

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

EDWIN H. STERN
PRESIDING JUDGE FOR ADMINISTRATION



FOUR HEADQUARTERS PLAZA
SUITE 1101, NORTH TOWER
158 HEADQUARTERS PLAZA
MORRISTOWN, N.J. 07960-3965
973-631-6381

April 18, 2007

MEMORANDUM TO: Honorable Philip S. Carchman

FROM: Honorable Edwin H. Stern
Chair, Criminal Practice Committee

**RE: Criminal Practice Committee – Supplemental Report
Rule Recommendation - R. 3:26-1**

The Criminal Practice Committee is submitting the attached proposed amendment to Rule 3:26-1, to be considered by the Court this cycle. This rule proposal is designed to create a procedure to avoid the issuance of conflicting orders for visitation by the Family Part and no-contact bail by the Criminal Division in child abuse and neglect cases. Conflicting orders are sometimes entered when the alleged perpetrator is the parent or guardian of the child victim.

Attached is a discussion of this issue and the reasons why the Committee is proposing this rule amendment. Appendix A includes the proposed rule amendment, along with the rule proposal (R. 5:12-6) submitted by the Family Practice Division to address sharing of pre-indictment discovery. Appendix B contains the Report of the Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases.

Thank you for your courtesies and consideration in this matter.

/mp

Attachment

cc: Hon. Lawrence Lawson, Vice-Chair, Criminal Practice Committee
John J. McCarthy, Jr., Esq.
Joseph J. Barraco, Esq.
Harry Cassidy, Assistant Director, Family Practice Division
Steven D. Bonville, Special Assistant
David Tang, Esq.
Melaney Payne, Esq.
Lauren Carlton, Esq. (Office of the Attorney General)
Criminal Practice Committee

A. Proposed Rule Amendment Recommended for Adoption.

1. Rule 3:26-1 – Report of the Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases

The Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases was created by the Chairs of the Criminal Practice and Family Practice Committees in an effort to resolve two issues that arise when the Division of Youth and Family Services (DYFS) brings an action against a parent or guardian in the Family Part based upon allegations of child abuse, and the parent or guardian is also the subject of a concurrent criminal prosecution in the Law Division based upon the same incidents of child abuse. The first issue concerns the nature and extent of parental contact with the child, pending disposition of the criminal case. Given the need to protect the child from further abuse and neglect, and the possibility that the parent or guardian may attempt to pressure the child to recant, one of the typical conditions of bail in the criminal case is that the defendant have no contact with the child. DYFS, however, is statutorily required, under N.J.S.A. 30:4C-11.1, to exercise reasonable efforts to reunify the family. Consequently, issues concerning the nature and extent of parental or guardian contact with the child are simultaneously before the Law Division and the Family Part, different parts of the Superior Court that have different, and sometimes conflicting, objectives.

The second issue that often arises in concurrent civil and criminal child abuse cases concerns the sharing of information between DYFS and the county prosecutor during the pre-indictment stage of the criminal investigation. Both Federal and State statutes require that the child abuse fact-finding hearing, in which it is determined whether the child is an abused

or neglected child, be scheduled expeditiously and without undue delay. Consequently, the fact-finding hearing is typically held before the parent or guardian is indicted in the criminal matter, and often while the criminal investigation is still underway. While DYFS must release its confidential records and reports to law enforcement agencies investigating child abuse, the county prosecutor is under no obligation to provide DYFS with any information regarding an ongoing criminal investigation. Prosecutors are understandably reluctant to part with that information, as any information given to DYFS would also have to be provided to the attorney representing the parent or guardian in the Family Part case, and could be used to compromise the ongoing criminal investigation.

That reluctance to turn over information, however, could result in the situation that occurred in DYFS v. Robert M., 347 N.J. Super. 44 (App. Div.), certif. denied, 174 N.J. 39 (2002). In that case, the county prosecutor's refusal to turn over the pre-indictment discovery, including statements of the victim's siblings and autopsy-related materials, to the Deputy Attorney General representing DYFS in the Family Court fact-finding hearing led the Family Part judge to find that DYFS had failed to prove its case regarding the victim and the three surviving children.

