SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3948-15T4

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

E.V.,

Defendant-Appellant,

and

V.V.,

Defendant.

IN THE MATTER OF
V.V., JR., V.V., L.V., and
A.V.,

Minors.

Submitted October 10, 2017 – Decided February 13, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FN-09-0182-15.

Joseph E. Krakora, Public Defender, attorney for appellant (John A. Albright, Designated Counsel, on the briefs).

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (David Valentin, Assistant Deputy Public Defender, on the brief).

PER CURIAM

Following a fact-finding hearing, N.J.S.A. 9:6-8.44, the Family Part judge found that defendant, E.V., had neglected her four children, V.V., Jr. (Vincent), born February 1998, V.V. (Valerie), born February 2004, and twin daughters, L.V. and A.V., born April 2009, "due to environmental neglect."[1] The order also provided that under the "totality of [the] circumstances," see Div. of Youth & Family Servs. v. C.M., 181 N.J. Super. 190, 202 (J. & D.R. Ct. 1981), defendant failed "to ensure that [Vincent] and [Valerie] attended school regularly." Approximately fifteen months later, with the children already returned to defendant's custody, a different judge entered an order terminating the litigation. This appeal followed.

[1] We use initials and pseudonyms to maintain the confidentiality of defendant and the children.

I.

The documentary evidence and testimony adduced at the fact-finding hearing revealed that the Division of Child Protection and Permanency (the Division) received a referral in June 2014 that Valerie was not regularly attending school.[2] It was reported that the family was evicted one month earlier because defendant could not pay her rent and was now living in a motel. The caseworker who testified went to the motel and noted the unkempt nature of the room. She also interviewed defendant and Valerie.

Valerie admitted to not attending school for approximately three months because her mother was not waking her up on time. Defendant told the caseworker that the family recently moved from another motel, and, although she notified Valerie's school of the move, the school bus never came to the new motel. Defendant claimed Vincent was attending and doing well in school. The caseworker, however, checked with the school and was told both children were "classified," had individualized education plans (IEPs), had missed many days of school and would likely be retained in grade.

[2] The Division had prior involvement with the family, including responding to repeated police-initiated referrals earlier in 2014 resulting from violent attacks on defendant perpetrated by her husband, defendant V.V., Sr.

The Division was unable to locate the family for several months thereafter, before defendant and her three daughters surfaced at a shelter in New York City. The city's social service agency was initiating services. However, before that happened, defendant moved again, and the Division found her and her daughters living in a basement apartment in Union City. Vincent was staying nearby with a cousin.

The caseworker visited the apartment on September 18, 2014, and was immediately overcome with the strong odor of "Clorox," "feces and sewage." Gnats swarmed the apartment's ceilings, the countertops in the kitchen were strewn with garbage and there was no food. All four children were present at the time of the visit.

Defendant explained and demonstrated that flushing the toilet caused sewage to seep up through the floor tiles. Vincent said the toilet did not work properly when the family moved in nine days earlier.[3] After speaking with the children and observing the filthy conditions, the caseworker effected an emergent Dodd[4] removal.

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[3] The judge saw pictures of the condition of the apartment taken that day by the caseworker. They are in the appellate record.

[4] A Dodd removal is an emergent removal of a minor without a court order pursuant to N.J.S.A. 9:6-8.21 to -8.82 known as the Dodd Act. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 26 n.11 (2011).

On cross-examination, the caseworker acknowledged that defendant was the victim of domestic violence and relocated to a motel with the children in June because her husband was "coming after her." The caseworker acknowledged that she did not speak to the landlord or call the municipal building or health department to report the unsanitary conditions in defendant's apartment.

A psychologist for the Union City Board of Education, who was Valerie's case manager, testified. Valerie had a specific learning disability, which required in-class support. Records reflected that during the 2013-14 school year, Valerie was absent fifty-four and tardy eighteen days. However, because the district did not retain classified elementary school students, Valerie was not retained despite her many absences.

Vincent's case manager from the school district also testified. Vincent was classified as emotionally disturbed, and, because he lacked a sufficient number of credits, was retained in ninth grade after the 2013-14 school year. He had been absent eighty-four days, but received some home instruction, thereby missing, in total, approximately forty-five days of school.

Defendant did not testify or call any witnesses. In colloquy with the Deputy Attorney General (DAG) representing the Division, the judge asked about Vincent's current status, and whether the Division, which now had custody of Vincent, was "having less luck

than mom did" with getting him to school. The DAG admitted that Vincent, now nearly seventeen years old, was "missing."

In his oral opinion, the judge said the case was "very difficult," because it dealt "with poverty and all the attenuated, unfortunate circumstances that go along with poverty." The judge addressed each of the four specific claims the Division made to support a finding of neglect under the "totality of the circumstances."

The judge rejected the assertion that defendant "fled" from the Division's investigation or attempts to provide services to the family. He found defendant's frequent movement with the children was "really of no moment." He also rejected the Division's argument that the condition of the children or the motel room in June was anything more than a "onetime event."

Although he expressed a preference that the Division not have proceeded under Title Nine, the judge found the Division had proven "environmental neglect." Although there was no proof the sewage backup was defendant's fault, the judge concluded, "you've got to do a little bit more than throw some bleach down and try to clean it up when you have four kids there, two of whom are very young." The judge credited Vincent's statement that the condition existed ever since the family moved in to the apartment. He faulted

defendant for not having called the police or the municipality for help.

Turning to the Division's assertion of educational neglect, the judge recognized that the family repeatedly moved and that Vincent was frequently truant or suspended. However, the number of Valerie's absences was "extraordinary." The judge said he would not make a finding of neglect based only upon "educational neglect," but, under the "totality of the circumstances pursuant to C.M.," the judge concluded defendant had educationally neglected her two children.

II.

On appeal, defendant argues that the judge erred in finding "environmental neglect," because her conduct was neither grossly negligent nor reckless, but rather resulted from her poverty. Defendant also contends that the Division failed to prove "educational neglect," and specifically failed to prove educational neglect as to Vincent, because the Division "admitted . . . [he] was not attending school while in [the Division's] custody." Both the Division and the Law Guardian for the children urge 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). "The focus of Title 9 'is not the culpability of parental conduct but rather the protection of children.'" N.J. Div. of Child Prot. & Permanency v. A.B., ___ N.J. ___, ___ (2017) (slip op. at 17-18) (quoting E.D.-O., 223 N.J. at 178). Title Nine 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 or guardian . . . 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. 9:6-8.21c(4)(a) and (b) (emphasis added).]

Although the judge said the Division was proceeding under both subsection (a) and (b), and the Division cites to both in its appellate brief, it is clear that the judge made his findings

under subsection (a), and that was the only subsection of the statute relevant to the evidence produced at the hearing.

"[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.'" A.B., slip op. at 20 (citation omitted) (quoting E.D.-O., 223 N.J. at 180).

Defendant argues that the judge erred in finding she had neglected the children because the conditions in the apartment did not result from grossly negligent or reckless conduct on her part, and there was no evidence the children were harmed, or faced imminent risk of harm, because of the conditions. She also argues the judge's recognition of her poverty precluded him from finding defendant had the financial ability to abate the conditions, and the Division did nothing to help defendant either find other housing or fix the sewage problem. We disagree.

The judge found the conditions in the apartment had existed for nine days, ever since the family moved in. Raw or dried sewage was on the floor of every room, including the bedroom, where the entire family slept on the floor, and the kitchen. During that time, defendant did little, except to pour bleach on and mop the floor and light incense to dispel the fumes. She told the caseworker that she was on her way out to buy a plunger just before the caseworker arrived, but she never complained to the landlord or the appropriate municipal agencies, nor did she call the Division.

While the caseworker was present, Valerie slipped and fell while trying to mop up the fetid water. All of defendant's children suffered from asthma, yet defendant's attempt to use chlorine bleach to cure the problem only exposed them to noxious fumes. The judge expressly recognized defendant's penurious state, but he placed appropriate significance on the fact that the sewage flow existed for more than one week.

We also reject defendant's claim that the Division simply removed the children rather than assist her. Defendant never called the Division after she returned from New York City. The Division was only able to locate defendant through the efforts of the Human Services Police, and did so shortly before the caseworker

visited. Because the risk posed to the children's health was so significant, we find no fault with their immediate removal.

We therefore affirm the fact-finding order based upon the judge's finding and conclusion that defendant's conduct exposed the children to "environmental neglect." As a result, we need not reach the other arguments raised by defendant.

Affirmed.