

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1545-16T3

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

A.P.,

Defendant-Appellant,

and

J.C.,

Defendant.

IN THE MATTER OF A.C. and J.C.,

Minors.

Argued March 6, 2018 – Decided March 16, 2018

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FN-07-0238-16.

Beatrice W. Shear, Designated Counsel, argued
the cause for appellant (Joseph E. Krakora,

Public Defender, attorney; Beatrix W. Shear, Designated Counsel, on the briefs).

Monisha A. Kumar, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Monisha A. Kumar, Deputy Attorney General, on the brief).

Todd Wilson, Designated Counsel, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Todd Wilson, on the brief).

PER CURIAM

In this appeal, Defendant A.P. seeks reversal of the April 13, 2016 Family Part order finding she abused or neglected her children, Jason and Ashley¹, within the meaning of N.J.S.A. 9:6-8.21(c).² In that order, the trial court found defendant

¹ We refer to the children by pseudonyms for anonymity and ease of reference.

² Defendant's notice of appeal states she appeals from an order entered on November 4, 2016; however, that order only terminated the Title 9 litigation filed by the Division of Child Protection & Permanency (Division). Based upon defendant's brief, she clearly intended to appeal from the April 13, 2016 adverse fact-finding order. Since all counsel fully briefed the issue defendant intended to raise, we exercise our discretion and consider defendant's challenge to the April 13, 2016 order. But see W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008) ("It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and review.").

educationally neglected her children by failing to send them to school or provide them with an equivalent education.³ We affirm.

I

A. Referral and Investigation

On August 10, 2015, the Division received a referral alleging defendant educationally and environmentally neglected her children. The Division attempted to investigate, but found the parents uncooperative. The father reported the children last attended school three years ago and were currently home-schooled. Defendant initially refused to allow Division workers to speak to the children. She transported them to Georgia temporarily and then lied about enrolling them in school there.

On September 22, 2015, a Division worker finally met with defendant and the children. Defendant stated she home-schooled the children and they had a set curriculum, but provided no lesson plan. She claimed she taught them math, language arts, religious studies, cooking, and gym, and showed the worker a Triumph Learning Common Core Coach book. Defendant stated Jason did not have a learning disability. Defendant also stated she and the children's father separated and she did not intend on returning to his home.

³ The court found both parents educationally neglected their children; however, only defendant – the mother – appealed.

The Division worker also spoke with Ashley that day. Ashley was eleven years old at that time. Ashley first stated she attended school, but then stated defendant home-schooled her. She said she was in eighth grade. Ashley stated she studied math, science, and English; when asked what type of math, she replied "time tables." When the worker asked to see her books, Ashley provided a coloring book. She could not provide math or English books. Ashley also provided a folder of work, but the work was not recent.

The worker then spoke with Jason, who was nine years old at that time. Jason stated defendant home-schooled him. When asked to sing the alphabet, he made some mistakes. When asked to count to thirty, he also made some mistakes. When asked to add ten plus two, he answered "six." He could not write his last name. The worker advised defendant that Jason may need an evaluation. At the end of the September 22, 2015 meeting, defendant signed a Family Agreement stating she would enroll the children with a school district in order to have them evaluated.

On October 5, 2015, the Division followed up with defendant and learned she had not yet registered the children in any school. The Division informed defendant that if she did not register the children with the local board of education, the Division would likely petition the court for care and supervision.

The Division's Investigation Summary stated, "The children are safe at this time"; however, it also stated, "The children's well-being is compromised due to their lack of education." In the report's summary of conclusions, the Division listed defendant's lack of cooperation and the children's delayed educational development as aggravating factors. The Division substantiated defendant for educational neglect but not environmental neglect.

B. Fact-Finding Hearing

On April 13, 2016, the Family Part held a fact-finding hearing regarding the Division's substantiation of defendant for educational neglect. The Division presented its Investigation Summary report and one witness, a Division supervisor, who essentially testified to the facts summarized above. Defendant declined to testify or submit any evidence. The parties stipulated that at the time of the hearing, the children were enrolled in school, and that Ashley was in fifth grade and Jason in fourth grade.

During its closing argument, the Division asserted, apparently for the first time, that N.J.S.A. 18A:38-31 – a truancy statute – mandates parents either send their children to school or provide an equivalent education. The Division further cited State v. Vaughn, 44 N.J. 142 (1965), and State v. Massa, 95 N.J.

Super. 382 (Law Div. 1967), regarding the meaning of an equivalent education under the truancy statute.

The court considered the truancy statute and related cases; however, the court emphasized several times those were criminal cases, not abuse and neglect cases. At the conclusion of the hearing, the court found "the Division has proven by a preponderance of the evidence that the [d]efendants . . . educationally neglected their children and have failed to exercise a minimum degree of care in supplying their children with education"

II

Defendant argues we should reverse the trial court's finding of abuse and neglect, asserting the Division failed to prove educational neglect by a preponderance of the evidence. Specifically, defendant argues the trial court impermissibly relied on N.J.S.A. 18A:38, a criminal truancy law, and shifted the burden of producing evidence to defendant. We disagree.

In general, we do not disturb the trial court's factual findings on appeal when they are supported in the record with substantial, credible evidence. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). We must give due regard to the trial judge's credibility determinations and "'feel' of the case" based upon the opportunity of the judge to see and

hear the witnesses. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). Given the Family Part's special expertise, appellate courts accord particular deference to fact-finding in family cases, and to the conclusions that logically flow from those findings. Cesare v. Cesare, 154 N.J. 394, 413 (1998).

An "abused or neglected child" is defined as:

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 [or her] parent or guardian . . . to exercise a minimum degree of care . . . 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

[N.J.S.A. 9:6-8.21(c)(4) (emphasis added).]

"[T]he phrase 'minimum degree of care' refers to conduct that is grossly or wantonly negligent, but not necessarily intentional." G.S. v. N.J. Div. of Youth & Family Servs., 157 N.J. 161, 178 (1999). A parent or guardian "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.

N.J.S.A. 18A:38-25 sets forth the duty of every parent to provide an education to his or her child:

Every parent, guardian or other person having custody and control of a child between the ages of six and [sixteen] years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

A parent who fails to comply with the attendance requirements "shall be deemed to be a disorderly person" N.J.S.A. 18A:38-31.

In order to initiate a truancy complaint, the State need only make an allegation of a violation of N.J.S.A. 18A:38-25. State v. Vaughn, 44 N.J. 142, 147 (1965). The burden of production then shifts to the defendant to introduce "evidence from which it could be found that a child attends a day school in which equivalent instruction is given, or that the child is receiving equivalent instruction elsewhere than at school." Ibid. "If there is such evidence in the case, then the ultimate burden of persuasion remains with the State" Ibid. The Court reasoned "if the burden of proving a violation of [providing equivalent instruction elsewhere] rests upon the State, it would be saddled with a fairly impossible task, for it would be obligated to prove a negative

proposition in circumstances in which the area of disproof is extremely wide." Id. at 146.

Our courts have specifically recognized the failure to provide an education as a form of abuse and neglect under Title 9. See, e.g., N.J. Div. of Youth & Family Servs. v. M.W., 398 N.J. Super. 266, 285-86 (App. Div. 2008) (noting a parent had harmed her children through educational neglect, among other forms of abuse, because she had left them with her cousin who locked them in a basement for an extended period of time and deprived them of beds, food, a toilet, and the physical ability to attend school). Our Supreme Court also linked truancy to child neglect in finding "[t]he reference to education contained in N.J.S.A. 9:6-8.21(c)(4)(a) concerns parental encouragement to truancy of a school age child, or other interference with normal educative processes." Doe v. Downey, 74 N.J. 196, 199 (1977) (quoting Doe v. G.D., 146 N.J. Super. 419, 431 (App. Div. 1976)) (holding a pre-school age child's lack of education is not educational neglect under N.J.S.A. 9:6-8.21).

Accordingly, in order to satisfy the "minimum degree of care" under N.J.S.A. 9:6-8.21 for educational care, a parent or guardian must meet the statutory requirements of N.J.S.A. 18A:38-25. That is, a parent educationally neglects a child when he or she fails to "cause [a school-aged] child regularly to attend the public

schools . . . or a day school . . . or to receive equivalent instruction elsewhere than at school." See N.J.S.A. 18A:38-25.

The burden-shifting of N.J.S.A. 18A:38-25 is also applicable in proving educational neglect under N.J.S.A. 9:6-8.21. Namely, the parent has the burden of production to prove the child is enrolled in private school or "receive[s] equivalent instruction elsewhere than at school." N.J.S.A. 18A:38-25. Once the parent meets the burden of production, the burden of persuasion then shifts to the Division, so the ultimate burden of persuasion remains with the Division. See Vaughn, 44 N.J. at 142 (explaining the burden shifting under N.J.S.A. 18A:38-25).

Here, defendant failed to meet the burden of production. She failed to present any testimony or other evidence of school enrollment for the children or that they received "equivalent instruction elsewhere than at school." N.J.S.A. 18A:38-25. Parents cannot simply declare they are home-schooling their children; they must provide some minimum level of proof. Defendant told the Division she home-schooled the children; however, she produced no lesson plan or curriculum for the children. The record shows the children did not attend school for at least three years and academically suffered, as evidenced by their inability to complete the most basic educational tasks. Defendant was generally evasive toward the Division, lied to the Division, and failed to

register the children with the local school district until the Division obtained care and custody.

Applying our deferential standard of review to the trial court's factual findings, as well as to the relevant law, we are satisfied the trial judge's determination of educational neglect was evidentially and legally sound. We therefore affirm the trial court's decision.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION