Here, Say Hearsay!

A Critique of Evidence Issues in Title 9 DYFS Cases

by Allison C. Williams

Trial lawyers have been known to say, "Once you know how to try a case, you can try any case." While this saying may be accurate in most instances, it unfortunately does not hold true for cases initiated by the Division of Youth and Family Services (DYFS). DYFS cases are unique in that they are circumscribed by their own set of procedural requirements and evidence rules, many of which are antithetical to the very training lawyers undertake. Lawyers are taught that valid judgments must be based upon competent evidence that hearsay—except in a limited number of circumstances—is unreliable, and that only evidence (both testimonial and documentary) that is reliable and trustworthy should be considered in a court of law.

Trying a DYFS case can make the most skilled lawyer feel as if he or she is operating in a parallel universe. Reliability, trustworthiness and competency give way to reticence, truncation and convenience, almost all of which inures to the benefit of DYFS. However, this need not be the case. The effective advocate must not only be knowledgeable and adept at navigating the New Jersey Rules of Evidence, but also must be able to differentiate those rules from the DYFS evidence rules codified by statute. This article is designed to further that knowledge and assist with that navigation.

An understanding of the applicability of the evidence rules to DYFS proceedings starts with a thorough understanding of the rules of evidence. Specifically, one must become intimately familiar with the evidence rule that is included in Title 9, which can be found at N.J.S.A. 9:6-8.46.

There are three key components of this statute. Part one contains what this author refers to as the nuts and bolts—the who, what, when, where and how of the evidence rule.[1] Part two contains what this author refers to the essentials (*i.e.*, the state's burden of proof and the quality of evidence required).[2] Part three contains what this author refers to as the gotcha provision—the overarching premise in DYFS matters, which confuses even the most skilled lawyers.[3] This article begins the discussion here, as understanding this provision of the Title 9 statute will assist counsel in analyzing evidence issues throughout all phases of a DYFS case.

THE GOTCHA

The New Jersey Rules of Evidence were enacted to ensure the trustworthiness and reliability of evidence before the court. In general, the rules of evidence apply to all court proceedings or proceedings conducted under the supervision of the court.[4] If the rules are applicable to a proceeding, they are not ordinarily relaxed in the absence of specific authority, either within the rules themselves or in statutes.[5]

In child abuse and neglect cases, the rules of evidence are *supplemented*—not supplanted—by statute and by court rule.[6] While some limited hearsay is permissible in DYFS matters, the threshold requirement of reliability remains:

> Judicial findings based on unspecified allegations, hearsay statements, unidentified documents and unsworn colloquy from attorneys and other participants erodes the foundation of the twin pillars upon which the statute rests: (1) that no child should be exposed to the dangers of abuse or neglect at the hands of their parent or guardian; and, commensurately, (2) that no parent should lose custody of his/her child without just cause.[7]

It is the job of defense counsel to ensure that these principles guide the court's analysis when ruling on evidentiary issues in DYFS matters and what the rule says and what it means. Specifically:

> In a dispositional hearing and during all other stages of a proceeding under this act, only material and relevant evidence may be admitted.[8]

Only material and relevant evidence may be admitted. Makes sense, correct? After all, what judge would even want to consider irrelevant evidence? And if not material, the evidence, by definition, would not impact the outcome of the issue under consideration one way or another.

This statutory provision cannot be read in a vacuum. One must consider the preceding provision:

> Evidence offered at fact-finding hearings must be material, relevant *and* competent.[9]

Consider this provision when

read with the proviso that "during all other stages of a [Title 9] proceeding," only material and relevant evidence may be admitted, and you have your gotcha!

Competency, the cornerstone of our judicial system and the core of the New Jersey Rules of Evidence, is only required to determine whether the abuse or neglect alleged actually occurred. Practically speaking, this means that when DYFS files its order to show cause to remove a child, incompetent evidence is allowed at the initial hearing. For example, a caseworker's discussion with the police officer who recounted discussions with a teacher who read from a child's notebook entry that "Daddy burned me" clearly contains multiple layers of hearsay, which would be inadmissible under N.J.R.E. 805 unless a specific exception to each layer of hearsay exists. Notwithstanding all those layers of hearsay, if a judge finds the notebook entry to be *material* and *relevant* to the standard at removal hearings (*i.e.*, imminent danger to a child's life, safety or health[10]) then all of that testimony comes in.