The Ad Hoc Committee proposed the following to address these two issues:

1. Where a civil child abuse complaint initiated by DYFS against the parents or guardians is pending in the Family Part, and there is a no-contact bail condition as the result of a criminal complaint filed against parents or guardians, arising out of the same incident(s), a hearing shall be held in the Family Part to determine the nature and scope of parental or guardian contact, if any, with the child. The hearing shall be on notice to the County Prosecutor, the Public Defender(s) or other counsel representing the parents or guardians in the criminal prosecution, the Deputy Attorney General representing DYFS in the civil Family Part matter, the attorney from the Public Defender's Office, designated counsel, or other counsel

representing the parents or guardians in the civil Family Part matter, and the designated Law Guardian for the child in the Family Part matter. Prior to commencement of such a hearing, an appropriate protective order should issue governing disclosure of confidential DYFS records. See N.J.S.A. 9:6-8.10a. No bail condition except contact will be entertained in the Family Part. Upon considering the evidence and proofs and weighing the competing considerations, the Family Part shall determine the nature and scope of parental or guardian contact with the child, and an order memorializing that decision shall be issued. A copy of the resulting order shall be transmitted to the Law Division (Criminal Part) and shall constitute a condition of the bail ordered in the Law Division. Any applications for modification of that order shall be made to the Family Part, upon notice to the same parties and counsel as required in the first instance.

2. Where there are concurrent civil and criminal prosecutions arising from investigations being conducted by DYFS and the county prosecutor concerning an alleged incident of child abuse or neglect, and there is no consensus concerning the sharing of pre-indictment information, a conference should be conducted on an informal application to the Assignment Judge, who shall either hear the matter or assign it to an appropriate judge in the Family Part or Law Division, Criminal Part. The purpose of the conference is to determine what information, if any, contained in the investigation conducted by the county prosecutor shall be released to DYFS. In making this determination, the presiding court may wish to view the records in camera. This conference should take place expeditiously, bearing in mind that for cases of children in DYFS placement, fact-finding hearings must occur within four (4) months of out-of-home placement. Notice of the conference shall be given to the county prosecutor and all counsel in the Family Part case. Any agreements reached shall be placed on the record and memorialized by an order issued by the Family Part.

Some members of the Committee wondered if it might be better to let one judge handle the entire case, noting that under the procedures proposed by the Ad Hoc Committee, there could be three judges involved in the two cases. The Ad Hoc Committee felt that the Family Part judge was best equipped to handle contact issues, but that it was better for the Criminal Division judge to handle discovery issues. It is fairly common for the two cases to “bump up against each other,” although not to the degree that occurred in Robert M, and that when there was disagreement, it was best for the Assignment Judge to decide the matter.

The Committee also discussed whether it might set a bad precedent to allow one judge to dismiss the order of another judge of equal stature. The intent of the Ad Hoc Committee was to encourage communication between the two courts, and to avoid conflict by having them work together. It was also noted that the proposed procedures were an improvement over the current practice, in which it was fairly common to have competing orders, with the Criminal Division judge ordering “no contact,” but the Family Part judge allowing visitation. It was suggested that an alternative would be to give the Family Part more jurisdiction over the criminal matter until the jury trial began, but the Committee did not agree with that suggestion.

The Committee agreed with the proposed procedures contained in the Ad Hoc Committee’s report, but felt that the report might be better received if it were accompanied by draft rules. The Ad Hoc Committee was reconvened and drafted rules to implement the proposed procedures. By request of the Ad Hoc Committee, the Criminal Practice Committee considered proposed amendments to Rule 3:26-1 to address conflicting court orders in civil and criminal child abuse cases. In addition, the Committee considered a new rule, Rule 5:12-6, to address the release of pre-indictment discovery to the DYFS in child abuse or neglect cases.

The Committee considered an amendment to Rule 3:26-1 that would state the following:

(b) Other Conditions. The court may also impose terms or conditions appropriate to release including conditions necessary to protect persons in the community. If these conditions include restrictions on contact between the defendant and the defendant’s minor child, (1) a copy of the order including the

restrictions shall be transmitted to the Family Part, and (2) the restrictions shall not affect contact authorized by an order of the Family Part in a child abuse/neglect case whether that order was made before or after the restriction was imposed except that an order restricting contact shall be effective for 72 hours to allow a hearing to be conducted as provided by R. 5:12-6 (a) and the court shall notify the Family Part of the order.

Initially, the Committee noted that the proposed rule amendment was intended to give the Family Part control over the amount of contact between the defendant and the child-victim. The rule provided for an exception, however, in cases in which the Family Part issued an order allowing contact and the defendant was subsequently arrested for a new crime. In that case, an order restricting contact would be effective for 72 hours to give the Family Part time to conduct a hearing to determine whether visitation should still be permitted. The intent was to protect the child by restricting contact in emergent situations, and to account for weekends and holidays, when the courts were closed.

It was noted that while the drafters may have intended for contact to be governed by the original Family Part order if a hearing was not held within 72 hours, the proposed rule did not contain language to that effect. It was also noted that, as written, the proposed rule stated that the “order restricting contact *shall* be effective for 72 hours.” So, even if the Family Part held a hearing and decided otherwise, the restrictive order would remain in effect for the full 72 hours.

Some members of the Committee objected to the idea that the Family Part should retain control over the amount of contact between the defendant and the child-victim. They felt that the judge with the latest and best information about the family in question should control the scope of visitation, and noted that there could be dire consequences if the Family

Part was not aware of a subsequent Criminal Part order that restricted visitation. Other members, however, pointed out that the assumption was that the Family Part knew the most about the family, and would ordinarily be in the best position to determine the scope of visitation. They also noted that the intent of the rule was to avoid conflicting court orders, a situation that would become more likely if the judge with the most recent information controlled visitation. The Committee discussed this issue at length, but could not reach a consensus regarding the language of the proposed rule. The Committee did, however, agree that (1) the Criminal Part bail order governing contact should remain in effect until the Family Part took some sort of action; and (2) once the Family Part acted, its order regarding contact would take precedence – unless the defendant committed a new crime, in which case contact would again be governed by the new Criminal Part order and the process would start all over again.

The Committee next turned its attention to proposed Rule 5:12-6. It was suggested that section (b) was not necessary, because even if a conference were held pursuant to that section, the prosecutor could still refuse to turn over any pre-indictment discovery. In response, it was noted that section (b) provided for a mediation conference, which would hopefully provoke more thoughtful consideration of the issues involved.

It was eventually decided to leave the discussion of the Ad Hoc Committee's report "as is" in the 2004-2007 Criminal Practice Committee Report, and that another attempt should be made to draft rules consistent with the procedures recommended in that report.

After the Committee filed its 2004-2007 report, it considered further revisions to the proposed amendments to Rule 3:26-1. It ultimately agreed to add a new paragraph

(redesignated as paragraph (b)) to Rule 3:26-1. The proposal specifically addresses bail conditions involving restrictions on contact.

In its report, filed in January 2007, the Family Practice Committee proposed new Rule 5:12-6 to develop a procedure to permit the sharing of pre-indictment discovery between DYFS and law enforcement in child abuse or neglect cases.

The Committee is requesting that the Court consider this proposed amendment to Rule 3:26-1.

APPENDIX A

Proposed Rules - Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases

3:26-1. Right to bail before conviction

(a) Persons Entitled; Standards for Fixing. All persons, except those charged with crimes punishable by death when the prosecutor presents proof that there is a likelihood of conviction and reasonable grounds to believe that the death penalty may be imposed, shall be bailable before conviction on such terms as, in the judgment of the court, will ensure their presence in court when required. The factors to be considered in setting bail are: (1) the seriousness of the crime charged against defendant, the apparent likelihood of conviction, and the extent of the punishment prescribed by the Legislature; (2) defendant's criminal record, if any, and previous record on bail, if any; (3) defendant's reputation, and mental condition; (4) the length of defendant's residence in the community; (5) defendant's family ties and relationships; (6) defendant's employment status, record of employment, and financial condition; (7) the identity of responsible members of the community who would vouch for defendant's reliability; (8) any other factors indicating defendant's mode of life, or ties to the community or bearing on the risk of failure to appear, and, particularly, the general policy against unnecessary sureties and detention. In its discretion the court may order the release of a person on that person's own recognizance. The court may also impose terms or conditions appropriate to the defendant's release including conditions necessary to protect persons in the community.

(b) Restrictions on Contact. If the court imposes conditions of bail that include restrictions on contact between the defendant and the defendant's minor child, (1) a copy of the order including the restrictions shall be transmitted to the Family Part, and (2) restrictions shall not affect contact authorized by an order of the Family Part in a child abuse/neglect case made

after any restriction on contact was imposed as part of a bail order.

[(b)](c) On Failure to Indict. . . . No Change.

[(c)](d) On Failure to Move Indictment. . . . No Change.

[(d)](e) Extradition Proceedings. . . . No Change.

Note: Source-R.R. 3:9-1(a)(b)(c)(d); paragraph (a) amended September 28, 1982 to be effective immediately; paragraphs (a), (b), (c) and (d) amended July 13, 1994 to be effective January 1, 1995; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended, paragraph (b) redesignated as (c), paragraph (c) redesignated as (d), paragraph (d) redesignated as (e), new paragraph (b) adopted _____ to be effective _____.

5:12-6. Matters Involving Law Enforcement

(a) Visitation during pendency of related criminal action. When a criminal complaint has been filed against a parent or guardian arising out of the same incident as a Division of Youth and Family Services action pursuant to R. 5:12, the Family Part shall determine the nature and scope of parental or guardian visitation, if any, with the child as follows:

(i) The court shall provide notice of any hearing at which visitation conditions are to be imposed or modified to the county prosecutor and counsel representing the parent or guardian in the criminal prosecution, as well as to all counsel and parties in the Division of Youth and Family Services matter.

(ii) Prior to any hearing, the court shall issue an appropriate protective order governing disclosure of confidential Division of Youth and Family Services records consistent with N.J.S.A. 9:6-8.10a.

(iii) A copy of any order governing such visitation shall be transmitted by the Family Part to the Law Division, Criminal.

(iv) Any application for modification of a visitation order shall be made to the Family Part, upon notice to the same parties and counsel as required for notice of a hearing pursuant to (i).

(b) If there is a criminal investigation of an incident that is the basis of a Division of Youth and Family Services action pursuant to R. 5:12, the Division of Youth and Family Services may request that the prosecutor provide any relevant information for use in the action. If the Division of Youth and Family Services and the prosecutor are unable to reach an agreement on what information is to be provided, either may request the assignment judge to assign a

judge to assist in the resolution of the matter. The judge assigned shall conduct a conference without delay. Notice of the conference shall be given to the prosecutor and to all parties to the Division of Youth and Family Services action. The court shall not order the release of pre-indictment information without the agreement of the prosecutor. No rights or privileges that may otherwise exist are affected by this procedure for dispute resolution.

Note: Adopted _____ to be effective _____.

APPENDIX B

Report - Joint Ad Hoc Committee on Civil and Criminal Child Abuse Cases

1 SUPREME COURT CRIMINAL AND FAMILY
2 PRACTICE COMMITTEES

3
4 Joint Ad Hoc Committee on Civil
5 and Criminal Child Abuse Cases
6
7

8 *REPORT*

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12
13 The Joint Ad Hoc Committee was created by the Supreme Court
14 Criminal Practice Committee, chaired by the Honorable Edwin H.
15 Stern, P.J.A.D., and the Supreme Court Family Practice Committee,
16 chaired by the Honorable Eugene D. Serpentelli, A.J.S.C., to
17 review and make recommendations concerning two key issues that
18 arise as the result of an action instituted against a parent or
19 guardian in the Family Part by the New Jersey Division of Youth
20 and Family Services (DYFS) based upon allegations of child abuse,
21 pursuant to N.J.S.A. 9:6-8.21 to -8.73 and N.J.S.A. 30:4C-11 to -
22 12.2, and the concurrent criminal prosecution of that parent or
23 guardian in the Law Division based upon the same incidents of
24 child abuse. These two issues are:
25

- 26
27 1. The nature and extent of parental
28 contact with the child, pending
29 criminal disposition, given the need to
30 protect the child from further abuse or
31 neglect, the prosecutorial objective of
32 preventing against unwarranted
33 recantation, and the statutory
34 requirement contained in N.J.S.A.
35 30:4C-11.1 that DYFS exercise
36 reasonable efforts to effect family
37 reunification, unless otherwise excused
38 by the exceptions set forth in N.J.S.A.
39 30:4C-11.3;
40
41 2. The extent of sharing of information
42 between DYFS and the prosecutor at the
43 pre-indictment stage of a criminal
44 investigation concerning the act or
45 acts of child abuse in light of the
46 statutory requirements contained in the
47 Federal Adoption and Safe Families Act
48 of 1997 (ASFA), Pub.L. No. 105-89, 111
49 Stat. 2115 (1997) (codified as amended
50 in scattered sections of 42 U.S.C.),
51 and in Title 30 and Title 9 of
52 N.J.S.A., that mandate the need to
53 secure permanency and stability for
54 children subject to abuse or neglect

1 without undue delay, see In re
2 Guardianship of DMH, 161 N.J. 365, 385
3 (1999), thereby dictating the
4 expeditious scheduling of a child abuse
5 fact-finding hearing.
6
7

8 Although there may be dual criminal and civil prosecutions
9 of the child's parent or guardian, the timing sequence of those
10 prosecutions is rarely parallel. More often than not, the fact-
11 finding hearing pursuant to N.J.S.A. 9:6-8.44, conducted in the
12 Family Part to determine whether the child is an abused or
13 neglected child, is held prior to the criminal indictment of the
14 parent or guardian, and often while the criminal investigation is
15 still pending.
16

17 I.
18

19 The first issue to be addressed concerns parental contact
20 with a child-victim or witnesses. N.J.S.A. 9:6-8.36a requires
21 DYFS to immediately report all instances of suspected child abuse
22 and neglect to the County Prosecutor. See also N.J.A.C. 10:129-
23 1.1 to -1.5. At or about that time, if DYFS determines that the
24 child is in need of protection, DYFS may effect an emergency
25 removal of the child from the home without a court order pursuant
26 to N.J.S.A. 9:6-8.29, and then is required to file a verified
27 complaint against the parent or guardian in the Family Part,
28 alleging that the parent or guardian has subjected the child to
29 abuse or neglect, within two court days after such removal takes
30 place. N.J.S.A. 9:6-8.30b.
31

32 Obviously, the Family Part complaint may name one or both
33 parents or guardians as defendants, depending upon the
34 circumstances as revealed by the initial investigation by DYFS.
35 In some instances, it is alleged that both parents or guardians
36 have subjected the child to abuse or neglect. In others,
37 although one parent is the apparent perpetrator, the child must
38 be removed from the home because the other parent denies the

1 allegations and supports the denial position of the other parent,
2 leading to circumstances where the non-abusive parent fails or
3 has failed to protect the child from the actual abuse or the
4 danger of continued or further abuse.

5
6 If the circumstances warrant continued removal, the Family
7 Part often issues an order to show cause directing continued out-
8 of-home placement by DYFS and no parental contact or such
9 supervised parental contact as DYFS permits, pending further
10 order. Issues of parental representation, discovery, parental
11 contact, evaluations and others are then routinely addressed by
12 the Family Part on the return date of the order to show cause.
13 See N.J.S.A. 9:6-8.31; Rule 5:12.

14
15 By the time of the return date of the order to show cause,
16 if not before, a criminal complaint may have been filed against
17 one or both parents or guardians. The criminal complaint may
18 charge the commission of one or more indictable offenses, ranging
19 in severity from first-degree aggravated sexual assault, contrary
20 to N.J.S.A. 2C:14-2a, to second- or third-degree aggravated
21 assault, contrary to N.J.S.A. 2C:12-1b(1) or -1b(7), to second-
22 or third-degree child endangerment, contrary to N.J.S.A. 2C:24-
23 4a, to fourth-degree child abuse, contrary to N.J.S.A. 9:6-2, or
24 any other number of criminal offenses.

25
26 Upon issuance of the complaint(s) and arrest with or without
27 a warrant, "without unnecessary delay, and no later than 12 hours
28 after arrest, the matter shall be presented to a judge," Rule
29 3:4-1, who shall set bail. Routinely, where the victim is a
30 child, a condition of bail is that the defendant have no contact
31 with the child. The issue of bail pursuant to Rule 3:26 is
32 revisited at the first appearance conducted in accordance with
33 Rule 3:4-2. Generally, the no-contact condition of bail is
34 continued.

35
36 The dilemma created by these parallel proceedings is that
37 the issue of the nature and extent of parental or guardian
38 contact with the child-victim is essentially simultaneously
39 before both the Family Part and the Law Division (Criminal Part).

40
41
42 Both DYFS and the County Prosecutor have the responsibility
43 to investigate and to safeguard abused children. However, there
44 are competing considerations. DYFS is subject to a statutory
45 requirement to exert reasonable efforts to effect family
46 reunification. The primary interest of the County Prosecutor is
47 the criminal culpability of those accused of child abuse and

1 neglect, DYFS v. Robert M., 347 N.J. Super. 44, 63 (App. Div.),
2 certif. denied, 174 N.J. 39 (2002), and to protect the child-
3 witness from direct or subtle pressure that may lead to
4 recantation, presenting special proof problems. See State v.
5 J.Q., 252 N.J. Super. 11 (App. Div. 1991), aff'd, 130 N.J. 554
6 (1993) (approving use of Child Sexual Abuse Accommodation
7 Syndrome (CSAAS) expert evidence to explain why a child recants
8 or delays in reporting the act of abuse). Then, of course, there
9 is the right of the parents to participate in child-rearing of
10 their children, a right of constitutional dimension. See In re
11 Guardianship of K.H.O., 161 N.J. 337, 346 (1999) (citing Stanley
12 v. Illinois, 405 U.S. 645, 92 S. Ct. 12087, 31 L. Ed. 2d 551
13 (1972)).
14

15 The delicate balancing of these considerations requires a
16 coordinated and comprehensive approach rather than separate
17 adjudications in different parts of the Superior Court that are
18 based on different objectives.
19

20 Accordingly, it is proposed that where a civil child abuse
21 complaint initiated by DYFS against the parents or guardians is
22 pending in the Family Part, and there is a no-contact bail
23 condition as the result of a criminal complaint filed against
24 parents or guardians, arising out of the same incident(s), a
25 hearing shall be held in the Family Part to determine the nature
26 and scope of parental or guardian contact, if any, with the
27 child. The hearing shall be on notice to the County Prosecutor,
28 the Public Defender(s) or other counsel representing the parents
29 or guardians in the criminal prosecution, the Deputy Attorney
30 General representing DYFS in the civil Family Part matter, the
31 attorney from the Public Defender's Office, designated counsel,
32 or other counsel representing the parents or guardians in the
33 civil Family Part matter, and the designated Law Guardian for the
34 child in the Family Part matter.
35

36 Prior to commencement of such a hearing, an appropriate
37 protective order should issue governing disclosure of
38 confidential DYFS records. See N.J.S.A. 9:6-8.10a. No bail
39 condition except contact will be entertained in the Family Part.
40

41 Upon considering the evidence and proofs and weighing the
42 competing considerations, the Family Part shall determine the
43 nature and scope of parental or guardian contact with the child,
44 and an order memorializing that decision shall be issued. A copy
45 of the resulting order shall be transmitted to the Law Division
46 (Criminal Part) and shall constitute a condition of the bail
47 ordered in the Law Division. Any applications for

1 modification of that order shall be made to the Family Part, upon
2 notice to the same parties and counsel as required in the first
3 instance.

4 5 II. 6

7 The second issue pertains to the dilemma created that is
8 best illustrated by the circumstances in DYFS v. Robert M.,
9 supra. In that case, the court reversed an order entered in the
10 Family Part that had dismissed the Title 9 child abuse and
11 neglect complaint initiated against Robert M. and Brenda M. on
12 that grounds that DYFS had failed to prove abuse or neglect of
13 their four children under N.J.S.A. 9:6-8.21. Id. at 47.
14

15 The parties' age seven male child was hospitalized on an
16 emergency basis in critical condition when he was unable to
17 breathe, had no pulse, and was in septic shock. DYFS became
18 involved when hospital personnel reported "suspicious injuries
19 consisting of cuts and extensive bruising on his legs, knees,
20 arms, hands and forehead." Id. at 50. When asked, the parents
21 attributed those conditions to self-inflicted injuries; the child
22 died three days later. Ibid.
23

24 An autopsy report noted the bruising and listed the cause of
25 death as undetermined pending further studies. Ibid. A medical
26 and fatality report prepared by the Child Protection Center of
27 the New Jersey Central Abuse Center issued about eight days after
28 the child's death set forth physical findings suggestive of
29 physical abuse, and cast doubt on the parents' explanation of the
30 injuries as being self-inflicted. Id. at 50-51. The report
31 considered medical neglect to be a contributing factor to the
32 child's death. Id. at 51.
33

34 On the date of issuance of that report, the parents were
35 arrested and criminally charged with endangering the welfare of a
36 child. They were released on bail with the specific condition
37 they have no contact with their remaining children. Id. at 52.
38

39 On that same date, the three remaining children were
40 interviewed at the county prosecutor's office in the presence of
41 the DYFS caseworkers. Ibid. (Best Practices in concurrent
42 criminal and DYFS investigations calls for joint interviews to
43 minimize repeated interviews of children).
44

45 DYFS effected an emergency removal of the children from the
46 parents' care and placed them in foster care overnight. Ibid. On
47 the next day, DYFS filed a Title 9 child abuse and neglect

1 complaint in the Family Part against the parents, seeking custody
2 and protective services. Ibid. DYFS was given custody of the
3 children by the Family Part and the children were placed into the
4 care of their grandparents. Ibid.
5

6 The Family Part case proceeded and DYFS continued its
7 investigation. About two months after the child's death, the
8 medical examiner amended the death certificate to state the cause
9 of death as cardiac arrhythmia due to hypothermia and the manner
10 of death as homicide. Id. at 53.
11

12 The required fact-finding hearing in the Family Part Title 9
13 action began less than three months after the child's death. At
14 that time, the investigation by the county prosecutor's office
15 was still on-going and the transcripts of the children interviews
16 conducted by the prosecutor's office were not released and hence
17 not given in the discovery packet to the parents' counsel in the
18 Title 9 Family Part action. Id. at 55.
19

20 The Family Part judge ruled that, notwithstanding N.J.S.A.
21 9:6-8.46a(4), because the transcript of the children's statements
22 had not been provided to the parents, the DYFS workers—although
23 present during the interviews—would not be permitted to testify
24 to the content of the statements of the children. Additionally,
25 the reports of examining psychologists, presented by DYFS, were
26 redacted to exclude any references to the interviews of the
27 children at the prosecutor's office.
28 Ibid.
29

