SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4265-14T2

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,[1]

Plaintiff-Respondent,

v.

C.B.,

Defendant-Appellant,

and

J.B.,

Defendant.

IN THE MATTER OF B.B., a minor.

Submitted November 29, 2016 – Decided March 2, 2017

Before Judges Ostrer and Leone.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FN-14-67-12.

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[1] The Division of Child Protection and Permanency was previously named the Division of Youth and Family Services. L. 2012, c. 16, § 20. We will refer to the agency as the "Division."

Joseph E. Krakora, Public Defender, attorney for appellant (Arthur David Malkin, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ashley Kolata-Guzik, Deputy Attorney General, on the briefs).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Lisa M. Black, Designated Counsel, on the briefs).

PER CURIAM

Defendant C.B. (Mother) appeals a March 23, 2015 order terminating litigation under N.J.S.A. 30:4C-12 (Section 12) and granting defendant J.B. (Father) sole physical and legal custody of their child, B.B. Mother principally claims that the family court erred by transferring custody in a Title 9 dispositional "G.M. hearing" under N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382 (2009), rather than a Title 30 summary hearing under N.J. Dep't of Children & Families v. I.S., 214 N.J. 8, cert. denied, __ U.S. __, 134 S. Ct. 529, 187 L. Ed. 2d 380 (2013). Finding no prejudice, we affirm.

I.

We derive the following from the trial judge's August 3, 2012 fact-finding opinion and the hearing judge's March 23, 2015 opinion awarding custody.

B.B. was born in 2002. Mother and Father divorced in 2006. They shared joint legal custody of B.B., who lived primarily with Mother, but had parenting time with Father.

Mother has a long history with the Division. On July 11, 2011, the Division received a referral from Mother's therapist indicating Mother was suffering from severe depression involving very dark fatalistic thoughts, and left therapy saying she would give away her children.

On July 12, a Division caseworker met with B.B. at Father's home. B.B. has Type I diabetes and requires an insulin pump to monitor his insulin and sugar levels. B.B. reported that while staying with Mother, he often ate only once a day, causing him to feel "strange." B.B. also reported Mother had been "acting strange, overreacting, and yelling." Father expressed concern that Mother was not monitoring B.B.'s diabetes and that she would go into "complete meltdown" when she failed to take her medications. Father signed a Safety Protection Plan agreeing B.B. could stay with him until the Division's investigation was completed. Mother signed the Safety Protection Plan, promised to seek medical attention for her depression, and agreed any visitation would be supervised.

Following this meeting, Mother went to her therapist's office angrily screaming that the therapist and the Division had taken

her child, and refused to leave the office. The therapist recommended Mother obtain a psychiatric evaluation at a hospital, and get other treatment. Mother stormed out of the office. The therapist told the caseworker Mother questioned her ability to correctly care for B.B.

On July 13, Mother went to the emergency room, was found not dangerous, and was cleared to go back home, but was recommended to seek further treatment. Mother's therapist informed the caseworker Mother was depressed, was no longer attending therapy, and was refusing to contact treatment providers for needed counseling and medication management. The therapist also reported Mother said she could not "buy food [and] would be evicted and live in her car with B.B."

On July 21, at a supervised visit, B.B. became very upset, saying Mother hits him and does not care for him. Mother's response was to take a video of B.B. for use in court.

On July 22, 2011, the Division filed a verified complaint pursuant to "N.J.S.A. 9:6-8.21 et seq. [and] N.J.S.A. 30:4C-12" for care and supervision of Mother's two children, B.B. and Sa.Br.[2] The trial judge initially suspended visitation. Starting in September 2011, the judge ordered therapeutic supervised

[2] Sa.Br. was in the primary custody of her father, Sc.Br. In April 2013, Sc.Br. and Sa.Br. were dismissed from the litigation.

visitation. Before any visitation occurred, B.B.'s therapist reported B.B. was not ready to attend therapeutic supervised visits because he "'continued to display a great deal of anxiety'" concerning Mother. B.B.'s therapist opined that before B.B. could safely attend such visits with Mother, Mother would have to engage in individual therapy, and the mental health providers would have to collaborate to gauge both parties' readiness for visitation. The judge ordered Mother and B.B. to receive such individual therapy and ruled supervised visitation should commence when recommended by B.B.'s therapist.

