SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3927-15T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

L.K.,

Defendant-Appellant,

and

J.K., JR.,

Defendant.

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IN THE MATTER OF S.K., M.K., and J.K., III, MINORS.

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Submitted October 23, 2017 – Decided December 11, 2017

Before Judges Whipple and Rose.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FN-12-0100-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Jill Alintoff, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; James R. Griffin, Jr., Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Olivia Belfatto Crisp, Assistant Deputy Public Defender, on the brief).

PER CURIAM

Defendant L.K.[1] appeals from a March 4, 2015 order[2] of the Family Court finding defendant abused or neglected her children by failing to provide them with safe and adequate shelter, and by leaving them unattended in the family's van. We affirm.

I.

We derive the salient facts from the record developed at the fact-finding hearing. Defendant, and her husband J.K., Jr.,[3] are the biological parents of three children, S.K., born in September 2006, M.K., born in September 2008, and J.K., III, born in November 2010. The family has a history with the Division of Child Protection and Permanency ("Division") since 2008.

[1] We use initials to protect the privacy of the parties. See R. 1:38-12(d)(12).

[2] This order became appealable as of right after the trial court entered a final order terminating litigation on April 5, 2016.

[3] J.K., Jr. does not appeal from the March 4, 2015 order that determined he also abused or neglected the children.

In August 2014, the Division received a referral regarding, among other things, inadequate housing and supervision of the children. A Division caseworker, who responded to defendant's trailer home, testified that the bedroom J.K., III shared with his parents was cluttered without sufficient space to walk, and the bathroom was dirty and smelled of mildew. Defendant admitted the home had a roach and fly problem, and the family's propane tank had been repossessed for nonpayment. Defendant was employed part-time, but J.K., Jr. had been unemployed since June 2014, and the family did not have health insurance. The children were not removed from the home at this time because defendant and J.K., Jr. were willing to clean the house.

However, in September 2014, the Division received another referral reporting concerns about the conditions of defendant's home. One of the caseworkers who responded to the home testified that the conditions were "deplorable." For example, "[t]here were roaches everywhere, and there [were] holes in the walls where roaches were coming out." Defendant informed the caseworker a pile of fifteen to twenty dead roaches on the countertop was likely a result of her attempt at extermination.

The caseworker testified further that the living room couches had "a very sticky film" over them. The cushions were torn apart with "roaches coming in and out" of them. The children's clothing

was strewn on top of the couches. Defendant told the caseworkers the children often fall asleep on the couches. The workers observed the children drinking from juice boxes and eating from an open bag of chips on the floor in close proximity to roaches.

While the caseworker observed many roaches in the living room, most of the roaches were located in the bathroom. Mold was visible on the falling bathroom ceiling, and the bathroom smelled of mildew. There were also two large holes in the bathroom floor that were large enough for the children to place their feet through, and deep enough that the grass under the trailer was visible. If the children stepped into the holes, they would be "up to their knees." She estimated the hole by the washer and dryer was approximately twelve inches, and the hole by the toilet was approximately six inches. Although there were half-inch boards covering the holes, the caseworker testified they were easily moveable.

The caseworker testified further the mattresses on the beds were dirty with "little pellets" that, based on her experience, "appeared to be like rat stools." The floors were dirty with cigarette butts, dirt, grime and roaches. Hanging from the wall, there was an exposed electrical socket covered only by a piece of cellophane tape.

At the conclusion of the inspection, the caseworkers created a safety protection plan. Defendant and J.K., Jr. agreed the children would stay with a maternal aunt until the Division determined the home was sufficiently safe and clean for the children to return.

Later that month, the Division received a third referral about the family after five-year-old M.K. drove the family's van into a neighbor's mailbox. Defendant told the caseworker who responded to the home that she left all three children unattended in the vehicle with the motor running. Defendant also admitted the children were not restrained in child safety seats, although S.K. may have been restrained with a seat belt. Defendant ran inside to retrieve something from the house and thought her adult brother or her husband, who were outside, would watch the children. However, M.K. climbed over the back seat, "turned the wheel and backed into the mailbox."

Following this incident, the Division executed an emergency Dodd removal[4] of defendant's three children pursuant to N.J.S.A. 9:6-8.28, and placed the children with their maternal aunt.

[4] A Dodd removal is an emergent removal of a minor without a court order pursuant to N.J.S.A. 9:6-8.21 to -8.82, known as the Dodd Act. N.J. Div. of Youth & Fam. Servs. v. P.W.R., 205 N.J. 17, 26 n.11 (2011).

In addition to the testimony of four caseworkers[5] adduced at the three-day fact-finding hearing, the Division entered into evidence documents and multiple photographs depicting the condition of the home. The Division's factual proofs were substantially unrefuted. Defendant did not testify nor call any witnesses.[6] On March 4, 2015, Judge Barbara Clarke Stolte issued an order and comprehensive oral opinion.

The judge found the Division's witnesses credible. Relying on the testimony of those witnesses, the facts established in the documents submitted into evidence, and the photographs depicting the condition of the home, the judge concluded the Division proved, by a preponderance of the evidence, the children were abused and neglected by their parents' inability to provide adequate shelter. The judge also determined the Division proved defendant and J.K., Jr. were grossly negligent by allowing the children to remain in the unattended family van, resulting in M.K.'s driving the vehicle into a mailbox.

On appeal, defendant contends there was insufficient evidence to support the court's findings defendant abused or neglected her

[5] The testimony of one of the caseworkers was limited to authentication of the Division's investigation summary.

[6] By stipulation, defendant introduced twenty-nine photographs of the condition of the apartment as of December 2014.

children. Specifically, defendant contends the court: failed to explain how the children were at imminent risk of physical impairment; erred in finding she was financially able to provide shelter for her children; and erred in finding she was grossly negligent for leaving the children in the running vehicle. Defendant also argues the conditions that led to the children's removal were substantially remediated by the time the fact-finding hearing commenced on December 10, 2014. The Division and law guardian urge us to affirm the court's order. After reviewing the record in light of the contentions advanced on appeal, we affirm.

II.

We begin with a review of the applicable legal principles that guide our analysis in abuse or neglect matters, as set forth by our Supreme Court:

> [A]ppellate courts 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. Indeed, we recognize that [b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court fact [-]finding.
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> [N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (second alteration in the original) (internal quotation marks and citations omitted).]

"[I]f there is substantial credible evidence in the record to support the trial court's findings, we will not disturb those findings." N.J. Div. of Youth & Fam. Servs. v. L.L., 201 N.J. 210, 226 (2010). However, "if the trial court's conclusions are 'clearly mistaken or wide of the mark[,]' an appellate court must intervene to ensure the fairness of the proceeding." Id. at 227 (alteration in original) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). We also owe no deference to the trial court's legal conclusions, which we review de novo. State v. Smith, 212 N.J. 365, 387 (2012), cert. denied, 568 U.S. 1217, 133 S. Ct. 1504, 185 L. Ed. 2d 558 (2013).

In a Title 9 action, the Division must prove by a preponderance of "competent, material, and relevant evidence" that a child is abused or neglected. N.J.S.A. 9:6-8.46(b). Title 9 cases are fact-sensitive, and the court should "base its findings on the totality of circumstances." N.J. Div. of Youth & Fam. Servs. v. V.T., 423 N.J. Super. 320, 329 (App. Div. 2011).

An "abused or neglected child" under Title 9 means, in pertinent part

> [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 . . . to exercise a minimum degree of care (a) in supplying the child with . . . shelter . . . though financially able to do so or though offered

> financial or other reasonable means to do so[.]
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> [N.J.S.A. 9:6-8.21(c)(4).]

