**RECORD IMPOUNDED**



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2052-15T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.H.,

Defendant-Appellant,

and

C.J. and R.A.,

Defendants.

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IN THE MATTER OF Z.H. and Z.A.,

Minors.

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Submitted November 6, 2017 – Decided March 8, 2018

Before Judges Messano and Accurso.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FN-20-0126-13.

Joseph E. Krakora, Public Defender, attorney for appellant (Sarah L. Monaghan, Designated Counsel, on the briefs).

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Christopher A. Huling, Designated Counsel, on the brief).

PER CURIAM

Defendant S.H. is the mother of Z.H. (Zoe), and Z.A. (Zach), who were fifteen-years-old and eight-years-old respectively, when in March 2013 the Division of Child Protection and Permanency (the Division) filed a verified complaint seeking care and supervision of the children.[1] Following a fact-finding hearing, N.J.S.A. 9:6-8.44, the Family Part judge entered an order, concluding defendant's conduct resulted in the "emotional and mental impairment" of Zoe, posed a "substantial risk of harm . . . to [Zach]," and resulted in "educational neglect" of Zach.

At the fact-finding hearing, Zach's school social worker testified that the child was having academic difficulties, and defendant refused to respond to all efforts to discuss or explain his frequent absences. Zach was in the midst of repeating third grade because he was absent fifty or more days during the prior

[1] We use initials and pseudonyms throughout the opinion to keep the parties' identities confidential.

school year.[2] The school's written response to the Division's request for information about Zach's "educational status" was admitted into evidence. It detailed the child's excessive absences and indicated the school had an added concern — defendant's "erratic behavior [was] causing [Zach] to feel uncomfortable, insecure and [was] having a negative effect on his learning."

The Division's caseworker testified regarding the January 2013 referral that precipitated the Title 9 litigation. Defendant and Zoe had a verbal altercation. Zoe called 9-1-1, and, when police responded, she asked them to transport her to the hospital. There, Zoe told the Division's worker and medical staff that she wanted to kill defendant and end her own life as well. The medical staff decided to admit Zoe to the hospital's adolescent psychiatric unit on a "seven-day hold," but, for reasons not entirely clear, the hospital discharged Zoe the next day with a recommendation for outpatient counseling and family counseling at the hospital. The discharge summary in evidence contained a diagnosis of "[a]djustment disorder with mixed disturbance of emotions and conduct . . . [and] parent-child relational problems."

Zoe left the hospital and stayed with her maternal grandmother for some period. Defendant refused to bring her daughter for

[2] Based on documentary evidence, the judge determined the number was more than thirty unexcused absences.

counseling at the hospital, telling the Division she would see another counselor. That never occurred.

The caseworker had experienced two similar situations in 2012, when the strained relationship between defendant and her daughter led the Division to refer the family for services. Defendant never followed through with the referrals. The caseworker testified and the reports in evidence demonstrated that Zoe claimed defendant suffered from mental illness, made derogatory remarks, and used profanity toward her daughter. Zoe told the caseworker that she occasionally contemplated suicide because of the way her mother mistreated her.

Defendant did not testify or call any witnesses. In his oral opinion, the judge scrupulously reviewed the testimony and documentary evidence. He found the Division had proven "defendant's actions or omission[s] constitute[d] educational neglect as to [Zach] and substantial risk of harm as to [Zach] and emotional and mental impairment as to [Zoe]." However, the judge immediately corrected himself and said, "That's substantial risk of harm as to [Zoe] and emotional and mental impairment [as] to [Zoe] and educational neglect as to [Zach]."

Citing the credible testimony of the school social worker, the judge found "appropriate efforts were attempted and taken by the school to address excessive tardiness and assist defendant

with resolving this issue, but the defendant ignored the efforts and the tardiness remained as to [Zach]." The judge further found defendant "had the resources available to transport [Zach] to school," as well as "school personnel available to discuss" Zach's educational issues. He concluded, "defendant's conduct rose to the level of educational neglect."

As to Zoe, the judge found the caseworker's testimony was credible and demonstrated defendant "refused to avail herself of . . . services." Defendant's failure to act created a "substantial risk of harm" to Zoe, who had expressed "suicidal ideations" because of defendant's treatment. That treatment resulted in Zoe's "mental and emotional impairment."

