

## RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5112-15T1

NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

K.M.,

Defendant-Appellant,

and

S.M.,

Defendant.

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IN THE MATTER OF

L.M., Minor.

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Submitted January 10, 2018 – Decided April 11, 2018

Before Judges Fuentes, Koblitz, and Suter.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Bergen County,  
Docket No. FN-02-0077-15.

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

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Jill N. Stephens-Flores, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Linda Vele Alexander, Designated Counsel, on the brief).

PER CURIAM

K.M. appeals the June 16, 2016 Order Terminating Litigation (Order) in this action filed under N.J.S.A. 30:4C-12 (Title 30). Under the Order, K.M.'s daughter continued in the physical custody of the child's maternal grandmother. K.M. contends the Order was entered without an appropriate dispositional hearing, which deprived her of due process. We reject this argument and affirm the Order.

I

K.M. (Kim) and S.M. (Sam) have two children. L.M. (Laura) was born in 2004. A.M. (Albert) turned eighteen during the litigation and was dismissed from it.<sup>1</sup>

In August 2014, the Division of Child Protection and Permanency (Division) filed a complaint under N.J.S.A. 9:6-8.21(c)

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<sup>1</sup> We use fictitious names to protect the confidentiality of the family members and children. R. 1:38-3(d)(12).

(Title 9) and Title 30, seeking care and supervision of the children based on Sam's arrest for possession of heroin and his refusal to attend a substance abuse evaluation without a court order. Sam was the subject of the Division's investigation at the time. However, because Kim was groggy when Division workers arrived at the house, took prescription medications, and the children indicated to the caseworker that her medicine made her sleepy, the Division requested an order from the court that both parents undergo drug testing. Sam was positive for tetrahydrocannabinol (THC), the active chemical in marijuana. Kim tested positive for THC, benzodiazepines, and phencyclidine (PCP). She contended that the positive findings resulted from a prescription medication, Lovenox, that she took for blood clots.

The court placed the children under the care and supervision of the Division and required all parental contact to be supervised. Kim suggested that she and the children live with her mother, M.B. (Marge), who could provide supervision. Kim and Sam were ordered to undergo random urine screens, hair follicle examinations, substance abuse evaluations, psychological evaluations, and to sign releases for medical and pharmaceutical records.

When they returned to court in September 2014, Kim again tested positive for THC, and her hair follicle examination was positive for opiates. Her psychological evaluation recommended

that she attend a MICA program.<sup>2</sup> The court ordered her into the program over her objection. Sam was ordered to attend substance abuse treatment because his drug testing was positive for THC.

Later that month, the Division conducted an emergency Dodd<sup>3</sup> removal of the children because of conflicts between Kim and Marge. The Division's safety protection plan was not being followed, as Kim was having unsupervised contact with the children. The conflicts between Kim and Marge led to police intervention on two occasions. One of the conflicts stemmed from Kim's decision to allow the children to stay home from school when they were not sick, a decision with which Marge disagreed.

Following a hearing, the court found that it was contrary to Laura's welfare for her to remain in the physical custody of Kim "and that she would be in imminent risk of harm based upon the Division's concerns regarding the mother's substance issue and the conflicts in the home between the mother and the grandmother." The court found that "reasonable efforts to prevent placement prior to the removal [were made] as indicate[d] within [the complaint]." The court noted that Laura was "very comfortable

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<sup>2</sup> Reference here is to the Mentally Ill Chemical Abuser (MICA) program at Bergen Regional Medical Center.

<sup>3</sup> A "Dodd" removal permits the emergency removal of a child from the parent's home without a court order. N.J.S.A. 9:6-8.29.

with her grandmother." Although the children would continue under the care and supervision of the Division, the court ordered that Marge would have physical custody of Laura and Andrew, and that Kim, Sam and Marge would share legal custody of both children. None of the parties objected to this arrangement, which avoided placing the children in the custody of the Division.

