

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0410-15T3

NEW JERSEY DIVISION  
OF CHILD PROTECTION  
AND PERMANENCY,

Plaintiff-Respondent,

v.

N.R.,

Defendant-Appellant.

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IN THE MATTER OF J.S., M.L.,  
JR., C.E., and K.E., minors.

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Submitted April 4, 2017 - Decided August 18, 2017

Before Judges Espinosa and Suter.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Gloucester  
County, Docket No. FN-08-77-15.

Joseph E. Krakora, Public Defender, attorney  
for appellant (Norma Davis, Designated  
Counsel, on the briefs).

Christopher S. Porrino, Attorney General,  
attorney for respondent (Melissa H. Raksa,

Assistant Attorney General, of counsel;  
Katrina A. Sansalone, Deputy Attorney General,  
on the brief).

PER CURIAM

Defendant N.R. (Nancy)<sup>1</sup> appeals from an adjudication of abuse and neglect, N.J.S.A. 9:6-8.21, as to her four-year-old child, M.L. (Moe). She argues there was insufficient evidence to support this conclusion and the trial court erred in relying upon documentary evidence to support its decision. We disagree and affirm.

I.

Nancy is the mother of four children. In addition to Moe (d.o.b. 11/21/90), she has J.S. (Jack) (d.o.b. 1/28/05), and twins, C.E. and K.E. (Clark and Kim) (d.o.b. 9/2/14). M.L. (Mark) is Moe's father; Jack's father is deceased and B.E. (Bob) is the father of Clark and Kim.

On October 7, 2014, the Division of Child Protection and Permanency (the Division) was alerted to a domestic violence incident between Nancy and Bob that occurred while the children were present and resulted in Nancy being charged with simple assault. Nancy admitted Jack witnessed the incident. However,

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<sup>1</sup> We use fictitious names to protect the privacy of the parties.

both Jack and Moe told the Division caseworker they saw Nancy and Bob arguing and saw Bob break a window and go through it. Jack reported seeing Bob choke Nancy. Moe told the caseworker Bob had hurt Nancy "a lot of times."

The Division instituted a Safety Protection Plan in which Bob would not return to the home and was not permitted to have contact with the children. Both Nancy and Bob agreed to the terms of the plan.

On October 14, 2014, the Division received a referral from a Franklin Township police officer, reporting that Moe was observed by a neighbor wandering around outside at approximately 9:15 a.m., alone and clad only in his underwear. The neighbor questioned Moe, who stated no one was at home. Nancy and Bob returned to the home ten minutes after they were contacted by police.

The Division interviewed Nancy, who stated she ran to the store while her mother, D.B. (Dina), was in the basement doing laundry. Moe was sleeping at the time. Nancy stated Dina had been staying at the home to help with the babies. She had arrived and spent the night before at the home. She claimed Dina then left around 10:30 a.m. to go to work. Nancy stated she did not know how Bob got to the home, and thought he got a ride.

When interviewed by the Division caseworker, Bob stated, "I can't lie to you. [Dina] wasn't here. She is going to tell you that she was here but she wasn't." He told the caseworker Nancy had picked him up at the library and had only Clark and Kim in the car. Bob also admitted to being in the home in violation of the Safety Protection Plan.

The Division also interviewed Moe and Jack. Moe had not seen Dina that day. Jack also stated Dina did not spend the night before at the home, and that he had not seen Dina the morning of the incident.

Dina told the Division caseworker she was at the home that morning. She stated Moe was sleeping when she went into the basement to do laundry. She was in the basement for approximately fifteen minutes when her boss called to say she had to come to work. Bob and Nancy returned home, so Dina left at approximately 10:30-10:45 a.m. Dina reported she had a friend pick her up from Nancy's house but declined to disclose the name of her friend. Dina stated she had briefly interacted with Moe after Nancy returned home, and denied seeing the police outside of the home. The caseworker told Dina her timeline did not make sense, as Moe was outside at approximately 9:15 a.m., not 10:15 a.m. Dina later

called the Division caseworker to say she got the time wrong and she was in the basement at 9:15 a.m., not 10:15 a.m.

The Division caseworker checked Nancy's call history, which showed Nancy called Dina at 10:56 a.m., and made six more calls thereafter to her phone.