On July 9, 2012, the trial judge held a fact-finding hearing, at which the Division called the caseworker and Mother's therapist. In an August 3, 2012 opinion and order, the judge held the Division did not prove "by a preponderance of the evidence that [Mother's] conduct was wanton or willful as to constitute abuse or neglect within the purview of Title [9]." However, the judge found that Mother "suffered from serious, and at times, untreated mental illness while B.B. was in her care," and that "the facts indicate a failure to provide proper care such that B.B.'s safety or welfare was endangered under N.J.S.A. 30:4C-12." The judge continued B.B.'s physical custody with Father and ordered care and supervision remain with the Division under Section 12.

The trial judge held a compliance hearing on September 27, 2012. The judge ordered Mother to obtain psychiatric and psychological evaluations, attend weekly therapy and medication monitoring, engage in mental health treatment, take her medications, and sign releases for her providers. The judge maintained the parents' joint legal custody, continued the physical placement of B.B. with Father, and again ordered supervised visitation between Mother and B.B. if recommended by B.B.'s therapist.

The Division's plan was for Mother and B.B. each to receive individual therapy with Family Intervention Services (FIS) and for their therapists to collaborate to initiate family therapy between them. However, after attending some therapy sessions at FIS, Mother dropped out. Mother later claimed she was seeing an independent therapist, but refused to sign releases to allow the Division to contact her therapist.

Mother also failed to provide the Division with her address or contact information, despite court orders. Mother limited her contact with the Division to "minimal and sporadic" email communication. Mother failed to respond to any communications after March 2014. As a result, the Division was unable to properly assess Mother's mental health, her ability to provide a home for

B.B., or her ability to handle his significant medical and behavioral needs.

The Division found Father met all of B.B.'s needs. Father was "extremely consistent when it comes to [B.B.]'s therapy services. He has [B.B.]'s diabetes fully under control. He brings him to every medical appointment," and was "very open to any services and any treatment recommendations that are brought forth." Father was "a very involved parent" who worked with B.B.'s therapists and schools, and attended every court hearing in person or by telephone.

The trial judge scheduled the matter for a "G.M. hearing" on February 12, 2013. In January 2013, a different judge took over the case and first held a compliance hearing. There, Mother's counsel successfully asked for the G.M. hearing to be postponed because counsel needed more time to review the evaluations.

At the April 25, 2013 compliance hearing, Mother's counsel once again successfully argued the G.M. hearing should be postponed to allow Mother to attend evaluations and to have B.B. evaluated. In July 2013, the judge ordered a social worker to opine on whether it would harm B.B. to be evaluated by the defense expert. In August 2013, Mother's counsel successfully moved for an evaluation of B.B. by a defense expert to prepare for the G.M. hearing.

B.B.'s therapist reported B.B. was not ready for therapeutic supervised visits with Mother and "continued to display a great deal of anxiety." In fall 2013, as a result of behavioral problems, B.B. was hospitalized, sent to psychiatric center, and was diagnosed with anxiety disorder and post-traumatic stress disorder. He returned to regular therapy visits in January 2014, still expressing fear of Mother.

At the January 2014 compliance hearing in front of a new judge (hearing judge), the Law Guardian asked that the G.M. hearing be scheduled. Mother's counsel requested that another defense expert evaluate B.B. Given B.B.'s fragile medical state, the judge declined Mother's request, ordered B.B.'s own therapist to perform the evaluations, and scheduled the G.M. hearing for June 9, 2014.

At the March 2014 compliance hearing, Mother declined to appear. She also voluntarily absented herself from the June 9, 2014 evidentiary hearing, and failed to appear on March 23, 2015, when the hearing judge issued an oral opinion.