Kim and Sam continued to test positive for THC at elevated levels. Kim also tested positive for opiates and hydrocodone. She attended an intake session at the MICA program and Sam was in a drug treatment program.

At the January 26, 2015 fact-finding hearing, the Division asked the court to dismiss the Title 9 portion of the case and to continue providing services to the family under Title 30. Alexander Curry, the Division caseworker, testified about the family's continued need for services. Sam had relapses and wanted to enroll in a substance abuse program. Kim attended outpatient psychiatric medication monitoring but had not started treatment at MICA. She exercised supervised visitation with Laura, but would inappropriately tell Laura that she would be going to a foster home.

The court dismissed the Title 9 portion of the case with prejudice with the consent of the parties, and ordered the Title 30 part to continue "because I find that it is in the best interest

of [Laura]" so that both parents could continue treatment. Kim was ordered to attend substance abuse treatment at the MICA program. Sam was ordered to attend level one substance abuse treatment.

At the compliance hearing in February 2015, the court commented on its interview with Laura, who had told the court about text messages from Kim that were upsetting to her. The court found Laura "articulate, very mature for her age, and very credible." Laura wanted to live with her father, but Sam had relapsed. Kim was not exercising supervised visitation with Laura and had been hospitalized for a suicide attempt.

Sam continued substance abuse treatment through May 2015 and was looking for an apartment. Kim had not started the MICA program. She wanted phone contact and visitation with Laura, who was apparently not ready to resume contact with her mother.

In September 2015, Laura's attorney asked the court to close the Title 30 case, but both parent's objected. The court continued the litigation because Kim needed services although Sam was doing well.

At the December 2015 compliance hearing, Kim represented to the court that she was engaged in a MICA program and was attending. The court ordered supervised visitation between Kim and Laura at

the request of the child, but declined to close the case at that time.

At the compliance hearing in March 2016, Marge testified that after the child's interactions with Kim, Laura's behavior "becomes crabby, and it becomes short, and then we have to like let her calm down, let her process it. It keeps her awake at night." Also, Sam relapsed, and he sometimes did not call or appear for scheduled visitation. The court ordered that, based on the health and welfare of Laura, the Title 30 litigation remain open because there was a need to continue services for the parents.

On June 16, 2016, the court terminated the Title 30 litigation. At the hearing, the Division's "court report," certified to by the Division caseworker and supervisor, was placed in evidence without objection. In the report, the Division recommended terminating the litigation and continuing Laura in the physical custody of Marge, although Kim, Sam and Marge would share legal custody. The report also detailed the caseworker's weekly contacts with the family. It reported that Kim was not "engaged in a drug rehabilitation facility," and had not complied with hair follicle tests. Sam had relapsed.

Marge testified that Laura was a "wreck" after visiting with her parents. Laura was concerned about Kim's health and that she might die. She became upset when her father did not visit. The

visits with Kim ended up with Marge and Kim "in a screaming match." Marge wanted the court to set limitations on the number of phone calls from Kim.

Kim testified in response to the Division's report. She objected to continuation of the custody arrangement. She would consent to dismissal of the case if she had sole physical custody of Laura and if she and Sam shared legal custody. Kim contended the child was not safe with Marge because Marge had disclosed confidential information to Laura. Kim asserted she was a "pillar within [her] community" because she had been active in the PTA and Laura's school functions.

Kim continued to assert that Lovenox caused false positive drug screen results. When the court asked whether she had supporting documentation, Kim asserted that another judge who had handled an earlier case in 2004 had that information. Kim's attorney acknowledged to the court that Kim's drug screens remained positive.

In response to the court's request for documentation about Lovenox creating false results, Kim testified:

[Kim]: The pharmaceutical company doesn't even have it, that makes the Lovenox. There's no request for it.

THE COURT: So how do you know it?

[Kim]: Because we did an order of elimination?



THE COURT: Oh okay.

[Kim]: We went through the whole entire thing with the Judge and the Sheriff's Department, and my doctors; okay. And that's why I was tested every day for my amounts of Lovenox; okay? And it gradually, . . . pull[ed] down my THC levels.

Based on the testimony and evidence, the court found that Sam had relapsed and that the "child suffers as a result." The court found Kim's testimony about Lovenox causing false positives as "almost implausible for me." He did not find her answer to be credible and it raised concerns "about [her] spaces in reality right now." He found the parents were not constant in the child's parenting, and that he could not return the child to either parent. The court found the parties had consented to the custody arrangement at the Dodd hearing to avoid the Division obtaining custody. Laura was safe with Marge, who was trying to protect the child emotionally. The court remarked that the case would not close but for the fact that Marge had custody because the parents had not taken advantage of the services provided to them.

The Order terminated the litigation. Laura remained in the physical custody of Marge. Kim, Sam and Marge shared joint legal custody. The court did not preclude either parent from filing for custody under a non-dissolution (FD) or matrimonial (FM) docket

upon a showing of changed circumstances and lack of safety concerns for the children. The court ordered continued supervised visitation.

On appeal, Kim raises the following issues:

POINT I

THE JUDGMENT BELOW SHOULD BE REVERSED BECAUSE THE TRIAL COURT DENIED K.M. HER DUE PROCESS RIGHTS BY FAILING TO CONDUCT A PROPER DISPOSITIONAL CONCLUSION TO THE TITLE 30 LITIGATION

A. THE DIVISION FAILED TO ESTABLISH THAT IT WAS IN L.M.'S BEST INTEREST TO TERMINATE THE TITLE 30 PROCEEDINGS LEAVING PHYSICAL CUSTODY WITH MS. B.

B. THE PROCEDURES EMPLOYED BY THE TRIAL COURT IN CONDUCTING THE JUNE 16, 2016 SUMMARY HEARING DEPRIVED K.M. OF DUE PROCESS.

II

We accord "great deference to discretionary decisions of Family Part judges," Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012), in recognition of the "family courts' special jurisdiction and expertise in family matters." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 26 (2014)

(citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

N.J.S.A. 30:4C-12 "provides the means for the Division to effectuate services to children in need when a parent does not consent to the Division's supervision, care or custody." N.J. Div. of Youth & Family Servs. v. I.S., 214 N.J. 8, 33 (2013). It's "purpose is to protect children." Ibid. (citing N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007)). "Section 12. . . is triggered by the appearance that a child's welfare is endangered." N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 32 (2013).

Under Section 12, the Division can file a complaint "whenever it shall appear" that a parent "shall fail to ensure the health and safety of the child, or is endangering the welfare of [a] child[.]" I.S., 214 N.J. at 34 (quoting N.J.S.A. 30:4C-12). Following its investigation, and if the child appears to require care and supervision, the Division can file a complaint for care, supervision or custody of the child. Upon application by the Division, "at a summary hearing held on notice to . . . the parents," the court may issue an order of care, supervision or custody "if satisfied that the best interests of the child so require" it. I.S., 214 N.J. at 35 (quoting N.J.S.A. 30:4C-12). Under the statute,

the court must conclude that it is in the best interests of the child to award the Division an order of care, supervision, or custody. The court may then order the services that the Division's investigation revealed were necessary.

[I.S., 214 N.J. at 35.]

The initial order under Section 12 "shall not be effective beyond a period of six months from the date of the entry unless the court" extends the time of the order at a summary hearing based on notice. Ibid. (quoting N.J.S.A. 30:4C-12). Then, the court may in its discretion extend the order if "it is satisfied, by the preponderance of the credible evidence, that the best interests of the child require continuation of that order." I.S., 214 N.J. at 37-38.

"Best interests" is not defined in Title 30. However, "[I]n construing this statute, our courts have considered the Legislature's underlying purpose – protection of children from harm when the parents have failed or it is 'reasonably feared' that they will." N.J. Div. of Youth & Family Servs. v. T.S., 426 N.J. Super. 54, 65 (App. Div. 2012) (quoting N.J. Div. of Youth & Family Servs. v. Wunnenburg, 167 N.J. Super. 578, 586-87 (App. Div. 1979)). Given the scope of this inquiry, we do not agree that the trial court erred by terminating this litigation and

continuing physical custody of Laura with her maternal grandmother.

