

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1602-14T2

NEW JERSEY DEPARTMENT
OF CHILDREN AND FAMILIES,

Petitioner-Respondent,

v.

D.C.,

Respondent-Appellant.

Argued January 26, 2017 – Decided April 7, 2017

Before Judges O'Connor and Whipple.

On appeal from New Jersey Department of
Children and Families, Division of Child
Protection and Permanency.

Allison C. Williams argued the cause for
appellant (Williams Law Group, LLC,
attorneys; Ms. Williams, of counsel and on
the brief; Victoria D. Miranda, on the
brief).

Lori J. DeCarlo, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney;
Andrea M. Silkowitz, Assistant Attorney
General, of counsel; Ms. DeCarlo, on the
brief).

PER CURIAM

Respondent D.C. (mother) and J.P. (father) are the parents of I.P. (Imani) and A.P. (Adam).¹ The mother appeals from the October 16, 2014 final decision of petitioner New Jersey Department of Children and Families (Department), which determined an allegation Imani and Adam had been neglected was "not established," see N.J.A.C. 3A:10-7.3(c)(3).² The mother contends the Department's finding is arbitrary, capricious, and unreasonable and, thus, unsustainable, because there is no

¹ We use initials and pseudonyms to protect the privacy of these parents and their children.

² N.J.A.C. 3A:10-7.3 was codified as N.J.A.C. 10:129-7.3 until January 3, 2017, when this regulation was recodified in its present form. See 49 N.J.R. 98(a) (Jan. 3, 2017).

The Department of Children and Families has recodified certain regulations relevant to abuse and neglect investigations. See *ibid.* ("The Department of Children and Families requested, and the Office of Administrative Law agreed to permit, the administrative recodification of the Department's rules from Title 10, Human Services, to the newly created Title 3A, Children and Families, of the New Jersey Administrative Code."). The Notice of Administrative Changes noted the recodified chapters and technical changes were effective January 3, 2017, but it was "anticipated that approximately two to four chapters will be recodified with each Code Update produced." Ibid. Where applicable we cite the recodified regulations. The Notice included a table, which set forth "the Title 10 chapters being recodified along with their chapter headings and new Title 3A codification." Ibid.

evidence the children were harmed or put at risk for harm. We agree and reverse.

I

Early in the morning on May 28, 2013, the father contacted the police and reported the mother had stabbed him in the arm with a steak knife. According to the police report, the father claimed he and the mother were arguing in their bedroom when the mother threw his clothes into the hallway, told him to leave the home, ran into the kitchen, and retrieved a knife. He then "realized" he had been stabbed in his right arm.

The father went to the hospital for treatment, where he received seven stitches and was discharged. Later that day, the police retrieved the knife from the home, which was described as a small steak knife. The father declined to press charges, but the police charged the mother with aggravated assault, N.J.S.A. 2C:12-1(b)(1), possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(d), and unlawful possession of a weapon, N.J.S.A. 2C:39-5(d).

While at the police station, the mother reported sustaining two bruises during the incident, but the police report does not disclose whether she divulged any other details. The police did photograph a bruise on her right arm and a red area on the bridge of her nose.

Because the children were home during the incident, the police contacted the Department. At the time, Imani was five years of age and Adam was two. The Department immediately commenced an investigation, which included interviewing the parents. The father told the caseworker the mother had been diagnosed with lupus within the month, a condition that made her tired and irritable. Late in the evening of May 27, 2013, the parents quarreled over their Internet password, and the argument escalated to the point where the mother asked the father to leave their home. The mother then removed his clothes from the closet and threw them on the floor. He responded in kind, throwing her clothes on the floor.

The father went to the living room and the mother followed, but she stopped in the kitchen to grab a steak knife. He claimed the mother "then went after him" on a staircase leading to a lower floor. At some point while descending the staircase, he realized he had been stabbed. He stated the children were in their bedrooms at the time, so neither witnessed the stabbing.

The mother drove the father to the home of her aunt, a physician. Unable to provide the treatment he required, the aunt advised the father to go to a hospital. He did so, and was treated and discharged. The father maintained he and the mother had no prior physical altercations.

A few days later, the father filed a complaint pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, and obtained a temporary restraining order. In his complaint, he alleged the mother grabbed his arm with her nails and stabbed him. Contrary to what he had reported to the police and the caseworker, his complaint alleged Imani was present when he was stabbed, and the mother had hurt him in the past. He stated that in 2009, the mother slapped him, and in 2010, she scratched his face with her nails.

A caseworker from the Department also interviewed the mother. The mother told the caseworker the parties were arguing in their bedroom, which culminated in her asking the father to leave the home. The father responded by stating the mother should leave. Imani and Alex were in their parents' bedroom at the time. The mother picked up Imani to take her to her bedroom when the father pushed the mother, called her a "fucking bitch," "broke hangers in her face," and grabbed her arm. The mother ran from the room and into the kitchen. The father ran behind her and so she grabbed a knife, turned around, and stabbed him in the arm. The children did not witness the stabbing. The mother reported the father showed the wound to the children and said "Your mother did this."

The mother showed the caseworker a picture of her arm, because the father had grabbed her arm just before she ran from the bedroom into the kitchen. The caseworker noted the picture depicted a large bruise. The mother also pointed out what the caseworker characterized as "slight bruising" by the bridge of the mother's nose; the mother told the caseworker she sustained the bruising when the father was "smashing hangers" on her nose.

The mother's attorney, who was present during the interview, advised the caseworker the mother was asserting she stabbed the father in self-defense. The mother also reported the father had been physically aggressive in the past. In 2011, he kicked her in the ribs and threw her to the floor. Finally, the caseworker noted the mother shook and cried during various points of the interview and appeared upset about the incident.

The caseworker interviewed Imani, who reported her parents yell at and sometimes hit each other. On the night of the incident, she was in her room but knew her parents were throwing clothes at each other. Although she did not see her father being injured, she stated her mother cut her father's arm on purpose with a hanger; it is not clear from the record how Imani acquired this information.

The mother also obtained a temporary restraining order, but her complaint is not in the record. Both parties withdrew their

respective domestic violence complaints and entered into a consent order. A complete copy of the consent order was not provided, but the record reveals that, among other things, the parties agreed they would not be within one hundred feet of each other.

The caseworker contacted a collateral source, the director of the children's day care center, who reported that, one year before, the mother got into a verbal dispute with another parent over a parking spot in the parking lot. The mother yelled at the other parent, who walked away from the mother while she continued to yell at him. The other parent stated he was afraid of the mother. The caseworker did not identify the source of the director's knowledge.

The caseworker also discovered the mother had called the police in 2006 because the father was throwing things and intimidating her. In 2011, she contacted the police because the father had struck her with a towel and, in 2012, told the police the father slapped her.

In September 2013, both parents submitted to a psychological evaluation by Jemour A. Maddux, Psy.D. During his evaluation, the father recounted the events of the incident, essentially repeating what he told the police. Objective testing administered by Dr. Maddux revealed the father had a

number of positive attributes, but also had poor control over his anger.

The mother told the psychologist the father attempted to strike her while both were in the bedroom, but she averted the blow by scratching his arm. She then fled from the bedroom and ran to the kitchen, where she grabbed the first thing she saw, which was a knife. She turned around and cut her husband, who was standing in front of her.

In his report, the psychologist stated he asked the mother how she knew the father was not holding one of the children when she turned around with the knife. She replied she knew so because he had been right behind her as she fled to the kitchen and she saw him just prior to cutting him. Inexplicably, Dr. Maddux found her explanation implausible and negatively reflected upon her credibility.

The mother advised Dr. Maddux cutting her husband was against her "moral beliefs" but, in this instance, she acted in self-defense. When asked if Imani was harmed from witnessing the conduct she did observe that evening, the mother stated she had been, but the mother was only fifty-percent responsible for such harm. The psychologist also confronted her about the parent with whom she had a verbal dispute in the day care center parking lot a year before. The mother denied she had "yelled"

at the other parent and denied she had a tendency to lose her temper. The mother advised Dr. Maddux of the previous acts of domestic violence the father inflicted upon her and noted she did not engage in the acts of violence alleged by the father.

The expert resolved the parents' conflicting factual versions of the subject incident and the other incidents they mentioned by making his own credibility findings. We digress in our recitation of the facts to note fact-finding by an expert is not appropriate, except under very limited circumstances, none of which exist here. Expert testimony is for the purpose of providing "specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702. The "role of an expert witness is to contribute the insight of his speciality," State v. Papasavvas, 163 N.J. 565, 653 (2000) (citing In re Hyett, 61 N.J. 518, 533 (1972)), not to provide what he may believe as a lay person. "[An expert] is not the ultimate trier of fact; that is the role of the [fact-finder]." Ibid.

Of course, given the nature of this kind of proceeding, the expert did not testify; he merely provided a report to the Department. Nevertheless, as evidenced by its findings, the Department heavily relied upon Dr. Maddux's conclusions, which

primarily turned upon which parent was telling the truth. We provide some examples of Dr. Maddux's key findings.

Dr. Maddux found the mother presented as an "unreliable historian," given her "inconsistencies and [the] conflicting corroborative data." He stated the mother appeared to harbor "intense levels of emotionality," and that "collateral reports," referring to the incident at the day care center and the father's claim she had been violent in the past, supported the mother is "emotionally intense with the capacity to act explosively."

As for the subject incident, Dr. Maddux commented the mother's behavior toward the father during the incident was "violent, thoughtless, and unlawful," and that her conduct exposed her daughter to a risk of harm, a conclusion he drew because the mother, untrained in psychology, believed she harmed her daughter as a result of the incident, even though the child was not present during the stabbing itself.

Dr. Maddux was also critical of the mother for failing to express remorse for her actions because "she rationalized that her behavior was lawful despite her arrest." Without any explanation, he stated the mother's psychological functioning has put the child's psychological health "in sure danger of becoming impaired[,]" and posed a significant risk for exposing

her children to her lapses of emotional control and acting aggressively toward others.

Even if permitted to make credibility findings, we briefly comment upon the quality of his findings. Dr. Maddux failed to reconcile or at least account for the large bruise on the mother's arm and the marks on her face, upon which she relied to show the father assaulted her during the incident and led to her using a knife in self-defense.

Dr. Maddux overlooked the father's inconsistent statements, and placed significant weight on sources unproven to be reliable, such as the hearsay statements of the director of the day care center. In his opinion, the mother's demeanor indicated she did not have remorse for her actions. However, he failed to account for the fact that, if the mother were acting in self-defense, then logically she would not be remorseful. We need not continue with this critique; suffice to say his credibility findings were questionable and the Department only compounded matters by relying upon them.

In October 2013, the Department substantiated the mother for neglect of the children during the subject incident, setting forth in its Investigative Summary its findings and

conclusions.³ The mother requested a hearing to contest the Department's determination; the matter was stayed pending the resolution of the criminal matter.⁴ After the criminal matter was resolved, in October 2014, the Department changed its decision from "substantiated" to "not established."⁵ The Department did not provide its reasons for changing its decision at that time, but did so in its brief before us.

The Department explains it altered its decision out of a concern it could not sustain its earlier finding under

³ N.J.A.C. 3A:10-7.3(c)(1) defines a "substantiated" allegation as follows:

An allegation shall be "substantiated" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21 and either the investigation indicates the existence of any of the circumstances in N.J.A.C. 3A:10-7.4 or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 3A:10-7.5.

⁴ The mother entered and successfully completed a pretrial intervention program. See N.J.S.A. 2C:43-12. On September 18, 2014, the criminal charges were dismissed.

⁵ N.J.A.C. 3A:10-7.3(c)(3) defines an allegation of "not established" as follows:

An allegation shall be "not established" if there is not a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, but evidence indicates that the child was harmed or was placed at risk of harm.

controlling case law that existed at the time, citing N.J. Div. of Child Prot. & Permanency v. M.C., 435 N.J. Super. 405 (App. Div.), certif. granted, 220 N.J. 41 (2014), certif. dismissed and remanded, 223 N.J. 160 (2015). In 2014, we issued M.C., which held where a parent has not caused actual harm to a child, the Department must evaluate whether the child was placed in imminent risk of harm at the time of fact-finding, not at the time of the alleged incident. See id. at 419. In October 2014, our Supreme Court granted certification in M.C., and in September 2015, remanded the matter on its own motion for reconsideration, in light of the Court's opinion in Dep't of Children & Families v. E.D.-O., 223 N.J. 166 (2015). See N.J. Div. of Child Prot. & Permanency v. M.C., 223 N.J. 160 (2015). In E.D.-O., the Court made clear the evaluation of a parent's conduct should not be determined by the risk the parent poses at the time of the fact-finding. E.D.-O., supra, 223 N.J. at 170. Rather, the analysis should focus on the events up through the time of the alleged wrongful conduct. Ibid.

The Department states when in 2013 it substantiated the mother had neglected the children during the incident, it relied upon the mother's admission she harmed Imani and Dr. Maddux's expert's report. After M.C. was issued in October 2014, the Department assessed whether the mother neglected the children at

the time of its fact-finding. The Department reviewed the record again and took into account a report by Imani's therapist that she had not suffered any "lasting negative effects of her parents['] argument/violence and therapy has been successful," and that the mother had successfully completed all services. In addition, given the parents' conflicting accounts about the subject and the prior incidents of domestic violence, not to mention what occurred at the day care center was also disputed, the Department concluded it could not show the mother neglected the children.

Although it claimed it evaluated the evidence for the purpose of determining what the circumstances were at the time of its fact-finding, the Department nevertheless found the mother harmed or exposed the children to a risk of harm during the incident. In light of the Court's subsequent holding in E.D.-O., evaluating the mother's conduct at the time of the incident turned out to be appropriate. The Department determined it could not justify its decision of "substantiated," but concluded a finding of "not established" was appropriate. The Department relied upon Dr. Maddux's report and the mother's admission she harmed the child to make the latter determination.

However, the Department also relied upon the police report, as well as the father's and the day care center staff's accounts

of the mother's conduct. The Department does not reconcile the fact it previously determined these sources of information were insufficient to sustain a finding the mother neglected the children, because these sources were inconsistent with the mother's account of what had occurred. Finally, the Department claims it also relied upon Imani's statement of what transpired, but does not identify what Imani said that revealed the mother harmed or placed the children at risk for harm.

A party aggrieved by a finding his or her conduct has been "substantiated" or "established" for abuse or neglect is entitled to a hearing to challenge such finding. See N.J. Div. of Child Prot. & Permanency v. V.E., ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 33). A finding of "not established" or "unfounded" does not entitle a party to a hearing, see N.J.A.C. 3A:5-4.3(a)(2), and is deemed a final agency decision. The mother appeals to us, challenging the Department's decision, arguing the "not established" finding should have been "unfounded."

II

On appeal, the mother in part argues there is no evidence she abused or neglected Imani. We easily dispose of this contention. The finding against the mother was "not established," which N.J.A.C. 3A:10-7.3 defines as follows:

An allegation shall be "not established" if there is not a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, but evidence indicates that the child was harmed or was placed at risk of harm.

[N.J.A.C. 3A:10-7.3(c)(3).]

Thus, a finding of "not established" is not a finding a party abused or neglected a child. Moreover, N.J.A.C. 3A:10-7.3(d) states "A finding of . . . not established . . . shall constitute a determination by the Department that a child is not an abused or neglected child pursuant to N.J.S.A. 9:6-8.21." Because the Department did not find the mother abused or neglected Imani, we need not address any argument premised upon the mother's erroneous conclusion the Department did so.

The mother next contends the Department's finding the children were harmed or put at risk for harm as a result of the incident is not supported by the record, and therefore, the finding of "not established" is arbitrary, capricious, and unreasonable. We agree.

We must "uphold an agency's decision 'unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 301-02 (2011) (quoting In re Herrmann, 192 N.J. 19,

27-28 (2007)). However, even though "the determination of an administrative agency is entitled to deference, our appellate obligation requires more than a perfunctory review." Blackwell v. Dep't of Corr., 348 N.J. Super. 117, 123 (App. Div. 2002).

Our function is not to merely rubberstamp an agency's decision; rather, our function is "to engage in a 'careful and principled consideration of the agency record and findings.'" Williams v. Dep't of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000) (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). We must determine whether the agency's finding could reasonably have been reached on sufficient credible evidence in the record, "considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge their credibility." In re Taylor, 158 N.J. 644, 656 (1999) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)).

In our view, there is insufficient proof the mother harmed or put the children at risk for harm during the subject incident. The mother maintains the children did not witness the incident. The father told the police and the Department neither child was present, but in his domestic violence complaint, he claimed Imani was present when he was stabbed by the mother. However, Imani herself stated she did not witness the stabbing.

She could not have been traumatized from viewing the stabbing if she herself is maintaining she did not see it.

There is no indication the children were harmed or placed in harm's way because of what transpired between the parents that evening. Even if they had witnessed the stabbing, we could not assume they were harmed. See N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004), certif. denied, 182 N.J. 426 (2005) (holding the mere act of viewing domestic violence does not establish a child was harmed). The Division must establish harm occurred or is likely to occur as a result of being in the presence of violence. Id. at 24.

In S.S., we reversed a finding S.S. abused or neglected her infant son because he was present when S.S. was physically attacked by the child's father, and thereafter S.S. sought to remain in a relationship with the father. Id. at 15. We held it could not be assumed "witnessing domestic abuse had a present or potential negative effect on the child sufficient to warrant a finding of abuse against appellant – the battered victim." Id. at 26. We determined the failure to adduce psychological evidence establishing a causal connection between the violence and emotional harm to the child was fatal to the trial court's conclusion the child had been abused. Id. at 22-23.

Here, the children were not even present during the stabbing, making it even more unlikely they suffered any emotional trauma as a result of the incident. There was no competent evidence they suffered or will endure emotional harm from anything that occurred that evening.

The Department argues Dr. Maddux stated in his report the mother is at "significant risk" for exposing the children to "her lapses of emotional control and acting aggressively towards others," and her "psychological functioning put the child's psychological health in sure danger of becoming impaired." However, the bases for these and other opinions in Dr. Maddux's report were not borne of uncontested facts. His opinions largely depended upon what occurred during the incident and how the mother behaved in the past, about which there was conflicting evidence. Although Dr. Maddux appropriated to himself the task of resolving the conflicts in the evidence, his opinion was irrelevant.

The opinions of Dr. Maddux that were not grounded upon facts established to be true by the fact-finder were not competent evidence. "An expert opinion that is not factually supported is a net opinion or mere hypothesis to which no weight need be accorded." Beadling v. William Bowman Assocs., 355 N.J. Super. 70, 87 (App. Div. 2002); see generally Buckelew v.

Grossbard, 87 N.J. 512, 524 (1981). Accordingly, the expert's conclusions the mother's actions posed a risk of harm to the children must be rejected.


The Department submitted a report from Imani's therapist, who stated the child made significant progress toward processing "the family trauma." It is not clear to what trauma the report refers, not to mention the report does not specify if Imani was in fact harmed by such trauma. The therapist's report also states the child "appears to have no lasting negative effects of her parents['] argument/violence." Again, it is not clear from such statement whether Imani in fact suffered any actual harm.

The Department notes that, in response to Dr. Maddux's question whether she believed Imani had been harmed "on the day of the instant scenario," the mother responded in the affirmative. The Department argues the mother made an admission the child was harmed. First, the mother's response to this very generic question does not establish Imani was in fact harmed. Second, as there is no evidence the child was physically harmed, any harm to which the mother was referring would have to have been emotional or psychological. However, it was not established the mother was qualified to render the opinion she expressed. See generally N.J.R.E. 702.

In summary, applying the appropriate standard of review, we conclude the Department's determination the children were harmed or put at risk for harm "lack[ed] fair support in the record[,]" see In re Herrmann, supra, 192 N.J. at 27-28, and thus was arbitrary, capricious, and unreasonable, requiring reversal. Our disposition makes unnecessary our consideration of the mother's remaining arguments. To the extent any argument raised by the Department has not been explicitly addressed in this opinion, it is because we are satisfied the argument lacked sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed.

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


CLERK OF THE APPELLATE DIVISION