Shocking? To any self-respecting trial lawyer, absolutely. Hence, DYFS can scream "Gotcha" when defense counsel objects, and without defense counsel having a true understanding of how the pieces fit together, DYFS would be correct to do so.

THE ESSENTIALS

As noted above, the DYFS evidence rule delineates the burden of proof in fact-finding hearings. Any determination that the child is an abused or neglected child must be based on a preponderance of the evidence.[11] Is it more likely than not that the child fits any or all of the criteria established by statute to declare a child an abused or neglected child?

While it certainly may be disheartening that the lowest quantum of proof is required for the state to prove a child is "abused or neglected" and then continue its intrusion into the lives of a family, the reality is that tackling this low burden of proof is not an insurmountable obstacle. It means that when the proofs are in equipoise, the defense wins. Thus, every argument made, every objection advanced, every question asked should be designed to attack the division's proofs.

THE NUTS AND BOLTS

The various rules in statutory provision N.J.S.A. 9:6-8.46 (the DYFS evidence rule) that apply to all Title 9 hearings are discussed in summary fashion below.

1. Proof of the abuse or neglect of one child shall be admissible evidence on the issue of abuse or neglect of any other child of the parent.

This rule appears to be an end-run around the general bar to "prior bad act" testimony codified in N.J.R.E. 405(a), which provides: "Specific instances of conduct not the subject of a conviction of crime shall be inadmissible." However, this rule is really nothing more than an explication of the principles of N.J.R.E. 405(b).[12] Also, commentary 1 to N.J.R.E. 405 holds: "The Rule makes it clear that specific instances of conduct not the subject of a criminal conviction are not admissible for proving character except when character is actually in issue."[13] "When a person's character is at issue substantively, evidence of specific acts of the person's character may be used to prove that person's character trait....[The rule] should not be read as intending to limit the introduction of evidence when character is actually at issue [.]"[14]

Thus, by virtue of offering evidence of a parent's prior act of child abuse or neglect, the division is essentially offering "specific instances of conduct" in accordance with N.J.R.E. 405. While it may seem that this rule can only benefit the division, defense counsel may make use of it as well. Defense counsel should posit that the defense to the division's allegation of child abuse/neglect in this instance is, in part, that the parent does not have the character of a perpetrator of abuse/neglect. By framing the defense's position as one of character, counsel opens the door to introduce evidence of specific instances of conduct, which are inconsistent with the division's theory of the case.

It is important that defense counsel carefully deconstruct this rule. Proof of abuse of one child is admissible on the issue of abuse of another child. It is not sufficient for the division to offer allegations of abuse of one child to prove abuse of another child—the statute requires proof. Before the fact-finding hearing commences, defense counsel should file an *in limine* motion to limit the division's case to omit reference to previous allegations of abuse. It is not uncommon for the division's complaint to plead numerous referrals, which were unsubstantiated or unfounded, or if administratively substantiated, were never the subject of a hearing on the issue. An administrative finding by DYFS is not proof of abuse. After all, if the parent is currently being subjected to a fact-finding hearing at present, obviously DYFS has already made an administrative finding of abuse. Administrative findings in previous matters should be treated as are the current administrative findings (*i.e.*, as allegations by the division, which should be subjected to a hearing on the merits). The fact that the parent did not pursue an administrative appeal of the previous substantiated claims, for whatever reason, should not authorize the division to assert that its previous allegation has been 'proven' any more than has the current allegation.

In cases where the division is making allegations of abuse/neglect regarding more than one child (*e.g.*, mom used excessive corporal punishment on one child on March 1 and on a second child on May 1)

defense counsel should oppose the introduction of the March 1 claim as 'proof' of the May 1 claim. Each allegation may be the subject of the current fact-finding hearing; however, each must be proven independently. The division's efforts to argue "proof by assertion" (*i.e.,* if the division makes multiple allegations against a parent, that must mean that at least one of them happens to be true) often arise in the context of this rule.

If the court does allow a previous superior court finding or stipulation of abuse/neglect to be admitted against a parent, defense counsel must still argue the probative value (or lack thereof) of the previous finding. Any evidence, even that which is admissible pursuant to this statute, remains subject to objections based upon N.J.R.E. 401 (relevancy); N.J.R.E. 403 (probative value) is outweighed by prejudicial effect, and any other appropriate basis under the rules of evidence. Though 403 objections are much less likely to prevail in bench trials verses jury trials, defense counsel should still preserve the record by making the objection. For instance, if an incident occurred in 1993, which resulted in a stipulation of neglect, the division's abuse allegations in 2010 are arguably: a) too remote to be of probative value, and/or b) so unrelated to the current allegation as to render them irrelevant. Thus, while it may come into evidence, it adds little to the discussion.

2. Proof of a child's injuries or of a child's condition that would ordinarily not exist except by the acts of omissions of a parent shall be prima facie evidence that a child is abused and/or neglected child.[15]

This rule is often referred to as the burden-shifting provision of the Title 9 evidence statute. If the division can prove that a child's condition would not be present but for the acts/omissions of the parent, the burden of coming forward with an explanation shifts to the parent to prove his or her non-culpability.[16] The *D.T.* court held that "[Where] a *limited number* of persons, each having access or custody of a baby during the time frame when a sexual abuse *concededly occurred, (no one else having such contact)* and the baby being then and now helpless to identify her abuser, ... [t]he burden would then be shifted, and such defendants would be required to come forward and give their evidence to establish non-culpability."[17]

However, *D.T.* should not be read to foist a universal burden-shifting requirement upon parents to prove themselves innocent every time DYFS makes a *prima facie* case of abuse. "[T]he burden-shifting rule prescribed in *D.T.* is not universally applicable in child abuse and neglect cases."[18] In cases where abuse is confirmed and the question before the court, *solely*, is who committed the admitted abuse, the *D.T.* burden-shifting analysis applies, and the parents must come forward to rebut the division's case and the burden of persuasion shifts to the parents.

Conversely, where a number of persons, including the parents, had access to a child who *could have been* abused, once the division makes a *prime facie* case of abuse, "the burden of going forward shifts to respondents to rebut the evidence of parental culpability. But ... the burden of proving child abuse always rests with [DYFS]; [s]hifting the burden of explanation or going forward with the case does not shift the burden of proof."[19]

Following are a few practice tips on burden-shifting cases. First, defense counsel should ask the court for a conference to address the applicable burden-shifting analysis to be applied in the case. If the child is *not concededly abused*, as in *D.T.,* and the question to be answered is whether or not abuse occurred, traditional *res ipsa loquitor* principles apply, and the burden of persuasion remains with the division. No matter which burden-shifting paradigm is applied, defense counsel should use every opportunity to remind the court that the burden of proof *always* remains on DYFS.

Second, defense counsel should consider whether to file a motion to have the court determine if this statutory provision is applicable in the present case. Keep in mind that the child's condition must be one that would not ordinarily exist *but for the acts or omissions of a parent.* It is conceivable to have a case in which the child's condition is such that *would* ordinarily exist, exclusive of the parents' acts or omissions. For instance, if a child accidentally ingested a foreign agent, left on the floor in the home, the division's position that the child was inadequately supervised, and therefore neglected, should not shift the burden of coming forward to the parent. Arguable statistics can demonstrate that children's accidental ingestion of foreign agents is not uncommon and does not require parental 'omission' to occur.

3. The business record exception to the hearsay rule (i.e., N.J.R.E. 803(c)(6)) applies and statements contained in DYFS records serve as proof of the child's condition presented herein. However, documents submitted must:

a. Be made in the regular course of the business;
b. Be from a business in which it is the pattern or practice of the business to make such documents; and
c. Be prepared reasonably contemporaneously with the events set forth therein.
d. Be accompanied by a certification from the head of the agency, or if not by the head of the agency, it must be filed with a copy of a delegation. All other circumstances of the making of the record, including lack of personal knowledge of its contents, go to weight, not admissibility.

Because it is standard practice for the division to offer its contact

sheets as proof of abuse or neglect allegations in the fact-finding hearing, it is important that defense counsel be intimately familiar with this provision of the statute, as well as with N.J.R.E. 803(c)(6), as both will be implicated in every fact-finding hearing.