Based on testimony by the caseworker and other evidence, the hearing judge found that, "[d]espite three years of litigation, [Mother] has failed to address the mental health issues that led to [B.B.]'s placement with [Father] in July 2011." Mother "has not made even the most minimal progress that would allow

therapeutic supervised visitation with [B.B.]" despite the Division's efforts. There was "no indication that [Mother] could offer the appropriate level of care and medical monitoring [B.B.] requires." "Given [B.B.]'s special needs, it would be harmful to return him to [Mother]'s care."

The judge found Father "has demonstrated he is capable of parenting [B.B.] despite [B.B.]'s significant behavioral issues and medical needs." It was "clear that [Father] is the only parent that can safely parent [B.B.] at this time." The judge granted full legal and physical custody of B.B. to Father, and terminated the litigation. The judge added that when Mother demonstrated she "is consistently enrolled in mental health treatment," she may "seek a modification of custody or visitation or parenting time" in the matrimonial action between the parents.

Mother appealed the March 23, 2015 order. On appeal, Mother belatedly produced some therapy records, and a signed release, which she concedes was unknown even to her counsel at the time of the hearing. We denied Mother's motions to expand the record and for summary disposition, but granted her alternative request to remand so she could file a motion to vacate under Rule 4:50.

On July 18, 2016, the hearing judge denied the motion to vacate after reviewing the belated records.[3] The records showed Mother attended a March 2014 intake session, misrepresented her mental health history, angrily left therapy in April 2014, and did not return until February 2015, but her referral had expired. The judge found the records did not change the finding that Mother was not regularly undergoing mental health treatment and had not made any progress to allow therapeutic visitation with B.B. The judge added that the custody and visitation rulings were also based on the recommendation by B.B.'s therapist that visitation "was not in B.B.'s best interest." The judge rejected her request to reopen the Section 12 litigation, finding no evidence that B.B. required the Division's involvement. The judge also saw no evidence why the custody or visitation orders should be changed under N.J.S.A. 9:2-4, but reiterated Mother could file a motion in the matrimonial case showing changed circumstances.

II.

We must hew to our standard of review.

> [W]e defer to a trial court's factual findings "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." We have long recognized

[3] We grant Mother's renewed motion to expand the record now that the records have been considered by the hearing judge.

> that "[b]ecause of the family courts' special . . . expertise in family matters, appellate courts should accord deference to family court factfinding." Thus, if there is substantial credible evidence in the record to support the trial court's findings, we will not disturb those findings. Nevertheless, 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.
>
> [N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 226-27 (2010) (citations omitted).]

III.

Although Mother appealed only the hearing judge's March 23, 2015 order placing B.B. in Father's custody, Mother also faults the trial judge's February 2, 2011 order finding no abuse or neglect but continuing the case under Section 12. Mother notes "[i]f facts sufficient to sustain the complaint under [Title 9] are not established, . . . the court shall dismiss the complaint and shall state the grounds for the dismissal." N.J.S.A. 9:6-8.50(c).

However, the dismissal of the Title 9 action "does not foreclose further intervention by the Division pursuant to N.J.S.A. 30:4C-12 to protect a child who, although not abused or neglected, is in need of services to ensure [his] health and safety." I.S., supra, 214 N.J. at 33 (quoting N.J. Div. of Youth & Family Servs. v. T.S., 426 N.J. Super. 54, 64 (App. Div. 2012)).

Here, the trial judge properly proceeded under Section 12, which was raised in the complaint, and relied on the order to show cause which placed B.B. "in the care and supervision of the Division." See N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 292-93 (2007).

The initial summary hearing under Section 12 should address "whether an order of care and supervision should be entered under Title 30," "determine whether the Division's intervention was in the children's best interests [and] identify services the parent needed." T.S., supra, 426 N.J. Super. at 58, 66. "[T]he court must be satisfied when entering temporary relief under N.J.S.A. 30:4C-12 that the Division has proven by a preponderance of the evidence that it is in the best interests of the child to enter the relief requested." I.S., supra, 214 N.J. at 38.

Here, the trial judge placed on the Division the burden by the "preponderance of the evidence" at the fact-finding hearing. N.J.S.A. 9:6-8.46(b). The judge expressed "serious concerns regarding [Mother]'s current mental health status and ability to monitor her son's diabetes," concluded she "continues to present substantial risk as a parent . . . and remains unable to parent B.B. due to major depression," and found Mother "fail[ed] to provide proper care such that B.B.'s safety or welfare was endangered under N.J.S.A. 30:4C-12." Although the judge did not

explicitly reference the "best interests of the child" standard, the judge's findings were "consistent with the required findings under N.J.S.A. 30:4C-12." N.J. Div. of Youth & Family Servs. v. J.C., 423 N.J. Super. 259, 268-69 (App. Div. 2011). In any event, Mother failed to show the judge would have issued a different order had the judge explicitly applied the best-interests standard.

Despite these findings, Mother argues the trial judge failed to make an initial determination she was at fault. She references prefatory language in N.J.S.A. 30:4C-12:

> Whenever it shall appear that the parent or parents, guardian, or person having custody and control of any child within this State is unfit to be entrusted with the care and education of such child, or shall fail to provide such child with proper protection, maintenance and education, or shall fail to ensure the health and safety of the child, or is endangering the welfare of such child, a written or oral complaint may be filed with the division, or other entity designated by the commissioner, by any person or by any public or private agency or institution interested in such child.

However, that language only refers to when a person can file a complaint with the Division. Our Supreme Court has held this "wording that appears at the outset of the first paragraph of Section 12" does not require "that there must be the equivalent of Title 9 abuse or neglect level of culpability on the part of

the parent in order [for the Division] to file a complaint under Section 12." I.S., supra, 214 N.J. at 35-36. Instead, N.J.S.A. 30:4C-12 permits the Division to seek an order of care and supervision if "it appears that the child requires care and supervision by the division or other action to ensure the health and safety of the child." The trial judge made that finding, which was supported by the evidence.

It is important that Mother never objected to the trial judge's continuation of the case under N.J.S.A. 30:4C-12. As a result, Mother must show "'plain error,' that is, 'error clearly capable of producing an unjust result.'" N.J. Div. of Youth & Family Servs. v. B.H., 391 N.J. Super. 322, 343 (App. Div.) (quoting R. 2:10-2), certif. denied, 192 N.J. 296 (2007). Under that standard, Mother "'has the burden of proving that the error was clear and obvious and that it affected [her] substantial rights.'" State v. Koskovich, 168 N.J. 448, 529 (2001) (citation omitted).

Mother has failed to carry that burden. Had she objected, the trial judge properly would have reached the same result given the evidence that B.B. would be endangered if returned to her care and that both Mother and B.B. required continuing services.

IV.

An initial order under N.J.S.A. 30:4C-12 "shall not be effective beyond a period of six months from the date of entry unless the court, upon application by the division, at a summary hearing held upon notice to the parent, . . . extends the time of the order." At such a summary hearing, "the court — in its discretion — may extend the order provided that it is satisfied, by the preponderance of the credible evidence, that the best interests of the child require continuation of that order." I.S., supra, 214 N.J. at 37-38.

Mother complains the judges handling the case did not explicitly hold "summary hearings" to extend the order. However, after the August 3, 2012 order, the judges did hold a series of compliance review hearings in September 2012, January and April 2013, and January and March 2014, prior to the final hearing in June 2014.[4] Although those hearings generally did not include testimony, the judges actively considered whether it was in B.B.'s best interest to remain with Father or have parenting time with Mother. Moreover, those hearings were within six months of each

[4] The purpose of a compliance review hearing "is to require the Division to demonstrate that continued care and supervision is still in the best interests because there is a need to ensure the child's health and safety." T.S., supra, 426 N.J. Super. at 66-67 (citing N.J.S.A. 30:4C-12).

other except between April 2013 and January 2014, and the court issued orders in July and August 2013 to try to arrange defense evaluations of B.B.

More importantly, the trial judge scheduled the "G.M. Hearing" for February 12, 2013, within six months of the first compliance hearing, and only six months and nine days from the August 3, 2012 order. Mother successfully moved to postpone the scheduled hearing three times to allow her counsel to review and obtain evaluations and prepare for the G.M. hearing. When the Law Guardian asked the court to schedule the hearing, Mother sought another postponement. The hearing judge denied that request and held the hearing within six months.

Under the invited error doctrine, a party "'cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, . . . then condemn the very procedure he sought . . . claiming it to be error and prejudicial.'" N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010) (citation omitted). Because it was Mother who requested the postponements about which she now complains, the invited error doctrine applies.

In any event, Mother failed to show a reasonable probability the outcome would have been different had Mother demanded summary hearings. If Mother's counsel had objected, "the Division could

have taken steps to satisfy any evidentiary requirements." Id. at 341. The Division would have had no difficulty proving by a preponderance of the evidence it was in the troubled B.B.'s best interests to continue the order granting the Division care and supervision. It was equally clear that Mother required services and was not ready to parent B.B.

Mother has not carried her burden to show the judges' granting of the requested continuances was plain error "clearly capable of producing an unjust result." R. 2:10-2. Moreover, "this case presents no fundamental injustice that would warrant relaxing the invited error doctrine." M.C. III, supra, 201 N.J. at 342.

V.

Mother argues the hearing judge improperly held a Title 9 dispositional hearing under G.M., rather than a Title 30 summary hearing under I.S. Regardless of the nomenclature, the hearing judge ultimately employed the best-interest standard required for a summary hearing under I.S. Therefore, Mother cannot show prejudice.

In G.M., our Supreme Court held "Title [9] provides that upon a finding of abuse and neglect, the offending parent or guardian is entitled to a dispositional hearing to determine whether the children may safely return to his or her custody, and if not, what the proper disposition should be." G.M., supra, 198 N.J. at 387-

88. The G.M. Court ruled such a Title 9 dispositional hearing was not "a custody determination based on the best interests of the child standard." Id. at 402.

In 2011, when the trial judge ordered a "G.M. hearing," Appellate Division precedent provided a family court "may, without a finding of abuse or neglect, enter an order continuing the Division's care, supervision, and custody of a child . . . pursuant to Title 9" and then, "[f]ollowing the dictates of G.M.," hold a hearing to determine whether the child could be "'safely returned'" to the custody of a parent. N.J. Div. of Youth & Family Servs. v. I.S., 422 N.J. Super. 52, 58, 70 (citation omitted), reconsideration denied, 423 N.J. Super. 124 (App. Div. 2011), aff'd in part, rev'd in part, & modified, 214 N.J. 8 (2013).

However, in 2013 our Supreme Court "reverse[d] the Title 9 portion of [the Appellate Division's] judgment that continued the [family] court's jurisdiction under that statutory scheme" after the family court found no abuse or neglect. I.S., supra, 214 N.J. at 15, 32. The Court ruled a family court which does not find abuse or neglect must apply the "best-interests analysis" to determine whether to alter parental custody over the child. Id. at 39-41.

At the opening of the June 9, 2014 dispositional hearing, the trial court asked: "We are here for a GM hearing. Is that correct?"

The Division responded: "Yes your Honor. The only technicality really is that this case is in litigation under Title 30 and not Title 9. So the IS [case] is relevant with respect to disposition." The Law Guardian argued that "[b]ecause this is a Title 30 case the legal standard of procedures to be applied was clarified in DYFS v. I.S.," that under the Supreme Court's opinion in I.S. the family court should determine which parent got custody based on "the best interest of the child," and that B.B.'s "best interest" was to remain with Father. By contrast, Mother's counsel took no position on whether the judge should apply Title 9 and G.M. or Title 30 and I.S.

In the March 23, 2015 opinion, the hearing judge characterized the June 9, 2014 hearing as a dispositional hearing under Title 9 and G.M. The judge stated that under I.S., "a G.M. Hearing is proper even where the Court has not found abuse or neglect, pursuant to Title 9, but has determined that care and supervision, pursuant to Title 30, is appropriate." Despite this mistaken nomenclature, the judge recognized that under I.S., "the Court must apply the best interest of the child analysis to determine whether a permanent change in custody is in [B.B]'s best interest."

We uphold the hearing judge's conclusion for the same reasons our Supreme Court in I.S. upheld the family court's similarly-flawed conclusion. In I.S., after the family court could not find

abuse or neglect, it continued to issue orders under Title 9 even though it "should have turned to the alternative basis found in Title 30." Id. at 32. The court declared it was holding a G.M. dispositional hearing at which it would determine whether it was "'safe to return the children.'" Id. at 21. The court found "'it was not safe to return [child S.S.] to her mother's care.'" Id. at 22. "The court proceeded to a best-interests-of-the-child assessment, referring to N.J.S.A. 9:2-4, and determined that granting [the father] custody of S.S. was in S.S.'s best interests." Ibid.

Our Supreme Court in I.S. held "the trial court erred in not dismissing the Division's complaint[] which was pled on the basis of Title 9 at the fact-finding hearing," ruled "the trial court should not have continued to enter orders under Title 9," and "reverse[d] the Title 9 portion of the judgment that continued the court's jurisdiction under that statutory scheme." Id. at 15, 32. The Court also ruled that: "[the father] should have been required to show that S.S.'s placement with him was in her best interests after filing a changed circumstances application." Id. at 40-41.

Nevertheless, the Court stressed "it would require blinders for this Court not to recognize that granting custody to [the father] was an appropriate disposition to end the Title 30 proceedings." Id. at 41. For that reason, and because the family

court ultimately "applied a best-interests test," the Supreme Court in I.S. had "no difficulty deferring to the factual findings and conclusions the court reached." Id. at 41. The Court added: "Although it is preferable for the court to ensure that there occurs separate and distinct proceedings at which Title 30 actions are adjudicated to disposition and FM custody matters are adjudicated, . . . the consolidated procedure followed by the court did not result in any cognizable harm to [the mother]." Id. at 41-42.

Here, as in I.S., the hearing judge applied the "best-interests test" despite misapprehending the role of G.M. and Title 9. Id. at 41. As in I.S., "it would require blinders for this [c]ourt not to recognize that granting custody to [Father] was an appropriate disposition to end the Title 30 proceedings." Id. at 41.

As in I.S., Father "was the only appropriate parent to award custody to at the dispositional conclusion of this fact-sensitive Title 30 proceeding." Ibid. Mother "had not completed her required therapeutic regimen," maintained contact with the Division, or made any effort to pursue reunification. Ibid. "Therefore, it would not have been consistent with the court's continued responsibility to act in the best interests of [B.B.]'s

health and safety to return [him] to [Mother's] custody at that time." Ibid.

Thus, we affirm the hearing judge's order "based on the authority and flexibility afforded the court under N.J.S.A. 30:4C-12 to assist families requiring the Division's services." Id. at 42. Mother cannot show that the judge would have applied the best-interests test any differently citing Title 30 rather than Title 9. Additionally, as in I.S., we "do not find that [Mother] was deprived of due process as a result of the proceedings that occurred." Id. at 41.

Mother notes in I.S. "the family court analyzed the N.J.S.A. 9:2-4 best-interests factors," id. at 40, but the hearing judge did not reference N.J.S.A. 9:2-4. However, the undisputed evidence of the pertinent factors overwhelmingly favored leaving B.B. in Father's custody, namely:

> the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody . . . ; the interaction and relationship of the child with its parents . . . ; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; . . . the extent and quality of the time spent with the child prior to or subsequent to the separation; . . . and the age and number of the children.

[N.J.S.A. 9:2-4(c).]

Mother was not prejudiced by the judge's failure to explicitly cite N.J.S.A. 9:2-4 and its factors.

Mother complains the hearing judge stated she "has not been compliant with a single court order since the onset of the case." However, that was a reasonably accurate summary of Mother's sustained non-compliance with court orders. Mother cites the judge's true observation that she "in fact did not attend the G.M. hearing," claiming it was an adverse inference barred by N.J. Div. of Youth & Family Servs. v. M.G., 427 N.J. Super. 154, 169 (App. Div. 2012). However, M.G. simply held it was not "proper to enter default" for sporadic failure to follow orders under the circumstances there. Id. at 158.

Here, the hearing judge did not enter a default. See N.J. Div. of Youth & Family Servs. v. P.W.R., 410 N.J. Super. 501, 509 (App. Div. 2009), rev'd on other grounds, 205 N.J. 17, 22 (2011)). ("Default is different."). Nor did the judge say anything about drawing an adverse inference. Cf. Torres v. Pabon, 225 N.J. 167, 181-83 (2016) (discussing the "adverse inference" charge).[5]

[5] In any event, the judge could note Mother's failure to attend the hearing, which did not evidence the highest level of interest or participation in determining who should have custody of B.B. See, e.g., N.J. Div. of Youth & Family Servs. v. S.V., 362 N.J. Super. 76, 78 n.1 (App. Div. 2003).

Mother argues the hearing judge did not have the benefit of expert reports concerning the mental health of Mother and B.B. However, Mother refused — despite court orders — to provide information about her alleged mental health treatment. Moreover, the judge heard the testimony of the caseworker and considered numerous reports from FIS about B.B.'s therapy in 2012-14. Notably, the 2014 FIS report contained the social worker's clinical assessment that, in light of B.B.'s fear and anxiety about Mother, "requiring visitation and/or a change of custody to occur at this time could further exacerbate his anxiety symptoms," and that Mother should participate in weekly individual therapy to prepare her to deal with B.B.'s "anger and anxiety" if visitation resumed.[6]

[6] The "only objection" of Mother's counsel to these reports was that the 2012 reports were not germane to the issues in 2014. Mother did not object to the admission of the 2012 FIS reports on hearsay grounds. Mother now notes the social worker was not called to testify. Courts may consider hearsay to which no hearsay objection is raised. N.J. Div. of Child Prot. & Permanency v. J.D., 447 N.J. Super. 337, 348-49 (App. Div. 2016). To the extent Mother is raising a hearsay objection on appeal, she must show plain error. However, a court may consider the statements in the report to the Division made by affiliated psychological consultants "if those statements were made based on their own first-hand factual observations, at a time reasonably contemporaneous to the facts they relate, and in the usual course of their duties with the Division." N.J. Div. of Child Prot. & Permanency v. N.T., 445 N.J. Super. 478, 487 (App. Div. 2016). Even if the social worker's assessment was excludable under N.J.R.E. 808, see id. at 500-03, Mother cannot show its admission was "clearly capable of producing an unjust result." R. 2:10-2.

In any event, the hearing judge could rule even though no expert testimony was presented. R. 5:3-3(a) (leaving the use of experts in family matters to the trial court's discretion). "Expert testimony would be helpful; it is desirable even in an ordinary [custody] case. The law, however, does not invariably require it, either of the parties or of the court." Wist v. Wist, 101 N.J. 509, 514 (1986).

Mother contends the judges relied on B.B.'s unwillingness to have visitation with her. However, the judges did not treat B.B.'s wishes as dispositive, instead ordering visitation after necessary therapy. In any event, the hearing judge was required to consider "the preference of the child" under N.J.S.A. 9:2-4, and it "must be accorded 'due weight.'" Beck v. Beck, 86 N.J. 480, 501 (1981) (citation omitted). "This standard gives the trial court wide discretion regarding the probative value of a child's custody preference." Ibid.; see N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 114 (2008). It was not an abuse of discretion to give weight to the preference, extreme fear, and anxiety of a fragile child, whose therapist recommended against visitation until B.B. and Mother had received the necessary therapy.

Mother complains she has not had visitation since her unsuccessful visit with B.B. in July 2011. However, that was caused in large part by her refusals to show she had received the

prerequisite mental health treatment for visitation to cooperate and communicate with the Division, or even to disclose where she lived. Her refusals thwarted the persistent efforts of all the judges to bring about the visitation they repeatedly ordered. Thus, it was not an abuse of discretion for the hearing judge to order that visitation between Mother and B.B. "will continue to be suspended until [she] can demonstrate that she is consistently enrolled in mental health treatment." Suspension is permissible if "'visitation will cause physical or emotional harm to the child[].'" V.C. v. M.J.B., 163 N.J. 200, 229 (citation omitted), cert. denied, 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed. 2d 243 (2000).

Mother claims the hearing judge's order is a de facto termination of her parental rights. However, suspension of visitation conditioned on compliance with court orders designed to protect the child is not termination. As the judge made clear, Mother "may move before the Family Part to request alteration of the custodial [or visitation] arrangement for [B.B.] at any time in light of changed circumstances." I.S., supra, 214 N.J. at 42.

"Parents have a constitutionally protected right to maintain a relationship with their children." M.M., supra, 189 N.J. at 279, but that right "must be balanced against the State's parens patriae responsibility to protect the welfare of children," N.J.

Div. of Youth and Family Servs. v. G.L., 191 N.J. 596, 605 (2007). We decline to "second-guess" the hearing judge's decisions to terminate the litigation and award custody to Father, who has ably cared for B.B., rather than Mother, a mentally-ill parent who refused to participate in court-mandated therapy and derailed reunification with her child. See N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012).

Nonetheless, we emphasize that the procedural uncertainty here should not recur given the clarification provided by the Supreme Court in I.S. Even under the more flexible Section 12, "[t]he statutory and constitutional rights of the parent must be 'scrupulously protected.'" N.J. Div. of Child Prot. & Permanency v. G.S., 447 N.J. Super. 539, 555 (App. Div. 2016) (quoting G.M., supra, 198 N.J. at 397). Relief under Section 12 is intended to be "temporary and must periodically be reviewed." I.S., supra, 214 N.J. at 37. If the Division seeks an extension, it should file an application which should be decided in summary hearings based on a preponderance of the evidence. N.J.S.A. 30:4C-12. If custody is to be transferred in Section 12 litigation, it should be done pursuant to I.S. and not G.M. Future cases should follow the appropriate procedures and avoid the prolonged delays which characterized this litigation.

VI.

Mother next claims her trial counsel was ineffective. "Parents in New Jersey charged with civil abuse and neglect under Title [9] or who are subject to Title [30] termination proceedings have a constitutional right to counsel[.]" G.S., supra, 447 N.J. Super. at 555; see N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 305 (2007); N.J. Div. of Youth & Family Servs. v. E.B., 137 N.J. 180, 186 (1994). However, no case has held parents have a right to effective counsel in cases continued solely for care and supervision under Section 12. Assuming Mother has such a right, she fails to show ineffective assistance.

To show ineffective assistance, a parent must satisfy a two-pronged test. "[C]ounsel's performance must be objectively deficient – i.e., it must fall outside the broad range of professionally acceptable performance" and "counsel's deficient performance must prejudice the defense – i.e., there must be 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" B.R., supra, 192 N.J. at 307 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)).

Mother first argues trial counsel was ineffective because he failed to inform the court the Division had to renew its

application for care and supervision pursuant to Section 12. However, as set forth above, Mother has failed to show prejudice. Had counsel objected, there is no reasonable probability the extensions would not have been granted given B.B.'s clear need for care and supervision and Mother's need for services.

Second, Mother claims trial counsel was ineffective for not calling Father or an expert witness at the June 2014 hearing. However, where "the failure to produce expert or lay witnesses is claimed, appellant will be required to supply certifications from such witnesses regarding the substance of the omitted evidence along with arguments regarding its relevance." Id. at 311. Mother fails to proffer certifications from an expert, Father, or anyone else to show what favorable evidence they could offer. There is no reason to believe Father would have given testimony favorable to Mother. See B.H., supra, 391 N.J. Super. at 349-50. Moreover, trial counsel obtained a psychological expert, but he was unable to complete the evaluations of Mother and B.B. Mother has not shown the expert would have been able to give testimony favorable to her.

Third, Mother claims trial counsel failed to adequately cross-examine the Division's caseworker to explore B.B.'s psychological issues, and the reason the Division "established" but did not substantiate a finding of abuse or neglect after Father

left B.B. at an FIS session. See N.J.A.C. 3A:10-7.3(c)(1)-(2). However, Mother has neither made "an evidentiary proffer" of what information would have been revealed, B.R., supra, 192 N.J. at 311, nor "proven that this information would have been helpful to her cause," B.H., supra, 391 N.J. Super. at 351. Therefore, Mother has failed to show prejudice.

Affirmed.