in litigation involving such weighty matters as family separation. It is not OPR's position that any party should be relieved of the obligation to provide timely discovery, nor is this a tactic by defense counsel to avoid intense preparation for Title 9 trial. However, to protect fairness for parents this right should be waivable by defendants in consultation with competent counsel. This waiver would be akin to a criminal defendant waiving the right to a speedy trial under Rule 3:52-4 for strategic purposes. The issues parents face in their interactions with DCPD are no less serious and impactful than those faced by criminal defendants and the same strategic defenses should be equally available in both types of cases. Similarly, the Appellate Division's determination that suspended judgments under N.J.S.A. 9:6-8.52 were not intended to go to the findings, but merely the placement decision as noted in N.J. Div. of Youth & Family Servs. v. R.M., 411 N.J. Super 467 at 478-482 (App. Div. 2010) meant an important tool for family defenders attempting to mitigate a lifetime on a CARI check was denied based on statutory interpretation. Denying a parent the choice to try or negotiate a Title 30 matter while the Title 9 trial is pending would effectively preempt the opportunity for the family to demonstrate its ability to stay together safely, further diminishing the defendant-parent's power to remediate the reasons for State intervention in the most sacred of spaces.

Aside from the issues of fundamental fairness, OPR also has specific concerns regarding the wording of the proposed changes. The language of subpoint (ii) of the proposed changes to Rule 5:12-4 creates a practical issue. A Title 30 matter is tried under different legal criteria than a Title 9 matter determining whether the Division can prove child abuse or neglect. The legal basis for a Title 9 case can be found under N.J.S.A. 9:6-8.21, while a Title 30 case is tried under N.J.S.A. 30:4C-12 seeking a finding as to the family's need for services, reviewable at six-month intervals. These lengthy statutes contain few similarities to one another and are not interchangeable. Accordingly, it is not always possible or proper to "next apply the facts" to the Title 30 allegations, as the proposed change would require. A separate hearing must be held wherein specific facts may be elicited that are applicable to the differing legal criteria. Finally, the amended rule defines all of N.J.S.A. 30:4C-11 to -12 as "failure to provide for the safety of a child." It is respectfully submitted that this language should instead read "If DCP&P has not met its burden under NJSA 30:4C-12, the Title 30 count shall be dismissed immediately." Rather than risk creating an amorphous parallel standard within the rule.

Thank you for your consideration of OPR's concerns as the judiciary moves forward with our shared goal of more equitable and efficient adjudications in child welfare matters.

Respectfully submitted,

s/Robyn Veasey

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