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

Re: ***Comments to the 2019-2021 Report and Recommendations of the Supreme Court Family Practice Committee***

Dear Judge Grant,

The New Jersey Office of the Public Defender, Office of the Law Guardian (OLG) represents children in litigation brought under Titles Nine and Thirty by the New Jersey Division of Child Protection and Permanency (DCPP). These cases are commonly referred to as the Children-in-Court (CIC) dockets. The OLG appreciates the opportunity to comment on the rule amendments proposed by the Supreme Court Family Practice Committee (Committee) in its Report and Recommendations for the 2019-2021 Reporting Cycle that have the potential to impact our practice and access to the courts for our clients.

1. Name Change Applications for Minors (Related to R. 1:38-3)

The OLG supports the Committee's recommendation to amend Rule 1:38-3 to seal name change court records for minors. In the OLG's experience, there are multiple reasons why a name change may be requested by a minor in DCPP's custody or guardianship. The minor may seek a name change due to identification as a transgender, non-conforming gender identity or non-binary person, a failed adoption, or the trauma attendant to sharing a surname with the child's abuser. As observed by the Committee, the general public has no interest in name change applications for minors in these circumstances. Excluding release of court records related to name changes for minors is consistent with the statutes and court rules that ensure confidentiality in all matters related to DCPP litigation and records.

In addition, the OLG respectfully requests that the Committee expand the amendment to

include Young Adults receiving case management, financial, or other services from DCPP. This population shares the same compelling interests as the minors referenced above, but also may face additional economic concerns. For example, it is well documented that foster children are more often subject to identity theft than children in the general population, and the identity theft is not usually discovered until the children become adults.[1] After resolving issues related to the theft of their identities, young adults aging-out of foster care may seek a name change and a sealing of the record to prevent the continued misappropriation of their new identifying information. Accordingly, the OLG asks this Committee to consider adding "Young Adults receiving case management, financial, or other services from DCPP" to the language for the proposed change to Rule 1:38-3 to protect the interests of this discrete and vulnerable population.

The OLG also urges the Committee to consider an additional rule amendment relative to name change applications for minors in DCPP's custody. Currently, Rule 4:72-1(b) provides that only a parent or guardian may file a name change complaint. The OLG seeks an amendment to the rule to permit the child or the child's counsel to file a name change complaint. This amendment would provide recourse to a foster child whose parent, guardian, or DCPP representative indiscriminately objects to the requested name change.

Presently, in CIC cases, the child may request that the court order DCPP or the parent to file a name change application. A conflict of interest, however, or a lack of DCPP resources may impede follow through and untenably delay the name change process. Name change applications for children are not within the DCPP's standard practice nor within its statutory purpose, which may impact efficient filing of the application for the child. Additionally, DCPP's obligation is to serve all members of the family, which may result in a conflict of interest in consideration of a foster child's request for a name change. In CIC litigation, as the OLG is appointed to represent each child, the child's counsel is uniquely suited to file and argue name change applications as requested by the child. The child's assigned counsel ethically represents only the child's position.

In addition, in the OLG's experience, court practices vary by vicinage with some courts permitting the child's counsel to file the name change application and others requiring DCPP or a parent or guardian to file the application. Modifying the rule to allow the child and/or child's counsel standing to file the application would ensure that all similarly situated litigants, in this instance foster children, are treated the same statewide.