Detailed inquiry should be made in every case as to the requirements of N.J.R.E. 803(c)(6). Defense counsel should never simply accept a caseworker's testimony that the DYFS records being offered are kept in the ordinary course of business of the division. Far too often, this is the colloquy at the beginning of a fact-finding hearing:

DAG: Caseworker, you are employed by the Division of Youth and Family Services?
CW: Yes.
DAG: In what capacity?
CW: As a Child Protective Services case worker. I investigate child abuse and neglect.
DAG: And while working in that capacity, did you investigate Mr. and Mrs. Doe for alleged acts of child abuse that are reflected in the complaint filed on March 1, 2010?
CW: Yes.
DAG: In conducting your investigation, did you document your actions?
CW: Yes.
DAG: Those actions are contained within the division contact sheets you have there in front of you?
CW: Yes.
DAG: Were those records kept in the ordinary course of business of the Division of Youth and Family Services?
CW: Yes.
DAG: Thank you. Judge, I'd like to offer P-1 through P-257 into evidence.
JUDGE: Defense, any objection?
DEFENSE: No objection.

Defense counsel must preserve the record by questioning the division's witnesses prior to the documents being admitted into evidence. A few areas to probe include the following:

a. Ask the caseworker about the functions of DYFS. What is done in the 'ordinary course of business' of DYFS? Extract the details of a Child Protective Services investigations, the process of note-taking and entry of those notes into the computer system. Not every caseworker will know these steps; thus, not every caseworker can lay a foundation for what is done in the ordinary course of business of the division.
b. Turn to the division field operations manual.[20] Cross examine the caseworker on the steps outlined in the manual for documenting an investigation. Often, the caseworker did not comply with the manual. Lock the caseworker in to confirming that the manual represents the steps taken in the ordinary course of business of DYFS. Then get the caseworker to acknowledge his or her non-compliance with the division's requirements.
c. Go through each contact sheet, investigation summary, report, etc. being offered by DYFS. The testimony must show that it is the "pattern or practice" of DYFS to make "such documents." The fact that the caseworker testifies that DYFS is in the habit of making certain contact sheets does not mean that it is in the habit of including certain extraneous information. When there is a pending criminal matter, there are often times when the police document information in lieu of DYFS. Upon cross-examining DYFS employees regarding the division's pattern or practice of documenting information, one quickly discovers that no such pattern exists with any uniformity.

The statute further requires that the document being offered was made "reasonably contemporaneous" with the events documented. It is not uncommon that contact sheets be prepared several days or even weeks after the events described in them. When questioned about the time lag, the caseworker often attempts to minimize the time lag by alleging that handwritten notes were taken simultaneously with the investigation, though not entered into the computer system until days later.

Defense counsel should aggressively pursue this allegation:

a. Ask for a copy of the alleged handwritten notes. If such notes exist, any inconsistency between the short handwritten notes and the thorough typed record undermine the assertion that the typed record truly was made contemporaneously.
b. More likely than not, such notes will not exist; thus, defense counsel can then focus on the time delay between the trial date and the time period when the caseworker made such notes. Obvious attention should be given to memory attrition, which occurs between the investigation (usually months sooner) and the trial, with particular attention being paid to the number of investigations undertaken by the caseworker between the time of the investigation in this case and the time of trial.
c. Turn to the division's field operations manual. Requirements for data entry should be explored with the caseworker in depth. If the delay in typing the handwritten notes is not consistent with DYFS protocol, such inconsistency further erodes the claim that note-taking was 'reasonable' under the circumstances.

This provision requires a certification from the head of the agency or, if by someone other than the head, the certification must be accompanied by a delegation. Do not overlook this requirement. Often, the division will obtain medical records with a certification from the custodian of records of

the hospital. This, alone, is not sufficient. If defense counsel notes such a deficiency when reviewing discovery, a useful strategy may be to ask that evidence issues be handled at the close of the division's case. Once the division closes its case and offers the medical records, defense counsel should object based upon this non-compliance with the statute.

Defense counsel should be mindful that Rule 5:12-4(d) does not 'trump' N.J.R.E. 803(c)(6), but should be read in tandem with it.[21]

Specifically, N.J.R.E. 803(c)(6) lays out the prerequisites to admissibility under the rule, but concludes with the most important *caveat*: "[the documents are admissible]...unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy."

Trustworthiness is required—even with DYFS records. Thus, defense counsel should explore:

a. The source of the information
b. The method of preparing the information
c. The purpose for preparing the information
d. The circumstances of preparing the information

Each area is ripe for productive cross examination. This is where defense counsel should, in essence, put DYFS on trial.

First, consider the source of the information. Information obtained from hostile neighbors, former spouses, disgruntled teachers, overzealous social workers with bias against the economically disadvantaged, appears inherently suspect. Information from doctors appears more trustworthy; however, do not concede this at any stage of litigation. Investigate the referring doctor. Perhaps he or she fears a malpractice claim, and therefore has a vested interest in DYFS or a court finding that the child was abused. Or perhaps the doctor is affiliated with any number of child protection centers throughout New Jersey, and therefore would arguably be more inclined to find child abuse than other medical professionals whose income is not tied to finding child abuse.

And, of course, be critical of information obtained from the caseworker. After all, the division is the plaintiff in this case. As with all parties to litigation, the party has a desire to prove his or her position. Lock the caseworker into a position on the merits—he or she believes this is child abuse/neglect; he or she believed this was child abuse/neglect every time he or she wrote horrible things about the parent; he or she believed this was child abuse/neglect every time he or she spoke to people about the investigation; and most importantly, he or she believed this was child abuse/neglect when preparing to give testimony about what transpired.

Second, explore with the caseworker the method of preparing the information. This really takes place when addressing the business practices of the division, as well as the timing of note-taking in the investigation.

Third, and this cannot be stated emphatically enough, defense counsel must explore the purpose for preparing the information. Documents prepared for litigation purposes are inherently suspect and are treated as such by the rules of evidence. For this reason, before a record is to be admitted in a DYFS proceeding, the trial court must conduct a 104(a) evidentiary hearing to determine whether all criteria for admission, including trustworthiness, are met.[22] Though the caseworker may posit that the division's records were not prepared for the purpose of litigation, but rather to investigate child abuse/neglect, the likelihood is that at least some records were prepared after the division developed its plan to remove the child or to validate a removal that previously occurred.

Finally, defense counsel should explore the circumstances in which the information was prepared. Did the division receive a referral at 2 a.m., necessitating immediate action? If so, notes taken at that hour may be less reliable. Did the investigation involve a parallel criminal investigation? If so, the caseworker may have missed key pieces of information as the matter unfolded, particularly where law enforcement directs the division to discontinue questioning witnesses for fear of tainting its investigation. How many caseworkers, supervisors and investigators were involved in the matter? The more second- and third-hand information received, processed and acted upon, the greater likelihood for errors to have occurred or data to have been lost in translation.

4. Previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, provided uncorroborated statements are insufficient to make a fact finding of abuse or neglect.

This provision of the statute requires corroboration in order for the court to rely upon a child's hearsay statements to make a finding of abuse or neglect. This section does not obligate DYFS to produce every child alleged to be abused or neglected to testify. However, where the division seeks to rely upon the child's statements, corroboration is a condition precedent to a finding of abuse being made.

Defense counsel should be able to tell from the face of the division's complaint whether or not a child's statements may be introduced by the division. If such statements are pled in the complaint, defense counsel should press the division to specify—before the start of trial—whether or not it intends to rely upon the child's statements at trial. If so, demand a proffer regarding the corroboration. Failing a proffer, a motion to dismiss the complaint should be made. Whatever the alleged corroboration, defense counsel should request an

evidentiary hearing at the outset of the case before any such statements are introduced by DYFS. This decreases the impact of such statements, which, if heard by the trial judge before any corroboration is introduced, may lead the less prudent jurist to find corroboration after the fact where none exists.

The division can introduce a broad array of statements, conduct or collateral information to constitute corroboration. Corroborative evidence need not relate directly to the accused.[23] The evidence need only provide support for the out-of-court statements.[24] For instance, in *New Jersey Div. of Youth & Family Servs. v. Z.P.R.*,[25] the trial court admitted evidence of a child's age-inappropriate, sexually precocious knowledge as corroborative of his statements alleging sexual abuse. Though *Z.P.R.* is still good law, defense counsel should question whether sexually precocious knowledge continues to be a viable form of corroboration, as society continues its descent into the realm of 'reality television.' Such sexual knowledge is certainly more rampant for children of all ages now than in past generations.

Whatever the corroboration is alleged by the division, defense counsel must question these proofs and insist that they be proven before the court hears any statements attributed to the child. In the event the court finds the child's statements may be admitted, defense counsel should strongly consider asking the trial judge to conduct an *in camera* interview of the child. If the child is of an age whereby he or she is mature enough to recall his or her alleged abuse or neglect, the trial court may be said to have abused its discretion by refusing to conduct such an interview.[26] This is particularly so where the crux of the division's case is the hearsay account of a child witness who is not produced at trial to testify.[27]

In short, "[a]lthough trial judges have broad discretion in the way they conduct abuse and neglect cases, a judge's factual findings must be based on competent reliable evidence. Thus, when resolution of a material factual dispute depends upon a child witness's testimony, the *in camera* interview affords the trier of fact the opportunity to assess the credibility of the child, his powers of communication and observation, and his demeanor."[28]

A WORD ABOUT POLYGRAPH TESTS

As noted above, competency of evidence is only required at the fact-finding stage of DYFS litigation. Practically speaking, this means that hearsay is generally admissible, except at fact-finding hearings. This rule is not limited to DYFS's presentation of proofs, and the evidence rule does not limit its applicability to the evidence offered by DYFS. Thus, defense counsel may make use of incompetent evidence throughout the case as well.

One device this author has employed with success is the use of polygraph tests in hearings throughout DYFS matters. For many allegations made by the division, the parent will be required to defend multiple claims. The allegation may be a pattern of gross neglect or inadequate supervision. The allegation may be physical abuse in circumstances wherein the parent did have some contact with the child, though not in the manner alleged by DYFS. These cases clearly would not warrant the use of a polygraph test.

However, in cases where the allegation is a single act of abuse and/or neglect, or where the parent clearly could not have committed the act alleged due to timing, location or other circumstances, defense counsel should strongly consider having the parent submit to a polygraph test. For instance, if the allegation is that the parent used physical force on a child, causing a fracture, the parent can be asked whether or not he or she used any force on the child whatsoever. If the allegation is that the parent induced shaken baby syndrome in an infant, the parent can be asked whether he or she ever shook his or her child.

If a parent 'passes' the polygraph test, the evidence should be submitted to the court with an application for return of the child, increased parenting time, unsupervised or less restrictive supervised access to the child, or any number of requests. Unfortunately, polygraph test results are not yet admissible as competent evidence, so they cannot be introduced at the fact-finding hearing.[29] However, a parent's passing a polygraph test certainly is relevant to the issue of whether or not he or she abused his or her child, and few pieces of evidence could arguably be more material. Thus, the test results can be considered for purposes other than fact-finding.

A limited exception to the rule barring introduction of polygraph test results exists where the court conducts an evidentiary hearing pursuant to N.J.R.E. 104(a). In such hearings, the Rules of Evidence do not apply, except for claims of privilege and N.J.R.E. 403 (probative value outweighed by prejudicial effect). Thus, if a 104(a) hearing is conducted in a fact-finding hearing, the test results may be used. For instance, in qualifying an expert to testify, the information upon which he or she relied in making conclusions is relevant to the issue of whether or not the professional has the expertise to be an expert in the case. Many in the mental health community have testified that they rely upon hearsay in making determinations. A polygraph test is no less hearsay than is a statement directly from the parent that he or she did not commit the act alleged. Thus, qualifying an expert may provide an opportunity to introduce polygraph test results.

There are other instances wherein polygraph test results may be admissible pursuant to the rules of evidence. Mental health experts may rely upon such evidence in

evaluating parents, in which case otherwise inadmissible evidence may be admissible.[30] By way of example, if the defense obtained a risk assessment early on in the case in support of the parent's request for a return of the child, the evaluator's report—or some portion of it—may be used at fact-finding on the issue of the parent's mental health. If the evaluator relied upon the polygraph test results in determining that the parent does not pose a risk to the child to warrant further supervision, he or she may testify about the polygraph test results if he or she posits that such test results are of a type "reasonably relied upon by experts."

