SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5789-14T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

A.T.,

Defendant-Appellant.

IN THE MATTER OF N.T. and J.F., minors.

Submitted April 4, 2017 – Decided April 27, 2017

Before Judges Reisner and Koblitz.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FN-07-137-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Susan P. Gifis, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Roman Guzik, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Danielle Ruiz, Designated Counsel, on the brief).

PER CURIAM

Defendant A.T. appeals from a November 12, 2014 fact finding order, determining that she abused or neglected her children by failing to comply with substance abuse treatment and continuing to use marijuana. The order was entered over the objections of defendant and the children's Law Guardian, both of whom argued that there was no evidence to support a finding of abuse or neglect. On this appeal, the Law Guardian continues to support defendant's position, urging that we should reverse the fact finding order.

Having reviewed the record, we conclude that the trial court's factual findings were not supported by the record. A brief summary will illustrate that conclusion. The hospital called the Division of Child Protection and Permanency (Division) after defendant's baby tested positive for marijuana at birth. Defendant did not dispute that she smoked marijuana occasionally during her pregnancy, in part to help stimulate her appetite and mitigate her anxiety, and she apparently believed that occasionally smoking marijuana would not harm the baby in utero. The Division admitted there was no evidence that the baby was harmed by defendant's use of marijuana during her pregnancy. Neither he nor his four-year-

old sibling were removed from defendant's custody, although the Division filed a Title 30 complaint for care and supervision, N.J.S.A. 30:4C-12, so that the court could oversee defendant's participation in drug treatment. For reasons not clear on this record, the trial court later held a fact finding hearing, although the Division never filed pleadings under Title 9.

At the fact finding hearing, the Division claimed that defendant put her children at risk by her delay in attending the drug treatment services that were offered to her. In her testimony, however, the case worker admitted that defendant's expressed reasons for the delay were her lack of child care and her concern about taking the baby outside in the cold. It was undisputed that by the time of the fact finding hearing, defendant was attending a drug treatment program.[1]

The trial court found that defendant placed her children at risk by continuing to smoke marijuana, although there was no evidence that she used it more than occasionally, and no evidence that she was under its effect when caring for the children. Instead of relying on record evidence, the trial court inappropriately filled in the gaps in the Division's case with speculation. See N.J. Div of Youth & Family Servs. v. A.L, 213 N.J. 1, 28 (2013);

[1] She successfully completed the treatment, and the court dismissed the litigation in an order filed on July 1, 2015.

N.J. Div. of Child Prot. & Perm. v. R.W., 438 N.J. Super. 462, 469 (App. Div. 2014). The judge posited that, because defendant admitted to the occasional use of marijuana, she must (as the judge phrased it) be "stoned all the time" and incapable of caring for her children.

In making that finding, the judge did not consider the Division case worker's admissions that the children were healthy and well cared for, and that she had no concerns for their safety. The judge also gave no weight to the fact that a parent aide - who had visited the home three days a week for the past year and was still doing so at the time of the hearing - had rendered uniformly positive reports about the children's care and well-being.

While this appeal was pending, we granted the Division's motion to remand the case to the trial court to reconsider in light of R.W., supra. On remand, the Division did not present any additional evidence. The judge distinguished R.W. as involving only a single instance of drug use, and concluded that "the long term continued use of marijuana does create a risk, a substantial risk." He entered an order on May 4, 2016 reaffirming the original fact finding decision.

Ordinarily, we defer to a trial judge's factual findings, so long as they are supported by substantial credible evidence. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007).

However, in this case, we are convinced that the judge's findings were "so wide of the mark that a mistake must have been made." Ibid. (citation omitted). As the Court has reminded us, "[j]udges at the trial and appellate level cannot fill in missing information on their own or take judicial notice of harm." A.L., supra, 213 N.J. at 28. Unfortunately, the judge's findings were based on speculation and assumptions, rather than on "particularized evidence" of harm. Ibid. The judge also appears to have accepted the Division's argument that a parent's delayed participation in drug treatment constitutes child abuse or neglect. However, "a failure to successfully defeat drug addiction does not automatically equate to child abuse or neglect." N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 331 (App. Div. 2011).

Accordingly, we reverse and vacate the November 12, 2014 fact finding order and the May 4, 2016 order entered on remand. If defendant's name has been placed on the Central Registry, it shall be removed from the Registry within ten days of the date of this opinion.

We close with an additional observation. Although the issue was not raised in the trial court, we conclude that the trial court should not have held a Title 9 fact finding hearing in the first place, because the Division never filed a Title 9 complaint

against defendant. The Division only filed a Title 30 complaint for care and supervision, N.J.S.A. 30:4C-12, and never amended its complaint - not even informally through a request on the record - to include a claim under Title 9. Because a finding of abuse or neglect has serious consequences for a parent, the initiation of a Title 9 action should proceed with the formality appropriate to such a serious matter. What occurred here did not meet that standard. See N.J. Div. of Youth & Family Servs. v. P.C., 439 N.J. Super. 404, 413-14 (App. Div. 2015).

Reversed.