This custodial arrangement was entered into twenty months earlier with the tacit consent of the parties to avoid the Division's custody of the child after emergency removal. Subsequent compliance reviews<sup>4</sup> continued to demonstrate that Laura's care and supervision was required to ensure her health and safety.

At the June 2016 hearing, Sam did not contest that he relapsed repeatedly and was not available to parent Laura. His visits lacked certainty. His attorney acknowledged that Sam failed at times to attend visits because he was under the influence.

The court found Kim's claim that Lovenox caused false positive results was not credible. She did not actually dispute that the test results were positive for drugs; her contention was that Lovenox caused these results. At the hearing, she admitted there was no pharmacological proof of this. Her far-fetched contention was that a judge, who was not assigned the case, knew of proof from ten years earlier. Furthermore, Kim never disputed that, even

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<sup>4</sup> A "compliance review" "is not to check-up on and review a parent's compliance or to manage the case. The purpose is to require the Division to demonstrate that continued care and supervision is still in the best interests because there is a need to ensure the child's health and safety. N.J.S.A. 30:4C-12." T.S., 426 N.J. Super. at 67.

if she did attend the court ordered MICA program, that she did not complete it.

Kim's reliance on N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 330-31 (App. Div. 2011) and A.L., 213 N.J. at 1, is not persuasive. Those cases involved abuse and neglect findings. The court did not have to find that Kim and Sam's drug use actually harmed Laura to maintain her custody with Marge; Sam was not able to maintain sobriety and Kim did not accept the need for treatment. There also was testimony that Kim's comments to Laura were inappropriate. She did not offer emotional support to Laura; Marge did. The court found that Marge was trying to emotionally protect the child. The parties had been before the court for twenty months with little or no improvement and with the parties having failed to cooperate with or complete services. It was not error on these facts to terminate the litigation with Laura in Marge's physical custody. Marge was the only option for Laura at the time. We have no difficulty deferring to the factual and legal conclusions of the Family Part judge who terminated the Title 30 litigation and ordered that Laura's physical custody remain with Marge with the parties sharing joint legal custody.

We also are not persuaded by Kim's arguments that the procedures followed were deficient under I.S., or violated due process under N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J.

382, 387-88 (2009), a Title 9 case in which the Court held that an "offending parent is entitled to a dispositional hearing to determine when the children may safely return to her custody . . . ." "Title 30 does not discuss dispositional hearings, as delineated in Title 9." N.J. Div. of Youth & Family Servs. v. J.D., 417 N.J. Super. 1, 23 (App. Div. 2010). Rather, "the [c]ourt . . . may proceed to hear the matter in a summary manner and if satisfied that the best interests of the child so require may issue an order as requested." Ibid.


I.S., 214 N.J. at 1, involved a combined Title 30 and matrimonial case which was not the factual circumstance here. Although the trial court in I.S. did analyze the custody factors under N.J.S.A. 9:2-4, I.S. did not hold that analysis of these factors is required in a Title 30 action involving out of home placement of a child. Certainly, their consideration may be warranted where applicable in determining the child's best interest, but the dispute does not involve two parents and therefore, may require consideration of facts different from the enumerated list.

Kim contends the hearing was procedurally flawed. However, none of the parties objected to the entry in evidence of the Division's report. See R. 5:12-4(d); In re Cope, 106 N.J. Super. 336, 344 (App. Div. 1969). There also was testimony by Marge

about the child and the effect on her of visitation. Kim testified to rebut the report. The court made credibility determinations based on the testimony. Although it might also have been preferable to hear testimony from the Division's caseworker, we cannot say, as Kim contends, that the court's findings lacked support in the record, required the testimony of an expert or deprived her of due process.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION