New Jersey

Division of Child Protection

And

Permanency

Legal Standards

And

Case Law Overview

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ROLE OF DIVISION OF CHILD PROTECTION & PLACEMENT AND COURT PROCEDURE

The Division of Child Protection and Permanency, formerly DYFS, is authorized to investigate allegations of child abuse and neglect and provide for the protection of the children and the family's treatment where necessary.

BALANCING CONSTITUTIONAL RIGHTS AND STATE INTERESTS

While parents have a constitutional right to raise their children without state interference; the state is responsible for protecting the welfare of children from serious physical, emotional or psychological harm resulting from the actions or omissions of their parents. *N.J. Div. of Youth & Family Serv's. v. C.S.*, 367 N.J. Super. 76 (App.Div.2004). Thus while the state recognizes the constitutional right, the interest in protecting the children outweighs this right where the child is at a risk of potential harm.

Defendants have a right to counsel in all stages of court proceedings with the Division. The New Jersey Constitution has long recognized a right to counsel for a parent in any proceeding in which there may be a temporary loss of custody or a termination of their parental rights. *N.J. Div. of Youth & Family Serv's. v. B.H.*, 391 N.J. Super. 322, 344 (App. Div. 2007); *Guardianship of C.M.*, 158 N.J. Super. 585, 591 (J. & D.R. Ct. 1978).

INVESTIGATION - Commencing Court Action

Court action is typically commenced by the Division's filing a complaint seeking to either place the child or for care and supervision of the child and family. N.J.S.A. 9:6-8.33; N.J.S.A. 30:4C-12. Under N.J.S.A. 30:4C-12, if it is in the best interests of the child, the court may issue an order to investigate, ordering the family to comply with the Division's investigation. In emergency situations, the Division may file for a court order providing for the emergency removal of a child where there is reasonable cause to suspect the child's life, safety or health is in imminent danger. N.J.S.A. 9:6-8.28. If, however, the child is in "such condition that the child's continuance in the place or residence, or in the care and custody of the parent or guardian, presents an imminent danger to the child's life, safety or health, and there is insufficient time to apply for a court order," the Division may commence an emergency removal without a court order. N.J.S.A. 9:6-8.29(a). Upon the removal of the child, the Division may move to either (1) extend the child's placement with the Division or (2) return the child pending a dispositional hearing. N.J.S.A. 9:6-8.31(d).

DUTY TO REPORT CHILD ABUSE OR NEGLECT

Everyone is obligated to report the abuse immediately. N.J.S.A. 9:6-8.10 *State v. Hill*, 232 N.J. Super 353, 356 (Law Div. 1989). DYFS must cooperate with law enforcement and law enforcement must cooperate with the Division. New Jersey Div. of Youth and Family Services v. Robert M., 347 N.J. Super. 44, 63 (App. Div.), certif. denied, 174 N.J. 39 (2002).

- N.J.S.A. 9:6-8.36(a) requires DYFS to report all instances of suspected child abuse and neglect to the county prosecutor of the county in which the child resides.
- N.J.A.C. 10:129-1.1(a) requires DYFS to refer to county prosecutors all cases that involve suspected criminal activity on the part of a child's parent, caretaker or any other person.
- The Family Part is required to forward prosecutors a copy of any complaint alleging child abuse. N.J.S.A. 9:6- 8.25(a); N.J.S.A. 9:6-8.25(b); N.J.S.A. 9:6-8.10.
- Prosecutors are statutorily required to report to DYFS any complaint "which amounts to child abuse or neglect."

The prosecutor's obligation to work collaboratively with DYFS does not end with the reporting phase. The existing regulatory framework requires a specific institutional mechanism of cooperation encompassing investigational and adjudicatory phases as well. *N.J. Div. of Youth and Family Serv's v. H.B*., 375 N.J. Super. 148, 179 (App. Div. 2005). It is a disorderly person's offense to fail to report an act of child abuse reasonably believed to have been committed.

Any person who stands in loco parentis to a child and knowingly permits sexual abuse of a child by another person is guilty of sexual abuse. N.J.S.A. 9:6-8.14. See *F.A. v. W.J.F.*, 280 N.J. Super. 570, 576 (App. Div. 1995). N.J.S.A. 2A:61B-1a(1).

When a spouse has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons, a spouse has a duty of care to take reasonable steps to prevent or warn of the harm. *J.S. v. R.T.H.*, 155 N.J. 330, 352 (1998).

IMMUNITY WHEN REPORTING CHILD ABUSE OR NEGLECT

Anyone that makes reports under this act shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. N.J.S.A. 9:6-8.13. Immunity to a reporter of child abuse is conditioned upon the reporter acting pursuant to N.J.S.A. 9:6-8.10 which provides: Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to the Division of Youth and Family Services by telephone or otherwise. Thus, in making a report "pursuant to this act" a person must have "reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse." There is no legislative intent to protect those people who report child abuse without any reasonable ground for so doing. *F.A. v. W.J.F.*, 248 N.J. Super. 484, 491 (App. Div. 1991).

EMERGENCY REMOVAL – Dodd Hearing

When the Division commences an emergency removal, an ***order to show cause,*** stating the reasons and facts on which DCPP relied on to remove the child, must be filed. At the order to show cause hearing, a determination must be made whether or not the removal was appropriate and placement of the child should continue.

Defendant parents have a right to be represented by counsel at the hearing. *N.J. Div. of Youth & Family Serv's v. H.P.*, 424 N.J. Super. 210, 221 (App. Div. 2011). The trial judge has the ultimate responsibility of conducting adjudicative proceedings in a manner that complies with required formality in the taking of evidence

and the rendering of findings**.** *N.J. Div. of Youth & Family Serv's v. J.Y.*, 352 N.J. Super. 245, (App. Div. 2002).

After this hearing, if the Division is given care and custody of the child, the DCPP must make ***reasonable efforts*** to either work toward reunification with the parents or guardians or, if reunification cannot be accomplished, DCPP must attempt to find a permanent placement for the child. N.J.S.A. 9:6–8.8(b)(2)-(4). This reasonable efforts standard is also outlined in Title 30. N.J.S.A. 30:4C-11.2; See also *N.J. Div. of Youth & Family Serv's v. I.S.*, 202 N.J. 145 (2010) (construing N.J.S.A. 30:4C-15.1in identifying "reasonable efforts" within the context of termination of parental rights determinations).

RELIEF OF REASONABLE EFFORTS TO REUNIFY FAMILY

To bypass the requirement for reasonable efforts to reunification, "aggravating circumstances" must be found to exist. ***N.J. Div. of Youth and Family Serv's v. A.R.G.*, 361 N.J. Super. 46, 76, 824 A.2d 213 (App. Div. 2003), *aff'd* 179 N.J. 264, 845 A.2d 106 (2004).**

"Aggravated Circumstances" defined:

> 1. That the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the child, and would place the child in a position of an unreasonable risk to be re-abused.
> 2. Moreover, any circumstances that increase the severity of the abuse or neglect, or add to its injurious consequences, equates to "aggravated circumstances."
> 3. Where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety and welfare of the child, they are "aggravated" to the extent that [DYFS] may bypass reasonable efforts of reunification.
> 4. Where the parental conduct is particularly heinous or abhorrent to society, involving savage, brutal, or repetitive beatings, torture, or sexual abuse, the conduct may also be said to constitute "aggravated circumstances."

FACT-FINDING HEARING - Abuse or Neglect

After the DODD hearing, there is a return date for the order to show cause, followed by status conferences to see if the defendants have attended evaluations and recommended treatment modalities from the evaluations. The court must then hold a fact-finding hearing to decide whether the child was abused or neglected within the definition of N.J.S.A. 9:6-8.21(c).

The purpose of a fact-finding hearing, as with all other proceedings under Title 9, is "to provide for the protection of children under 18 years of age who have had serious injury inflicted upon them by other than accidental means." G.S. v. Dep't. of Human Servs., 157 N.J. 161, 171 (1999) (quoting N.J.S.A. 9:6-8.8). The Division must establish at a fact-finding hearing, by a preponderance of the evidence, that the child was abused or neglected and only competent, material and relevant evidence may be admitted. New Jersey Div. of Youth and Family Services v. J.Y., 352 N.J. Super. 245, 262 (App. Div. 2002); New Jersey Div. of Youth and Family Services v. H.B., 375 N.J. Super. 148, 175 (App. Div. 2005).

If there is no such finding, the court may either:

- amend the complaint to comply with the evidence presented and the findings made, or
- the court may dismiss the complaint and order the child returned to the parents.

Where there is no finding of abuse or neglect, courts routinely continue Division involvement either in the best interests of the child or because the court's continued assistance is required. On January 14th, 2013, the New Jersey Supreme Court heard oral arguments in the case of *N.J. Div. of Youth and Family Serv's v. I.S.*, A-81-11. The question before the court is whether trial courts may order the Division's continued care, custody, and supervision of the family absent any evidence of abuse or neglect. The Appellate Division in *I.S.* held that courts may order the Division's continuing care, supervision, and custody of a child based upon its determination that the court's continued assistance is required pursuant to Title 9, N.J.S.A. 9:6–8.21 to –8.73, or a "best interests of the child" analysis under Tile 30, N.J.S.A. 30:4C–11 to –14. *N.J. Div. of Youth and Family Serv's v. I.S.*, 422 N.J.Super. 52, 58 (App. Div. 2011). The Appellate Division also held that hybrid proceedings conducted under both Title 9 and Title 30 would not be set aside as long as a defendant's right to due process was strictly protected. *Id*.

Depending on the New Jersey Supreme Court's decision, there could be a sweeping change in DCPP court proceedings. In *I.S.*, the trial court made a determination at the fact finding hearing that there had been no abuse or neglect under N.J.S.A. 9:6-8.21. The court was then silent on whether or not its assistance was still required pursuant to N.J.S.A. 9:6-8.50; however, it did find by clear and convincing evidence that neither parent had the ability to care for the children at that point and ordered continued custody, care, and supervision pursuant to Title 30. *Id*. at 69. It is yet to be determined whether or not the New Jersey Supreme Court will find that proceeding under Title 30 is proper under the statutory scheme after no finding of abuse or neglect; however, it is worth noting that the Court has expressed concern in the past over the "unnecessary complexity" of these cases because of the "parallel but not congruent" nature of Title 30 and Title 9. *N.J. Div. of Youth and Family Serv's v. A.P.*, 408 N.J.Super. 252, 265 (App. Div. 2009) quotng *Guardianship of G.S., III*, 137 N.J. 168, 179 (1994). Regardless of how the case is decided, the I.S. opinion is expected to offer a great deal of clarification regarding concurrent proceedings brought under Title 9 and Title 30.

Where there is a finding of abuse or neglect, the court must make a note of its decision and consider filing a preliminary order to protect the interests of the child, placing the child elsewhere (if the court believes its final disposition will be placing the child), or refer the matter back to the Division to put in place any required services to protect the child and rehabilitate the family. N.J.S.A. 9:6-8.50. After the fact-finding hearing, the court must decide the disposition of the case.

CONSEQUENCES OF TITLE 9 FINDING

If a court determines that a child has been abused or neglected, "the name of the person found to have committed child abuse and any identifying information are entered into a Central Registry maintained by DYFS." *New Jersey Div. of Youth and Family Services v. M.R.*, 314 N.J. Super. 390, 398 (App. Div. 1998) (citing N.J.S.A. 9:6-8.11; N.J.A.C. 10:129A-3.4). The Division is required to forward any report of child abuse or neglect to the child abuse Central Registry operated by the Division of Trenton. *New Jersey Div. of Youth and Family Services v. D.F*., 377 N.J. Super. 59, 64 (App. Div. 2005). The entry of an individual's name on the Central Registry gives rise to a constitutionally protected liberty interest in reputation warranting due process

protections on the part of that individual. *Matter of East Park High School*, 314 N.J. Super. 149, 160-61 (App. Div. 1998).

SUSPENDED JUDGMENT (N.J.S.A. 9:6-8.52)

The suspended judgment provision of N.J.S.A. 9:6- 8.51(a)(1) is generally applicable when a Family Part judge has held a dispositional hearing and is not prepared to enter an order returning the child to the parent or placing the child with the Division, but instead proposes to give the parent an opportunity to maintain the family unit based upon adherence to the particular remedial requirements established pursuant to N.J.S.A. 9:6-8.52(a). Successful completion of a period of suspended judgment does not result in expungement of the underlying finding of abuse or neglect as there is no basis to conclude that the Legislature intended the suspended judgment provision of N.J.S.A. 9:6-8.51(a)(1) to provide the equivalent of PTI in abuse and neglect cases. *N.J. Div. of Youth and Family Serv's v. R.M.*, 411 N.J. Super. 467, 481-482 (App. Div. 2010).

