Michael R. Ascher, Esq Published in New Jersey Family Lawyer Magazine

Michael R. Ascher, Esq. recently published an article in New Jersey Family Lawyer Magazine, a publication of the New Jersey State Bar Association.

Mr. Ascher is a Principal in the firm and is engaged in a litigation practice handling both criminal and complex civil matters. He is a former Deputy Attorney General in the Department of Justice and a former Assistant Passaic County Prosecutor. His practice includes all categories of criminal cases including drunk driving defense, sex offenses, drug and white collar crimes, computer crime, conspiracy, fraud & theft cases and matters involving the Division of Permanency and Placement (DCPP formerly known as DYFS).

The article, entitled The Impact of Changes IN DCPP Investigatory Findings was a jointly written article with Dina M. Mikulka, Esq.

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(Click on page below to read the entire article.)

The Impact of Changes in DCPP Investigatory Findings

by Michael R. Ascher and Dina M. Mikulka

There has been a dramatic change in the investigatory findings of child protection investigations. For the first time since the late 1990s, there are now findings of child abuse/neglect that are not entitled to be challenged by an independent fact-finding procedure. Attorneys who do not routinely practice in the area of child protection litigation should take notice. This new findings scheme can have a significant impact on the average New Jersey family enduring a Division of Child Placement and Permanency (DCPP) (formerly known as DYFS)[1] investigation or on a parent who makes a serious, but one-time, error in judgment and risk being labeled for the rest of his or her life as a child abuser.

The most commonly relied upon definition of an abused child is:

> ...[A] child whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian...to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so...or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court.[2]

There have been significant decisions in recent years that may have made it more difficult for the division to establish abuse/neglect under Title 9. A one-time incident where a mother used physical discipline against her autistic daughter resulted in the Appellate Division reversing a final agency decision of abuse.[3]

The mother in *K.A.*:

> Out of sheer frustration, or through an ill-advised impulse...struck her child five times. These blows, though undoubtedly painful, did not cause the child any permanent harm, did not require medical intervention of any kind, and were not a part of a pattern of abuse.[4]

The Appellate Division concluded that "[u]nder all of these circumstances, labeling K.A. a child abuser is factually unwarranted and legally unsustainable."[5]

The division created a new category of child abuse with the 'established' finding in an effort to circumvent unfavorable appellate decisions. 'Established' is a less serious investigatory finding than 'substantiated,' but nonetheless may have a highly negative impact on a person, particularly a parent, who may be faced with a child custody dispute. The parent, or other accused, has no right of administrative appeal to challenge any division finding other than 'substantiated.' However, an 'established' and 'not established' finding is maintained in division records in perpetuity and conveys that the perpetrator did something to harm a child. As explained below, the DCPP records are obtainable in future non-DCPP court proceedings.

In New Jersey, the protection of children from acts of abuse and neglect falls within the authority of the division. The division must investigate all abuse, abandonment, cruelty, and neglect cases pursuant to statutes N.J.S.A. 9:6-8.9, N.J.S.A. 9:6-1 and N.J.S.A. 9:6-8.21.

Reports that are made to the division and information obtained during the course of the investigation are entitled to statutory confidentiality.[6] However, as explained below, confidentiality can be pierced under circumstances defined in the statute. Although the courts recognize that many of the division's investigatory findings are not subject to procedural challenges, the trend