SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5793-14T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

E.C.,

Defendant-Appellant.

IN THE MATTER OF W.C.,

Minor.

Submitted January 19, 2017 – Decided March 2, 2017

Before Judges Alvarez and Accurso.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FN-02-122-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Amy M. Williams, Designated Counsel, on the brief).

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Karen A. Lodeserto, Designated Counsel, on the brief).

PER CURIAM

The Title 9 case against defendant E.C. was converted to a Title 30 matter at the request of the Division of Child Protection and Permanency three months after it was filed. The entire matter was dismissed, without an adverse finding, five months later. Conceding the matter is moot, defendant nevertheless asks that we

> in an exercise of [our] duty of judicial administration, apply and extend P.C.[1] beyond cases in which the State seeks a finding of abuse [and] neglect against a parent to instances where the State seeks to intrude in the inner workings of a family for the purposes of conducting a court-ordered investigation of circumstance[s] that may or may not rise to the level of abuse or neglect.

Relying on well-settled law that "[a] litigant satisfied with the judgment cannot have an advisory appellate evaluation of an alleged interlocutory error," Magill v. Casel, 238 N.J. Super. 57, 62 (App. Div. 1990), we dismiss the appeal.

[1] N.J. Div. of Youth & Family Servs. v. P.C., 439 N.J. Super. 404 (App. Div. 2015).

The essential facts are undisputed. The Division got a referral in late September 2014 from the Bergen County Board of Social Services alleging E.C. and her four-year-old son were homeless and had slept the night before on a bench in Elmwood Park. E.C. refused to cooperate in the Division's investigation, refusing even police entreaties to allow a Division worker to talk with her and her son.

The Division nevertheless learned that when the Board had offered E.C. shelter in Passaic County, because nothing was available in Bergen, she had become irate, storming out and choosing instead to expose her son to the elements. E.C.'s parents, with whom E.C. and her son had been living until a recent falling out, expressed concern about her erratic behavior and shared their suspicions that she was using drugs. Other information the Division gathered however, was more positive. The boy appeared well cared for, and his school, although noting some behavioral problems, expressed no concerns. The Division also learned that E.C. was working full time and attending college.

After the Division's efforts to gain E.C.'s cooperation in its investigation failed, the Division on October 17, 2014 filed a verified complaint and application for an order to show cause for investigation pursuant to N.J.S.A. 30:4C-12. The Division,

the Law Guardian and E.C., represented by counsel, appeared before the court that same day. The Division sought an immediate drug screen, which E.C. did not oppose, and a temporary restraint that her son sleep at her parents' home pending the return date, which she would not agree to.

The Division presented the testimony of a caseworker who described its concerns about E.C.'s ability to care for her son and the reports it received about her recent erratic conduct, mental instability and suspected drug use. The worker relayed a report by E.C.'s parents about her behavior over the past few months, including falling asleep at the dinner table, biting her mother on the arm and leaving her parents' home to go to either a shelter or a friend's house with her son. They claimed she refused their attempts to discuss those problems, becoming "explosive" and refusing to listen to anything they said.

The worker also recounted in her report her conversation with E.C. at the time of the initial referral. E.C. explained she attended school and worked a full-time job, but that her parents helped her care for her son. She admitted having frequent verbal conflicts with her mother. E.C. also reported having little money, being behind on bills, and facing the loss of her public assistance, without which she could not support herself. The worker expressed the Division's concern that E.C.

did not have any place to live aside from her parents' home, and that her conflicts with them were putting her son at risk of homelessness. She explained the Division wanted to have a better understanding of the problems facing the family and to provide E.C. with services to stabilize her living environment.

When the court asked E.C.'s counsel whether her client opposed taking a drug test, E.C. broke in and complained about the Division accepting her mother's allegation that she was using drugs when no one else reported any such concern. When the judge explained the Division was in court because E.C. had refused to cooperate in its investigation of the referral from the Board of Social Services, and refused a random drug test after her mother expressed fear that E.C. was using drugs, E.C. continuously interrupted her to make the exact same point six more times, all the while saying she did not oppose taking the drug test.

The worker testified on redirect that E.C.'s response to the judge was a "mild example" of what her behavior had been like in her interactions with the Division. According to the worker, it was precisely that behavior that had led to the Division's concerns about E.C.'s mental health and stability.