DEFAULT JUDGMENT

In a Title 9 case a judge may not enter default merely because a defendant fails to appear for trial. A party may defend at trial without being physically present and "default based upon the failure to comply with an order requires as a predicate that the defendant received adequate notice that default may follow a failure to comply." *New Jersey Div. of Youth and Family Services v. P.W.R.*, 410 N.J. Super. 501, 506- 507 (App. Div. 2009), *rev'd on other grounds*, 205 N.J. 17 (2011). It is important to note, however, that in P.W.R., the party against whom the default judgment had been entered had attended every court hearing but one. Thus, where a party has consistently missed court appearances, an entry of default judgment may be appropriate.

DISPOSITIONAL HEARING

The next step is to decide the ultimate outcome of the case in a dispositional hearing. The dispositional hearing may commence immediately after the fact-finding hearing. Under N.J.S.A. 9:6-8.51, there are six possible conclusions that the court may come to:

1. Suspended judgment,
2. Return of the child to the parent(s) with possible continued intervention by the Division,
3. Initial placement of the child for 12 months, with the possibility of extending the placement by one year at a time upon proper hearing,
4. Return of the child to parent(s) with an order of protection to outline proper care and behavior by parents,
5. Placement of the parent on probation, and
6. Order mandating "therapeutic services." N.J.S.A. 9:6-8.51 - N.J.S.A. 9:6-8.58.

A dispositional hearing is used to decide what will ultimately be done with the child. The pivotal question in a dispositional hearing is whether the child will be safe going forward if returned to the parents, and if not, what the proper disposition should be. *N.J. Div. of Youth & Family Serv's v. G.M.*, 198 N.J. 382 (N.J. 2009). The focus in a dispositional hearing should not be on the child's wishes, but on the child's safety going forward. *N.J. Div. of Youth & Family Serv's v. M.D.* 417 N.J.Super. 583 (App.Div. 2011).

PERMANENCY HEARING

Where the child has remained outside of the home for up to 12 months and the Division has provided services recommended by the court, the court will hold a permanency hearing to determine the long-term plan for the child. N.J.A.S. 30:4C-61.2. As long as the court adequately addresses fact-finding and dispositional procedures under N.J.S.A. 30:4C-61.2, any hearing may be considered a permanency hearing.

A seventeen-day delay is an "inconsequential deviation from the twelve-month time period" and does not warrant reversal of the placement decision. Rather, the Federal Adoption and Safe Families Act of 1997 provides for a graduating series of reductions in a state's funding eligibility as a consequence for noncompliance with the time limitations of the statute, 42 U.S.C.A. § 672. *N.J. Div. of Youth and Family Serv's v. M.F.*, 357 N.J. Super. 515, 526 (App. Div. 2003).

The New Jersey Supreme Court has held that a transfer of custody from an offending parent receiving Division services to a non-offending, non-custodial parent is a placement and a permanency hearing is required under N.J.S.A. 9:6–8.54 to decide whether the child can be safely returned to the offending parent. *N.J. Div. of Youth and Family Serv's v. G.M.*, 198 N.J. 382, 403-4 (2009).

The objective of the permanency hearing is to decide whether or not the Division should continue to work toward reunification, or if the Division should pursue a petition for an alternative plan, such as terminating the parental rights of the offending parents, which would proceed under Title 30 of the New Jersey Code. *See* N.J.S.A. 30:4C–15.3 (setting out exceptions to when the Division must file to terminate parental rights); *See also* N.J.S.A. 30:4C–15.1 (setting out necessary standards for terminating parental rights).

DISMISSAL OF TITLE 9 LITIGATION

It is the preferable procedure for a court to defer dismissal of a Title 9 action until the court exercises jurisdiction over custody and related matters in the Title 30 action, which allows the prior custody orders in the Title 9 action to remain in effect during the interim period. *New Jersey Div. of Youth and Family Services v. A.P.*, 408 N.J. Super. 252 (App. Div. 2009).

II – Findings of Abuse or Neglect

STANDARD OF CARE

Under N.J.S.A. 9:6-8.21, a parent or guardian has committed an act of child abuse or neglect where the guardian has failed to exercise a minimum degree of care by being aware of an inherent danger in a situation and failing to adequately supervise the child or recklessly creating a risk of serious injury to the child. The question of whether child is abused or neglected should focus on the harm to the child and whether that harm could have been prevented had the guardian performed some act to remedy the situation or remove the danger. *N.J. Div. of Youth & Family Serv's v. N.S.*, 412 N.J.Super. 593, 616 (App.Div.2010) (quoting *G.S. v. Dep't of Human Serv's*, 157 N.J. 161 (1999)).

The standard in deciding whether a guardian has failed to exercise a minimum degree of care is one of **gross negligence**. *G.S. v. Dep't of Human Serv's*, 157 N.J. 161, 178 (1999). In *G.S.*, the New Jersey Supreme Court established and discussed the standard of care in child abuse and neglect cases in holding that where a guardian had given a child an entire bottle of pills under the false impression that she was administering one dose, the guardian was grossly negligent because she "utterly disregarded the substantial probability that harm would result from her actions." *Id.* at 183.

Under this standard**, accidentally caused injuries may nonetheless form the basis for a finding of abuse or neglect.** *Id.* at 172-76. In addressing the purpose of the statute, which aims to protect children harmed by other than accidental means,[1] the court in *G.S.* interpreted the "accidental" language to refer to the means of the injury, and where only the result is accidental, the injury is not one of accident. *Id.* at 176.

FINDINGS OF NEGLECT

In order to be considered a neglected child, the child must suffer as a result of his or her parents' failure to exercise a minimum degree of care causing or creating a substantial risk of physical, emotional, or mental impairment. A neglected child is one who's physical, mental, or emotional condition was 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 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 in providing the child with proper supervision or guardianship N.J.S.A. 9:6-8.21(c)(4)(a)-(b). This minimum degree of care is a standard of gross negligence, as outlined in *G.S.*

***N.J. Div. of Youth and Family Serv's v. T.B.*, 207 N.J. 294, (2011).** The New Jersey Supreme Court recently revisited and reaffirmed the interpretation of the statute set forth in *G.S.*, noting that a decade has passed since the *G.S.* decision and the legislature has not amended or altered the language of the statute. *Id*. at 307-8. In *T.B.*, a mother dropped her four-year old son off at home and went out for the evening under the mistaken belief that the child's grandmother was there to watch him, as the grandmother lived in the home with them and her

N.J.S.A. 9:6-8.8(a) Purpose reads, in part: "[t]he purpose of this act is to provide for the protection of children under 18 years of age who have had serious injury inflicted upon them by other than accidental means." N.J.S.A.9:6-8.8.

car was in the driveway. **The New Jersey Supreme Court found that although this was an act of clear negligence, it did not rise to the level of gross negligence.** *Id.* at 309.

***N.J. Div. of Youth and Family Serv's v. J.L.*, 410 N.J. Super. 159 (App. Div. 2009).** The Appellate Division found no neglect where a mother allowed her children to walk home alone from a park at which she was supervising them, and the children inadvertently locked themselves inside the family's condo. *Id*. at 162. The children became worried and dialed 911, and the Division filed a complaint. *Id.* Citing the standard set forth in *G.S.*, an administrative law judge found that the conduct by J.L. fell "far short" of what is required under *G.S.* to substantiate abuse or neglect. *Id.* at 165. The Division threw out the ALJ's decision and entered a finding against the mother because she had put the children in a substantial risk of harm by leaving them alone for some 30 minutes. *Id.* The Appellate Division agreed with the ALJ and overturned the Division's finding of neglect, holding that while her conduct may have been inattentive or even negligent, J.L. did not act with wanton or gross negligence. She allowed her children to walk home to a house that was "within her sight" and the mother has had no other incidents. Additionally, the Division offered no services to the family. *Id.* at167-68. That the children mistakenly locked themselves inside the house was nothing more than an accident, and while it may have been careless for J.L. to allow her children to be put in a situation like that, it did not rise to the level of gross negligence as required by the statute and *G.S.* Thus, an accidentally caused incident may form the basis for a finding of neglect or abuse, but the *means* by which the accidental incident occurred must be grossly negligent, not merely negligent or by mistake.

***New Jersey Div. of Youth and Family Serv's v. P.W.R.*, 205 N.J. 17, 11 A.3d 844 (2011).** In *P.W.R.*, a teenage girl had made allegations of abuse and neglect against her parents. After running away from home and being involved in multiple disputes with her parents regarding truancy at school, not coming home at night and sexual activity with her boyfriend, the teen alleged that her mother regularly slapped her in the face, took money from her paychecks and that the house was freezing cold, causing her to sleep elsewhere, and also that she had not been to her pediatrician in some two years. *Id.* at 848-49. The trial court entered a finding of abuse and neglect which was affirmed by the appellate division. The lower courts explicitly found that the mother had physically abused the daughter, and her father had not intervened as he should have, the child had not seen a pediatrician in two years, the child's parents took money from her paychecks to support themselves, and they isolated the daughter from her grandfather. *Id.* at 854.

As to the finding of physical abuse against the mother, the New Jersey Supreme Court found that the mother did not physically abuse the child. Id. at 855. The court cited New Jersey *Div. of Youth and Family Serv's v. K.A.* in finding that there was no evidence of physical abuse because there were no bruises, scars, lacerations or fractures. *Id.*, citing *Div. of Youth and Family Serv's v. K.A.*, 413 N.J.Super. 504, 996 A.2d 1040 (App.Div. 2010) (listing bruises, scars, lacerations as harms that might evidence abuse by corporal punishment). The court reasoned that while a slap to the face of a child is not a desirable form of punishment, it cannot substantiate a finding of abuse where no resulting injury or mark was left on the child's face. *P.W.R.*, 205 N.J. 17, 11 A.3d 844 at 856 (2011).

As to the remaining allegations, the court found that the lack of heat in the house could not substantiate a finding of neglect because the parents did not refuse, although financially capable of doing so, to care for their child. They were going through financial difficulties and thus the heat was temporarily turned off. In addition, the Division offered no assistance in helping the family get their heat turned back on. *Id.* Considering these

factors, the court found there to be no neglect as to the lack of heat in the home. Similarly, the parents' taking some of their child's paycheck to help pay bills cannot constitute abuse or neglect. *Id*. "Requiring working-aged children to contribute to the family expenses is not an actionable reason to remove the child from the family home." *Id*. Likewise, the daughters' failure to see a pediatrician was the result of her parent's temporary financial difficulties, and no medical condition warranting regular visits to the pediatrician was put forth by the Division.

The daughter had braces, but her parents' financial decision to delay this process did not constitute a substantial risk of harm to the child and does not rise to the level of neglect required by the statute and relevant case law. *Id.* at 856-57. In this case, the New Jersey Supreme Court commented on an array of different allegations of neglect and did not enter a finding or abuse or neglect in any instance. *P.W.R.* reaffirms N.J.S.A. 9:6-8.21 and the standard set forth in *G.S. v. Dep't of Human Serv's* in holding that in order to enter a finding of abuse or neglect, a parent must have acted or failed to act in a way that harms a child or puts a child in a substantial risk of harm with a wonton disregard for such consequences that an ordinarily reasonable person would be aware of. Where this standard is not meant, there is not enough evidence to enter a finding of abuse or neglect.

Abuse and neglect cases are extremely fact sensitive, and each case requires careful, individual scrutiny to wade through the facts and come to a reasonable conclusion. One of the situations in which it can be extremely difficult to sift through the totality of the facts in reaching a conclusion is a situation in which an impoverished or extremely poor family is incapable of providing food, shelter, and clothing to their children. Where the parents or guardians are found by the court to have the necessary financial means to adequately care for the children, the court may find child neglect within the meaning of N.J.S.A. 9:6-8.21(c)(4).

***Doe v. G.D.*, 146 N.J.Super. 419 (App.Div. 1976), *aff'd sub nom*., *Doe v. Downey*, 74 N.J. 196 (1977).** In *G.D.*, the appellate division dealt with the question of **extreme poverty conditions.** In this case, a child had been removed from her home based on the mother's inability to adequately care for her daughter in regard to her living conditions and mental health and stimulation. The child undoubtedly lived under poverty conditions, and after she was placed with a foster family and was permitted to have visitation with her natural parents, the child would return to the foster home "filthy" and with dirty clothes. *Id.* at 426-27. She eventually moved back in with her natural parents and lived in cramped conditions with other adults staying in the house. The trial court found the child to be a neglected child under the statute. *Id.* at 425-27. The appellate division reversed a finding of neglect by the trial court because " although substandard, dirty and inadequate sleeping conditions may be unfortunate incidents of poverty, they do not establish child neglect or abuse." Id. at 431. The proper focus is on whether or not the parent is financially capable of remedying the conditions.

In other instances, where it is either apparent or clear that parents have the ability to care for their children and to provide them with adequate care and shelter, but nonetheless fail to do so to the extent that the child suffers impairment or is at a substantial risk of doing so, courts will find that the child is a neglected child under 9:6-8.21.

***N.J. Div. of Youth and Family Serv's v. K.M.*, 136 N.J. 546 (1994).** The New Jersey Supreme Court found children to be neglected where they were living in deplorable living conditions, suffered physical harm as a result of their parent's failure to adequately care for them, and where the parents lacked crucial parenting skills. Id. at The Division initially became involved with the family when one of the children fell from a window on

the second story of the family's apartment. Although the child was not injured the Division had reason to investigate, and upon performing a home visit, uncovered deplorable living conditions. *Id.* at 989. The family was living in a one-room apartment that was infested with roaches, had holes in the walls with exposed wiring, and had no screens in open windows. *Id.* Additionally, one of the children had badly rotted teeth as a result of poor feeding practice, and the children were developmentally delayed. *Id.* at 991. Based on all of the circumstances, the Division concluded that the parents clearly lacked parenting skills, and also found that the impoverished conditions under which the family was living were not the result of financial hardship. The trial court found that "[t]hese children were exposed to dangerous situations by parents who did not and do not have the ability to anticipate or appreciate situations which pose serious physical and emotional risk to their children..." *Id.* The appellate division as well as the New Jersey Supreme Court both affirmed the lower courts on the issue of the finding of neglect. In *K.M.*, the court made explicit assertions that the fact that the deplorable living conditions and failure to adequately care for the children were not the product of financial hardship were of importance. Thus, as the statute reads in N.J.S.A. 9:6-8.21(c)(4), a parent who fails to adequately provide for her child in terms of shelter, care, and food will be found to have neglected her child if she has the financial means to improve the situation for the child but fails to do so.

***New Jersey Div. of Youth and Family Serv's v. Wunnenburg,* 149 N.J. Super. 64, 372 A.2d 1376, (Dom. Rel. 1977).** The court found that parents had abused and neglected all three of their children through a series of omissions, as well as living conditions, that posed a potential risk of harm to all of the children. As to the first child, the court found neglect and abuse where there had been an anonymous call to the Division by a neighbor and the caseworker had found the child in her crib, locked in the home alone. *Id.* at 1380. At a later visit, the Division caseworker noticed lacerations on the child's face and testified that the mother admitted to "clawing her daughter in frustration." *Id.* Additionally, a medical expert examined the child and noted that she could not hold her head up or respond to oral stimuli and that, although the child was nineteen months old, she had the height and weight of a five-month old infant. *Id.* As to the second child, a home visit revealed that she was malnourished and suffering from a severe fungal infection. *Id.* at 1381. Her weight was below her original birth weight and she had not received any medical attention for the infection. Even when Medicaid provided prescriptions for the child's fungal infection, the mother and father failed to pick up the medicine. *Id.* The next day, the Division visited again and found the child asleep in an unchanged, urine-soaked diaper in a room that smelled of urine. *Id.* The child was then hospitalized to treat her caloric deprivation. *Id.* The third child was born prematurely and was hospitalized with jaundice. Upon the child's release from the hospital, the child's father refused to drive the mother to pick her up. Instead, a friend of the mother gave her and the child a ride home. *Id.* at 1382. Credible testimony revealed that, upon arriving home, the mother grew frustrated with the third child, and stuck her in the back harder and harder in an attempt to burp the child. *Id.* This was a textbook case of abuse and neglect. It was not simply the living conditions that led to a finding of abuse or neglect and eventual termination of parental rights, but the parents' collective omissions that illustrated a clear incapability of raising their three children and providing for them in a safe, healthy environment. The court found that the home was a "maze of alleys – cluttered and dirty." The court also found that mom and dad were wholly incapable of caring for their 3 children. Over months of foster care, the parents visited their children a combined total of 4 times. *Id.*

In situations where there is not a clear and consistent pattern of behavior that exposes the children to potential risks of harm as there was in *New Jersey Div. of Youth and Family Serv's v. Wunnenburg*, a finding of

abuse or neglect may nonetheless be substantiated where a single intentional act – even if the consequences were unintended – causes a child to be placed in a substantial risk of harm.

***New Jersey Div. of Youth and Family Serv's v. A.R.*, 419 N.J. Super. 538, 17 A.3d 850 (App.Div. 2011).** Where a father put his son to sleep directly next to a hot radiator, resulting in injury to the child, the appellate division overturned the superior court and entered a finding of neglect even where the incident was an isolated one. In *A.R.*, a father had put his 10-month old child to sleep in a bed in which another child was sleeping. The bed was situated directly next to a radiator that was known to get extremely hot when the heat was turned on. Id. at 852. The next morning, the child's mother entered the room and found the child on the floor next to the heater with severe burns to his face and scalp. The burns to the child's scalp were third-degree burns that were describe to be "all the way down to his scalp." *Id.* When he put the child in bed, the father had wrapped the child in blankets, presumable to act as a buffer against the heat of the radiator. *Id*. at 855. The trial court found that the father did not abuse or neglect the child. The court stated that the father was negligent and practiced "very poor judgment" in placing a child that age on a bed with no railings to prevent the child from falling but that, all things considered, this act did not exhibit gross or wanton disregard for the safety of the child and was not gross negligence within the statutory definition of N.J.S.A. 9:6–8.21(c). *See G.S. v. Dep't of Human Servs.*, 157 N.J. 161, 723 A.2d 612, 620 (1999). The appellate court reversed, finding that "[t]he undisputed facts demonstrate that defendant's actions in placing the child on a twin bed without railings next to an operating radiator were deliberate, and the events that followed—although not intended by defendant—were not brought about by accidental means." *Id.* at 853. The court further opined that an ordinarily reasonable person would have understood that the situation posed dangerous risks, and that the father acted without regard for the potential consequences. *Id.* at 853-54. The father's understanding of the risks was evident by his preparing a "buffer" for the child using blankets. *Id.* at 855. In this case, the court illustrated that a finding of abuse or neglect need not come from a systemic pattern of a parent's placing a child in an environment that poses a substantial risk of harm; an act or omission by a parent that poses a substantial enough risk of harm or ends up resulting in harm may suffice, as long as the parent acts intentionally – even where the consequence is unintended – with a reckless disregard for a risk of harm that an ordinarily reasonable parent would recognize under the test set forth in *G.S. v. Dep't of Human Serv's.*, 157 N.J. 161, 723 A.2d 612, 620 (1999).

Where the standards set forth in *G.S. v. Dep't of Human Serv's* and the statutory framework of N.J.S.A. 9:6-8.21 are not met, the court will not enter a finding of abuse or neglect.

DRUG USE DURING PREGNANCY

In ***New Jersey Div. of Youth and Family Serv.'s, v. A.L.*, 213 N.J. 1 (2013)**, the New Jersey Supreme Court held that a mother's illicit prenatal drug use, without some showing of actual harm to the child after birth does not constitute actual harm or a substantial risk of harm under N.J.S.A. 9:6–8.21(c)(4)(b). The court further clarified that Title 9 does not apply to fetuses, so there must be cognizable harm to the child *after* birth. Id. at 20-21. The defendant in *A.L.* tested positive for cocaine upon the birth of her child, whose meconium also tested positive for cocaine metabolites. The child did not suffer withdrawal symptoms, and was discharged two days later. *Id*. at 9-11. Additionally, the Division offered no evidence other than various hospital notations that the patient seemed "jittery" and the positive meconium screen.

The Division conceded that this evidence did not constitute actual harm to the child, and sought to prove a substantial risk of harm. The Supreme Court note that proof of drug use while pregnant is an important factor

in determining whether or not there is an ongoing substantial risk of harm, but that "not every instance of prenatal drug use establishes a risk of imminent harm." *Id*. at 22-23. To show a substantial risk of harm, expert testimony may be especially helpful; however, the court specifically stated that "expert testimony is not necessarily required. In many instances, an adequate showing can be made without the use of expert testimony." *Id*. at 23, 29.

To prove actual harm to a child who was subjected to prenatal drug use, there must be some resultant harm to the child after birth. This harm can be proven by showing the child suffered from withdrawal symptoms. *Id*. at 22. Additionally, the Division can show actual harm in the form of "evidence of respiratory distress, cardiovascular or central nervous system complications, low gestational age at birth, low birth weight, poor feeding patterns, weight loss through an extended hospital stay, lethargy, convulsions, or tremors." Id. at 23 (quoting *Guardianship of K.H.O.*, 161 N.J. 337, 736 A.2d 1246, 1253 (1999).

***Guardianship of K.H.O.*, 161 N.J. 337, 736 A.2d 1246 (1999).** The New Jersey Supreme Court has previously held that drug use by a mother while pregnant does not constitute a legally cognizable harm to the child under the best interest of the child test outline by Title 30, unless the child suffers some sort of effect and attendant suffering such as withdrawal or addiction related to the drug use. *K.H.O*, 161 N.J. 337, 736 A.2d at 1252-53. It is the attendant harm that is deleterious to the child's health, not the drug use. *Id.*

***New Jersey Div. of Youth and Family Serv.'s v. L.V.*, 382 N.J.Super. 582, 889 A.2d 1153 (App.Div. 2005).** The appellate division noted that it is "well-settled" that where a mother has used drugs during pregnancy, and he child has been forced to *suffer* as a result of that drug use, the mother can be shown to have abused or neglected the child. But without a showing of harm or suffering to the child after birth, drug or alcohol use during pregnancy is an insufficient basis for a finding of abuse or neglect. Id. at 1157-58. In *L.V.*, however, it was the mother's refusal to take medication that could have lowered the risk of HIV to her unborn child that was the crux of the argument. Where the child was not born with HIV anyway, there was shown to be no harm to the child. *Id.* at 1158. The fact that the mother in *L.V.* was refusing treatment as opposed to using illicit drugs is an important distinction, as people have a constitutional right to refuse medical treatment. *Id*.

When *New Jersey Div. of Youth and Family Serv's, (DCPP) v. A.L.* was at the appellate level, the appellate division noted that this case is easily distinguishable from both L.V. and *K.H.O.* in that *L.V.* considered a mother's constitutional right to refuse medication even at the risk to her or her child and *K.H.O.* was a Title 30 termination of parental rights proceeding that inherently requires a much higher showing of proof. *New Jersey Div. of Youth and Family Services v. A.L.*, 2011 WL 2410063, pg. 5 (App.Div. 2011). In *A.L.*, the mother tested positive for cocaine and marijuana both while pregnant and at the time of birth. The child, although born without any withdrawal symptoms, also had a positive meconium test for cocaine. Based on the mother's marijuana and cocaine tests, as well as baby's positive test, the Division substantiated a charge of neglect for a "substantial risk of physical injury to the child." *Id.* at 1. The court distinguished *L.V.* and *K.H.O.*, stating that as a Title 30 case, *K.H.O.* has no bearing on the present finding of abuse or neglect decision. When the Supreme Court overturned the appellate division, the Court noted that K.H.O. is not dispositive as it is a Title 30 case; however, it does properly highlight the need for an actual finding of harm or risk of imminent harm to the child before a finding against a parent can be made.

Corporal Punishment

Findings of **excessive corporal punishment** will be made where a parent uses physical force against his or her child for discipline or other reasons in an excessive fashion. Incidences of excessive corporal punishment that make the child likely to be found to be an abused or neglected child within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b) include those in which:

1. The physical contact is sufficiently malicious, or
2. The contact is done regularly or systemically, or
3. The child is left with serious marks, bruises, or demarcations from the physical contact.

Courts have also looked to the New Jersey Administrative Code for guidance as to what type of effects on a child could inform a finding of abuse or neglect due to excessive corporal punishment. The New Jersey Administrative Code provides, in part: child death, head injuries, internal injuries, burns, wounds, bone fractures, cuts, bruises, abrasions, welts, oral injuries, human bites, sprains, and dislocations. N.J.A.C. 10:129–2.2(a).

***N.J. Div. of Youth and Family Serv's v. P.W.R.*, 205 N.J. 17 (2011).** In *P.W.R.*, the Supreme Court held that a disciplinary slap to the face of a teenager where there were no resulting bruises or marks does not constitute excessive corporal punishment to sustain a finding of abuse under Title 9. *Id*. at 37. The court further noted that the legislative use of the term "excessive" recognizes some autonomy in child-rearing, and is not a total ban on corporal punishment. *Id*. at 36. Thus, where there is no factor showing that the discipline was excessive, such as an actual medical ailment as a result of the punishment, a finding of abuse under Title 9 cannot be sustained.

***N.J. Div. of Youth and Family Serv's v. C.H.*, 414 N.J. Super. 472 (App. Div. 2010), *certif. denied*, 207 N.J. 188 (2011).** The Appellate Division affirmed a finding of abuse or neglect where a mother hit her five-year-old child with a paddle for telling a neighbor that the family did not have electricity in their house. *Id*. at 476. The punishment left scratches and "red demarcations" on the child's face, back and arms that were discovered by the school nurse. *Id*. The mother also admitted to using corporal punishment in the past against the child, arguing that she can discipline her child as she sees fit. *Id*. at 477. The court also made note of the fact that abuse like this clearly fits within the statutory language requirements that the child be physically, mentally, or emotionally impaired or at risk of continuing impairment. *Id.* The child's physical condition was clearly impaired, and the mother's admittance that she typically uses corporal punishment showed not only a risk of future impairment to the child, but also gross negligence in failing to meet the minimum degree of care that is required of a parent. *Id.* at 506-7.

***N.J. Div. of Youth and Family Serv's v. M.C. III.*, 201 N.J. 328 (2010).** The Supreme Court found abuse where a father, after having an argument with his children, choked his thirteen-year-old son and hit his daughter in her stomach and back, causing the three of them to fall to the floor. The court made note that the findings were made based on a totality of the facts, most importantly the fact that the father intentionally put his hands on his children and disregarded a substantial probability that the action could result in injury or future injury to the child. *Id*. at 345. In *M.C.*, the court made it clear that although some recognizable harm to the child is

generally required before a finding of abuse, the issue may turn on whether or not the parent intentionally acted or failed to act while disregarding a substantial probability that harm would befall the child as outlined in N.J.S.A. 6-8.21(c)(4)(b).

***N.J. Div. of Youth and Family Serv's v. Robert M.*, 347 N.J.Super. 44 (App. Div. 2002).** In *Robert M.*, the parents had four natural children and 3 adopted Russian children. One of the adopted children died as a result of serious physical abuse as well as neglect. The trial court found that the two other adopted children were also abused children under the statute, specifically because of the substantial risk of harm posed to them by the physical abuse of the other adopted child; however, no finding was made as to the biological children, as the trial court did not allow their testimony into evidence, and nonetheless found no risk of harm as to them. *Id*. at 62. The Appellate Division remanded to consider whether the biological children were also abused or neglected children within the statute, noting that "[a]lthough the absence of past physical abuse to the natural children may infer their future safety, the alleged treatment of Viktor could be a dangerous harbinger to one or more of the others." *Id*. at 68.

III - Title 30 – Guardianship & Termination of Parental Rights

Role of Division of Child Protection & Placement and Court Procedure

As noted earlier, 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. *N.J. Div. of Youth and Family Serv's v. R.D.*, 207 N.J. 88, 118 (2011).

Investigation - Commencing Court Action

Title 30 proceedings are commenced either through an application for care or custody or a petition for guardianship. N.J.S.A. 30:4C–11-11.1; N.J.S.A. 30:4C–15-15.1. The Division is not required to commence a Title 9 proceeding before commencing a Title 30 proceeding, although this is typically how Title 30 cases are commenced. *See N.J. Div. of Youth and Family Serv's v. A.P.*, 408 N.J. Super. 252, 974 A.2d 466 (App. Div. 2009) (holding that the Division is not required to prevail in an abuse or neglect action before it could initiate an action for the termination of parental rights). It has long been the case that Title 30 cases and Title 9 cases are very different in nature, thus the New Jersey Supreme Court stated in 1987 that "[T]ermination of parental rights cannot be effected through child abuse and neglect action … such permanent relief can only be achieved through guardianship proceedings." *N.J. Div. of Youth and Family Serv's v. D.C.*, 219 N.J.Super. 644, 530 A.2d 1309 (App.Div. 1987), *affirmed* 118 N.J. 388, 571 A.2d 1295, 1299 (1990).

Time Frame For GSP Trial

N.J.S.A. 30:4C-15.2 requires a final hearing for guardianship to be held within three months from the date the petition is filed. There is no exception for a case in which a related Title 9 action is pending before a trial or appellate court. Therefore, absent unusual circumstances, a Title 30 action should be promptly tried to conclusion without regard to the pendency of a related Title 9 action even if that action was not mooted by the filing of the Title 30 action. *N.J. Div. of Youth and Family Serv's v. A.P.*, 408 N.J. Super. 252 (App. Div. 2009). Strict enforcement of this mandate "furthers the important [legislative] policy preference for the permanent placement of children." *N.J. Div. of Youth and Family Serv's v. K.M.*, 136 N.J. 546, 558 (1994).

TERMINATION OF PARENTAL RIGHTS

Filing for termination of parental rights is typical for many children who have been put in placement. If a child has been put in placement, filing for termination of parental rights must commence before that child has spent 15 of the last 22 months in placement or whenever any of the five standards set forth in the statute are satisfied. N.J.S.A. 30:4C–15.1. Filing for termination of parental rights is not required under the three exceptions outlined in N.J.S.A. 30:4C-15.3, which require that (1) the child is placed with a relative *and* a permanent plan can be achieved without termination of parental rights, (2) the Division has documented compelling reasons why terminating parental rights would not be in the best interests of the child, or (3) the Division was required to provide reasonable efforts to reunify the family but has not yet provided the services that would facilitate a safe return home for the child.

The standard set forth in N.J.S.A. 30:4C-15.1 is known as the "best interests of the child" test and it sets forth the central questions in termination of parental rights proceedings. Termination of parental rights should always be decided based on the child's wellness, whether it is because it is in the child's best interest to terminate parental rights, or the family has failed to – despite *reasonable efforts* by the Division – eliminate the circumstances that led to the initial placement. N.J.S.A. 30:4C–15.1. The aforementioned statute defines "reasonable efforts" as "attempts by an agency authorized by the division to assist the parents in remedying the circumstances and conditions that led to the placement of the child and in reinforcing the family structure …" The statute sets strict requirements in regard to the best interest of the child test, and the New Jersey Supreme Court has consistently protects those requirements.

STANDING

Foster parents lack standing to bring an action for termination of parental rights, guardianship, and custody of children. Pursuant to N.J.S.A. 30:4C-2(a), DYFS is the designated State agency for the care, custody, guardianship, maintenance and protection of children. The Division is authorized to file a petition for guardianship under N.J.S.A. 30:4C-15. *In re T.M.B. v. Scalara*, 273 N.J. Super. 353, 359-60 (Ch. Div. 1993). T.M.B., a Chancery Division, Family Part case, was cited with approval in Matter of A., 277 N.J. Super. 454, 464 (App. Div. 1994). (N.J.S.A. 30:4C-26.7 permits the foster parents to apply, not to a court for adoption or termination of parental rights, but to DYFS).

BEST INTERESTS OF THE CHILD STANDARD - N.J.S.A. 30:4C–15.1.

The division shall initiate a petition to terminate parental rights on the grounds of the "best interests of the child" 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.

N.J.S.A. 30:4C–15.1

All of the criteria in the test must be met before the court may terminate parental rights; however, the "criteria enumerated in the best interests standard are not discrete and separate; they relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." *In Re Guardianship of K.H.O*, 161 N.J. 337, 736 A.2d 1246, 1251 (1999). The fourth standard often ends up being a last-ditch effort to preserve the parent's rights. It measures the child's relationship with his foster parents versus his biological parents. The question is, in measuring these two relationships, whether or not the child will suffer a greater harm in disrupting his relationship with his biological parent than he would if his relationship with his foster parents were disrupted. *N.J. Div. of Youth and Family Serv's v. A.R.*, 405 N.J.Super. 418, 965 A.2d 174, 188 (App.Div. 2009).

In applying this test, the court is balancing the very important state interest of protecting its citizens, especially its children, with the constitutional right that parents have to raise their children without interference from the state. The New Jersey Supreme Court has consistently asserted that the right of a parent to enjoy a right to a relationship his or her child is one that is constitutionally guaranteed. *In Re Guardianship of K.H.O*, 161 N.J. 337, 736 A.2d 1246 (1999); *N.J. Div. of Youth and Family Serv's v. A.W.*, 103 N.J. 591, 512 A.2d 438 (1986). However, the state's *parent's patriae* responsibility to protect its children is sometimes in direct conflict with a parent's constitutional guarantee, thus termination of parental rights is appropriate and necessary. Nonetheless, the constitutional question of parents' right to relationships with their children that is present in termination of parental rights cases accounts for the differing evidentiary standards between Title 9 and Title 30.

As was noted *supra* pages 14-15, Title 30 termination of parental rights cases have a different evidentiary standard than do Title 9 finding of abuse or neglect cases. In a termination of parental rights proceeding, the Division bears the burden of proving each of the four criteria for termination by clear and convincing evidence. N.J.S.A. 30:4C–15-15.1; *See* also *N.J. Div. Of Youth and Family Serv's v. G.L.*, 191 N.J. 596, 926 A.2d 320 (2007) (reaffirming the evidentiary standard set forth in the statute). The fact that termination of parental rights carries the possibility of compromising what would otherwise be an individual's constitutional right or liberty, the evidentiary standard of clear and convincing evidence is absolutely necessary. *K.H.O.*, 161 N.J. 337, 736 A.2d at 1248.

DEFAULT PROOF HEARINGS IN TPR CASES

When a default is entered in TPR case, a plenary proof hearing is required before parental rights can be terminated. The judge must announce findings, applying the standards of N.J.S.A. 30:4C-15.1. Pursuant to Rule 4:43- 2(b), the party against whom an default exists may not present affirmative proofs, but may, in the court's discretion, be heard to challenge the proofs offered on behalf of the claimant, including the opportunity to cross-examine. The law guardian for the child must have a role in such proceedings. *New Jersey Div. of Youth and Family Services v. L.H.*, 340 N.J. Super. 617, 619-20 (App. Div. 2001).

Entry of judgment based solely on a verified complaint should rarely occur in a termination case. Only through an evidentiary hearing can the court and the parties be assured that DYFS has met its heavy burden to prove by clear and convincing evidence that TPR is in the child's best interests. In most default cases, the matter should proceed to a plenary hearing where defendants' counsel and the law guardian shall have an opportunity to cross-examine the Division's witnesses. *New Jersey Div. of Youth and Family Services v. T.J.B.*, 338 N.J. Super. 425, 433-35 (App. Div. 2001).

Vacating Default Judgments in TPR Cases

An application to vacate a default judgment is "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." *Marder v. Realty Constr. Co*., 84 N.J. Super. 313, 319 (App. Div. 1964), *aff'd* 43 N.J. 508 (1964). The great liberality in permitting vacatur is "particularly important when the results have consequences of magnitude such as the termination of a parent's rights to his or her child." *New Jersey Div. of Youth and Family Services v. P.W.R.*, 410 N.J. Super. 501, 508 (App. Div. 2009) *rev'd on other grounds*, 205 N.J. 17 (2011) citing *T.J.B.*, 338 N.J. Super. at 434.

Where there is no good faith basis for missing the trial, however, the court will not vacate a default judgment. *In re Guardianship of N.J.*, 340 N.J. Super. 558, 559 (App. Div. 2001). In *N.J.*, the mother, who had a lengthy history of failing to appear and failure to comply with court orders, claimed she did not appear at GSP trial because she went to Atlantic City and forgot the trial was scheduled. Under these facts, her excuse did not justify vacating the default judgment pursuant to Rule 4:50-1.

The appellate division held that an entry of a default judgment was improper where a father had sporadically failed to comply with substance abuse screenings, coupled with the fact that he was homeless and thus did not attend the hearing. *N.J. Div. of Youth and Family Serv's v. M.G.*, 427 N.J.Super. 154 (App. Div. 2012).

MOTIONS FOR RECONSIDERATION

In *Guardianship of J.N.H.*, 172 N.J. 440, 475 (2002) citing *T.J.B.*, 338 N.J. Super. 433-35, the Supreme Court held that Rule 4:50 is applicable to TPR cases. In determining a Rule 4:50 motion in a parental termination case, the primary issue is not whether the movant was vigilant in attempting to vindicate his or her rights or even whether the claim is meritorious, but what effect the grant of the motion would have on the child. [It should be noted that Justice Long's dicta indicates that this case might not have been remanded if the child had achieved permanency at the time the appeal was heard.]

In *N.J. Div. of Youth and Family Services v. T.G.*, 414 N.J. Super. 423, 438 (App. Div. 2010), the appellate division reaffirmed the principle set forth in *J.N.H*. Where mother moved to set aside her identified surrender pursuant to Rule 4:50, the court applied the two-part standard of *J.N.H*, holding that the moving party's application must be supported by evidence of changed circumstances and that the best interests of the child must be considered. In this case, the mother failed to meet the first part of the test because she failed to establish that her surrender was dependent on the Division's consent to withhold information regarding her faulty compliance with her treatment program and criminal probation. *Id*.

POST TERMINATION APPEAL

In *New Jersey Div. of Youth and Family Services v. R.G.*, 354 N.J. Super. 202 (App. Div. 2002), a mother's motion for leave to file a notice of appeal *nunc pro tunc* was filed nearly a full year after entry of the order terminating her parental rights. The appellate division has held that Rule 2:4-4(a) may be relaxed in guardianship appeals and that indigent mother clearly signified her intention to appeal and requested Public Defender representation within the time prescribed by the Rule. The court balanced the right of a parent to appeal the termination of his or her parental rights with the rights of the children to finality and permanency in light of the clear public policy set forth in the federal Adoption and Safe Families Act (ASFA).

The court identified additional factors, such as (1) the effect that further delay will have on the specific children involved, (2) whether the parent made a timely request of counsel that a notice of appeal be filed, and (3) whether the parent seeking to file a late appeal bears some responsibility for the delay. The court concluded that the time provisions contained in Rule 2:4-1(a) and Rule 2:4-4(a) should be relaxed and mother granted leave to file a notice of appeal *nunc pro tunc*.

However, in *N.J. Div. of Youth and Family Serv's v. J.C.*, 411 N.J.Super. 508 (App. Div. 2010). the court noted that New Jersey liberally grants such motions in guardianship appeals; however, the court nonetheless denied the motion where defendants sought leave to file notices of appeal some sixteen months after the entry of a judgment terminating their parental rights and the child had been adopted some four months before the filing. Notwithstanding the policy of liberally granting such motions in guardianship appeals, the panel concluded that defendants' extraordinary delay coupled with the child's adoption requires denial of defendants' motions. An intervening judgment of adoption weighs heavily against granting an untimely filed appeal to a judgment of termination of parental rights.

SURRENDER OF PARENTAL RIGHTS

Identified Surrender

The Division is not required to accept an "identified surrender" and may proceed with TPR case to ensure the "finality" of a termination. The court relies on the discretionary language of the statute as both N.J.S.A. 9:3-41(d) and N.J.S.A. 30:4C-23 state that under certain circumstances, the Division "may" receive the parent's or guardian's surrender of the child. *New Jersey Div. of Youth and Family Services v. D.M.B.*, 375 N.J. Super. 141, 147 (App. Div. 2005).

Surrender to an Adoption Agency

Where a mother surrendered her parental rights to an adoption agency and consented to the grant of legal and physical custody of her child to her brother and his wife, from whom the Division effectuated an emergency removal, the mother's surrender was ineffective as the State's authority to protect the best interests of the child could not be usurped by a private agency. *In re A.S.*, 388 N.J. Super. 521, 526 (App. Div. 2006).

The deliberative, informed, and voluntary nature of a parent's decision to surrender her child and to consent to the child's adoption tends to demonstrate intentional abandonment. In re Adoption of a Child by D.M.H., 135 N.J. 473, 482 (1994).

Under N.J.S.A. 9:3-46(a), natural parents retained their right to withdraw their consent to a non-agency adoption at any time prior to an entry of judgment of adoption even after surrender of their child to adoptive parents where the parental rights of the natural parents had not been terminated by a court order. Only in an approved agency adoption, pursuant to N.J.S.A. 9:3-41, would the parents have relinquished their parental rights upon the surrender of their child. *A.L. v. P.A.*, 213 N.J. Super. 391 (App. Div. 1986).

NEW JERSEY SAFE HAVEN INFANT PROTECTION ACT

In *Doe*, 416 N.J. Super. 233 (Ch. Div. 2010), the appellate division considered the New Jersey Safe Haven laws. Where a mother delivered a baby in a maternity ward and immediately surrendered her, the infant qualified as a Safe Haven baby under the New Jersey Safe Haven Infant Protection Act, even though the child had not been delivered to an emergency room pursuant to N.J.S.A. 30:4C-15.7(b), as the mother clearly intended not to return for her child. Id. at 244. The court reiterated that the New Jersey Legislature, in passing Safe Haven, intended to provide the benefits of safety, anonymity, and immunity from prosecution in circumstances like these, where the mother delivers the baby in a hospital maternity ward, then clearly and unambiguously states her desire to surrender that infant anonymously and the other Safe Haven statutory requirements are met. *Id*.

INEFFECTIVE ASSISTANCE OF COUNSEL

In determining ineffective assistance claims in parental termination cases, the New Jersey Supreme Court adopts the two-part test announced in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The test requires a showing that (1) counsel's performance must be objectively deficient--i.e., it must fall outside the broad range of professionally acceptable performance; and (2) counsel's deficient performance must prejudice the defense, i.e., there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *New Jersey Div. of Youth and Family Services v. B.R.*, 192 N.J. 301, 307 (2007).

EFFECT OF INCARCERATION ON TPR

A parent's incarceration, while it is “unquestionably relevant” to the termination decision, does not automatically justify termination of parental rights. *Adoption of Children by L.A.S.*, 134 N.J. 127, 136-37 (1993).

In *N.J. Div. of Youth and Family Serv’s v. S.A*., 382 N.J. Super. 525, 534 (App. Div.2006), the appellate division held that courts must consider the length of the incarceration and the nature of the underlying crime as it may bear on parental unfitness. There must be a broad inquiry into all the circumstances bearing on incarceration and criminality, and must include an assessment of their significance in relation to abandonment or parental unfitness. Imprisonment necessarily limits a person's ability to perform the “regular and expected parental functions” and may serve to frustrate nurturing and the development of emotional bonds and as a “substantial obstacle to achieving permanency, security, and stability in the child's life.” *Id*.

BEST INTERESTS OF THE CHILD TEST – CASE LAW

The first prong of the test, whether the child's health, safety, or development has been or will continue to be endangered by the relationship with the parent, asks whether the child is actually being damaged in some way through the relationship with the mother. N.J.S.A. 30:4C–15-15.1(a)(1). The harm shown must be a harm that threatens the well-being of the child's health and could have lasting deleterious effects on the child. The second prong requires a showing that the parent is or will be unfit or unable to alleviate this harm in the future. *N.J. Div. of Youth and Family Serv's v. M.M.*, 189 N.J. 261, 914 A.2d 1265, 1277 (2007). The third prong requires the Division to show that they have provided reasonable services, and that these services have not helped to alleviate the situation. *In re Guardianship of K.H.O.*, 161 N.J. 337, 736 A.2d 1246, 1255 (1999). Lastly, the court addresses the question of whether termination of the relationship with the biological family will cause more critical harm than it will good. *Id*. When considering the fourth prong of the test, the New Jersey Supreme Court has held that merely showing that a child would be better off with an adoptive parent rather than with the biological parent is not enough to satisfy the requisite burden of proof. *Adoption of Children by G.P.B.*, 161 N.J. 396, 404 (1999).

***Guardianship of K.H.O.*, 161 N.J. 337, 736 A.2d 1246, 1255 (1999).** In *K.H.O.*, the court very carefully examined each prong of the best interest of the child test in reversing the appellate court and terminating a parent's parental rights. Although termination of parental rights cases are extremely fact-specific, this case offered a textbook example of conduct that satisfied the best interests of the child test as required in order to terminate parental rights. In *K.H.O.*, the mother had used drugs during her pregnancy, and such drug use resulted in the child being born addicted to heroin and suffering withdrawal. *Id.* at 1249. The child remained in the hospital for the first month of her life, during which time the Division had referred the mother to drug treatment programs that the mother failed to complete. *Id*. The child was put in foster care voluntarily, where she remained for the next six years, developing a very strong bond with the foster family with whom she was placed. *Id*. at 1250.

In addressing the first prong of the test, the New Jersey Supreme Court held that a mother's use of drugs while pregnant, which resulted in the child being born addicted to drugs or suffering from withdrawal symptoms is sufficient to show that the child's health, safety, and development has been endangered by the parent. *Id.* at 1252-53. The court noted that it is the "[a]ttendant suffering, not the drug use itself" that constituted harm to the child. *Id*. Here, the child spent a month in the hospital after birth as a result of her being born addicted to heroin, thus the first prong was satisfied.

As to the second prong of the test, the court found that the mother was unwilling and unable to eliminate harm to the child. She had voluntarily placed the child in foster care shortly after her birth in 1993. *Id.* at 1254. In the six years that the child was placed in foster care, the mother was unable to get herself off of drugs or complete any of the drug treatment programs to which she was referred by the Division. This failure illustrated her inability to improve upon or alleviate the harm to the child. *Id.*

Likewise, this failure to complete any of the services rendered to her by the Division that could have moved her closer toward reunification, as well as attempts by the Division to place the child with a relative, constituted a situation that satisfied the third prong of the best interests test – that the Division had provided reasonable efforts to reunify the family to no avail. *Id*. at 1255.

Finally, the court addressed the fourth prong of the test – that the termination would not do more harm than good. The court cited *Matter of Guardianship of J.C,* 129 N.J. 1, 608 A.2d 1312, 1324 (1992) in illustrating that the fourth prong does not require that no harm befall the child in terminating her parental rights, but that, weighing the relationship of the biological parents against that of the foster parents, a greater harm will not befall the child in terminating the relationship with her biological parents. *Id*. at 1256. In applying this standard, the court held that where the child's relationship with the foster parents is very strong, and the relationship with the biological parents is not comparatively strong, and an expert has corroborated such evidence, the fourth prong of the test set forth in N.J.S.A. 30:4C–15.1(a) is satisfied. The court thus found that it was necessary to terminate parental rights. *Id.* at 1260-62.

***New Jersey Div. of Youth and Family Services v. F.M.*, 211 N.J. 420, 48 A.3d 1075 (2012).** The New Jersey Supreme Court more recently addressed the issue of termination of parental rights in *F.M.* In *F.M.*, the mother was found to be unwilling and incapable of keeping her child away from the danger posed by the child's father, in violation of court order and case plans. *Id.* at 1079-80. The father's parental rights had been terminated after he had been found to be of extreme danger to the child due in part to his extensive history of drug addiction and mental illness that led him to believe he was god. *Id*. In earlier proceedings, the Division had established that the child's father was a serious threat to the child's safety and received a court order and developed a case plan that barred the mother from allowing the child's father to return to the home. On subsequent visits during the period of the Division's care and custody, case workers continued to discover that the father was in the home, at times caring for the child by himself. *Id.* at 1080. During the Division's involvement with the family, the family had been offered parenting classes and domestic violence counseling sessions with little participation from the parents. *Id.* at 1084.

In applying the best interest of the child test, the court found as to prong one that the mother was committed to the drug-addicted father and this constituted a harm or substantial risk of harm to the children's well-being. Further, her clear unwillingness to adhere to the case plan that required she not permit the father to have contact with the children satisfied the second prong of the best interests test, as she was clearly "unwilling or unable to alleviate the harm or risk posed to the child." *Id.* at 1085.

As to the third prong, the Division had offered more than enough reasonable efforts to reunite the family. The court noted that the Division had offered some nineteen services, including parenting classes, domestic violence counseling and transitional living. *Id*. at 1093. At this point, there were no alternatives to terminating parental rights in the event that such termination would not do the children more harm than good.

As to the fourth prong, the Division offered expert testimony establishing that the children had been placed with foster families since they were days and months old, respectively, and that eliminating that relationship would have a worse effect than eliminating the biological relationship, as the children's bonds with their foster parents were stronger than those with their biological parents. *Id.* at 1094. For these reasons, the New Jersey Supreme Court terminated parental rights to the children. *Id.*

***New Jersey Div. of Youth and Family Serv's v. D.M.*, 414 N.J.Super. 56, 997 A.2d 1010, 1026 (App.Div. 2010).** New Jersey courts conduct a very careful analysis in termination of parental rights cases, and where the best interests test is not met by clear and convincing evidence, the court will refuse to terminate parental rights. In *D.M.*, the court had found in a fact-finding hearing that the father of a child put the child at risk of harm, and that the mother should have sole physical custody of the child. Upon finding that the child was

continuously left with the father, the court placed the child in foster care. *Id*. at 1013. The child remained in foster care for some four years, and expert testimony showed that during that time the child had formed a very strong bond with the foster parents and that terminating this bond would cause psychological harm. *Id.* at 1021.

The appellate division nonetheless refused to terminate parental rights because the other prongs of the best interest's tests had not been proven by clear and convincing evidence, and thus termination was not in the best interests of the child. Id. at 1025. The court cited *New Jersey Div. of Youth and Family Serv's v. T.C.* in refusing to terminate parental rights, holding that the [c]onstitutional, social and psychological force of these conjoined principles ordinarily weighs heavily against parental termination based on the foster-parent bonding of a child whose biological parents are fit to have her returned to them, particularly in those cases in which the parent-child separation has been substantially contributed to by public agencies whose mission it is to protect the family. *Id*. at 1021-22, citing *New Jersey Div. of Youth and Family Serv's v. T.C.*, 251 N.J.Super. 419, 598 A.2d 899, 909 (App.Div. 1991). Thus New Jersey courts will not terminate parental rights simply because the child will be better off with his foster parents. Each and every prong of the best interests test must be satisfied by clear and convincing evidence before parental rights may be terminated. N.J.S.A. 30:4C–15-15.1.

<u>PRONG ONE</u>: THE CHILD'S SAFETY, HEALTH OR DEVELOPMENT HAS BEEN OR WILL CONTINUE TO BE ENDANGERED BY THE PARENTAL RELATIONSHIP

DRUG ISSUES

Child's health and development are endangered when they are born drug addicted and their mother cannot care for the child at birth. ***In re Guardianship of K.H.O.*, 161 N.J. 337, 363 (1999).**

The continuing inability of the mother to overcome her own addiction in order to care for her child constitutes endangerment of the child. **In re Guardianship of K.H.O., 161 N.J. 337, 363 (1999).**

The detection of cocaine in a child's system would not be sufficient, by itself to support a finding under this prong. ***New Jersey Div. of Youth and Family Services v. B.M. (In re Z.T.T.B.)*, 413 N.J. Super 118, 128 (App. Div. 2010)**;

MENTAL ILLNESS

Harm is not limited to physical abuse or neglect. Parents' mental illnesses created an environment in which they could not adequately care for and raise the children. ***In re Guardianship of R., G., and F*., 155 N.J. Super. 186, 194 (App. Div. 1977).**

Despite the good intentions of the parents, there was just no evidence in the record to show that either parent separately, or together, would have the mental status sufficient to eliminate the risk of future harm to the child. ***New Jersey Div. of Youth and Family Services v. A.G.*, 344 N.J. Super. 418, 440 (App. Div. 2001).**

As we noted in *In re Guardianship of J.C.*, 129 N.J. 1, 18 (1992), injury to children need not be physical to give rise to State termination of biological parent-child relationships. Serious and lasting emotional or psychological harm to children as the result of the action or inaction of their biological parents can constitute injury sufficient to authorize the termination of parental rights. *See* ***Matter of Guardianship of K.L.F.*, 129 N.J. 32, 42, 608 A.2d 1327 (1992).**

ABANDONMENT/DELAY

A father who delayed for eight months in offering himself as his child's caregiver did not cause "harm" to a then-sixteen-month-old child. ***N.J. Div. of Youth and Family Serv's v. I.S.*, 202 N.J. 145 (2010).**

(Title 9 Case) A father who never sees his child or never makes efforts to be a part of a child's life sufficient to cause the child to view the person as a parent, causes harm to the child. ***Adoption of Children by G.P.B.*, 161 N.J. 396, 414 (1999) (O'Hern, J. concurring).**

ABANDONMENT

There is overlap between the abandonment standard and the best interests of the child standard. Abandonment requires a showing of volitional conduct in failing to care for and protect the child that amounts to a repudiation or forsaking of parental obligations, while the best interests standard requires a showing of very substantial and continuing or recurrent abuse or neglect that endangers the child's health and development. ***Adoption of Children by L.A.S.*, 134 N.J. 127, 134-35 (1993).**

Although the trial court ordered the termination of a father's parental rights, expressing its findings in terms of the abandonment standard, as set forth in N.J.S.A. 30:4C-15(d), DYFS acknowledged that defendant did not "abandon" his children, as he did not willfully forsake them; he professed parental love for them and sporadically expressed interest in providing for them. The father's parental unfitness consisted of substantial and continuing neglect and his failure to provide any care and support for his children resulted in harm that endangered their welfare. The appellate court affirmed the termination under the best interests of the child standard of N.J.S.A. 30:4C-15.1(a). ***Guardianship of DMH*, 161 N.J. 365, 377-78 (1999).**

A mother of three children, who was unable to raise them due to homelessness, domestic abuse, and her own substance abuse, voluntarily placed her children in foster care through DYFS. The mother visited with them regularly and frequently but DYFS determined that she lacked parental fitness and that the children required permanent homes. The lower court terminated the mother's parental rights and the Appellate Division affirmed. The Supreme Court found that the case presented no basis for terminating the parental rights of the mother based on abandonment as that requires a finding that a parent, although physically and financially able to fulfill her parental responsibilities, willfully forsook them. The concept of abandonment entails volitional and purposeful conduct that equates with a willful giving up of parental rights and duties and the mother was not guilty of that kind of conduct. ***Guardianship of J.C.*, 129 N.J. 1, 17 (1992).**

ONE FIT PARENT/ONE UNFIT PARENT

Father, who established, maintained, and was unwilling or unable to alter dangerous conditions within his home led to the appropriate termination of his rights (satisfying prong two as well). Mother had substance abuse problems, habitually ran away from home and had a history of falsely alleging domestic violence which created a "fatal obstacle" to the development of the young child. Mother's cognitive limitations also posed a risk. Father

intended to remain with Mother, but failed to develop a plan that would not leave the child alone in the Mother's care. Mother's parental rights had been terminated. ***N.J. Div. of Youth and Family Serv's v. M.M.*, 189 N.J. 261, 281 (2007).**

Where a Father was conviction of child endangerment, but the Mother failed to acknowledge his guilt under that conviction, termination of parental rights is inappropriate on that basis alone. Mother complied with all recommendations imposed by DYFS and satisfied both DYFS and experts as to her ability to function as a mother, and no proof was offered to show that Mother, herself, endangered the child. ***N.J. Div. of Youth and Family Serv's v. G.L.*, 191 N.J. 596, 607 (2007).**

<u>PRONG TWO</u>: 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.

ELIMINATING HARM TO CHILD

Father, who established, maintained, and was unwilling or unable to alter dangerous conditions within his home led to the appropriate termination of his rights (satisfying prong two as well). Mother had substance abuse problems, habitually ran away from home and had a history of falsely alleging domestic violence which created a "fatal obstacle" to the development of the young child. Mother's cognitive limitations also posed a risk. Father intended to remain with Mother, but failed to develop a plan that would not leave the child alone in the Mother's care. Mother's parental rights had been terminated. ***N.J. Div. of Youth and Family Serv's v. M.M.*, 189 N.J. 261, 281 (2007).**

Infant died while in the care of father who was convicted of child endangerment. Mother refused to condemn him for the death of child and insisted that he simply failed to call for help. Although that stance was unrealistic and a tactical error, it did not justify the loss of mother's parental rights as DYFS failed to show that mother was unwilling or unable to eliminate the threat posed by father to another child. Mother did stop living with Father and refused to allow him to see the child unsupervised. ***N.J. Div. of Youth and Family Serv's v. G.L.*, 191 N.J. 596, 608 (2007).**

Where the mother obtained an apartment, a stable job and, with the exception of a brief drug relapse, had complied with services DYFS had provided, she has eliminated the harm facing the child and could provide a safe and stable home for him. Thus, DYFS had failed to satisfy prong two. ***N.J. Div. of Youth and Family Services v. A.R.*, 405 N.J. Super. 418, 438 (App. Div. 2009).**

BOND WITH FOSTER PARENT(S)

The State can satisfy the second prong if it can show "that the child will suffer substantially from a lack of stability and a permanent placement and from the disruption of [his or] her bond with foster parents." ***New Jersey Div. of Youth and Family Services v. M.M.*, 189 N.J. 261, 281, 914 A.2d 1265 (2007) citing *In re K.H.O.*, 161 N.J. 337, 363 (1999).**

PRONG THREE: 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

An evaluation of the efforts undertaken by DYFS to reunite a particular family must be done on an individualized basis….decided with reference to the circumstances of the individual case before the court, including the parent's active participation in the reunification effort….Therefore, other services, including those offered in conjunction with the reunification plan developed by DYFS…must be evaluated on a case-by-case basis. ***In re Guardianship of D.M.H.*, 161 N.J. 365, 390-91, 736 A.2d 1261 (1999).**

For example:

1. Consultation and cooperation with the parent in developing a plan for appropriate services;
2. Providing services that have been agreed upon, to the family, in order to further the goal of family reunification;
3. Informing the parent at appropriate intervals of the child's progress, development and health; and
4. Facilitating appropriate visitation.

[N.J.S.A. 30:4C-15.1(c)(1-4) "Reasonable Efforts" defined]

FAILURE TO ESTABLISH THE THIRD PRONG

DYFS failed to develop a plan or provide appropriate devices to further the goal of family reunification. "The only so called 'services' DYFS offered defendant were inconveniently scheduled and utterly irrelevant parenting classes, this for a fifty-six year old man who already successfully had reared four children of his own." DYFS also failed to inform the father "at appropriate intervals of the child's progress, development and health," and DYFS failed to facilitate appropriate visitation between defendant and his child. ***N.J. Div. of Youth and Family Serv's v. I.S.*, 202 N.J. 145, 178 (2010).**

RELIEF OF REASONABLE EFFORTS

Relief may be granted where the Division has provide:

1. Array of services aimed at reunification
2. Monitoring of the family's progress
3. Development of a case plan
4. Referrals for community services
5. Attempts at enlisting family support

***N.J. Div. of Youth and Family Serv's v. M.M.*, 189 N.J. 261, 285-86 (2007).**

The term "aggravated circumstances" embodies the concept that the nature of the abuse or neglect must have been so severe or repetitive that to attempt reunification would jeopardize and compromise the safety of the

child, and would place the child in a position of an unreasonable risk to be abused again. Any circumstances that increase the severity of the abuse or neglect, or add to its injurious consequences, equates to "aggravated circumstances." Where the abuse or neglect creates an unacceptably high risk to the health, safety and welfare of the child, they are "aggravated" to the extent that DYFS may bypass reasonable efforts of reunification. ***N.J. Div. of Youth and Family Services v. A.R.G.*, 361 N.J. Super. 46, 77, 824 A.2d 213 (App. Div. 2003), *aff'd* 179 N.J. 264, 845 A.2d 106 (2004).**

When the Division seeks to obtain a waiver of the duty to make efforts at family reunification, the parent should be given sufficient notice of that intention to obtain representation and prepare a meaningful defense. ***N.J. Div. of Youth and Family Serv's v. A.R.G. (In re C.R.G.), 179 N.J. 264, 286 (2004).***

Each determination of aggravated circumstances eliminating requirement of reasonable efforts to reunify child with parent must involve separate lines of inquiry in the following ways: (1) the first issue is whether the alleged conduct, in fact, took place; (2) if the conduct did occur, the next issue is whether it was severe or repetitive; and (3) if the answer is yes, the court then must determine whether reunification would jeopardize and compromise the safety and welfare of the child. Social Security Act, § 471(A)(15)(D)(i), as amended, 42 U.S.C.A. § 671(a)(15)(D)(i); N.J.S.A. 30:4C–11.3.

PRONG FOUR: TERMINATION WILL NOT DO MORE HARM THAN GOOD

BONDING

Because psychologists and psychiatrists play a critical role in reaching an ultimate decision in termination cases both sides should be able to present expert witnesses. DYFS employees and the law guardian were not qualified to express opinions concerning psychological bonding and the harmful consequences to the children from its disruption. ***In re Guardianship of J.C., 129 N.J. 1, 22-23 (N.J. 1992).***

RELATIONSHIP WITH NATURAL PARENT

Where the first three prongs had been met, the Supreme Court reversed a decision to terminate the parental rights of a mother with mental illness and drug problems finding a failure under prong four because there was little likelihood of permanency for the thirteen year old child, and her mother was "the one enduring and sustaining emotional relationship she has had in this world." While it has been emphasized that permanency must be the Division's goal, [but] none ha[ve] stated that the unlikely possibility of permanency in the future should outweigh a strong and supportive relationship with a natural parent. ***N.J. Div. of Youth and Family Serv's v. E.P., 196 N.J. 88, 110-11 (2008).***

RELATIONSHIP WITH FOSTER PARENT

[Prong Four] does not provide an independent basis for termination where the other standards have not been satisfied….where DYFS fails to prove all prongs of the best interest of the child standard, any psychological or emotional harm a child may suffer as a result of the breaking of the bond between the child and his or her foster parents cannot, in and of itself, serve as a legally sufficient basis for a termination of a parent's parental rights. ***N.J. Div. of Youth and Family Serv's v. D.M., 414 N.J. Super. 56, 79-80 (App. Div. 2010).***

NATURAL PARENTS v. FOSTER/ADOPTIVE PARENTS

To the extent that the quality of the child's relationship with foster parents may be relevant to termination of the natural parents' status, that relationship must be viewed not in isolation but in a broader context that includes as well the quality of the child's relationship with his or her natural parents….To show that the child has a strong relationship with the foster parents or might be better off if left in their custody is not enough. ***In re Guardianship of J.C.*, 129 N.J. 1, 18-19 (1992), citing, *In re Baby M*, 109 N.J. 396, 445 (1988).**

Merely showing that a child would be better off with an adoptive parent, rather than with the biological parent, is not enough to satisfy the requisite burden of proof. ***Adoption of Children by G.P.B.*, 161 N.J. 396, 404 (1999).**

NEED FOR EXPERT TESTIMONY

Proof that separating the child from his or her foster parents [or terminating parental rights] "should include the testimony of a well-qualified expert who has had full opportunity to make a comprehensive, objective, and informed evaluation of the child's relationship with the foster parent…. The trial court must also consider parallel proof relating to the child's relationship with his or her natural parents…." ***Guardianship of J.C.*, 129 N.J. 1, 18-19 (1992).**

POST TERMINATION VISITATION

New Jersey courts, like those of most jurisdictions, do not recognize the parental right of visitation following a final order of adoption by non-relative, adoptive parents and New Jersey's policy is to protect adoptive parents from interference in their relationship with child by natural parents whose parental rights had been voluntarily surrendered or judicially severed. *Adoption of a Child by D.M.H.*, 135 N.J. 473, 491, *cert. denied sub nom., Hollingshead v. Hoxworth*, 513 U.S. 967, 115 S. Ct. 433, 130 L. Ed. 2d 345 (1994). Termination under N.J.S.A. 30:4C-11 ends a child's visitation with its biological parents. *N.J. Div. of Youth and Family Serv's v. D.C.*, 118 N.J. 388, 396 (1990).

OPEN ADOPTION

An "open adoption" is one in which the final judgment incorporates the parties' pre-adoption written agreement that the child will have continuing contact with one or more members of his or her biological family after the adoption is completed. *N.J. Div. of Youth and Family Services v. B.G.S.*, 291 N.J. Super. 582, 596 (App. Div. 1996).

A foster family may permit adopted children to maintain their connection with their biological parents. Such continued contact between a biological parent and the adopted child, sometimes referred to as "open-adoption," is a voluntary arrangement or agreement providing for continued contact with biological parents after the termination of parental rights. While open adoptions have not been approved of by the Legislature and open adoptions agreements are not enforceable, the court approved informal and voluntary agreements for visitation by biological parents provided they are fully counseled, mutually undertaken, and in the best interests of the children involved. *In re Guardianship of DMH*, 161 N.J. 365, 386 (1999).

The New Jersey Supreme Court has consistently noted the unenforceability of open adoption agreements in *Adoption of Child by W.P.*, 163 N.J. 158. Even arrangements that are entered into with mutual consent permitting continued contact between biological relatives and the adopted child, "cannot be judicially enforced

given the potential for disruption of the child's family life under such arrangements and the fact that under the adoption laws the adoptive parents' rights are paramount." Id. at 173, quoting *K.H.O.*, 161 N.J. at 362; *See* also *N.J. Div. of Youth and Family Serv's v. D.S.H.*, 425 N.J.Super. 228, fn 1(App. Div. 2012) (recently noting that open adoptions remain unenforceable).

VISITATION

N.J.A.C. 10:122D-1.14(a)(1) specifically requires that "[t]he first visit between the child and parent shall be scheduled to occur as soon as possible, within five working days of the date of initial placement[.]" Where the parent is identified and located after the initial placement of the child, there is no viable reason a schedule of reasonable visitation was not established immediately or within a very short period of time. *N.J. Div. of Youth and Family Serv's v. I.S.,* 202 N.J. 145, 178 (2010). "Visits that are frequent and of long duration are beneficial for most children placed in out-of-home placement and facilitate movement toward achieving a case goal that establishes permanency" and that "for most children in out-of-home placement, the goal is to hold a visit every week for a period as long in duration as possible." *Id.*; N.J.A.C. 10:122D-1.1(b).

The standard for whether visits should be supervised is set forth in DYFS's own regulations. They unequivocally provide that "[u]nless [DYFS] or the Superior Court, Chancery Division, Family Part finds a need for supervision, visits shall be unsupervised." N.J.A.C. 10:122D-1.10(b). The regulations also require that "[i]f visits will be supervised, the plan shall contain a statement of the reason supervision is required." N.J.A.C. 10:122D-1.10(c). In *I.S.* DYFS provided no reason to restrict defendant's visits with his son to supervised ones, and the record, too, revealed no reason. *I.S.*, 202 N.J. 145, 179 (2010).

DYFS improperly denied a mother visitation with her infant child in the one year period prior to initiating proceedings to terminate her parental rights. The mother had attempted to contact DYFS and when she finally reached DYFS and was able to be a caretaker for the children, she was refused visitation. The court held that DYFS has an obligation to assist parents to reunify their family and cautioned that "those in the child welfare system not tip the scales and encourage a foster parent-child bond to develop when the natural parent is both fit and anxious to regain custody." *Guardianship of K.L.F.*, 129 N.J. 32, 46 (1992). The refusal to provide or allow an able and willing parent contact with her child is tantamount to a unilateral displacement of the biological parent, which is impermissible without judicial approval. *Id.*

SIBLING VISITATION

The risk to children stemming from the deprivation of the custody of their natural parent is based on the paramount need the children have for permanent and defined parent-child relationships. *Guardianship of J.N.H.*, 172 N.J. 440, 478 (2002), quoting *Guardianship of J.C.*, 129 N.J. 1, 26 (1992). Part and parcel of such an inquiry should be the effect of permanently terminating a child's connection to his siblings. *J.N.H.*, 172 N.J. at 478. The relationship between siblings is a "blood relationship" that the Legislature has determined to have special importance. *Adoption of Child by W.P.*, 163 N.J. 158, 198 (2000).

Under the Child Placement Bill of Rights Act, N.J.S.A. 9:6B-1 to -6, visitation between siblings placed outside the home is presumed in the period between placement and adoption, and the Division has an independent obligation during that period to facilitate such visitation. If the Division opposes visitation, it bears the burden of overcoming the presumption and proving under the standards in the Child Placement Bill of Rights Act that such visitation is contrary to the child's welfare. As to post-adoption visitation, both biological families and adoptive families may be ordered to permit third-party visitation, over their objections, where it is necessary under the exercise of a court's *parens patriae* jurisdiction to avoid harm to the child. *In re D.C.*, 203 N.J. 545, 563-66 (2010).

KINSHIP LEGAL GUARDIANSHIP

PURPOSE

KLG is clearly intended to formalize the status of a relative who agrees to take on responsibility for a child and can remain in place throughout the child's minority where parental neglect and poor prospects for change in the foreseeable future are established, but adoption is neither feasible nor likely. The court found that adoption was both feasible and likely, making kinship guardianship inappropriate. *N.J. Div. of Youth and Family Serv's v. S.V.*, 362 N.J. Super. 76, 88 (App. Div. 2003).

STATUTORY ELEMENTS

PRONG ONE

The first element required as a basis for kinship legal guardianship, that the parent's incapacity is of such a serious nature as to demonstrate that they are unable or unwilling to perform the regular and expected functions of raising a child, N.J.S.A. 3B:12A-6(d)(1), essentially mirrors the definition of child neglect set forth at N.J.S.A. 9:6-1. A mother's long term drug addiction when combined with her lack of involvement in her children's lives, demonstrated by clear and convincing evidence an incapacity of such a serious nature as to demonstrate that she is unable, unavailable or unwilling to perform the regular and expected functions of care and support of her two children. *N.J. Div. of Youth and Family Serv's v. S.F*., 392 N.J. Super. 201, 211 (App. Div. 2007).

PRONG TWO

The second element, requiring proof that the parent's inability to perform the required parenting functions is unlikely to change in the foreseeable future. N.J.S.A. 3B:12A- 6(d)(2) mirrors the second element of the termination statute, N.J.S.A. 30:4C-15.1(b).

PRONG THREE

The third element requires a finding that adoption is neither feasible nor likely. When a caregiver in a case brought by the Division unequivocally asserts a desire to adopt the child, the finding required for a KLG that "adoption is neither feasible nor likely" cannot be met. *N.J. Div. of Youth and Family Serv's v. T.I*., 423 N.J. Super. 127, 129 (App. Div. 2011).

PRONG FOUR

The fourth element is that KLG is in the best interests of the child. Fourth prong is satisfied where children lived continuously with their grandparents who were extraordinarily dedicated to their wellbeing and it was the only home that they have ever known. Grandparents were particularly attuned to the older son's need for specialized care and treatment due to his autism, when contrasted to mother's refusal to believe her older son is autistic, demonstrates that it is in children's best interest to live with their grandparents, who do recognize the older boy's autism and have expended substantial effort to ensure that he receives the services he needs. *N.J. Div. of Youth and Family Serv's v. S.F.*, 392 N.J. Super. 201, 213-14 (App. Div. 2007).

PERMANENT PLACEMENT OPTION

Where child was placed with the maternal grandmother for seventeen months and she did not want to adopt, trial court's decision that KLG was not a permanency plan was reversed as the plain language of the KLG Act indicates that the Legislature intended KLG to be an alternative permanency plan to severing parental rights. Specifically, the KLG Act declares such relationship "to be permanent and self-sustaining." N.J.S.A. 3B:12A-1(b). *N.J. Div. of Youth and Family Serv's v. D.H.*, 398 N.J. Super. 333, 342 (App. Div. 2008).

POST-KLG REMOVAL

Father consented to the maternal aunt of his son being appointed his KLG. After the aunt moved with the child to North Carolina, the father sought an order directing DYFS to facilitate and pay for his visitation with the child in North Carolina. The court remanded for consideration of the applicable *Baures v. Lewis* factors in determining whether the maternal aunt proved that there was a good faith reason for the move and the move will not be inimical to the child's interest. *N.J. Div. of Youth and Family Serv's v. T.M.*, 399 N.J. Super. 453, 468 (App. Div. 2008).

VACATING KLG

Pursuant to N.J.S.A. 3B:12A-6(f), the party seeking to vacate a judgment of kinship legal guardianship has the burden to prove by clear and convincing evidence that the parent has overcome the incapacity or inability to care for the child that led to the original guardianship proceedings, and that termination of kinship legal guardianship is in the best interest of the child. As to the second prong, the Court cited the nine factors in N.J.A.C. 10:132A-3.6(a) that DYFS considers when taking a position on a motion to vacate a kinship legal guardianship but cautioned that while this list should aid the court, it is not exhaustive. *N.J. Div. of Youth and Family Serv's v. L.L.*, 201 N.J. 210 (2010).

IV – Evidentiary Issues: Title 9 & Title 30

EVIDENTIARY OVERVIEW IN DCPP COURT PROCEEDINGS

Evidentiary standards differ between Title 9 and Title 30 proceedings. Where Title 30 Termination of Parental Rights proceedings are conducted under an evidentiary burden of a **"clear and convincing"** standard, Title 9 proceedings are conducted under a **"preponderance of the evidence"** standard. N.J.S.A. 30:4C–15.1, N.J.S.A. 9:6-8.46(b). This is because Title 9 proceedings do not inherently implicate parents' core constitutional rights to raise their children in the manner that Title 30 proceedings do. *N.J. Div. of Youth & Family Serv's v. R.D.*, 207 N.J. 88, 113 (2011).

In a **fact finding proceeding** the court can make a finding based on the standard of "preponderance of the evidence" or "clear and convincing evidence," but a finding under the "clear and convincing" standard can only be made if prior notice is given to the defendant that that this higher standard would be sought. *N.J. Div. of Youth & Family Serv's v. T.S.*, 429 N.J.Super. 202 (App. Div. 2013). The fear is that a finding of abuse or neglect by the heightened standard can be "lifted" and used against a defendant in a later guardianship or termination of parental rights proceeding. This confusing collateral estoppel issue has been extensively litigated in recent history.

COLLATERAL ESTOPPEL

The differing evidentiary burdens have often led to the belief that a court could make a factual finding in a Title 9 hearing by the heightened clear and convincing standard and then stipulate to that finding in a subsequent Title 30 hearing, relieving the Division of their burden to prove the first prong of the statutory test; however, this is not the case. Guardianship and termination of parental rights adjudications under Title 30 address the constitutional issue of interference with a parent's right to their child, thus extra care is required in applying findings from the Title 9 adjudication to the Title 30 adjudication.

In *N.J. Div. of Youth and Family Serv's v. R.D.*, 207 N.J. 88 (2011), the New Jersey Supreme Court held that if a court reasonably foresees that "the Title 9 proceeding will ripen into a Title 30 proceeding, " the court may attempt to minimize duplicative proofs if it protects procedural due process in three ways:

1. The court must clearly and unequivocally put the defendant on notice that the Title 9 proceeding is being conducted under the heightened standard, and that that the finding under that standard will have preclusive effect in a later Title 30 proceeding,
2. The court must make clear to the parties that, while the Title 9 relief that the court grants is interim relief, the determination of that relief may have preclusive effect on the permanent relief granted under Title 30.
3. the Title Nine court must relax the time deadlines and, to the extent necessary, use in the Title Nine proceeding the admissibility of evidence standards applicable to Title Thirty proceedings.

Id. at 120-21.

Thus, while courts can apply the heightened "clear and convincing" standard, any attempt to do so must carefully respect the procedural safe guards afforded defendants through due process. In *R.D.*, the trial court had read the decision on the record and announced that it had made the finding by "clear and convincing evidence." The Title 30 court then estopped the defendant from arguing against the first prong of the termination of parental rights test. *Id*. at 102. After the Appellate Division affirmed under the doctrine of collateral estoppel, the Supreme Court reversed, noting that such application of the doctrine without notice to the defendant violated his due process rights. *Id*. at 122.

The appellate courts have continuously applied *R.D.* dealing with this issue, most recently in *N.J. Div. of Youth and Family Serv's v. T.S.*, 429 N.J.Super. 202 (App. Div. 2013), where the Appellate Division reversed a finding of abuse or neglect because, in addition to insufficient proof of abandonment, the defendant was told in the fact finding hearing that the "preponderance" standard applied and the court nonetheless applied the heightened standard. *Id*. at 216.

In reversing *T.S.*, the Appellate Division also followed the reasoning of *N.J. Div. of Youth and Family Serv's v. H.P.*, 424 N.J. Super. 210 (App.Div. 2011). In *H.P.*, the trial judge had made his finding of abuse or neglect by a clear and convincing standard. The Appellate Division reversed and remanded the case to the trial court to apply the proper standard because "the court gave the defendant no notice of its intention to employ the standard", and the Appellate Division was worried the Division could "lift" the finding and use it as a stipulated finding under Title 30. *Id*. at 223-24.

STIPULATIONS TO FINDINGS OF FACT

Stipulations to fact findings are common in Title 9 and Title 30 Proceedings. In many instances, especially where there is clearly neglect or abuse, a stipulation may speed up the adjudication, and in less serious cases it may ease the process because the parent has shown understanding that there is a problem that needs to be addressed before the family can be reunited. However, stipulations Appellate Division has held that "[a]ny stipulation by a parent must be definite and certain in its terms and the consent of the parties to be bound by it must be clearly established." *N.J. Div. of Youth and Family Serv's v. J.Y.*, 352 N.J. Super. 245, 265-66 (App.Div. 2002). In this scenario, much like in the employment of a heightened evidentiary standard, parties must sufficiently and unequivocally understand the legal effect of a stipulation before the court will allow it.

The holding of *J.Y.* has been affirmed and somewhat expanded in the last two years to ensure not only that both parties understand the fact being stipulated and its binding legal consequences, but also to require:

1. The trial judge to thoroughly apprise the defendant of her right to a fact-finding hearing with the burden of persuasion placed on the Division,
2. The defendant to be apprised of the effect of a finding of abuse or neglect with respect to being placed on the registry, and that she is waiving any right to challenge such placement in the future, and
3. The trial judge to be satisfied that a finding of abuse or neglect could be supported by the factual basis established.

N.J. Div. of Youth and Family Serv's v. M.D., 417 N.J.Super. 583, 618-19 (App.Div. 2011). The M.D. court noted further noted that not only must the judge be satisfied that there is a factual basis from which to conclude that the parent has committed some specific act or acts which constitute abuse or neglect, but also that the parent willingly, knowingly, and voluntarily agrees that she has committed these acts. *Id*.

While this line of cases requires judges to engage in an extensive inquiry with the defendant, the M.D. court noted that "when constitutional rights are at stake, nothing less than procedures that 'scrupulously protect' those rights are required." *Id*. citing *N.J. Div. of Youth and Family Serv's v. N.D.*, 417 N.J.Super. 96, 109 (App. Div. 2010).

EVIDENTIARY BURDEN SHIFTING - Traditional and Conditional Res Ipsa Loquitur

In *N.J. Div. of Youth and Family Serv's v. J.L.*, 400 N.J. Super. 454 (App.Div. 2008), the Appellate Division clarified the confusing standard for burden shifting in DCPP cases that had been set forth in *Matter of D.T.*, 229 N.J. Super. 509 (App.Div. 1988). In a Title 9 proceeding, the burden is obviously on the Division to prove its case; however, the burden of production and the burden of persuasion can be shifted in specific circumstances. If the Division can establish a prima facie case of abuse or neglect under N.J.S.A. 9:6–8.46(a)(2), then there two distinct burden-shifts that may take place: burden of production and burden of persuasion.

Traditional Res Ipsa Loquitur

The **burden of production** will shift where the Division has established a prima facie showing of abuse or neglect and it is thereafter shown that the injured child was "exposed to a number of unidentified individuals over a period of time, and it is unclear as to exactly where and when" the injury took place. *J.L.*, 400 N.J. Super at 470. In this scenario, the burden of production shifts to the parents to "come forward with evidence to rebut the presumption of abuse or neglect." *Id*. It is important to note that, in this scenario, the burden of persuasion never shifts from the Division; there is simply a **presumption of culpability** that can be rebutted upon production of evidence.

Conditional Res Ipsa Loquitur

The **burden of persuasion** will shift, however, where the Division has established a prima facie showing of abuse or neglect and a limited, identifiable number of persons have "had custody of or access to the child during the timeframe when the abuse or neglect definitively occurred, no one else having such contact and the baby being then and now helpless to identify her abuser." *Id*, In such a scenario, the burden of persuasion shifts to the defendants and requires them to present "evidence to establish non-culpability" by a preponderance of the evidence. *Id*. at 468, quoting *D.T.*, 229 N.J. at 517.

Thus, there are subtle differences in the two burden-shifting scenarios. In *J.L.*, the Appellate Division found that the Division had made out a prima facie case of abuse where a mother and father brought their son to the doctor for an unrelated issue and the doctor noticed fractures in the child's growth plates of the lower legs, because this was an unexplainable injury. 400 N.J. Super. at 461. It could not be determined when the injury

took place, and during the time in which the family was at the hospital, the child was handled by a number of people, including technicians, doctors, and nurses. *Id*. The Appellate Division then held that the **mother and father had successfully rebutted the presumption of guilt through an expert witness's showing that the "extremely fragile growth plates … can easily sustain mild fractures with minimal force, and such fractures have been known to occur during medical procedures."** *Id.* at 473. The Appellate Division further noted that the parents could have rebutted the presumption by showing that they were not with the child at the time of the injury or that the injuries could have been reasonably sustained through accident, as the parents did show. *Id.* The parents were not held to the responsibility of showing by a preponderance of the evidence that they did not commit the harm to the child. Rather, they were merely required to produce evidence that rebutted a presumption that they committed the injuries.

In *D.T.*, however, the court applied the conditional res ipsa loquitur analysis. A mother and father had left their child with some eight different family members over the course of a day. The next day, the parents had some reason for concern and took their child to the doctor, where it was discovered that she had suffered sexual abuse and tested positive for chlamydia bacteria in her vagina. 229 N.J. at 512. The trial court definitively ruled out the mother and father as potential abusers. **Because it was definitive as to when the injuries occurred, and the child was with a limited, identifiable number of people during that time, the Appellate Division remanded and required the parents to establish by a preponderance of the evidence that they neither improperly allowed nor committed the apparent abuse.** *Id.* at 518.

N.J.S.A. 9:6-8.46 EVIDENCE

The statutory evidence guidelines for Title 9 proceedings are set out in N.J.S.A. 9:6-8.46 as follows:

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 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.
4) 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

5) 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.

N.J.S.A. 9:6-8.46

IMPORTANT DECISIONS - Evidence

Admissibility

***In re Cope*, 106 N.J. Super. 336 (App. Div. 1969).** The appellate division in Cope held that testimony of Division workers was insufficient evidence where Division workers testified from written reports that were not prepared by the testifying witnesses themselves, but by other Division workers. The court held that reports by "Division staff personnel (or affiliated medical, psychiatric, or psychological consultants), prepared from their own first-hand knowledge of the case, at a time reasonably contemporaneous with the facts they relate, and in the usual course of their duties with the Division," may be admissible as business records because they have a reasonably high degree of reliability. *Id*. at 343-44.

***N.J. Div. of Youth and Family Serv's v. M.C. III*, 201 N.J. 328 (2010)**. In *M.C.*, the Supreme Court reaffirmed the principles of *Cope* in holing that "competent, material, and relevant evidence," as outlined in 9:6-8.46 includes "any writing, record or photograph ... 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." *Id*. at 346-47. The Supreme Court noted that this evidence must still satisfy all of the requirements set forth in the business record exception to hearsay. N.J.R.E. 803(c)(6). Under R. 5:12–4(d), conclusions drawn from these records should be treated as prima facie evidence, subject to rebuttal. *Id*.

***N.J. Div. of Youth and Family Serv's v. B.M. (In re Z.T.T.B.)*, 413 N.J. Super. 118 (App. Div. 2010).** The trial court committed reversible error in admitting a medical report that diagnosed a child with Fetal Alcohol Spectrum Disorder, because the Division failed to establish all the prerequisites of N.J.R.E. 803(c)(6). *Id*. at 131-32. The language of Rule 5:12-4(d) permits admission of reports by staff personnel or professional consultants as business records "pursuant to N.J.R.E. 803(c)(6) and 801(d)." *Id*. This language indicates that there was no intention in adopting Rule 5:12-4(d) to create an exception to the prerequisites for admission of a business record set forth in N.J.R.E. 803(c)(6). *Id*.

***N.J. Div. of Youth and Family Services v. I.Y.A.*, 400 N.J. Super. 77, 91 (App. Div. 2008).** Where DYFS caseworker was allowed to testify regarding medical conclusions attributed to an unidentified psychologist who was not a Division consultant and who did not testify at the fact-finding hearing, the testimony by the caseworker regarding the results of the psychological evaluation were unreliable and inadmissible. Accordingly, any reliance by the court on these statements of the principal, which were not offered for their truth, was improper and, highly prejudicial.

***N.J. Div. of Youth and Family Services v. J.T.*, 354 N.J. Super. 407, 413-14 (App. Div. 2002).** Hawaii DHS records were sufficiently authenticated under N.J.R.E. 901 and were properly considered on the issue of abuse or neglect. The documents included a cover sheet signed by a DHS caseworker; they were made in the ordinary course of business by a child protection agency and were admissible under N.J.R.E. 803(c)(6). They were also admissible by Rule 5:12-4(d) as part of the Division reports.

Children's Hearsay Statements

N.J.S.A. 9:6–8.46a(4) provides that in any hearing under the statute, "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."

***N.J. Div. of Youth and Family Serv's v. P.W.R.*, 205 N.J. 17 (2011).** In *P.W.R.*, the Supreme Court, although overturning a finding of abuse and neglect, highlighted the need for children's hearsay statements to be corroborated in order to be relied upon in making a finding of abuse or neglect: "[t]hus, a child's hearsay statement may be admitted into evidence, but may not be the sole basis for a finding of abuse or neglect." *Id*. at 32.

***N.J. Div. of Youth and Family Serv's v. Z.P.R.*, 351 N.J.Super. 427 (App. Div. 2002).** In *Z.P.R.*, the Appellate Division held that a child's exhibiting precocious sexual knowledge age-inappropriate sexual behavior may be sufficient corroboration of the child's hearsay statements. *Id*. at 436. In *Z.P.R.*, a child had made allegations that his mother had "licked his privates". *Id*. at 430. The child was seen performing fellatio on his sibling while under the care of foster parents and told the foster parents "this is what mommy does." *Id*. The trial court found no corroboration, but the Appellate Division overturned, recognizing that while the best forms or corroboration are eyewitness testimony, a confession or admissions by the accused, and medical or scientific testimony documenting abuse, "that type of corroboration is very rare in child abuse cases, where there typically is no evidence other than the child's statements." *Id*. at 436 (quoting *State v. Swan*, 114 Wash.2d 613, 790 P.2d 610, 615–16 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L. Ed.2d 772 (1991)).

***N.J. Div. of Youth and Family Serv's v. L.A.*, 357 N.J. Super. 155 (App. Div. 2003).** In *L.A.*, the Appellate Division reversed a finding of abuse or neglect where a mother had allegedly allowed her children to be in the presence of their father, who was ordered to have no contact with them after he had sexually assaulted the older of the two children. *Id*. at 157. The elder child had made allegations that the mother told the father to come to the house and invited him over because he had a debt to pay her. *Id*. at 157-62. The trial court found that the father's acknowledgement of a debt corroborated the child's allegations. *Id*. at 167. The Appellate Division held that this admission was far too indirect to satisfy the precondition to the admission of the child's allegations, and thus, they were inadmissible. *Id*.