Defendant argues we should reverse the order because there was no evidence her conduct caused Zoe actual harm or exposed her to the risk of harm. Defendant further contends we should reverse the order as to Zach, because the finding of educational neglect was not supported by substantial credible evidence, and the judge made no actual findings that defendant's conduct posed a substantial risk of harm to her son. In a fourth point, defendant argues "there [was] no value to placing [her] name on the central registry, and therefore no value in making a finding of abuse or neglect."

The Division urges us to affirm and argues the judge's findings were supported by sufficient evidence, although it acknowledges, as we discuss below, the order does not accurately reflect the judge's oral decision. The children's Law Guardian also acknowledges an error in the order but otherwise urges us to affirm.

We have considered these arguments in light of the record and applicable legal standards. We affirm.

"[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.'" N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Cesare v. Cesare, 154 N.J. 394, 413 (1998).

However, "[t]here is an exception to th[e] general rule of deference: Where the issue to be decided is an 'alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom,' we expand the scope of our

review." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188-89 (App. Div. 1993)). When the issue presented turns on a legal conclusion derived from the Family Part's factfinding, "we are not required to defer." N.J. Div. of Youth & Family Servs. v. A.R., 419 N.J. Super. 538, 542-43 (App. Div. 2011).

"In general, 'Title 9 controls the adjudication of abuse and neglect cases.'" Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 177 (2015) (quoting M.C. III, 201 N.J. at 343). Title 9 defines an "abused or neglected child" as one under the age of eighteen 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 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, or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court.
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> [N.J.S.A. 9:6-8.21(c)(4)(a) and (b) (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. Dep't of Human Servs., 157 N.J. 161, 178 (1999). "[A] 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. "To determine if a parent or guardian failed to exercise a minimum degree of care, we must additionally 'account for the surrounding circumstances,' given that '[a]buse and neglect cases are fact-sensitive.'" N.J. Div. of Child Prot. & Permanency v. A.B., ___ N.J. ___ (slip op. at 20) (citation omitted) (quoting E.D.-O., 223 N.J. at 180).

The parties agree that the judge's order does not conform to his oral decision. It is well accepted that, "[W]here there is a conflict between a judge's written or oral opinion and a subsequent written order, the former controls." Taylor v. International Maytex Tank Terminal Corp., 355 N.J. Super. 482, 498 (App. Div. 2002). Therefore, although the order includes the judge's finding that defendant's conduct posed a "substantial risk of injury . . . to [Zach]," the judge corrected himself in mid-sentence while rendering his oral decision. He made such a finding as to Zoe, but not Zach.

Therefore, as to Zach, we only consider whether defendant's conduct amounted to "educational neglect" of the child. We have said, "The 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. G.D., 146 N.J. Super. 419, 431 (App. Div. 1976), aff'd. sub nom., Doe v. Downey, 74 N.J. 196 (1977). Contrary to defendant's argument, a Family Part judge can make such a finding without expert testimony.

Here, the evidence demonstrated Zach was excessively absent from school, and defendant failed to respond to the school's attempts to address and rectify the problem. The school social worker testified about the deleterious effect Zach's frequent absences had and continued to have upon his education and behavior. The evidence fully supported the judge's findings and conclusions, and we therefore affirm the order as to Zach.

The evidence as to Zoe presents a closer question. Defendant argues whether Zoe truly evidenced homicidal or suicidal ideations is subject to debate. She points to portions of the hospital record that imply the child was only seeking attention because she hoped to move out of defendant's house and live with her grandmother. Defendant argues that absent expert medical testimony of actual harm to Zoe, the failure to bring Zoe for

recommended counseling is insufficient evidence of child abuse or neglect.[3]

Defendant largely relies upon the Court's decision in New Jersey Div. of Youth and Family Services v. P.W.R., 205 N.J. 17 (2011), and our decision in New Jersey Division of Youth & Family Services. v. S.I., 437 N.J. Super. 142 (App. Div. 2014). The reliance is misplaced.