It is important that defense counsel use every opportunity of persuasion available. The longer the case drags on, the longer the parent will be without his or her child, unless defense counsel is zealous in pursuing the parent's right to parenting time with the child. Every motion should provide a background of the matter, including a background of the removal and its impact on the parent and child. To every application, attach the polygraph test results. Just as DYFS can rely upon incompetent evidence at all stages of the case, except fact-finding, so, too, can and should defense counsel. Polygraph test results offer an ongoing opportunity for the parent to corroborate his or her innocence even before the state's case is presented through testimony, as well as during the case. Defense counsel should be creative in utilizing opportunities to advocate by use of polygraph tests.

CONCLUSION

The rules of evidence are the cornerstone of litigation, but particularly so in DYFS matters. As Judge Geoffrey Gaulkin so eloquently stated some four decades ago, "evidence upon which judgment is based [must] be as reliable as the circumstances permit and the answering parent [must] be given the fullest possible opportunity to test the reliability of the [state's] essential evidence by cross-examination".[31] Just as defense counsel must be adept at challenging the state's evidence through cross examination, so must defense counsel be intimately familiar with the rules of evidence, as well as the Title 9 evidence rules in order to accomplish justice for parents in these most trying matters. ■

ENDNOTES

1. N.J.S.A. 9:6-8.46(a).
2. N.J.S.A. 9:6-8.46(b).
3. N.J.S.A. 9:6-8.46(c).
4. *See,* Biunno Commentary to NJ.R.E. 102(a)(2).
5. *See,* Biunno Comment 1 to NJ.R.E. 102.
6. *See, New Jersey Div. of Youth v. L.A.,* 357 N.J. Super. 155, 166 (App. Div. 2003).
7. *New Jersey Div. of Youth & Fam. Services v. J.Y.,* 352 N.J. Super. 245, 264-265 (App. Div. 2002).
8. N.J.S.A. 9:6-8.46(c).
9. N.J.S.A. 9:6-8.46(b)(2) (In a fact-finding hearing, only competent, material and relevant evidence may be admitted).
10. N.J.S.A. 9:6-8.29.
11. N.J.S.A. 9:6-8.46(b)(1).
12. N.J.R.E. 405(b) provides, "Specific Instances of Conduct. When character or a trait of character of a person is an essential element of a charge, claim, or defense, evidence of specific instances of conduct may also be admitted."
13. Biunno, New Jersey Court Rules, Comment 405[5] (2010 GANN).
14. Id.
15. N.J.S.A. 9:6-8.46(a).
16. *In re D.T.,* 229 N.J. Super. 509 (App. Div. 1988).
17. *Id.* at 517.
18. *Division of Youth and Family Services v. J.L.,* 400 N.J. Super. 454, 457 (App. Div. 2008).
19. *Id.* at 471.
20. A copy can be obtained by subpoenaing the division. This is appropriate in any case in which a DYFS case worker will testify. The manual will provide relevant areas to probe as to policy, which is an appropriate inquiry as a condition precedent to admissible per N.J.R.E. 803(c)(6).
21. *Division of Youth and Family Services v. B.M.,* 413 N.J. Super. 118 (App. Div. 2010)
22. *Division of Youth and Family Services v. E.D.,* 233 N.J. Super. 401, 413 (App. Div. 2008).
23. *New Jersey Div. of Youth & Family Servs. v. Z.P.R.,* 351 N.J. Super. 427, 436 (App. Div. 2002).
24. *Id.*
25. *Id.*
26. *New Jersey Division of Youth and Family Services v. L.A.,* 357 N.J. Super. 155 (App. Div. 2003).
27. *New Jersey Division of Youth and Family Services v. H.B.,* 375 N.J. Super. 148 (App. Div. 2003).
28. Id. at 183-184.
29. *State v. A.O.,* 198 N.J. 69, 83, (2009), citing, *State v. Domicz,* 188 N.J. 285, 312-13 (2006).
30. *See, generally,* N.J.R.E. 703 (Bases of Opinion Testimony by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
31. *In re Guardianship of Cope,* 106 N.J. Super. 336 (App. Div. 1969).

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