After determining Nancy had left Moe home alone, the Division conducted an emergency removal of the four children pursuant to N.J.S.A. 9:6-8.29 and 9:6-8.30. The Division also determined Nancy and Bob had violated the Safety Protection Plan that prohibited Bob from being in the home.<sup>2</sup>

A Safety Protection Plan was instituted for Moe, who was taken to Mark's house. Jack, Clark, and Kim were placed in resource care with the maternal grandfather and step-grandmother. The following day, the Division interviewed the neighbor who called the police about Moe. She reported she had gone outside around 9:15 a.m. and saw Moe outside wearing only a t-shirt and underwear. Moe told her Nancy was not home, and the neighbor stayed outside with him for approximately fifteen minutes. Nancy then returned home with Bob driving the car, and Nancy told Moe that Dina was in the basement. Nancy took Moe inside and dressed him, and then

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<sup>2</sup> The trial judge found this allegation did not rise to the level of a Title 9 finding.

they all left. The neighbor stated she stayed outside out of curiosity and never saw Dina leave or any cars pick her up.

On October 15, 2014, the Division filed a complaint for the care and supervision of Moe, and for the custody, care, and supervision of the three other children.

A hearing was held on October 16, 2014, at which Nancy, Mark, Dina and a Division caseworker testified. The caseworker, Michelle Leyman, who responded to the home following the referral, recounted her interviews with Nancy, Dina, Bob, Moe, and the neighbor who called the police. Moe told her when "he woke up, he looked in several of the rooms of the house. No[]one was home. He went outside. He said at no time did he see his . . . maternal grandmother. And then, his mom came home in the yard."

Nancy testified Moe woke up early and was sick. She put him back to sleep. Her mother was present when she left to do an errand, taking the twins with her. When she returned, Moe was in the yard and her neighbor scolded her, saying, "What are you doing? Nobody's here. [Moe] was looking for you. He came outside." Nancy explained that her mother had come late the previous night and neither Moe nor Jack knew she was there. Nancy said she went into the house and told her mother Moe was outside. She said Dina

had been in the basement doing laundry and was still there when Nancy returned.

Dina provided testimony that was largely corroborative of Nancy's version of events. Mark, a non-dispositional defendant, was present and advised the court he had filed for custody of Moe.

The trial judge acknowledged there was "a lot of conflicting testimony" but resolved that conflict by finding, "[Moe] was left unattended." He concluded "the Division has made its case with regard to removing the children," and issued an order placing Moe in the care and supervision of the Division and the three other children under the custody, care, and supervision of the Division. An order to show cause why the children should not continue under the custody, care, and supervision of the Division was entered. That order was continued; a preliminary fact-finding hearing was held on March 6, 2015, and the fact-finding hearing was held on April 17, 2015.

At the outset of the fact-finding hearing conducted on April 17, 2015, the Deputy Attorney General advised the court there was an agreement as to several exhibits: an Investigation Summary dated October 7, 2014; an Investigation Summary dated October 14,

2014; and four Safety Protection Plans, and stated further that "the Division will rest on the papers." Nancy's attorney consented to the admission of those exhibits into evidence.

The trial judge reviewed the documentary evidence, noting it had been admitted without objection. He cited specific statements in the documentary evidence, including the following.

The neighbor, who observed Moe standing outside in his underwear on October 14, 2014, asked Moe, "Are you all right, Honey?" He replied, "Mommy's not here," and "[Bob] took mommy to work." She stated she asked if he had checked the bedrooms and bathrooms and stayed with Moe until Nancy and Bob returned approximately fifteen minutes later. She remained outside to continue her observation and stated at no time did she see the maternal grandmother leave the house on October 14, 2014.

Bob admitted that Nancy picked him up that morning on October 14, 2014, and had the twins in the car. He stated Nancy's mother was not at home. Bob "couldn't believe [Nancy] left [Moe] home alone," stating, "She's messed up."

Dina stated she was in the basement doing laundry for about fifteen minutes at the time that Moe wandered outside and left for work at about 10:30-10:45 a.m. that morning. Although she said

she had interacted with Moe that morning, she could not recall what she said to him.

Nancy denied leaving Moe home alone on October 14, 2014, maintaining her mother was there.

Jack reported he did not see Dina the prior night or in the morning before he got on the bus for school at about 7:52 a.m.

Moe stated he did not find anyone in the house when he woke up and he was scared. He did not see his grandmother the prior evening or at all that morning. He also said Bob had been in the home over the weekend.

The trial judge noted inconsistencies in Dina's statements and found Nancy's account not credible in light of the statements from Bob, Jack and Moe. He concluded the Division had proven by a preponderance of the evidence that four-year-old Moe was left alone unattended, warranting an adjudication of abuse and neglect under N.J.S.A. 9:6-8.21.

In her appeal, Nancy argues the Division failed to prove neglect because her conduct was not grossly or wantonly negligent and did not constitute a failure to exercise a minimum degree of care, and because the record fails to show that Moe was at a substantial risk of harm. She further argues the trial judge erred in relying exclusively upon documentary evidence.

