

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2467-20

NEW JERSEY DIVISION  
OF CHILD PROTECTION  
AND PERMANENCY,

Plaintiff-Respondent,

v.

K.K.,

Defendant-Appellant,

and

K.V.,

Defendant.

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IN THE MATTER OF S.K.,  
a minor.

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Submitted May 11, 2022 – Decided June 3, 2022

Before Judges Hoffman and Whipple.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Family Part, Passaic County,  
Docket No. FN-16-0113-19.

Joseph E. Krakora, Public Defender, attorney for  
appellant (Richard Foster, Deputy Public Defender, of  
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Joseph E. Krakora, Public Defender, Law Guardian,  
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Public Defender, of counsel and on the brief).

#### PER CURIAM

Defendant K.K.<sup>1</sup> appeals from a June 14, 2019 order terminating litigation after a fact-finding hearing wherein the Family Part Judge found K.K. abused and neglected her daughter, S.K, by a preponderance of the evidence. Because the court found actual harm without sufficient evidence and without evidence of causation and thus treated the positive presence of drugs as a categorical finding of abuse, we are constrained to reverse.

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<sup>1</sup> We use abbreviations to protect the parties' privacy and preserve the confidentiality of these proceedings. R. 1:38-3(d)(17).

The record informs our decision. On December 19, 2018, the Division of Child Protection and Permanency (Division) filed a complaint for custody, care, and supervision, against K.K. and codefendant K.V.<sup>2</sup> The Division sought custody of their daughter, S.K., who was born in November 2018, and was still in the neonatal intensive care unit (NICU). K.K. admitted to heroin use shortly before giving birth, and hospital test results from S.K.'s birth were positive for cocaine, opiates, and methadone for both mother and child. K.K. was previously involved with the Division when it removed another child from her care.

Previously, in August 2018, a pregnant K.K. went to the hospital with chest pains and admitted drug use. In October 2018, she told hospital staff that she wanted to obtain detox treatment but left the hospital despite medical advice. She returned to the hospital later that month with an arm infection and admitted using drugs. K.K. could not have treatment because she did not have proper identification. The Division initiated a screening in November when the hospital alerted them that K.K.'s labor was induced and she gave birth to S.K. Hospital staff reported S.K.'s prematurity, low birth weight, respiratory problems, Apgar score, and NICU treatment, and K.K.'s positive tests for opiates and cocaine.

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<sup>2</sup> K.V. surrendered his parental rights as to S.K. on April 16, 2019, and the Division made no allegations against him for the abuse and neglect in the fact-finding hearing that is the subject of this appeal.

Hospital records listed S.K.'s drug withdrawal symptoms, sepsis, feeding intolerance, and impaired thermoregulation, but the discharge sheet said that S.K. was never treated with morphine. Later, S.K.'s urine test was negative for drugs, but her meconium tested positive for cocaine, methadone, and opiates. S.K. was in the NICU because she was small, but stable and not experiencing any withdrawal symptoms.

The Division filed a complaint and order to show cause and to execute an emergency removal, asserting S.K. was suffering from withdrawals. The court, in approving the order, found S.K. "tested positive for illicit substances at birth and is suffering from withdrawal symptoms," and "tested positive for opiates and cocaine and is experiencing withdrawal symptoms." The court granted K.K. one weekly supervised visit and ordered her to submit to a Division substance abuse assessment as well as a psychological/psychiatric and/or parenting evaluation and to comply with any resulting recommendations, including completing any recommended substance abuse treatment. S.K. remained in the hospital until December, when the Division placed S.K. in a non-relative foster home.

On the first day of the abuse and neglect fact-finding trial, the court heard testimony from the only trial witness, Division Investigator Tamika Jones. The

Division alleged actual harm to S.K. from K.K.'s illicit drug use, asserting K.K. admitted to heroin and cocaine use while pregnant; that S.K.'s urine tests were negative for any illicit drugs, but her meconium test showed exposure to methadone, cocaine, and opiates; and that S.K. was in the NICU then moved to the nursery within two weeks. Jones testified about S.K. and K.K.'s known struggle to get treatment without an identification card. The court found Jones credible. However, the Division did not present a medical expert or treating hospital staff. The medical records showed an 8.89 Apgar score out of 10 and a Finnegan score that was so low neonatal abstinence syndrome (NAS) treatment was never prescribed.

The Division submitted its screening summary prepared by Jones from November to December when the Division concluded K.K.'s substance abuse had resulted in S.K.'s premature birth, low birth weight, and Apgar score of 8.8 to 9. The summary noted K.K.'s positive meconium test results, failure to obtain prenatal care, or pursue the substance abuse treatment offered, admission of near-daily illicit drug use, and lack of income to provide the necessities to care for S.K.

Hospital records from November to December established S.K. was discharged without ever having a high enough Finnegan score for morphine

treatment to treat NAS. She was only assessed with a risk of NAS, but never diagnosed with NAS.

On June 14, 2019, the court made oral findings that the Division showed by a preponderance of the evidence that K.K. had abused and neglected S.K. The court found that K.K.'s "use of illicit substances during her pregnancy . . . affected [S.K.]'s health." The court detailed that S.K. "was born prematurely at [thirty-two] weeks, suffered from low birth weight, withdrawal symptoms due to [K.K.]'s use of illicit substances" and that such "issues resulted in [S.K.] being hospitalized for approximately one month." The court included that "[t]he Division emphasizes that [S.K.] tested positive for opiates, cocaine and methadone at birth, suffered from withdrawal symptoms, [NAS], low birth weight and was hospitalized from November . . . 2018 to December . . . 2018."

The court concluded that K.K. had abused and neglected S.K. under N.J.S.A. 9:6-8.21(c)(4)(b) because she failed to exercise a minimum degree of care by using illicit substances throughout her pregnancy up until being admitted to the hospital leading to the child suffering from withdrawal symptoms resulting in the child's extended hospitalization in the NICU. The court added that K.K. had been "aware of the dangers of using illicit substances during her

pregnancy, disregarding the substantial probability that harm would result from her actions."

Then, in the fact-finding order, the court added:

The minor child tested positive for cocaine, methadone and opiates at the time of birth [in November] 2018. The minor child suffered from withdrawal symptoms, diagnosed with [NAS]. [K.K.] tested positive for opiates and cocaine when she was admitted to the hospital [in November] 2018, as well as for the reasons set forth on the record.

[emphasis added.]

A termination of litigation order was entered on June 14, 2019. This appeal followed.

K.K. argues that the court improperly applied Title 9 by entering a categorical finding that illicit drug exposure at birth, a NAS diagnosis, and the two-week NICU stay because of prematurity and low birth weight constituted enough harm to support a finding of abuse and neglect under N.J.S.A. 9:6-8.21(c). She argues that case law prohibits such a categorical finding and the evidence does not show actual harm or the causes of that harm. We agree.

Our scope of review of an order finding abuse or neglect is limited and deferential. N.J. Div. of Child Prot. & Permanency v. Y.A., 437 N.J. Super. 541, 546 (App. Div. 2014) (citing N.J. Div. of Youth & Fam. Servs. v. I.Y.A.,

400 N.J. Super. 77, 89 (App. Div. 2008)). We will uphold the trial judge's factual findings and credibility determinations if they are supported by "adequate, substantial, and credible evidence." N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007) (citing In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)). Accordingly, we will only overturn the trial judge's findings if they "went so wide of the mark that the judge was clearly mistaken." Ibid. We do not, however, give "special deference" to the trial court's interpretation of the law; instead, we apply a de novo standard of review to legal issues. D.W. v. R.W., 212 N.J. 232, 245-46 (2012).

Title 9, N.J.S.A. 9:6-1 to -8.114, governs the adjudication of abuse or neglect. At the fact-finding hearing, the Division has the burden of showing abuse or neglect by the preponderance of the evidence. N.J. Div. of Youth & Fam. Servs. v. G.M., 198 N.J. 382, 398 (2009). In N.J. Div. of Child Protection & Permanency v. E.D.-O., our Supreme Court noted that a finding of abuse or neglect is "at the time of the event that triggered the Division's intervention" rather than "at the time of fact-finding." 223 N.J. 166, 170 (2015).

Under Title 9, a child is abused or neglected if:

[a] parent or guardian . . .

(1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which



causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ;

(2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ . . . ;

. . . .

(4) or [their] 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 . . . ;

. . . .

(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).]

The failure to exercise a "minimum degree of care" refers to "conduct that is grossly or wantonly negligent, but not necessarily intentional." G.S. v. Div. of Youth & Fam. Servs., 157 N.J. 161, 178 (1999). "Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result." Ibid. A parent fails to exercise a minimum degree of care if,

despite being "aware of the dangers inherent in a situation," the parent "fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." Id. at 181.

Under the statute, abuse or neglect can be based on either (1) actual harm or (2) substantial risk of harm. We decline the Division's request to consider whether K.K. abused and neglected S.K. under a substantial risk of harm theory. At the fact-finding hearing, the Division only argued that it had "proven by a preponderance of the evidence that [S.K.] is an abused child who suffered actual harm . . . pursuant to N.J.S.A. 9:6-8.2(1)(c)(4)(b)." (emphasis added). "If there is no evidence of actual harm, though, the statute requires a showing of 'imminent danger' or a 'substantial risk' of harm before a parent or guardian can be found to have abused or neglected a child." N.J. Dep't of Child., Div. of Youth & Fam. Servs. v. A.L., 213 N.J. 1, 8 (2013) (citing N.J.S.A. 9:6-8.21(c)) (emphasis in original). We do not treat these terms interchangeably.

The protection of the abuse and neglect statute "is limited to the condition of a child after birth." A.L., 213 N.J. at 22 (2013) (citing N.J. Div. of Youth & Fam. Servs. v. L.V., 382 N.J. Super. 582, 590 (Ch. Div. 2005)). "If an expectant mother's drug use causes actual harm to the physical, mental, or emotional condition of a newborn child, a finding of abuse or neglect is appropriate." Id.

at 8. Moreover, Title 9 asks "whether [the child], as a newborn, 'ha[s] been impaired' or was in 'imminent danger of becoming impaired' as a result of his [or her] mother's failure to exercise a minimum degree of care by unreasonably inflicting harm or allowing a 'substantial risk' of harm to be inflicted." Id. at 22 (quoting N.J.S.A. 9:6-8.21(c)(4)(b)).

The Division can show that a newborn has been impaired in a number of ways. For example, proof that a child is suffering from withdrawal symptoms at birth could establish actual harm. See, e.g., [In re Guardianship of K.H.O., 161 N.J. 337, 349 (1999)] (noting in context of termination of parental rights action that "a child born addicted to drugs and suffering from the symptoms of drug withdrawal as a result of her mother's substance abuse during pregnancy has been harmed by her mother and that harm endangers the child's health and development"). In addition, the Division can prove actual harm by showing evidence of respiratory distress, cardiovascular or central nervous system complications, low gestational age at birth, low birth weight, poor feeding patterns, weight loss through an extended hospital stay, lethargy, convulsions, or tremors. See id. at 350 . . . . That information may come from any number of competent sources including medical and hospital records, health care providers, caregivers, or qualified experts.

[Id. at 22-23 (emphases added).]

N.J. Div. of Youth & Fam. Servs. v. N.D., provides the most instructive analysis for this case. 435 N.J. Super. 488 (App. Div. 2014). There, the mother tested positive for cocaine and admitted to cocaine, marijuana, and alcohol use

throughout her pregnancy. Id. at 490-91. The Division included lack of housing and ability to provide for a newborn with the drug use in its complaint. Id. at 491. The trial court admitted medical records and Division reports then found abuse and neglect despite finding that prematurity and low birth weight were not proved as directly caused by the mother's drug use. Id. at 491-92. The trial court in N.D. made a finding based on substantial risk of harm, not actual harm, id. at 492; and N.D. preceded the guidance provided in A.L., id. at 497-98. Thus, we remanded for the Family Part to consider whether there was a causal connection between the mother's drug use and actual harm to the baby. Ibid.

Similarly here, the trial court never affirmatively stated that the Division proved K.K.'s drug use directly caused S.K.'s prematurity and low birth weight notwithstanding the Division's theory and the court's finding were focused on actual harm. Moreover, we see no merit to remanding for further findings and expert medical testimony regarding causation of the NAS and drug withdrawal symptoms because those findings were wholly unsupported in the factual record. The Division presented no medical testimony linking S.K.'s low birth weight and extended hospital stay to K.K.'s drug use.

The only hospital record mention of NAS was a "[r]isk of NAS," and the judge excluded testimony as to NAS and drug withdrawal because those were

not listed in the Division's substantiation. The Finnegan score was never high enough for morphine treatment. While the hospital records do list drug withdrawal symptoms as confirmed among the other problems and associated diagnoses, such as poor feeding, prematurity, sepsis, and thermoregulation, this was not sufficient and credible evidence of "suffering from drug withdrawal symptoms." In fact, the Division reports indicate that the hospital workers were only monitoring for such symptoms and that the Division worker herself did not see such symptoms at a visit. The court needed medical testimony to support its findings as to drug use causing low birth weight or any other listed harm as well as medical testimony to support NAS and drug withdrawal symptoms. The evidence presented was insufficient to support a finding of actual harm.

Any unaddressed remaining arguments do not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed.

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



CLERK OF THE APPELLATE DIVISION