In P.W.R., the Court held that the defendant's failure to take her stepdaughter to the pediatrician for two years, while not being a "paragon[] of parenting," failed to establish the stepdaughter's "physical, mental, or emotional condition [was] impaired or [was] in imminent danger of becoming impaired." P.W.R., 205 N.J. at 38-9. In reversing the finding of abuse and

[3] Defendant relies upon New Jersey Deptartment of Children and Families, Division of Youth and Family Services v. A.L., 213 N.J. 1, 27 (2013), in support of her argument that expert testimony was necessary. There, the court concluded that a lack of expert testimony demonstrating a nexus between evidence of drugs found in a newborn child and any actual harm was fatal to the Division's abuse and neglect case. However, the Court also recognized that "[i]n many cases, an adequate presentation of actual harm or imminent danger can be made without the use of experts." Id. at 29. Here, without objection, the hospital records were admitted into evidence. The records contained an actual discharge diagnosis, as well as the medical recommendation that Zoe engage in "individual and family therapy." Additional expert testimony was not necessary.

Before us, defendant advances no argument regarding the admissibility of the hospital records and argues only that some of the statements in the records support a claim that Zoe was not suicidal.

neglect, the Court noted a lack of "proof of a physical condition . . . for which [the stepdaughter] required pediatric care that was not sought." Id. at 39.

Certainly, this is not the same case. Two parent-child confrontations in 2012 were significant enough to cause the Division to refer the family for services, but defendant failed to act. In January 2013, another altercation resulted in Zoe's hospitalization, which, albeit brief, resulted in a mental health diagnosis that required further attention. Unlike the facts in P.W.R., defendant failed to address an actual medical condition that required attention.

In S.I., 437 N.J. Super. at 146-48, the defendant-grandmother refused to comply with the Division's recommendation that her twelve-year-old granddaughter undergo a psychiatric assessment. The granddaughter's threat of suicide was evidenced by a note stating she "wanted to kill herself," and facts "show[ing] the child was upset, [and] distraught by her perceived treatment by [her grandmother]" and her classmates. Id. at 155. The record, however, was devoid of any evidence describing "the child's behaviors when she was examined by the mobile crisis unit or any recommendation by those responders after speaking with the child. The record also lack[ed] evidence demonstrating the effect of [her grandmother's] conduct." Ibid.

We found, absent expert evidence concerning the child's psychological condition, a parent's disagreement with the Division about the need to have a child examined by a psychologist did not constitute child abuse or neglect. Id. at 146-47. We nevertheless stressed

> [o]ur holding intends to underscore the need for evidence to support a claim of abuse or neglect . . . . This includes proof of actual harm or, in the absence of actual harm, "the Division was obligated to present competent evidence adequate to establish [the child was] presently in imminent danger of being impaired physically, mentally or emotionally." These essential proofs cannot merely be based on the Division's view that the parent or guardian's decision on behalf of a child was ill-advised. Rather, the Division must demonstrate harm or show the likelihood of an imminent substantial risk of harm rising above mere negligence. Such evidence is absent here. Accordingly, S.I.'s demonstrated failure to comply with the recommended psychiatric evaluation was not proven to be medical neglect under N.J.S.A. 9:6-8.21(c)(4).
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> [Id. at 158 (internal citations omitted).]

Here, unlike in S.I., the record is not "so limited [that] we can only conclude th[e] evidence fails to prove the child was in 'imminent danger' or that a 'substantial risk' of harm would result from . . . refusal to seek immediate psychiatric review." Id. at 154-55. The hospital staff actually admitted Zoe because of her "suicidal and homicidal ideations." The child's statements to the Division's caseworker corroborated the medical conclusions,

and the caseworker testified that Zoe asked for psychological services but did not receive any because of defendant's refusal to participate.

Moreover, unlike the factual record in S.I., which "lack[ed] evidence demonstrating the effect of [the grandmother's] conduct" on her granddaughter, id. at 155, the judge here specifically found Zoe was "liv[ing] in a world where she felt that her mother cared more about her brother and . . . where her mother taunted her with cruel nicknames and other inappropriate communications."

In short, the judge's findings and conclusions regarding the risk of harm posed by defendant's neglect were fully supported by the evidence. We affirm the order as to Zoe.

Lastly, defendant argues there was no value in putting her name on the Central Registry because the litigation was eventually terminated, the children were returned to her care, and the Division should have and could have provided services to the family pursuant to Title 30. The Court has clearly stated that abuse and neglect findings should be "evaluated through the lens of the statutory standard as interpreted and applied by the Court, rather than through the lens of the consequences of . . . enrollment in the Central Registry." E.D.-O., 223 N.J. at 195.

Affirmed.