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BY OVERNIGHT MAIL AND EMAIL

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

**Re: *Comments to the 2019-2021 Report and Recommendations of the
Supreme Court Committee on the Rules of Evidence***

Dear Judge Grant,

The New Jersey Office of the Public Defender, Office of the Law Guardian (OLG) represents children in litigation brought under Titles Nine and Thirty by the New Jersey Division of Child Protection and Permanency (DCPP). These cases are commonly referred to as the Children-in-Court (CIC) dockets. The OLG has reviewed the report and recommendations of the Supreme Court Committee on the Rules of Evidence (Committee) and offers comment as to the proposed amendments to N.J.R.E. 803(c)(27), commonly known as the incompetency proviso or the tender years exception to hearsay. The OLG also offers comment on the Committee's decision not to incorporate in the rules the Legislature's mandate that statements of children related to abuse and neglect be admissible, and with corroboration can support a court's finding of abuse and neglect or a judgment of termination of parental rights. The OLG encourages the Court to modify N.J.R.E. 803(c)(27) to account for potential inconsistencies in application of the evidence rule with N.J.S.A. 9:6-46(a)(4) and N.J.S.A. 30:4C-15.1a governing the admissibility of child statements in CIC proceedings.

The Committee has proposed that N.J.R.E. 803(c)(27), which permits admission of the statement of a child under twelve years of age relating to sexual misconduct committed with or against the child in a criminal, juvenile or civil case, be amended as follows:

- The rule will be modified to identify the preponderance of the evidence standard as the appropriate burden to be used by the court at a hearing to determine the trustworthiness of the statement pursuant to Rule 104(a).



- In criminal cases, the proviso that incompetency under Rule 601 cannot be used to disqualify a child witness has been removed from the rule.
- In civil cases only, a child will not be disqualified as a witness by virtue of the requirements of Rule 601(b) – recognition of the duty to tell the truth.

The Committee relies in part on the Joint Subcommittee Report on Assessing the Competency of Child Witnesses and the protocol set forth in that report as support for the rule amendments. The OLG does not support implementation of the protocol as explained fully in its letter of public comment to the Joint Subcommittee report dated March 15, 2021.¹ For the reasons expressed in that letter, the OLG opposes the addition of the Rule 601(a) competency requirement to the tender years exception for civil cases, which would include CIC matters. It is the OLG's position that child testimony should be admissible in CIC cases, with the weight given to the testimony to be determined by the trial court.

The OLG offers no comment with respect to the proposed amendment to add the preponderance evidentiary standard to N.J.R.E. 803(c)(27) or to eliminate the incompetency proviso in criminal cases.

Of great concern to the OLG is the incompatibility of the Titles Nine and Thirty statutes governing the admissibility of child statements in CIC matters with N.J.R.E. 803(c)(27). N.J.S.A. 9:6-8.46(a) enumerates specific categories of evidence admissible in abuse and neglect fact-finding hearings – the so-called “special evidentiary rules” applicable to Title Nine cases.² N.J.S.A. 9:6-46(a)(4) states that previous statements of a child relating to any allegations of abuse and neglect shall be admitted, provided that such statement will not be sufficient to make an abuse and neglect finding if uncorroborated. Since it was enacted in 1974, our courts have repeatedly analyzed and re-affirmed NJSA 9:6-46(a)(4) in the context of sexual abuse allegations.³

In 2019, the Legislature enacted N.J.S.A. 30:4C-15.1a, which expanded this special evidentiary rule to Title 30 proceedings. The statute mirrors the language of the Title Nine statute and is applicable to all hearings held during the course of Title Thirty litigation. The Legislature's action followed the Appellate Division's analysis of the applicability of Title Nine's special evidentiary rules to a Title 30 termination of parental rights trial.⁴ The T.U.B. court affirmed that

¹ The OLG incorporates by reference its reasoning for opposing implementation of the protocol generally and in CIC cases.

² See generally, N.J. Div. of Child Prot. & Perm. v. T.U.B., 450 N.J. Super. 210 (App. Div. 2018).

³ N.J. Div. of Child Prot. & Perm. v. A.D., 455 N.J. Super. 144 (App. Div. 2018); N.J. Div. of Child Prot. & Perm. v. N.B., 452 N.J. Super. 513 (App. Div. 2017); N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427 (App. Div. 2002).

⁴ N.J. Div. of Child Prot. & Perm. v. T.U.B., 450 N.J. Super. 210 (App. Div. 2018).



“[t]he Legislature is best positioned to weigh the legitimate policy interests in shielding children from stressful court appearances against the likewise legitimate interests of defendants in assuring that their parental rights are not terminated in an unfair manner based upon unreliable hearsay. We leave that policy choice to our elected officials. It is not our task or role to provide an advisory opinion about the merits of such hypothetical legislation.”

T.U.B., 450 N.J. Super. at 241.

As identified by the Appellate Division, the public policy considerations surrounding Titles Nine and Thirty are inextricably intertwined with the admissibility of child-specific evidence in proceedings held under those statutes. Although distinct statutory schemes, Titles Nine and Thirty are driven by the public policy that the safety of children shall be of paramount concern and the best interests of children shall be a primary consideration.⁵ Without the statutory provision permitting the court to admit previous statements of children related to abuse and neglect allegations, children would be required to choose between testifying against their parents or staying silent and remaining in a potentially unsafe situation. In addition, in the context of a Title Nine fact-finding which may occur months after the child’s initial statement, a child may be under the care and custody of the parent as to whom the allegations relate. Requiring the child to testify at the time of the fact-finding trial has the potential to disrupt and disturb a family relationship that may have stabilized.

The inconsistency among N.J.R.E. 803(c)(27), and the Titles Nine and Thirty admissibility statutes has the potential to create a disparate impact on children under the age of twelve who allege sexual abuse in the context of a CIC case. Applying N.J.R.E. 803(c)(27) to a CIC case, a child alleging sexual abuse would have to testify, where a child alleging any other type of abuse would not. This inconsistency may result in confusion for judges, attorneys and litigants, and different outcomes based on the practices of different judges or vicinages.

The OLG respectfully requests that the Court amend N.J.R.E. 803(c)(27) to explicitly exclude application of the rule when doing so would conflict with other law. This change would ensure that in situations where application of N.J.S.A. 9:6-46(a)(4) and N.J.S.A. 30:4C-15.1a conflict with the requirements of N.J.R.E. 803(c)(27), the statutes would control. There is support in our caselaw for the principle that the admissibility of extrajudicial statements of children pursuant to N.J.S.A. 9:6-8.46(a)(4) does not depend on admissibility under the evidence rule.⁶ The modification would be helpful to judges, practitioners and litigants in arguing and making evidence decisions in Titles Nine and Thirty cases. Further, amending the rule using general language

⁵ N.J.S.A. 9:6-8.8; N.J.S.A. 30:4C-1.

⁶ N.J. Div. of Child Prot. & Perm. v. M.C., 435 N.J. Super. 405, 423 (App. Div. 2014) (rev’ing the trial court on other grounds).



avoids the Evidence Committee's concerns that the Rules of Evidence are not written to apply to a specific case type and avoids a situation where a revision is necessary if the statutes are modified.

The OLG appreciates the opportunity to provide comments to the Court and stands ready to assist if further review is needed. We applaud the Court's efforts to protect our state's most vulnerable citizens and request that our concerns and commentary are taken into consideration as the Court proceeds further.

Respectfully submitted,

Traci Telemaque
Assistant Public Defender