30 The fact-finding hearing was delayed after receipt of the
31 amended death certificate of the medical examiner. Counsel for
32 the parents in the Family Part action filed a motion seeking
33 discovery of all autopsy photographs; autopsy body diagrams; all
34 photographs of seized items by the prosecutor's office; all
35 post-mortem x-rays; the complete forensic death medical
36 investigation; interim toxicology reports; and a complete copy
37 of the statements of the children given to the prosecutor's
38 office. Id. at 56. The DAG representing DYFS responded that
39 she did not have those items that were in the exclusive control
40 of the prosecutor's office. The prosecutor responded to the
41 DAG's discovery request by stating "that criminal charges were
42 pending presentation to the Hunterdon Grand Jury and that 'my
43 office will not provide any material obtained in the course of
44 our criminal investigation other than through the appropriate
45 criminal discovery process outlined in R. 3:13-3. That means,
46 as we have said repeatedly, no pre-indictment discovery will be

1 provided either directly to the defendants or through your
2 office.'" Id. at 56-57.

3
4 The prosecutor then obtained a protective order from the
5 assignment judge directing that no member of the prosecutor's
6 office would be required to testify in the Family Court case.
7 Id. at 57. A motion by the DAG in the Law Division (Criminal
8 Part), seeking release of the transcripts of the children's
9 statements was rendered moot when, about five months after the
10 child's death, an indictment was returned against the parents,
11 charging them with aggravated manslaughter and endangering
12 offenses. Ibid. Following the indictment, the statements were
13 released to the parents' counsel in both cases. Id. at 57-58.

14
15 However, apparently the children's statements were not
16 released by the time that the fact-finding hearing continued and
17 discovery issues persisted concerning autopsy materials sought
18 by defendants for review by an expert pathologist. Ultimately,
19 the judge excluded all evidence concerning the children's
20 interviews and the results of the autopsy report. After
21 conducting the redacted hearing, the judge found that DYFS had
22 failed to prove its case as to four of the children and
23 dismissed. Id. at 63. The Appellate Division reversed and
24 remanded for further proceedings, concluding that the children's
25 statements and autopsy report had been wrongfully excluded.
26 Ibid.

27
28 Judge Collester then focused on the discovery issues,
29 stating in pertinent part:

30
31
32 This case presents an unfortunate and
33 extreme instance of conflicts and problems
34 in Title 9 and Title 30 proceedings which
35 can arise from the relationship between the
36 Division and law enforcement agencies when
37 parallel investigations are pursued. . . .
38 The Division is required to investigate
39 allegations of abuse and neglect, . . . to
40 ascertain their veracity, to take action to
41 safeguard abused children from further harm,
42 either by seeking ways to remediate such
43 conduct or, in a proper instance, by placing
44 the child in protective custody of the
45 State. . . . The interest of law enforcement
46 is different since the focus is the criminal

1 culpability of those accused of child abuse
2 and neglect under N.J.S.A. 2C:24-4a. . . .
3

4 * * * *

5
6 The statutory scheme and administrative
7 regulations envisage cooperation between the
8 agency and law enforcement. . . . The
9 Division is obliged to immediately report to
10 the county prosecutor all instances of
11 suspected criminal activity including child
12 abuse or neglect. . . . If the Division
13 initiates a child abuse complaint in the
14 Family Court, a copy must be sent to the
15 county prosecutor. . . . Alternatively, if
16 the prosecutor decides to bring a criminal
17 case, the caseworker must be so advised. . .
18 .
19

20 While the Division must maintain strict
21 confidentiality of records and reports of
22 child abuse, an exception requires release
23 of such information to law enforcement
24 agencies investigating child abuse. . . .
25 However, no statute or rule requires the
26 county prosecutor to disclose information of
27 an ongoing criminal investigation to the
28 Division. While Title 9 contemplates that
29 actions brought by the Division will
30 continue after referral to the county
31 prosecutor, . . . the prosecutor is not
32 restrained from continuing its investigation
33 while the Title 9 action proceeds to trial.
34

35 Parallel investigations and proceedings
36 by the Division and the county prosecutor
37 have resulted in thorny constitutional
38 issues. . . . Defendants may face the
39 Hobson's choice of deciding whether to
40 testify and risk incrimination or remain
41 silent in the face of testimony that could
42 deprive them of custody of their children.
43 Judges must be mindful of the potential for
44 abuse of defendant's civil or criminal
45 procedural rights. However, the fact of
46 parallel proceedings does not invest a
47 defendant with any additional procedural

1 safeguards beyond those provided by
2 constitution, statute procedural rules. . . .

3
4
5 [Id. at 63-64 (citations omitted).]

6
7
8 This case illustrates the proof problems that may result
9 when there are dual, but not parallel, civil and criminal
10 prosecutions and investigations of the same incident(s).
11 Indeed, it is conceivable that the deprivation of certain
12 information within the control of the County Prosecutor may lead
13 to DYFS being unable prove in the Family Part, by a
14 preponderance of the credible evidence, that the defendant
15 parents or guardians subjected the child to abuse or neglect.
16 It is equally conceivable that the withholding of exculpatory
17 evidence could result in an unjust finding of abuse or neglect.

18
19 However, there are also dangers associated with the release
20 of pre-indictment investigatory materials. First, ongoing
21 investigations are incomplete. There is a very real danger that
22 information that might be seen in a different light upon
23 completion of the investigation will be misleading if viewed
24 piecemeal. Further, prosecutors live in a real world where
25 desperate and unscrupulous defendants, possibly facing
26 substantial jail time, will go to great lengths to sabotage a
27 criminal prosecution. Absent a protective order, defense
28 attorneys must disclose any discovery information provided in
29 the Title 9 case to their clients, but have no power to prevent
30 those clients from misusing the information. Therefore, it is
31 also likely that premature disclosure of the substance of an
32 ongoing investigation will enable defendants to conceal
33 evidence, tamper with witnesses and compromise law enforcement's
34 ability to successfully conclude the investigation.

35
36 Certainly, it is well-recognized that there is no pre-
37 indictment discovery concerning the investigation of the county
38 prosecutor. However, there is an equally well-recognized
39 function of the county prosecutor to assure that victims—
40 particularly children—are protected from continued abuse.

41
42 This was explicitly recognized in DYFS v. H.B. and L.M.B.,
43 375 N.J. Super. 148 (App. Div. 2005). There, in discussing the
44 release of information from a closed Megan's Law file, the court
45 ruled that
46
47

1 . . . absent compelling reasons grounded in
2 preserving the integrity of pending or
3 ongoing criminal cases, prosecutors should
4 view their relationship with DYFS as a
5 collaborative enterprise, designed and
6 intended to promote the overarching public
7 policy running through both Title 9 and
8 Megan's Law: protecting our children from
9 those who would do them harm.

10
11 The norm, in this collaborative
12 environment, is for information to be
13 liberally shared between these two public
14 agencies. In this context, the need for
15 judicial resolution of disputes arising as a
16 result of an application filed by one agency
17 against the other seeking injunctive relief,
18 either to protect or to disclose
19 information, should be a rare occurrence. In
20 such a case, the party bringing the action
21 would have the burden to establish,
22 as a threshold matter, that (1) all other
23 means for amicable resolution have been
24 exhausted; and (2) judicial intervention is
25 required to protect the integrity of an
26 ongoing investigation or, in the case of a
27 disclosure order, to establish an element of
28 proof in an abuse or neglect case.

29
30 [Id. at 179-80.]
31
32

33 Thus, in order to balance these competing, and sometimes
34 conflicting, interests and to assure the fair administration of
35 justice, we believe that where there are concurrent civil and
36 criminal prosecutions arising from investigations being
37 conducted by DYFS and the county prosecutor concerning an
38 alleged incident of child abuse or neglect, and there is no
39 consensus concerning the sharing of pre-indictment information,
40 a conference should be conducted on an informal application to
41 the Assignment Judge, who shall either hear the matter or assign
42 it to an appropriate judge in the Family Part or Law Division,
43 Criminal Part.
44

45 The purpose of the conference is to determine what
46 information, if any, contained in the investigation conducted by
47 the county prosecutor shall be released to DYFS. In making this
48 determination, the presiding court may wish to view the records
49 in camera. This conference should take place expeditiously,

1 bearing in mind that for cases of children in DYFS placement,
2 fact-finding hearings must occur within four (4) months of out-
3 of-home placement.
4

5 Notice of the conference shall be given to the county
6 prosecutor and all counsel in the Family Part case. Any
7 agreements reached shall be placed on the record and memorialized
8 by an order issued by the Superior Court judge presiding over the
9 conference.
10

11 No order shall issue as a result of the conference requiring
12 the release of pre-indictment information from the prosecutor's
13 office without the prosecutor's consent. Any party to the
14 conference may file a formal motion seeking an order governing
15 discovery.