Thus, the OLG proposes that Rule 4:72-1(b) be amended to permit foster children to file a name change application with notice to DCPP and the child's parents or guardians. The proposed change would not be prejudicial to the child's parents, guardians, or to DCPP as all applications would be on notice to them and they would have an opportunity to oppose the application. Ultimately, the court, using the best interest of the child standard, would determine whether a name

[1] "The Fleecing of Foster Children: How We Confiscate Their Assets And Undermine Their Financial Security," Joint Report by The Children's Advocacy Institute and First Star, published March 16, 2011 (*available at* Fleecing_Report_Final_HR.pdf (caichildlaw.org)).

change is warranted.[2]

2. Proposed Amendments to Rules related to Child Support Obligations (R. 5:6-9, R. 5:7-4A, R. 5:7-5) Necessary to Implement N.J.S.A. 2A:17-56.41 & 2A:17-56.67

The OLG supports the Committee's proposed changes to Rule 5:6-9 to the extent those changes modify the rule to be consistent with the recent amendments to the child support termination statute, N.J.S.A. 2A:17-56.67, et seq., effective on January 1, 2021. The proposed changes to Rule 5:6-9 and the amendments to N.J.S.A. 2A:17-56.67, et seq., provide needed support to adults who have a severe mental or physical incapacity that causes them to be financially dependent upon a parent.

The OLG also supports the Committee's proposed changes to Rules 5:7-4A and 5:7-5 to the extent those changes are consistent with N.J.S.A. 2A:17-56.41, effective January 1, 2021. Before N.J.S.A. 2A:17-56.41 was amended by the Legislature, the statute denied notice and due process to defendants before automatic revocation of their driver's license. In application, the statute had a far-reaching impact on parents of children in the custody of DCPP. The county social services agency files child support actions against parents whose children are in state custody, separate from the CIC docket. The timing of the child support actions varies by county. Child support arrears for parents with children in DCPP custody can be the result of this state action. On its face, this practice is inconsistent with the obligation of the State to assist families in remedying barriers so a parent can regain custody of the child. While addressing specific barriers within the CIC case, another barrier is erected outside of the context of the CIC case. This situation can have a significant impact on a parent's ability to reunify and to remain financially stable after reunification.

Even in cases in which DCPP has care and supervision of a child, and not custody, the previous child support statutes had the potential to derail a parent's progress towards extricating the family from court involvement. For example, if a parent is behind on child support payments, automatic revocation of the parent's driver's license, without notice and a hearing, could cause the parent to lose or be denied employment requiring a driver's license. This could then result in an inability of the parent to pay child support arrears and an accumulation of additional arrears. In turn, these circumstances could impact a parent's ability to become financially stable without DCPP's continued assistance.

Finally, reinstating a driver's license requires payment of a $100 fee and may involve numerous hours spent traveling to and waiting at the New Jersey Motor Vehicle Commission. The OLG suggests that the time of a parent with child support arrears could be better spent earning an income and/or parenting. For parents with limited financial resources and/or time, N.J.S.A. 2A:17-56.41 prior to the recent amendments, compounded the difficulties these families already experience.

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[2] See N.J. Div. of Youth & Family Servs. V. J.L, 264 N.J. 304, 309-311 (Ch. Div. 1993) (ordering a name change that the court determined to be in the child's best interests).

In sum, the OLG offers this commentary to highlight the importance of the shift in the statute and the rules to be more equitable to parents and families involved in the CIC dockets. The OLG thanks the Committee for recognizing the need for these changes.

3. Venue (R. 5:10-1)

The proposed amendments to Rule 5:10-1 are specifically aimed "to ensure that the trial court terminating parental rights also conducts the adoption proceeding" of minor children in the guardianship of DCPP.[3] The OLG opposes these amendments as the changes to the rule may delay permanency for our clients. In voicing its opposition, the OLG assumes that each county has access to a statewide judiciary database to confirm that the subject child of the adoption complaint is free for adoption.[4] Presently, the venue rule offers the greatest flexibility to the OLG's clients to achieve their right to live in a stable, nurturing environment as an adoption complaint can be filed in any county in which DCPP has an office.[5]

The recommended changes to Rule 5:10-1 are inconsistent with the best interests of the child standard and may be detrimental to the most vulnerable of New Jersey citizens by further delaying establishment of a stable and permanent home for the child.[6] In applying the best-interests test of N.J.S.A. 30:4C-15.1(a), a court must pay careful attention to a child's need for permanency and stability without undue delay.[7] Many children languish in the custody of DCPP while litigation continues for years. To limit available venues to complete the final step of adoption adds an additional hurdle of possible undue delay for these children to reach stability, safety, and permanency.