After hearing the testimony, the court invited argument by counsel. E.C.'s counsel opposed the temporary restraint,

arguing the statute under which the Division had determined to proceed would not support it. After E.C.'s drug screen was negative, her counsel argued the court should not sign the order to show cause but should instead dismiss the complaint as there was no basis for any further drug evaluation and a complaint for investigation pursuant to N.J.S.A. 30:4C-12, would not support the restraint of confining the child to spending overnights with the grandparents.

The Law Guardian, in contrast, maintained her concern about E.C.'s mental stability had been heightened by E.C.'s behavior in court and asked the judge "to take notice" of her demeanor. Although conceding E.C. had "every right to live wherever she wants," the Law Guardian contended "she doesn't have the right to put her child in jeopardy." The Law Guardian argued the child was "in need of the protection of the Division" and urged the court to enter the order to show cause and the temporary restraint of having the child spend overnights with the grandparents.

The deputy acknowledged "the Division doesn't frequently come in and ask for . . . this type of relief on an order to investigate" but argued it was "sustainable under Title 30." When the judge asked how the Division planned to assess E.C.'s mental health with the limited relief it was seeking, the deputy

responded that the Division was pursuing a conservative approach. If its concerns persisted after an interview and drug evaluation, the Division would seek to amend the complaint to seek care and supervision and a psychological evaluation, but in the meantime wished to insure the child had a safe place to sleep at night.

E.C.'s counsel continued to maintain that an order to investigate would not support the restraint the Division was seeking. She argued the Division has the "right under the rules to come in and ask for care and supervision and . . . restraints," but noted "[t]hat's not what they're asking. They're asking for an order to investigate." Counsel contended "[i]f the Division really had a major concern . . . [about] the child's wellbeing, safety, and imminent danger[,] they could have come in here and asked for care and supervision."

After hearing the testimony and the arguments of all counsel, the court expressed its concern over E.C.'s demeanor and what it might portend for her four-year-old son. Specifically, the judge stated she had never seen a parent as "hyper-excited, as argumentative" as E.C. She described E.C. as

> constantly moving, . . . bouncing up and down in her seat. [W]hen she was standing she was moving constantly. She was raising her hand. Her speech was so rapid that I had a hard time following everything she was

> saying. This mother appeared to this court to be in a[] highly agitated state.

Based on the testimony, the court determined to sign the order to show cause, entering not only the temporary restraint sought by the Division but also ordering E.C. to submit to a psychological evaluation, to be used for dispositional purposes only. The court invited E.C.'s counsel to "[g]o to the Appellate Division" if she believed the court lacked the authority to order the psychological evaluation, but concluded that given the testimony of the caseworker as well as E.C.'s own testimony and demeanor, and the young age of her son, that an immediate psychological evaluation was necessary.

Upon hearing the court's ruling, the deputy and the Law Guardian immediately moved to amend the Division's complaint to seek care and supervision of the child pursuant to N.J.S.A. 9:6-8.21, which the court granted. The court denied E.C.'s request for a stay.

On the return date of the order to show cause, E.C. had not appeared for a drug evaluation, but her counsel represented she was "very much willing to comply with the services." E.C. had secured her own apartment, and the court was willing to allow counsel to dissolve the restraint that the child spend overnights with his grandparents by consent order upon receipt

of favorable reports. At the Law Guardian's request, the court moved up the date for the next conference to allow the matter to proceed on a faster schedule.

When the parties returned to court on January 20, 2015, the Division had determined the allegations against E.C. were not established and asked that the matter be converted to a Title 30 proceeding, which was granted. E.C. had submitted to a psychological evaluation, but another appointment was scheduled and thus no report was available. Because of low levels of marijuana detected in her drug screen, E.C. had been referred for early intervention and been compliant with services.

At the next appearance on April 14, 2015, E.C.'s son was living with her in her new apartment and the Division had implemented the Families First in-home program to help stabilize the family. The court had also received the results of E.C.'s psychological evaluation, which deemed her "not yet prepared to function as an independent caretaker for [her son]." The evaluative team recommended "individual psychotherapy with an emphasis on anger management skills and support for her attempts to achieve consistent autonomous functioning." An order terminating the litigation was entered at the next appearance on June 25, 2015.

Besides asking us to extend P.C., E.C. contends the trial court violated her due process rights when "it converted litigation expressly seeking an investigation under Title 30 into a case for care and supervision under Title 9," and that the trial judge "following entry of the order to show cause, . . . lacked the requisite impartiality to continue to preside over this case without creating an inappropriate appearance of bias." We reject these arguments.

As is clear from our rendition of the facts, all that E.C. complains of happened on the very first day of the case. The Division had determined to proceed conservatively by seeking only an order for investigation, albeit with the temporary restraint of requiring the child to spend overnights with his grandparents. After E.C. presented in court as unstable and her counsel argued a complaint under N.J.S.A. 30:4C-12 would not support the temporary restraint requested by the Division, or the psychological evaluation the court deemed necessary after hearing E.C. testify, the Division, supported by the Law Guardian, made an oral motion to amend the complaint to assert a cause of action that would support the temporary relief it was seeking.

E.C.'s counsel asserted repeatedly that the Division had the "right under the rules to come in and ask for care and

supervision and . . . restraints." Thus E.C. can hardly be heard to complain when the Division acceded to her counsel's view and moved to amend its complaint to proceed in the fashion her counsel deemed more appropriate.

This case is obviously nothing like P.C. The setting there was a fact-finding hearing in which the court was taking testimony to resolve claims of sexual abuse of the defendant's daughter by her husband, the girl's stepfather. 439 N.J. Super. at 408-09. The Division had not substantiated claims against the defendant, and the complaint contained no substantive allegations against her. Id. at 408. Defendant was only included in the caption for dispositional purposes. Ibid.

After hearing the caseworker testify that the defendant did not believe and had not supported her daughter's accusations against her stepfather, however, the judge determined, sua sponte, that the evidence was sufficient to give rise to an abuse and neglect finding against the defendant. Id. at 408-10. After an adjournment to permit the defendant's counsel to appear on her behalf, the judge proceeded to preside over a fact-finding hearing against the defendant and her husband, resulting in findings of abuse and neglect against both. Id. at 410-11.

We held the trial court violated the defendant's due process rights by disregarding long-standing principles

requiring a party to a fact-finding hearing receive notice of the issues to be adjudicated and an adequate opportunity to prepare and respond. Id. at 413. Although acknowledging the due process problems could have been corrected had the judge referred the matter to the Division pursuant to N.J.S.A. 9:6-8.34, thereby permitting it to reopen its investigation and amend its complaint to add abuse and neglect allegations against the defendant, we emphasized that was not the course pursued. P.C., supra, 439 N.J. Super. at 414. We also held the trial court's decision to act sua sponte disqualified it from continued oversight of the fact-finding hearing because it "created an appearance of bias." Id. at 415.

Here, the events complained of did not occur at the fact-finding hearing but on the first day of the litigation. E.C. had not yet been served with the complaint. E.C.'s counsel repeatedly conceded the Division could have chosen to file a complaint for care and supervision under N.J.S.A. 9:6-8.21, instead of one seeking an order for investigation under N.J.S.A. 30:4C-12. That the Division orally moved to amend its complaint to proceed under N.J.S.A. 9:6-8.21, before service, did not result in a due process violation. E.C. received as much notice of the amended complaint as she had of the Division's original filing. She was entitled to nothing more.

We also find no error in the court determining to order E.C. to undergo a psychological evaluation after she elected to testify in opposition to the Division's request for the entry of an order to show cause with temporary restraints. Given defendant's refusal to cooperate in its investigation, the Division had been unable to assess her mental stability before appearing in court with its complaint. E.C.'s colloquy with the court that day was likely the most extensive observation of her the Division had been permitted to that point. Further, the transcript makes clear that both the Division and the Law Guardian had already expressed concerns about E.C.'s mental stability before the judge determined to order the evaluation.

The trial court determined to order the evaluation based on its own observations of E.C.'s conduct in court along with the testimony of the caseworker. Given the circumstances, including the age of the child, the stage of the proceedings and E.C.'s presentation on the record, we see no error in the judge determining to order the psychological evaluation "sua sponte." Further, no fair reading of the transcript would suggest any appearance of bias, which is reinforced for us by E.C.'s failure to seek the judge's recusal going forward.

Because there is no appealable order, see Magill, supra, 238 N.J. Super. at 62, and E.C.'s claims are without merit in any event, we dismiss the appeal.

Appeal dismissed.