## II.

To support a finding of abuse and neglect, the Division must prove by a preponderance of "competent, material and relevant evidence," N.J.S.A. 9:6-8.46(b), that the parent failed

to exercise a minimum degree of care . . . 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.

[N.J.S.A. 9:6-8.21(c) (4) (b).]

A parent fails to exercise a "minimum degree of care" when the parent engages in "conduct that is grossly or wantonly negligent, but not necessarily intentional." N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 305 (2011) (emphasis added) (quoting G.S. v. N.J. Div. of Youth & Family Servs., 157 N.J. 161, 178 (1999)). Such misconduct occurs when "an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences." Id. at 306 (quoting G.S., supra, 157 N.J. at 179). Each case of alleged abuse "requires careful, individual scrutiny" and is "generally fact sensitive." N.J. Div. of Youth & Family Servs.

v. P.W.R., 205 N.J. 17, 33 (2011). We accord deference to the trial judge's findings of fact "unless . . . they went so wide of the mark that the judge was clearly mistaken." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007).

The Supreme Court has noted that "[l]eaving a child unattended in a car or a house is negligent conduct. N.J. Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 170 (2015); G.S., supra, 157 N.J. at 180-181 ("For example, if a parent left a twoyear old child alone in a house and went shopping, the child would be considered a neglected child within the meaning of Title 9. . . ."). Whether such "conduct is negligent or grossly negligent requires an evaluation of the totality of the circumstances." E.D.-O., supra, 223 N.J. at 170.

Nancy's argument that the proofs are insufficient rely upon the premise that she believed her mother was present when she left Moe home, and therefore, her lapse was only negligence and did not rise to the level of grossly or wantonly negligent conduct necessary to sustain a finding of neglect. She relies for support upon T.B., supra, in which a mother and her four-year-old son lived in an in-law suite in her parents' home. 207 N.J. at 296. One evening, the mother put the child to bed and went out for dinner, believing her mother was at home because her car was in the

driveway, she had been ill, and she was "always home" on Sunday nights. Id. at 297. Unbeknownst to the mother, the grandmother had "made an impromptu decision to go" to New York with her husband. Ibid. The child woke up, discovered he was alone in the home and crossed a busy street to go to a neighbor's home. Ibid. Calling it a "close case," the Court noted, "[t]his is not a situation in which [the mother] left her four-year-old son at home alone knowing there was no adult supervision." Id. at 309. Although the mother's failure to confirm her mother's presence before leaving "was clearly negligent," the Court concluded "it did not rise to the level of gross negligence or recklessness." Id. at 310.

Nancy was well aware her assertion that her mother was home was refuted by Bob, both Moe and Jack, and her neighbor, and that the trial judge had earlier rejected her testimony in finding Moe had been left alone. Ordinarily, a trial judge should not make findings of fact based upon conflicting statements without the benefit of testimony. See Gilhoolley v. Cty. of Union, 164 N.J. 533, 545 (2000). But here, Nancy was present at the fact-finding hearing, available to testify and, yet, waived the right to challenge these opposing versions of events by consenting to the admission of documentary evidence without testimony. As a result, she is precluded from claiming the trial judge erred in relying

upon documentary evidence. See State v. A.R., 213 N.J. 542, 561 (2013) (holding "trial errors that 'were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal.'" (quoting State v. Corsaro, 107 N.J. 339, 345 (1987))). It follows that Nancy cannot now complain the evidence was insufficient based upon the version of the facts she gave - that had been rejected by the trial judge and was refuted by the statements of other witnesses.

The facts as found by the trial judge are supported by evidence in the record. For T.B. to lend any support for her argument, Nancy had to have a reasonable belief that she was not leaving four-year-old Moe at home unattended. The trial judge did not find that to be the case. As a result, T.B. provides no support for her argument.

As the Court found in E.D.-O., supra, 223 N.J., at 170, leaving a child alone constitutes negligence. The next inquiry is whether the circumstances support a finding "of gross negligence or recklessness." T.B., supra, 207 N.J. at 310.

The trial judge found the following "aggravating circumstances" present here: Nancy knew the lock on the front door was not working properly, allowing Moe to leave the house without adult assistance; at four years old, Moe did not know how to call

anyone or do anything and was left without any messages; although Moe was not injured when he wandered outside, there was "certainly" a "possibility of injury."

The trial judge's findings have ample support in the record and provide a sufficient basis for the adjudication of neglect under N.J.S.A. 9:6-8.21.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION