

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1084-15T1

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

T.S.,

Defendant-Appellant,

and

A.J. and F.R.,

Defendants.

IN THE MATTER OF F.R., A.S.,
Ks.J. and Ka.J.,

Minors.

Argued April 26, 2017 – Decided June 6, 2017

Before Judges Alvarez and Manahan.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FN-07-399-14.

Thomas W. MacLeod, Designated Counsel, argued
the cause for appellant (Joseph E. Krakora,

Public Defender, attorney; Mr. MacLeod, on the briefs).

Michael Antenucci, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mr. Antenucci, on the brief).

Margo E.K. Hirsch, Designated Counsel, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Hirsch, on the brief).

PER CURIAM

Defendant T.S. appeals from a May 15, 2014 Family Part order finding of abuse and neglect after the Division of Child Protection and Permanency (Division) conducted an investigation into defendant's marijuana abuse and its impact on her children. Defendant argues the Division failed to establish that her drug use created a substantial risk of harm. We disagree and affirm.

We discern the following facts from the record. Defendant is the mother of T.S. (Tessa) (born 1998), F.R., Jr. (Frank) (born 2000), A.S. (Amelia) (born 2001), and twins Ks.J. (Kyle) and Ka.J. (Kayla) (born 2010).¹ Tessa was reported to have been placed in the legal and physical custody of her paternal grandmother as an infant via a family arrangement.

¹ We use pseudonyms to protect the identity of the parties involved.

Defendant had eleven prior referrals with the Division dating back to 2003, prior to the referral presently before us. These previous referrals include allegations of substance abuse, physical abuse, inadequate supervision, lack of stable housing, and domestic violence.²

Defendant's current Division case opened on May 8, 2013, when she was involved with an investigation regarding a friend, T.O. (Trudy), and her six-year-old daughter, Z.S. (Zoe). Trudy asked defendant to watch Zoe for the afternoon. However, later that evening, Trudy reported to the Division that Zoe had gone missing. During the investigation, defendant admitted to keeping Zoe out for a "prolonged period of time" before giving the child back to her uncle. Zoe was later found by police on a porch at Trudy's home, asleep under a bag.

On May 17, 2013, defendant was asked about allegations of substance abuse reported by Trudy when she contacted the Division. Defendant admitted to daily marijuana use and occasional alcohol consumption. As a result of the admission, the Division referred defendant for substance abuse evaluations. Defendant completed the evaluations and was scheduled to begin substance abuse

² The record is not clear regarding the outcome of the prior referrals except for investigation summaries which state some of the previous allegations were "unsubstantiated."

treatment on July 9, 2013, at the University of Medicine and Dentistry of New Jersey's (UMDNJ) Behavioral Health Care Center. A.J. (Andrew), defendant's boyfriend at the time and father of Kyle and Kayla, completed a substance abuse evaluation on June 4, 2013, at the Essex County Substance Abuse Initiative (SAI). During the evaluation, Andrew reported his concern that defendant suffered from mental illness. SAI reported this allegation to the Division.

On June 6, 2013, the Division spoke with defendant and Andrew to address the allegation reported by SAI. Defendant denied suffering from mental illness. Notwithstanding defendant's denial, the Division scheduled her for a psychological evaluation to rule out any mental health issues.

During the course of the investigation, the Division also received school reports for Amelia and Frank. Amelia was reported to have a severe learning disability, which caused her to function below her grade level. Additionally, Amelia had a poor attendance record during the 2012-13 school year, missing twenty-six days overall. When Amelia was in school, she was described as being unprepared, appearing unkempt and having a foul odor, lacking social skills, becoming frustrated easily, and being physically violent. The school also reported that defendant was not responsive to its concerns for Amelia, although was aware of the

educational issues. Similarly, Frank's school reported that he suffered from a learning disability, had issues with aggression, and that his responses to situations were "often unwarranted."

At the conclusion of the Division's investigation, defendant was "established" for creating a substantial risk of harm to the children based on her admitted "frequent drug use." The case remained open with the Division to ensure the concerns raised were monitored, including defendant's compliance with substance abuse treatment and to ensure that Amelia and Frank's educational issues were resolved.

Defendant disclosed to the Division that, as of August 7, 2013, she had not commenced substance abuse treatment. Subsequently, the Division made numerous visits to defendant's home giving her treatment program information. Despite these efforts by the Division, as of December 17, 2013, defendant still had not started treatment.

The Division determined that care and supervision litigation against defendant was necessary because she was non-compliant with recommended substance abuse treatment. On January 16, 2014, the Division filed a Verified Complaint for Care and Supervision of the minors Frank, Amelia, Kayla and Kyle, naming defendant and

Andrew as defendants.³ At the hearing before a Family Part judge, the Division presented its concerns over defendant's history of substance abuse and non-compliance with treatment. The Division also noted concerns as to the family's frequent relocation within different school districts, and its negative impact on the minors' behavior and school attendance.

The judge signed the order to show cause (OTSC), finding the Division's care over the minors was necessary to "avoid an ongoing risk" to their lives, safety, and health based on the sufficient concerns presented by the Division.

On February 19, 2014, the return date for the hearing on the OTSC, the Division reported that defendant had not started her substance abuse treatment and failed to obtain a doctor's note clearing her for participation in a program. The judge ordered defendant to obtain the doctor's note and to comply with in-home services, including a parent aide.

At the May 15, 2014 fact-finding hearing, the Division offered the testimony of its investigator, Michael Hunter. Hunter testified about the Division's involvement with defendant, including the prior referrals and the current investigation

³ After the Division filed the Verified Complaint for Care and Supervision, Andrew never appeared.

prompted by the referral of Trudy regarding Zoe. Hunter also testified about the educational issues involving Amelia and Frank.

The Division further presented the testimony of Hasan Sanders, the case manager, who continued working with the family after the Division's initial investigation. Sanders testified that during his time with the family, defendant was non-compliant with substance abuse treatment. Specifically, defendant never followed up with the UMDNJ program, nor did she follow up with Sanders' list of recommended treatment programs. Each program required defendant to obtain a doctor's note clearing her for participation. Notwithstanding, defendant never made efforts to secure a doctor's approval.

At the conclusion of the testimony, the Division argued that it met its evidential burden that defendant neglected the minors by placing them at risk of harm, as defined by N.J.S.A. 9:6-8.21(c). The Division specifically pointed to the marijuana abuse and treatment non-compliance in combination with the educational neglect of Amelia and Frank as supportive of a finding of abuse and neglect.

In an oral decision, the judge determined that the Division had established by a preponderance of the evidence that defendant neglected the children, as proscribed by N.J.S.A. 9:6-8.21(c). The judge found that defendant had a long history with the

Division, including a prior substantiation involving substance abuse, and that she was given ample time to remediate the Division's substance abuse concerns. The judge further found that defendant never complied with any recommended substance abuse program, and that she continued to test positive for marijuana.

The judge held that defendant's drug use "had a detrimental effect on [the] children, and it did cause harm." The judge further held that the educational issues of Amelia and Frank stemmed from defendant's failure to monitor school attendance and her failure to address behavioral issues. The judge noted that the totality of the circumstances supported a finding that there was a risk of harm to the children based on defendant's potential relapse due to her continued substance abuse. An order finding abuse and neglect was entered.

Defendant raises the following point on appeal:

POINT I

THE TRIAL COURT'S FINDING OF ABUSE OR NEGLECT SHOULD BE REVERSED BECAUSE IT WAS NOT SUPPORTED BY A PREPONDERANCE OF THE COMPETENT EVIDENCE IN THE RECORD BELOW.

A. The Record Does Not Contain Sufficient Competent Evidence That [Defendant's] Conduct Actually Harmed Her Children or Created a Substantial Risk of Harm, or That [Defendant] Otherwise Failed to Exercise a Minimum Degree of Care.

B. Although the Trial Court Improperly Failed to Specify Which Element(s) of N.J.S.A. 9:6-8.21(c)(4) Supported Its Legal Finding of Abuse or Neglect, the Record Evidence Does Not Satisfy Either Potentially Relevant Subsection of This Statute.

Our standard of review is well-settled. We are bound by the trial court's factual findings if supported by sufficient credible evidence. N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 578 (App. Div. 2010). We accord particular deference to the Family Court's fact-finding because of the court's "special expertise" in family matters, Cesare v. Cesare, 154 N.J. 394, 412-13 (1998), its "feel of the case," and its opportunity to assess credibility based on witnesses' demeanor. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008). However, we will not hesitate to set aside a ruling that is "so wide of the mark that a mistake must have been made." N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 38 (2011) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007)). On the other hand, we accord no deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Whether a parent has failed to exercise a minimum degree of care "is fact-sensitive and must be resolved on a case-by-case basis." Dep't of Children & Families v. E.D.-O., 223 N.J. 166, 192 (2015). Courts undertaking this analysis "must avoid resort to categorical conclusions." Id. at 180 (citing Dep't of Children & Families v. T.B., 207 N.J. 294, 309 (2011)). The court should base its determination on the totality of the circumstances. N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 329 (App. Div. 2011). "[T]he elements of proof are synergistically related. Each proven act of neglect has some effect on the [child]. One act may be substantial or the sum of many acts may be substantial." Id. at 329-30 (internal quotation marks and citation omitted).

Defendant argues that the evidence presented by the Division was insufficient to establish that she abused or neglected her children. Specifically, defendant contends that the trial court did not make any specific findings with respect to what conduct placed her children in imminent danger of becoming physically, mentally, or emotionally impaired, or, alternatively, there was no evidence that the children's educational issues actually caused harm.

N.J.S.A. 9:6-8.21(c)(4) declares a child to be abused or neglected if the child's

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 . . . to exercise a minimum degree of care (a) in supplying the child with adequate . . . education . . . (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. . . .

The Division "must prove that the child is 'abused or neglected' by a preponderance of the evidence, and only through the admission of 'competent, material and relevant evidence.'" P.W.R., supra, 205 N.J. at 32 (quoting N.J.S.A. 9:6-8.46(b)). The statute requires a court to consider harm or risk of harm to the child, as opposed to the intent of the abuser, because "[t]he main goal of Title 9 is to protect children 'from acts or conditions which threaten their welfare.'" G.S. v. Dep't of Human Servs., 157 N.J. 161, 176 (1999) (quoting State v. Demarest, 252 N.J. Super. 323, 330 (App. Div. 1991)). Further, the phrase "minimum degree of care," as used in N.J.S.A. 9:6-8.21(c)(4)(b), means conduct that is not "grossly or wantonly negligent." G.S., supra, 157 N.J. at 178. Therefore, to show a failure to exercise a minimum degree of care, negligence is not sufficient, but intentional behavior is not essential. Id. at 178-79.

We have recognized that a parent's use of drugs while caring for a child puts the child at risk at "the slightest parental misstep." See V.T., supra, 423 N.J. Super. at 331. In V.T., this court held proof of a parent's drug use by itself was not enough to sustain a finding of abuse or neglect where a father used drugs prior to his visits with an eleven-year-old child. Ibid. We held that the father's use of cocaine and marijuana and failure to complete drug treatment did not "inherently create[] a substantial risk of harm" to the child. Id. at 330. "[A] failure to successfully defeat drug addiction does not automatically equate to child abuse or neglect." Id. at 331. In reversing the finding of abuse or neglect, this court noted there was no expert proof showing how the father's drug use posed a risk of harm to the child. Ibid.

We reached a similar conclusion in New Jersey Division of Child Protection & Permanency v. R.W., 438 N.J. Super. 462, 468-70 (App. Div. 2014), where we reversed a finding of abuse or neglect that was based solely on the mother's use of marijuana on one occasion while the child was in her care. We noted the absence of detailed proof regarding the "circumstances of her ingestion," whether "the baby was solely in her mother's care when she was intoxicated," and "the magnitude, duration, or impact" of the intoxication. Id. at 470. "Instead of filling in missing

information, an understandable response by judges who regularly witness the evils inflicted on children by their parents' drug use, judges must engage in a fact-sensitive analysis turning on 'particularized evidence.'" Ibid. (quoting N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 28 (2013)).

Proof of imminent danger or significant risk is not enough. "The Division must establish that, at a minimum, a parent acted with gross negligence or recklessness to succeed in a prosecution under N.J.S.A. 9:6-8.21(c)(4)(b)." N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 181 (2014). "Whether a parent exercised a minimum degree of care must be analyzed in light of the dangers and risks associated with the situation." Id. at 184 (internal quotation marks and citation omitted).

In this context, our Supreme Court has held that significant school absences would eventually result in permanent harm to a child's education as a result of "parental inattention or neglect." In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999). In New Jersey, parents are required to ensure their children either regularly attend the public schools of the district in which they reside or receive instruction equivalent in the public schools. N.J.S.A. 18A:38-25. Attendance is compulsory. Joye v. Hunterdon Cent. Req'l High Sch. Bd. of Educ., 176 N.J. 568, 641 (2003). A parent who fails to comply with the attendance requirements "shall

be deemed to be a disorderly person[.]" N.J.S.A. 18A:38-31. "The reference to education contained in N.J.S.A. 9:6-8.21(c)(4)(a) concerns parental encouragement to truancy of a school age child, or other interference with normal educative processes." Doe v. Downey, 74 N.J. 196, 199 (1977) (quoting Doe v. G.D., 146 N.J. Super. 419, 431 (App. Div. 1976), aff'd, 74 N.J. 196 (1977)).

Unlike the parental drug use scenarios presented in R.W. and V.T., defendant continually abused drugs and resisted attempts by the Division to assist her through assistance programs. Defendant's drug abuse was causally related to her children's numerous absences, their unpreparedness, and their poor physical appearance.


During the 2012-13 school year, Amelia was absent twenty-six days. When Amelia was in school, she was described as being unprepared, appearing unkempt and having a foul odor, lacking social skills, becoming frustrated easily, and being physically violent. Similarly, the school expressed concerns about Frank relating to his learning disabilities and his demonstrated aggressive behavior. Defendant was not responsive to the school's reported concerns on either score.

In light of our standard of review, and applying these principles, we conclude the Division produced sufficient competent

evidence to demonstrate by a preponderance of the evidence that defendant's conduct created a risk of harm to her children.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.


CLERK OF THE APPELLATE DIVISION