Here, one of the findings of abuse and neglect centers on defendant's purported "failure . . . to exercise a minimum degree of care," in supplying her children with adequate shelter. Our Supreme Court has held that:

> The phrase "minimum degree of care" denotes a lesser burden on the actor than a duty of ordinary care. If a lesser measure of care is required of an actor, then something more than ordinary negligence is required to hold the actor liable. The most logical higher measure of neglect is found in conduct that is grossly negligent because it is willful or wanton. Therefore, we believe the phrase "minimum degree of care" refers to conduct that is grossly or wantonly negligent, but not necessarily intentional.
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> [N.J. Div. of Youth & Fam. Servs. v. T.B., 207 N.J. 294, 305 (2011) (quoting G.S. v. Dep't of Human Servs., 157 N.J. 161, 177-78 (1999)).]

In turn, "'willful and wanton misconduct implies a person has acted with reckless disregard for the safety of others.'" Id. at 306 (citations omitted) (quoting G.S., supra, 157 N.J. at 179). "[W]here a parent or guardian acts in a grossly negligent or reckless manner, that deviation from the standard of care may support an inference that the child is subject to future danger." Id. at 307. However, "where a parent is merely negligent there

is no warrant to infer that the child will be at future risk." Ibid.

Moreover, the statute does not require that the child experience actual harm. N.J.S.A. 9:6-8.21(c)(4)(b). See also Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 178 (2015) (recognizing a court "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect.") (quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)). In cases where there is an absence of actual harm, but there exists a substantial risk of harm or imminent danger, the court must consider whether the parent exercised a minimum degree of care under the circumstances. G.S., supra, 157 N.J. at 171. Because there was no "actual impairment to the child[ren]" here, "the focus shifts to whether there is a threat of harm." E.D.-O., supra, 233 N.J. at 178. In this regard, a court can make a finding of abuse or neglect "based on proof of imminent danger and a substantial risk of harm." N.J. Div. of Youth & Fam. Servs. v. A.L., 213 N.J. 1, 23 (2013).

Here, Judge Stolte's finding the children were exposed to a risk of imminent harm is fully supported by the record. The judge referenced, at length, the undisputed "deplorable" conditions of the home, determining they were "dangerous conditions, [which placed] the children at imminent risk." Specifically, the court

cited: the two large holes that the children "easily . . . could fall into or get into;" mold on the falling bathroom ceiling;[7] an exposed electrical socket pulled from the wall; roaches on the couch where the children slept and ate; and dead roaches and rat droppings on the girls' mattresses.

In so ruling, the court recognized defendant and J.K., Jr. had been struggling financially, but found the condition of the home was not the result of poverty. The court elaborated

> You don't have to be a millionaire to [make a home safe]; to nail the board in on top of the hole. To put duc[t] tape to surround a socket so . . . no one can get into that socket.
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> These are things that could easily have been done, as one of the cases said, a little elbow grease, soap and water.
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> Those are things that . . . you don't need to be a millionaire. You don't need to have hundreds of dollars. These are things that . . . mom and dad could have absolutely done. But didn't do. And we know they could have

[7] On appeal, defendant contends there was no evidence of mold adduced at the hearing. However, defense counsel did not object to admission of this evidence at trial. In fact, the Division's investigative summary, which was admitted into evidence without objection except for inadmissible hearsay, contains defendant's explanation "that the mold is coming from the vent." In any event, "the making of contemporaneous objections [is] the principal and almost exclusive means of preserving an issue for appeal." State v. Robinson, 200 N.J. 1, 20 (2009). In the absence of an objection, we retain the inherent authority to "notice plain error not brought to the attention of the trial court[,]" provided it is "in the interests of justice" to do so. R. 2:10-2. Here, the introduction of the evidence of mold was not plain error because it was not "clearly capable of producing an unjust result." Ibid.

> because they did it before . . . in the summer of 2013.
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> The home was not clean. There [were] clothes all over. Food and dirt all over. And I don't find that these are conditions that were imposed by poverty, but by mom and dad and their failure to exercise a minimum degree of care.