The asserted purpose for limiting available venues to DCPP children, to discourage "forum shopping," is inapplicable, as foster children freed for adoption do not seek the most advantageous

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[3] Report at 18. Given the amendment's specific intent, the plain meaning of the proposed wording becomes ambiguous: in DCPP cases, is venue limited to the county in which termination of parental rights occurred, or does venue include all venue options in the proposed rule? Both interpretations may delay the adoption of children in the guardianship of DCPP.

[4] For example, the OLG can envision a situation in which the CIC litigation resolves with a KLG, yet the subject child of the KLG is later adopted through a private adoption agency in another county. The OLG assumes that the judiciary has access to a statewide database, and a consistent practice in each county to check the database before processing an adoption, thereby alleviating the conditions for such a circumstance to occur.

[5] N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 453 (2012).

[6] In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999).

[7] Id. at 385–86; see also In re Guardianship of J.N.H., 172 N.J. 440, 474-75 (2002) ("Where the future of a child is at stake, there is an additional weight in the balance: the notion that stability and permanency for the child are paramount." (citations omitted).

outcome from a court, but rather efficiency.[8] They seek the permanency promised to them, the completion of an adoption expeditiously, which occurs under the same adoption statute no matter the venue. As amended, this constructed impediment of restricting venues may have a disparate impact on children in the child welfare system. Accordingly, the OLG urges the Court not to adopt the proposed amendment as it is inconsistent with the best interests of the child standard.

4. Discovery (R. 5:12-3)

The OLG agrees with the Committee that self-represented parties in DCPP guardianship proceedings must have access to discovery. The OLG also supports the Committee's recommendation that the rule be amended to require that documents be distributed with a protective order prohibiting further distribution. The OLG requests that the Court further amend the rule to include a specific allowance for the court to appoint stand-by counsel and order discovery be provided to stand-by counsel when necessary instead of directly to a self-represented party to protect the privacy of minors involved in the litigation. Such an order would only be warranted upon good cause shown after a hearing and with specific findings by the court. Stand-by counsel would then have an obligation to make the documents available to the self-represented party for inspection and in preparation for trial.

5. Amendment To The Evidence Rules Regarding The Admissibility of a Child's Prior Statement

The OLG respectfully disagrees with the Committee's conclusion that it is unnecessary to amend the Rules of Evidence to address the hearsay exception for admission of child statements provided by N.J.S.A. 9:6-46(a)(4) and 30:4C-15.1a. The OLG issued public comments in response to the Evidence Committee Report and Recommendations related to this issue on March 26, 2021. The OLG refers the Court to those comments for its full commentary.

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

The OLG respectfully requests that the Court amend N.J.R.E. 803(c)(27) to explicitly exclude application of the rule when doing so would conflict with other law. This change would ensure that in situations where application of N.J.S.A. 9:6-46(a)(4) and N.J.S.A. 30:4C-15.1a

[8] Report at 17. Forum shopping is "[t]he practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on a determination of which court is likely to provide the most favorable outcome." https://www.merriam-webster.com/legal/forum%20shopping (Last viewed 3-17-2021).

conflict with the requirements of N.J.R.E. 803(c)(27), the statutes would control. There is support in our caselaw for the principle that the admissibility of extrajudicial statements of children pursuant to N.J.S.A. 9:6-8.46(a)(4) does not depend on admissibility under the evidence rule.[9] Moreover, the admissibility of child statements in CIC cases is inextricably entwined with the public policy considerations underlying Titles Nine and Thirty, placing the issue in the domain of both the Legislature and the Court.

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

Respectfully submitted,

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Assistant Public Defender

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