RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3763-15T4
A-1806-16T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

M.H.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF N.H., MY.H and J.H., minors.

Submitted October 31, 2017 – Decided December 14, 2017

Before Judges Fisher and Moynihan.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket Nos. FN-07-0239-15 and FG-07-0201-16.

Joseph E. Krakora, Public Defender, attorney for appellant M.H. (Rasheedah Terry, Designated Counsel, on the brief in A-3763-15; Thomas W. MacLeod, Designated Counsel, on the brief in A-1806-16).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz,

Assistant Attorney General, of counsel; Monisha A. Kumar, Deputy Attorney General, on the brief in A-3763-15; Casey Woodruff, Deputy Attorney General, on the brief in A-1806-16).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Noel C. Devlin, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

Defendant M.H. appeals from an order entered after a Family Part judge found she abused and neglected her three children, and from an order entered by another Family Part judge terminating her parental rights. We have consolidated these matters and address both in this single opinion; we affirm both orders.

M.H. is the mother of three girls, Nancy, Mildred and Jennifer,[1] born in 2005, 2006 and 2012, respectively. The Division of Child Protection and Permanency removed the girls on October 31, 2014; thereafter the Division was granted custody, with weekly supervised visitation offered to the girls' parents. Following a Title 9 hearing on March 4, 2015, the judge found M.H. abused and neglected the children.

M.H. contends the Title 9 judge erred because the Division failed to offer sufficient proof that: she "suffered from mental illness and that said mental illness prevented her from providing

[1] The girls' pseudonyms used in defendant's Title 9 brief are repeated here to protect their privacy.

adequate care to her children"; "the family's shortcomings, if any, were caused by [M.H.'s] mental illness as opposed to poverty"; M.H. "failed to comply with treatment or that her lack of compliance posed a real threat of harm to the children." She also avers the admission by the judge of an August 21, 2013 doctor's report as an adoptive admission was error. The children's law guardian submits the evidence presented by the Division did not establish abuse or neglect.

The State counters that the proofs established M.H. failed to properly address her mental health and home management issues and, despite services provided to her, placed the girls at substantial risk of harm.

The scope of our review of an order finding abuse or neglect is limited. New Jersey Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 112 (2011). We must "defer to the factual findings of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a feel of the case that can never be realized by a review of the cold record." New Jersey Div. of Youth and Family Servs. v. E.P., 196 N.J. 88, 104; see also New Jersey Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010). "[E]ven if we would not have made the same decision if we had heard the case in the first instance[,]" the trial court's factual findings

should not be disturbed unless they "are 'so wide of the mark that a mistake must have been made.'" N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007); see also N.J. Div. of Child Prot. & Permanency v. Y.A., 437 N.J. Super. 541, 546 (App. Div. 2014).

An "abused or neglected child," is defined by N.J.S.A. 9:6-8.21(c)(4), as a child who is less than eighteen years of age and

> 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 though offered financial or other reasonable means 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[;] . . . or by any other acts of a similarly serious nature requiring the aid of the court.

"'Whether a parent or guardian has failed to exercise a minimum degree of care' in protecting a child is determined on a case-by-case basis and 'analyzed in light of the dangers and risks associated with the situation.'" N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 614 (App. Div. 2010) (quoting G.S. v. Dep't of Human Servs., 157 N.J. 161, 181-82 (1999)). "'[M]inimum degree of care' refers to conduct that is grossly or wantonly negligent, but not necessarily intentional." G.S., 157

N.J. at 178. "[A] guardian [or parent] fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." Id. at 181.

This standard "implies that a person has acted with reckless disregard for the safety of others." Id. at 179. Moreover, a parent may be found to have abused or neglected a child when the parent creates a substantial risk of harm, since a court "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999). Courts have recognized that a parent's inaction or unintentional conduct may amount to a finding of abuse or neglect, if there is evidence that the child was injured. G.S., 157 N.J. at 177-82.

The judge recognized that poverty played a role in M.H.'s inability to provide furniture, food and a clean home. He noted, however, her reluctance to cooperate with the Division to address her long-standing mental health needs. The judge found reports that M.H. was medication compliant were belied by the condition of the children and home – and that there had been no change in that condition. He also found a "complete" lack of compliance with her mental health treatment led to a "psychotic episode" that

occurred in the Division's office, presenting overlapping circumstances that resulted in a risk to the children's safety. Despite the provision of services by the Division, M.H.'s failure to comply left her unable to care for her children and placed them at substantial risk of harm.

The record supports the judge's findings. The Division caseworker — the only witness to testify at the Title 9 hearing — and her reports, which were admitted into evidence, established that the Division, at the time this action was commenced in October 2014, had already assigned a parent-aide to assist M.H. in caring for the children because of issues involving the cleanliness of the home and the children, and a lack of food in the house. Despite favorable reports from the parent-aide, which led to the cessation of those services in April 2014, the caseworker, shortly thereafter, found the home ill-managed; the roach-infested residence was dirty and littered with trash, clothing and soiled dishes. The children's beds were devoid of linens, and the baths were devoid of toiletries. Although the Division had considered closing the family's case, M.H. was told that the case would remain open until she improved home conditions.

Over the next few months, the Division noted M.H. was not cleaning the residence. It was still roach-infested and strewn with trash, including food left on the floors. Moreover, the

children were unsupervised; the caseworker found Nancy and Mildred playing outside, wet and dressed only in their undergarments. Jennifer was seen without a diaper or underclothes. The children were not groomed. For months, M.H. did not take proactive steps to secure her food stamp entitlement in order to provide food for the children, despite previous exhortations from the parent-aide and a like concern from the caseworker. The caseworker described the amount of food in the house as "bare, bare minimum." The children did not attend school for a period because M.H. failed to buy clothes and school supplies, although she was given funds prior to the start of classes.

In August 2014, M.H. showed the Division workers a psychiatrist's report and her prescription medication — Seroquel. Based on the prescription instructions, the date of the prescription and the amount of pills — both originally prescribed and left in the bottle — the caseworker was concerned that M.H. was not properly medicating. The doctor's report M.H. gave to the workers contained a diagnosis of bipolar disorder with occasional auditory hallucinations.[2] The Division referred M.H. for a

[2] The judge summarily admitted the report as an adoptive admission prior to any testimony establishing the requirements for admission under N.J.R.E. 803(b)(3). The record is unclear — if not barren — as to the judge's findings justifying admission of the report. We find no justification for admission. We note that the only

psychological evaluation in order to assess her parenting capacity.[3] The Division also referred M.H. to Family Preservation Services (FPS) to assist her four days per week with home care, financial management, community resource links and mental health care. The FPS services were discontinued after approximately one month due to noncompliance and a lack of progress; although M.H. appeared to make an effort at times, she was incapable of retaining any of the skills she was taught.

After the psychological evaluation, the Division met with M.H. in an effort to set up a psychiatric evaluation and a partial-hospitalization program. Soon thereafter, M.H. appeared at the Division's office with Jennifer. Because she seemed emotional and delusional, she was referred for an emergency mental health screening. She was involuntarily committed on October 31, 2014 —

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possible reference to the report the judge made in his decision was that M.H. knew she had a mental health issue for some time, presumably based on the diagnosis in the report. We will not consider the report as evidence that could support the judge's findings.

[3] The caseworker testified she had discussed the need for a psychological evaluation because of M.H.'s inability to care for the children and the home even though she had the services of a parent-aide, and because "just talking to [M.H.] and seeing that she wasn't getting it, we were starting to feel like . . . is it something else."

the same day the children were removed[4] — and remained in the hospital for about two weeks.

Even absent expert testimony regarding M.H.'s psychiatric or psychological condition, her behavior and, more importantly, her failure to care for the children and their environment, notwithstanding services provided by the Division, present proof by a preponderance of the evidence that the girls were abused and neglected. N.J.S.A. 9:6-8.21(c)(4). Further, the proofs show that it was M.H.'s lack of care — not her poverty — that caused the abuse and neglect. She did not pursue entitlements which would have allowed her to provide sustenance for her children and cleaning supplies for the residence. She did not cooperate with the service providers in order to resolve her long-standing problems in caring for the children and the home. M.H. — not poverty — was the reason the children were unkempt and the residence was filthy for a protracted period.

The balance of M.H.'s arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following comments. Despite protestations about the lack of competent evidence of M.H.'s mental illness, she

[4] On the day of their removal, the caseworker testified that the two youngest children were in "the normal condition," "unkempt[,] [t]heir hair wasn't done. Their clothes were dirty. Neither one of them had on socks. [Mildred] didn't have on any undergarments."

concedes in her merits brief "the record demonstrates that [she] complied with mental health services," and that she "self-reported that she was 'seeing a psychiatrist,'" specifically Dr. Cowen, whose report she presented to the caseworker — the very report she now contends was improperly considered by the judge. Her appearance at the Division's office and her subsequent hospitalization were evidence of M.H.'s mental health issues. As the judge concluded, although M.H. was aware of her mental health diagnosis, she did not avail herself of services to address that issue. There was sufficient evidence, even without Dr. Cowen's report, to establish M.H.'s condition.

We affirm the order entered memorializing M.H.'s abuse and neglect.

Subsequent to the entry of the Title 9 order, after finding M.H. was not capable of providing adequate child care because she had a history of noncompliance with mental health treatment and needed intensive psychiatric treatment, a reunification plan with the girls' fathers was approved at an October 2015 permanency hearing.[5] That plan was scotched and the Division filed a complaint for guardianship in March 2016.

[5] No plan to reunify the girls with M.H. was attempted because she was found to be incapable of parenting.

Jennifer had been placed with a paternal aunt in Virginia in late August 2015. Mildred, after living in two resource homes, was also placed with the aunt in Virginia in July 2016. The Virginia aunt wanted to adopt both girls. Nancy was placed with another paternal aunt in New Jersey in November 2015. That aunt wanted to adopt Nancy.

Judge James R. Paganelli, during a three-day trial, heard testimony from the Division caseworker who testified at the Title 9 hearing, and the adoption caseworker. He also heard testimony from Jonathan Mack, Psy.D., who was stipulated as an expert in neuropsychology. Dr. Mack conducted a neuropsychological evaluation of M.H. Dr. Mark Singer, Ed.D., also testified, after he was stipulated as an expert in psychology, about his evaluation of M.H. and the bonding evaluations he conducted of all three girls with M.H. and the paternal aunt with whom each was residing. The judge issued a written decision and entered a permanency order terminating M.H.'s parental rights to all three girls.[6]

M.H. contends that the trial court's conclusions were improper because the evidence did not clearly and convincingly establish the statutory factors required to be proved by the

[6] The order also terminated the parental rights of Mildred's natural father. He has not appealed. Nancy's father and Jennifer's father executed voluntary identified surrenders of their rights.

Division before parental rights can be terminated. N.J.S.A. 30:4C-15.1(a). The Division and the law guardian aver that the court's determination was made after clear and convincing evidence as to each factor was established by the presented evidence. We affirm substantially for the reasons found by Judge Paganelli.

"Our review of a trial judge's decision to terminate parental rights is limited." In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002); see also N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). Moreover, we accord even greater deference to the judge's fact-finding "[b]ecause of the family courts' special jurisdiction and expertise in family matters." Id. at 413. We will not disturb the trial judge's factual findings unless they are "so wide of the mark that a mistake must have been made," even if we would not have made the same decision. Snyder Realty, Inc. v. BMW of N. Am., Inc., 233 N.J. Super. 65, 69 (App. Div. 1989); see also N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007).

"The balance between parental rights and the State's interest in the welfare of children is achieved through the best interests

of the child standard." In re Guardianship of K.H.O., 161 N.J. 337, 347 (1999). Before parental rights may be terminated, the Division must prove the following four prongs by clear and convincing evidence:

> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
>
> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
>
> (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
>
> (4) Termination of parental rights will not do more harm than good.
>
> [N.J.S.A. 30:4C-15.1(a); see also N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 604-11 (1986).]

The factors "are not discrete and separate; they relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." K.H.O., 161 N.J. at 348.

Judge Paganelli conducted a fact-sensitive analysis of each prong and made factual findings after an attentive consideration of the evidence.

The judge's conclusions relevant to the first prong dovetailed with his findings supporting the second prong, a common occurrence resulting from the overlap of the two. N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006). The record supports his ruling that the Division established these prongs.

Judge Paganelli noted Dr. Mack's and Dr. Singer's findings that M.H. suffered from various mental disorders, and that the deficits attributed to those disorders — and to "issues related to substance abuse and antisocial tendencies" — rendered her an implausible parenting option. He also credited Dr. Mack's opinion that her dysfunction negated any treatment option that would make her "a minimally effective parent," and found M.H. was thus "unable to eliminate the harm facing the children." He also found her noncompliance with mental health treatment services indicated her unwillingness to remove the harm. He further concluded the "uncontroverted and credible expert testimony . . . reveals that separating these children from their resource family parents would cause serious and enduring emotional or psychological harm" that M.H. could not mitigate.

Contrary to M.H.'s present argument, the judge's opinion that the Division met the first two prongs was not based solely on M.H.'s mental illness. The record is replete — as reflected by Judge Paganelli's findings — with evidence of M.H.'s noncompliance with treatment and services, and the deleterious impact of her protracted failure to provide for the children and their home.[7] Notwithstanding M.H.'s efforts at treatment, and occasional periods of appropriate parenting, she never sustained either.

The judge properly ruled there was clear and convincing evidence to establish the first and second prongs.

We determine M.H.'s argument with regard to the third prong is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only that Judge Paganelli recognized the plethora of services offered to M.H. by the Division, and that those programs "were planned after expert evaluations of her various needs" and "were individualized and particular" to her needs. He recognized that although the Division provided M.H. with transportation to the Virginia location at which Mildred and Jasmine were fostered, it did not provide M.H. with housing. He considered M.H.'s argument that the Division's

[7] Both doctors, whose opinions the judge considered, reviewed records and reports pertaining to M.H.; the judge particularly noted Dr. Singer's "extensive record review," as well as the doctors' interaction with M.H.

failure to provide lodging evidenced a lack of reasonable efforts regarding visitation, but rejected the argument because it ignored

> (1) [M.H.'s] failure to complete services which would have resulted in the children being returned to her, (2) this was a relative resource placement, [the Division] was obligated to assess the relative . . . , (3) [the Division] attempted to assess closer, however, uncooperative relatives, (4) [M.H.'s] failure to utilize the transportation offered – she is required to make some effort in the reunification process . . . and (5) [M.H.] was happy that [Jennifer] was "ok" that [Mildred] would be staying with the paternal aunt.

Inasmuch as the judge also fully considered all alternatives to termination, we conclude his findings as to the third prong were substantiated.

In deciding whether the Division met its burden with regard to the fourth prong, the judge heeded the Court's mandate in K.H.O. and considered the "realistic likelihood that the [natural] parent will be capable of caring for the child in the near future," 161 N.J. at 357, and found none.

The judge properly relied on Dr. Singer's unrefuted opinion that, although each girl would experience a negative reaction if removed from either M.H. or her prospective adoptive parent – her aunt – only the negative reaction to the loss of the adoptive parent would be significant and enduring. The determination of "whether, after considering and balancing the two relationships,

the child will suffer a greater harm from the termination of ties with her natural parents than from the permanent disruption of her relationship with her foster [or resource] parents," K.H.O., 161 N.J. at 355, "is an expert judgment," In re Guardianship of J.N.H., 172 N.J. 440, 478 (2002). Bonding evaluations play an important role in this regard. In re Guardianship of J.C., 129 N.J. 1, 18-19 (1992). Psychologists and psychiatrists who perform the evaluations "play a critical role in reaching an ultimate decision in termination cases." Id. at 22.

The judge, after reviewing Dr. Singer's opinion, reflected:

> Therefore, the court is left to consider a healthy relationship between the children and their paternal aunts that, if terminated, would cause harm that [M.H.] could not mitigate and would cause significant and enduring harm versus an unhealthy relationship with [M.H.] Further, although there would be harm in terminating [M.H.'s] parental rights, that harm can be mitigated by the paternal aunts.

The judge also recognized that great harm can result if termination is ordered "without any compensating benefit, such as adoption," and that such harm may occur when a child is "cycled through multiple foster homes" following termination. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 109 (2008). He also considered that a child's need for permanency and stability is a "central factor" in these cases, K.H.O., 161 N.J. at 357, and

concluded the girls would "have the benefit from termination and adoption by a loving family."

We conclude the judge did not err in finding the Division provided clear and convincing evidence as to the fourth prong. The Division proved all four prongs and termination was properly ordered.

Affirmed.