Finding the condition of the home was not the result of poverty, Judge Stolte distinguished the present case from Doe v. G.D., 146 N.J. Super. 419, aff'd sub nom. Doe v. Downey, 74 N.J. 196 (1977) and its progeny. See N.J. Div. of Child Prot. & Permanency v. L.W., 435 N.J. Super. 189, 195 (App. Div. 2014) (citing G.D., supra, 146 N.J. Super. at 430-31) ("It is well-settled that poverty alone is not a basis for a finding of abuse or neglect."). However, "a failure to provide for a child's needs, when a parent is capable of doing so, can support actionable neglect where a child's condition has been demonstrated to be impaired or in imminent danger of being impaired." P.W.R., supra, 205 N.J. at 35. Here, we agree the conditions of the home could have been remedied with physical effort, that is, self-cleaning the home, and self-repairing the obvious hazards cited by the trial court. We see no reason to disturb those findings.

We are also satisfied there was substantial credible evidence defendant was grossly negligent by leaving the children in an unattended car, resulting in M.K.'s accident. Indeed, defendant

admitted she left the children in the car with the motor running and they were not restrained in child safety seats. Thus, five-year-old M.K. was able to climb over the rear seat, position herself behind the wheel, and drive into a mailbox. Judge Stolte concluded defendant's actions "transcend[] negligence and move[] right into gross negligence" by failing to exercise the minimal degree of care. Specifically, she said, "You stop the car. You take the keys out. You have the [kids] in safety seats. That's the minimum degree of care." We agree.

Finally, defendant's argument that the trial court should have considered the imminent risk to her children at the time of the fact-finding hearing is misplaced. To support her argument defendant erroneously relies on our decision in N.J. Div. of Child Prot. & Permanency v. M.C., 435 N.J. Super. 405, 418 (App. Div. 2014), certif. granted, 220 N.J. 41 (2014), appeal dismissed by, remanded by, 223 N.J. 160 (2015).[8] Subsequent to our decision, however, the Court clarified that the evaluation of a parent's conduct for abuse or neglect should not be determined by the risk the parent poses at the time of the fact-finding. See E.D.-O., supra, 223 N.J. at 170. Rather, the analysis should focus on the

[8] In August 2016, we revised our original decision in M.C. See N.J. Div. of Child Prot. & Permanency v. M.C., No. A-2398-12 (App. Div. Aug. 4, 2016), aff'g in part, rev'g in part, 435 N.J. Super. 405 (App. Div. 2015).

events up through the time of the conduct. Id. at 170. A trial court's focus on the parent's status as of the time of the fact-finding hearing, "has the obvious potential to overlook [earlier] conduct, even aberrational conduct, that had the clear capacity to produce a catastrophic result. Such an approach contravenes the legislative determination that child protective services and a court may intervene before a child experiences actual harm." Id. at 189.

The Court instructed in E.D.-O. that a trial court may consider for limited purposes the risk a parent poses at the time of the fact-finding, but only in the context of determining future services and the disposition of the children, not for making the abuse-or-neglect determination itself. Ibid. The Court explained "[t]he myriad dispositions available to the trial court after it enters a finding of abuse or neglect are fashioned based on current circumstances." Ibid. (emphasis added). Therefore, the focus in an abuse-or-neglect fact-finding must be on the harm, or risk of harm, to the children at the time of the incident, and not the positive steps that the parent may have taken after the Division responded to the incident and provided services.

While we commend defendant for her cooperation with the Division's services and her post-incident efforts to provide adequate shelter for her children, these measures do not erase the

imminent danger she created by allowing her children to live in deplorable conditions, and leaving them in an unattended car with the motor running.

We conclude Judge Stolte's findings of abuse or neglect are supported by substantial credible evidence and the totality of the circumstances. We, therefore, affirm substantially for the reasons expressed in her oral decision.

Affirmed.