

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2053-15T1

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

M.T.,

Defendant-Appellant,

and

J.H., S.S. and F.H.,

Defendants.

IN THE MATTER OF Z.H., W.T. and M.H.,

Minors.

Argued October 2, 2017 – Decided March 8, 2018

Before Judges O'Connor and Vernoia.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Hudson County,
Docket No. FN-09-0113-13.

Ifeoma A. Odunlami, Designated Counsel, argued
the cause for appellant (Joseph E. Krakora,

Public Defender, attorney; Ifeoma A. Odunlami, on the brief).

Sara M. Gregory, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Sara M. Gregory, on the brief).

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

PER CURIAM

In this appeal, we consider whether the Family Part correctly determined that defendant, M.T., abused or neglected her two children, W.T. (Walter),¹ born in October 2009, and M.H. (Mark), born in June 2011, by failing to supply adequate shelter and proper supervision in July 2012. Because we conclude the State failed to prove the children suffered either actual harm or an imminent risk of harm, we reverse.

I.

The evidence presented at the fact-finding hearing showed that in the early morning hours of July 17, 2012, the New Jersey Division of Child Protection and Permanency (Division) received a referral that defendant, Walter and Mark were homeless after being directed to leave the home of Walter's godmother, J.L., where they

¹ We employ initials and pseudonyms to protect the privacy of the parties and children.

had been residing for a "few months." At approximately 3:00 a.m., Sonia Velasquez, a supervisor in the Division's special response unit who knew defendant from prior referrals, was advised defendant was at the Hoboken University Medical Center (hospital) with the children.

Velasquez went to the hospital, where she found defendant and the children in the lobby. The children were sleeping, one in a stroller and the other on a chair. Defendant appeared disheveled and her clothes were dirty. Velasquez noticed the children had dirty and greasy hair.

Defendant explained she had an argument with J.L., who then directed defendant and the children to leave her home. Defendant contacted shelters and determined there was no available emergency housing. Defendant called the Hoboken Police Department and was told to go to the hospital until the morning when she could request that welfare put her and the children in a shelter.

Velasquez and defendant discussed family members who might be of assistance. Velasquez and defendant went to defendant's uncle's home, and he allowed defendant and the children to stay with him until 9:00 a.m. Velasquez and defendant agreed defendant would take the children to their daycare program in the morning, and then go to the welfare office to obtain shelter.

Keisha Adams is a Division permanency worker who first interacted with defendant seven months earlier, in January 2012,² as the result of a referral arising from a domestic violence incident between defendant and Mark's father, F.H. At that time, defendant, F.H. and the children lived in a Jersey City apartment. Following the incident, defendant agreed to comply with services and the Division thereafter visited with defendant on a monthly basis.

On May 2, 2012, Adams met with defendant at her Jersey City apartment. Defendant was paying the rent with Temporary Rental Assistance (TRA) benefits from WorkFirst, New Jersey's welfare program,³ but had exceeded her benefits limit. Adams explained TRA benefits were of limited duration and defendant needed a permanent plan for the children's housing. Adams asked defendant if she submitted the application Adams previously provided for

² The record shows the Division received referrals concerning defendant and her children in January, September and December 2011. Adams had no involvement in the referrals and the trial court did not rely on any evidence related to the referrals in support of its abuse or neglect finding.

³ See generally The New Jersey WorkFirst Handbook, http://www.state.nj.us/humanservices/dfd/programs/workfirstnj/wf_nj_handbk_e0118.pdf (last visited Feb. 10, 2018) (explaining the New Jersey WorkFirst welfare program and benefits, TRA benefits, fair hearings, sanctions and WorkFirst-required activities).

Section 8 housing benefits⁴ in Morris County. Adams advised defendant the Section 8 program waiting list in Jersey City was closed, but the Morris County waiting list had recently reopened and defendant had a "good chance of being called soon, due to her current housing status." Defendant said she misplaced the application and did not want to move to Morris County. Adams gave defendant a Section 8 program contact number to call if defendant changed her mind.

Adams also asked defendant about her housing plans if defendant and the children were evicted from their Jersey City apartment. Defendant said she planned to live with Walter's godmother, J.L. Adams provided defendant with additional housing resources and reminded her that she needed a permanent housing plan.

On June 27, 2012, Adams again spoke with defendant about housing. Defendant had requested a letter from the Division advocating for additional TRA benefits for defendant. Adams went to J.L.'s home to deliver the letter to defendant, who explained she was scheduled for a Fair Hearing over welfare's imposition of

⁴ Section 8 rental assistance is provided under a federal program that is regulated by federal statutes and regulations. Bouie v. N.J. Dept. of Cmty. Affairs, 407 N.J. Super. 518, 528 (App. Div. 2009).

a sanction for defendant's receipt of TRA benefits in excess of the applicable limit.

On July 9, 2012, Adams again visited defendant at J.L.'s home. Defendant explained welfare required that she complete four consecutive days of WorkFirst activities to obtain additional TRA benefits. Adams testified defendant was available to perform the activities because the children were in daycare and defendant was unemployed.

Adams next spoke with defendant on July 17, 2012, several hours after Velasquez met defendant and the children at the hospital in response to the referral. Defendant said J.L. told defendant and the children to leave her home. Adams asked defendant about a housing plan, and defendant said she did not have one. Defendant and Adams agreed defendant should take the children to daycare and then go to the welfare office to discuss housing options.

Defendant later reported to Adams that welfare advised her it now required she perform ten days of WorkFirst activities to qualify for additional TRA benefits. Adams provided defendant with a list of housing resources, including the homeless prevention hotline which was only available after 4:00 p.m.

At 11:30 a.m., defendant and Adams discussed family members and friends who might provide housing, but none was available.

Defendant advised Adams the Division should take custody of the children.

During a conversation one hour later, defendant told Adams that the housing resources and a shelter she contacted were unavailable because she had not completed the WorkFirst activities required by welfare. Lacking any housing options, defendant again said the Division should take custody of the children.

Later in the day, defendant told Division investigator Janibell Romero that she contacted her uncle to request housing, but he could not accommodate defendant and the children. Defendant explained she contacted the homeless prevention hotline but was informed she was not eligible for housing because she failed to complete the required WorkFirst activities. Defendant confirmed she had advised Adams the Division should take custody of the children.

Romero went to the daycare center where she found the children dirty, disheveled and smelling of urine. Walter did not have shoes. The Division removed the children from defendant's care pursuant to the Dodd Act.⁵

⁵ A "Dodd removal" is an emergency removal of a child without a court order, pursuant to N.J.S.A. 9:6-8:29 of the Dodd Act, codified in N.J.S.A. 9:6-8:21 to -8:82. N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 609 n.2 (App. Div. 2010).

The Division filed a verified complaint against defendant and the children's fathers, co-defendants S.S. and F.H., for custody of Walter and Mark. F.H. was incarcerated during the litigation but was represented by counsel. Walter's father, S.S., was previously deported and his whereabouts are unknown. The court did not make any findings of abuse or neglect as to F.H. and S.S.

Defendant did not testify or present any witnesses at the fact-finding hearing. After considering the evidence presented, the court found the Division proved by a preponderance of the evidence defendant abused or neglected her children. See N.J.S.A. 9:6-8.21(c)(4)(a) and (b). More particularly, the judge found that despite being advised by Adams of the need for a housing plan for the children, and being afforded opportunities to obtain housing prior to July 17, 2012, defendant's failure to develop a plan or take advantage of opportunities to extend her TRA benefits by completing WorkFirst activities resulted in her children becoming homeless. The court found defendant could have completed the WorkFirst activities necessary to obtain reinstatement of TRA benefits because the children were in daycare, defendant "did absolutely nothing to secure housing for herself," and defendant placed her children at risk of harm by failing to "supply them with the appropriate housing when she had the means . . . through

welfare." Defendant appeals the court's order finding she abused or neglected her children.⁶

On appeal, defendant presents the following arguments:⁷

POINT I

THE TRIAL COURT[] FAILED TO APPLY THE WELL ESTABLISHED LEGAL STANDARD[] STATED IN N.J.S.A. 9:6-8.21(c) AND CASE LAW IN MAKING THE FINDING THAT M.T. ABUSED OR NEGLECTED HER CHILDREN AND THAT FINDING MUST BE REVERSED.

A. The Division Failed to Prove that M.T. Did Not Exercise a Minimum Degree of Care Under Title Nine (N.J.S.A. 9:6-8.21(c)(4)(a) and (b)), Therefore the Court's Finding of Abuse or Neglect Cannot Be Sustained.

B. There Is No Evidence Of Actual Harm or The Imminent Danger of Harm in the Record to Sustain the Lower Court's Finding of Abuse or Neglect[.]

⁶ There were subsequent compliance reviews and in December 2012, the Division filed a complaint for guardianship of Walter and Mark, and they were dismissed from this proceeding. Defendant's parental rights to the children were subsequently terminated in a separate proceeding. See N.J. Div. of Child Prot. & Permanency v. M.T., A-5885-13 and A-5886-13 (App. Div. June 29, 2015). Defendant had another child, Z.H., who was born in April 2013. The Title Nine proceeding continued as to that child and was subsequently terminated. On this appeal, we consider only the court's order finding defendant abused or neglected Walter and Mark.

⁷ The law guardian argued before the trial court that defendant abused or neglected the children. On appeal, the law guardian argues that although defendant acted negligently, the Division failed to prove the children suffered actual harm or were at imminent risk of harm. The law guardian offers no explanation for the change in its position, but we find the change irrelevant to our consideration of the evidence and review of the court's abuse or neglect finding.

POINT II

THE TRIAL COURT ERRED IN FAILING TO EXERCISE ITS DISCRETION TO DISMISS THE TITLE NINE ACTION AND CONTINUE THE MATTER UNDER TITLE THIRTY AND THIS ERROR CONSTITUTED A DENIAL OF DUE PROCESS[.]

II.

In our review of an order finding abuse or neglect, we determine whether the trial judge's decision was based on evidence supported by the record before the court. See N.J. Dep't. of Children & Families, Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 22 (2013) ("The Division bears the burden of proof at a fact-finding hearing and must prove . . . [harm] . . . by a preponderance of the evidence."). We will not disturb a trial court's factual findings "unless they are so wholly unsupportable as to result in a denial of justice." In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002) (citations omitted).

Even when a party "allege[s] error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom," deference must be accorded unless the court "went so wide of the mark that a mistake must have been made." N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (citations omitted). That is because, "by virtue of its specific jurisdiction, the Family Part possess[es] special

expertise in the field of domestic relations." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 553 (2014) (alteration in original) (citation and internal quotation marks omitted). "Nevertheless, the trial judge's findings are not entitled to that same degree of deference if they are based upon a misunderstanding of the applicable legal principles." N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 434 (App. Div. 2002) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Title Nine, N.J.S.A. 9:1-1 to 9:25-11, sets forth the controlling standards for adjudicating cases of abuse and neglect. N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 303 (2011). Title Nine's main precept is to protect children from circumstances and actions that threaten their welfare. G.S. v. Dep't of Human Servs., 157 N.J. 161, 176 (1999). In pertinent part, the statute defines an "abused or neglected child," as one:

(4) . . . 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 or guardian . . . to exercise a minimum degree of care (a) in supplying the child with adequate . . . shelter . . . 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
[N.J.S.A. 9:6-8.21(c)(4)(a),(b).]

The Division bears the burden of proving abuse or neglect. N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 178-79 (2014). Generally, "any determination that the child is an abused or neglected child must be based on a preponderance of the evidence and [] only competent, material and relevant evidence may be admitted." N.J.S.A. 9:6-8.46(b). However, where there is no evidence of actual harm to the child, "a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm." A.L., 213 N.J. at 23. As the Court noted in A.L., "we do not require expert testimony in abuse and neglect actions. In many cases, an adequate presentation of actual harm or imminent danger can be made without the use of experts." Id. at 29.

A "minimum degree of care," as required by the statute, does not refer to merely negligent conduct, but rather "to conduct that is grossly or wantonly negligent, but not necessarily intentional." T.B., 207 N.J. at 305 (quoting G.S., 157 N.J. at 178). "Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result." G.S., 157 N.J. at 178 (citation omitted). The essence of gross or wanton negligence is that it "implies that a person has acted

with reckless disregard for the safety of others." Id. at 179 (citations omitted).

Whether conduct is merely negligent, as opposed to grossly or wantonly so, is determined by a fact-sensitive inquiry where the conduct is "evaluated in context based on the risks posed by the situation." T.B., 207 N.J. at 309. While the Division must demonstrate "the probability of present or future harm" to the child, N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004), "[a] court 'need not wait to act until a child is actually irreparably impaired by parental inattention or neglect,'" A.L., 213 N.J. at 23 (quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)).

We first apply these standards to the court's finding of abuse or neglect under N.J.S.A. 9:6-8.21(c)(4)(b). The court did not make any factual findings supporting its determination that defendant failed to supervise the children and, based on our careful review of the record, we find no evidence defendant failed to supervise her children while they were in her care following their eviction from J.L.'s home. To the contrary, the evidence shows defendant supervised the children at all times prior to surrendering custody of the children to DYFS on July 18, 2016. Cf. N.J. Div. of Child Prot. & Permanency v. J.D., 447 N.J. Super. 337, 352-54 (App. Div. 2016) (affirming an abuse or neglect finding

under N.J.S.A. 9:6-8.21(c)(4)(b), where a father left his child unsupervised in the car while he patronized a bar); N.J. Div. of Child Prot. & Permanency v. K.G., 445 N.J. Super. 324, 327, 348 (App. Div. 2016) (affirming an abuse or neglect finding under N.J.S.A. 9:6-8.21(c)(4)(b) where a mother left her infant under the supervision of her nineteen-year-old son, who was "substantially cognitively impaired"). The court therefore erred in finding defendant abused or neglected her children under N.J.S.A. 9:6-8.21(c)(4)(b).

We next consider the court's abuse or neglect finding under N.J.S.A. 9:6-8.21(c)(4)(a), and are satisfied there was substantial credible evidence supporting the judge's determination that defendant was grossly negligent by failing to take available steps to secure stable housing for her children. The evidence showed defendant failed to supply the children with "adequate . . . shelter . . . though offered financial or other reasonable means to do so" N.J.S.A. 9:6-8.21(c)(4)(a); see, e.g., N.J. Div. of Youth & Family Servs. v. K.M., 136 N.J. 546, 550-53 (1994) (affirming abuse or neglect finding where parents who were financially and physically capable of providing "food, clothing and shelter" for their children failed to do so despite Division assistance).

In May 2012, Adams warned defendant she needed a stable housing plan for the children. Defendant failed to complete the Section 8 application Adams had provided and thereafter opted not to complete the WorkFirst activities she knew were required for continued TRA benefits. By July 9, 2012, eight days before she was kicked out of J.L.'s home, defendant had been advised she needed to perform only four days of WorkFirst activities to qualify for TRA benefits, but she failed to complete the activities even though she was not working and the children were in daycare.⁸ It was defendant's inexplicable failure to complete the WorkFirst activities that made her ineligible for TRA benefits and also emergency housing from shelters and other resources. Thus, defendant's failure to complete the WorkFirst activities directly resulted in her inability to provide stable housing immediately following her eviction from J.L.'s home.

Defendant relies on N.J. Div. of Child. Prot. & Permanency v. L.W., 435 N.J. Super. 189 (App. Div. 2014), where we reversed a trial court order finding the defendant mother neglected her two young children by failing to provide adequate housing. The mother moved with her fiancé to Georgia, returned to New Jersey after a

⁸ Beyond defendant's statement she and the children were staying at J.L.'s home, there is no evidence she enjoyed an enforceable tenancy or the arrangement was intended to be permanent.

death in her fiancé's family, but then did not have the funds to return to Georgia. Id. at 193. While in New Jersey, the mother and children lived with a relative, and then in a shelter before being forced to leave. Id. at 193. The mother was neither eligible for welfare nor housing benefits, and went to the Division seeking housing assistance to avoid being homeless. Ibid. The trial court found the mother abused or neglected the children by failing to provide shelter due to her "unbelievably poor planning." Ibid.

We reversed the trial court's abuse or neglect finding, id. at 197, concluding the mother's "poor planning" was "in part a side-effect of poverty," id. at 196, and "poverty alone is not a basis for a finding of abuse or neglect," id. at 195 (citation omitted). We also observed that the mother "sought housing through government agencies[,]. . . sought employment to no avail[,]" and did the "responsible thing" when she was unable to provide housing by contacting the Division for "help instead of subjecting her children to further homelessness." Id. at 196.

Defendant's reliance on L.W. is misplaced. The judge did not base her finding of abuse or neglect on defendant's poverty, and the record does not support defendant's contention that her poverty caused her failure to provide shelter for the children. To the contrary, it was defendant's abject failure to take advantage of

various options about which she was fully informed, and not her poverty, that resulted in her inability to provide shelter for the children. The mother in L.W. was not eligible for welfare or housing benefits, but actively pursued other housing options and employment before being rendered homeless. Id. at 196.

Here, defendant was eligible for TRA housing benefits, but simply failed to take the available steps necessary to obtain them. The court correctly determined defendant's failure satisfied the gross negligence standard supporting its abuse and neglect finding. See N.J. Div. of Youth & Family Servs. v. C.H., 428 N.J. Super. 40, 68-69 (App. Div. 2012) (finding defendant's failure to take available actions to properly protect her children satisfies the gross negligence standard for a finding of abuse or neglect).

The fact that defendant acted in a grossly negligent manner does not end the inquiry. "Each determination of whether the conduct of a parent or caretaker constitutes child abuse or neglect . . . requires a determination of whether the child suffered actual physical, mental, or emotional harm or whether the conduct exposed the child to an imminent risk of such harm." N.J. Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 185 (2015); N.J.S.A. 9:6-8.21(c)(4). A finding of abuse or neglect requires proof "by a preponderance of the

competent, material and relevant evidence [of] the probability of present or future harm" to the child. S.S., 372 N.J. Super. at 24. "Imminent risk of harm" under Title Nine requires a showing that the children are in imminent risk of impairment to their "physical, emotional, or mental well-being." E.D.-O., 223 N.J. at 193; N.J.S.A. 9:6-8.21(c)(4). The imminent risk of impairment must exist at the time the Division responds to the incident. E.D.-O., 223 N.J. at 187.

"A court 'need not wait to act until a child is actually irreparably impaired by parental inattention or neglect.'" A.L., 213 N.J. at 23 (2013) (quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)). "[H]arm cannot be presumed in the absence of evidence of its existence or potential." S.S., 372 N.J. Super. at 28. Our Supreme Court has cautioned that where, as here, an "allegation of child neglect in which the conduct of the parent or caretaker does not cause actual harm is fact-sensitive and must be resolved on a case-by-case basis." E.D.-O., 223 N.J. at 192. We eschew "categorical rule[s]" that a parent's gross negligence results in an imminent risk of harm, and determine on a case-by-case basis under all of the circumstances whether a parent's conduct poses an imminent risk of harm to his or her children. Id. at 192-93.

The court did not make any factual findings supporting its determination that defendant's conduct placed the children in an imminent risk of physical, mental or emotional harm. Instead, the court assumed that during the short period defendant and the children were without housing prior to the Division's initial involvement and award of custody, the children were in imminent risk of harm. The record does not support the court's finding.

Although defendant was grossly negligent in failing to take the actions necessary to secure housing prior to her eviction from J.L.'s home, the evidence shows the eviction from J.L.'s home was unanticipated. Faced with an unexpected late evening eviction, defendant attempted to secure emergency housing. When her efforts proved unsuccessful, she contacted the Hoboken Police Department, was advised to go to the hospital, and followed the instruction with a plan to seek assistance from welfare in the morning. During this period, defendant cared for the children and when Velasquez arrived at the hospital in the early morning hours, she observed the children were sleeping and noted only that they appeared disheveled and had greasy hair.

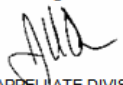
The Division had been involved with defendant and the children for six months and never had any concerns regarding the children's care, and further had no concerns about defendant's care of the children during the few hours they were homeless. Following their

departure from the hospital, the children were cared for by defendant at her uncle's home and then at daycare. Later in the day, when defendant was confronted with a lack of any available housing resources, she requested the Division take custody of the children to ensure their proper care. See L.W., 435 N.J. Super. at 196 (finding mother who could not provide housing for her children "did the responsible thing" by surrendering the children to the Division for placement in foster care).

We reject any categorical determination that defendant's very brief period of homelessness alone permits a finding of imminent risk of harm, E.D.-O, 223 N.J. at 192, and find there was no evidence the children faced an imminent risk of harm under the circumstances here. The court therefore erred by finding defendant abused or neglected her children under N.J.S.A. 9:6-8.21(c)(4)(a).⁹

Reversed.

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


CLERK OF THE APPELLATE DIVISION

⁹ Because defendant's parental rights to the children have been terminated, it is unnecessary to address defendant's contention that the court abused its discretion by failing to continue the matter under Title Thirty in order to provide services to defendant and the children.