

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1274-14T1

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

C.M.,

Defendant-Appellant,

and

A.T.,

Defendant-Respondent.

IN THE MATTER OF A.M., a minor.

Argued May 4, 2017 — Decided July 25, 2017

Before Judges Lihotz, O'Connor and Whipple.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Bergen
County, Docket No. FN-02-327-13.

Allison C. Williams argued the cause for
appellant C.M. (Williams Law Group, LLC,
attorneys; C.M., on the pro se brief).

Julie B. Colonna, Deputy Attorney General, argued the cause for respondent New Jersey Division of Child Protection and Permanency (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Colonna, on the brief).

Sunshine, Atkins, Minassian, Tafuri, D'Amato, Beane & Buckner, PA, attorneys for respondent A.T., join in the brief of New Jersey Division of Child Protection and Permanency.

Noel C. Devlin, Assistant Deputy Public Defender, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Mr. Devlin, of counsel and on the brief).

PER CURIAM

In this Title Nine action, defendant C.M. (father) appeals from the January 10, 2014 order finding he abused and neglected his son, A.M. (Adam), ten-years of age at the time of the subject incident, in violation of N.J.S.A. 9:6-8.21(c)(4)(b).¹ Although Adam's mother, A.T. (mother), is named as a defendant, the Division of Child Protection and Permanency (the Division) did not allege she abused or neglected the child. The father is also the father of M.M. (Molly or baby). Molly's mother is the father's current wife, K.W. (stepmother).

¹ We employ the use of initials for the parties and other family members, and a fictitious name for defendants' son, in order to protect their privacy.

Specifically, as set forth in the order, following a fact-finding hearing, the Family Part found the father "systematically isolated the minor child, [Adam], out of an irrational and medically unsupported fear that [Adam] would spread germs to his baby sister, [Molly]." The father contends the court's conclusions are not supported by the evidence. We agree, and reverse the finding he abused and neglected Adam.

I

The pertinent evidence adduced at the fact-finding hearing revealed the following. At the time of their divorce in 2007, the parties agreed to share joint physical custody of Adam. The father had physical custody of Adam every Wednesday from after school until Friday morning, and every alternate weekend from Friday evening to Sunday evening. In 2011, the father married the stepmother; their child, Molly, was born in January 2013.

On March 26, 2013, a counselor at Adam's school contacted the Division advising Adam had reported he no longer wanted to visit with his father because he confined the child to his bedroom during parenting time. Kimberly Roberts, the Division investigator who received the referral, interviewed Adam, the father, the mother, the stepmother, and other family members.

Roberts testified Adam advised that, since Molly was born, he had been required to remain in his bedroom when in his

father's home because his father was a "germaphobe." Adam reported the reason he was confined to his room was his father's concern Adam might contaminate Molly with his germs, so the father endeavored to limit contact between Adam and Molly as much as possible. If Adam needed anything, he was required to ring a cow bell and his father or stepmother would respond.

Adam claimed he ate all meals in his bedroom, as well. Each meal was put on a tray and placed outside of his closed bedroom door. His father then let Adam know his meal was on the other side of the door. Adam retrieved his meals after his father retreated a sufficient distance down the hall.

On a few occasions, Adam was able to eat outside of his room, but was required to sit on the opposite side of the table so that he would not breathe on his father and spread his germs to Molly. Although able to hold Molly on a few occasions, generally he was permitted to touch only her feet to keep his germs from contaminating the baby.

Adam also complained he was required to take a shower and put on fresh clothes when he arrived at his father's home from school. Adam acknowledged there were times he was allowed to leave his room to play sports with his father outside, but such breaks were only twenty minutes in duration. If on rare occasion he was permitted to leave his room and venture into

other parts of the house, he was required to sit in only one particular chair and was prohibited from touching most objects, including doorknobs and the refrigerator. At the conclusion of her interview, Adam stated he did not wish to return to his father's home because, while there, he felt like a "caged animal."

Roberts also interviewed the father and stepmother. According to Roberts, they confirmed Adam's allegations. Roberts also interviewed Adam and Molly's pediatrician, who informed Roberts the baby was healthy. However, the doctor commented the father and stepmother were "extremely cautious" about the baby, and at a recent appointment asked him many questions about the measures they should implement to prevent Molly from getting sick. The doctor informed Roberts he had advised the parents not to expose Molly to large crowds, persons with illnesses, or school age children who may be carrying illnesses.

After the investigation concluded, the Division filed a complaint and order to show cause why it should not have care and supervision of Adam, pursuant to N.J.S.A. 9:6-8.21 and N.J.S.A. 30:4C-12. In April 2013, the court granted the Division's order to show cause, and Adam's mother was granted physical custody; the father was permitted supervised visitation

only. In May 2013, the court entered an order stating the supervised visits between the father and Adam were not to occur unless the child wanted to see his father. The father has not had visitation with Adam since June 2013.

The Division called social worker Sean Conlon, L.C.S.W., as its expert on child abuse and neglect. Conlon evaluated Adam in May 2013, who told Conlon essentially what he had reported to Roberts. Conlon testified Adam sustained "some" emotional abuse because his father caused him to be isolated and restricted. Conlon did not qualify or define what "some" emotional abuse meant.

Conlon also noted the child was disappointed his father rejected his explanation of how he had sustained a minor injury to his chin, shoulder, and chest during their last visit in March 2013; required he be supervised when interacting with the baby; was not proud of him; and cursed on occasion. We note none of these acts is before us. The basis for the finding the father abused and neglected Adam is he unreasonably confined the child to his bedroom.

Adam testified, appearing on closed circuit television. In contrast to what Adam allegedly informed Roberts and Conlon, significantly, Adam testified he was confined to his room only when he was sick and for "the week after." He rang the cow bell

only three times; once to inquire if dinner was ready and twice to ask for water. When he was not ill, he sat at the dinner table, although he did have to sit at the opposite end of the table where his father sat so he would not breathe on him and make him ill.

Adam further testified he had to stay in his room if he did not want to do his homework, or was otherwise being punished. We note here the unlikelihood Adam was banished to his room as a form of punishment if he was otherwise restricted to his room. In addition, Adam testified he was not forbidden from touching all doorknobs in the house, just the one to his father's and stepmother's bedroom. However, he was sent to his room on one occasion as punishment for touching the door to the refrigerator.

Adam's response to other questions revealed he was not confined to his room. He testified when he got home from school, he showered and changed his clothes. He then did his homework, which he did in his room "sometimes" but "sometimes [he] didn't." After he completed his homework, he played or watched television. Adam did not have a television in his bedroom, and thus had to have ventured out of his room to watch television. Adam also stated his television privileges were restricted if he needed to be punished. It is improbable he was

prohibited from watching television as a form of punishment if expected to remain in his bedroom at all times.

In a journal Adam maintained, he wrote he was not allowed out of his room for "1 month since beginning of 3/13/13." This date was a Wednesday, and Adam had parenting time on this day and on the following day. It is not disputed he was not in his father's home again until the following Thursday, March 21, 2013, where he remained - except when at school - through Sunday, March 24, 2013, the last time he was in his father's home. Adam's claim he was confined to his bedroom for a month, commencing on March 13, 2013, is clearly unfounded.

The father's pertinent testimony was as follows. He disputed informing Roberts that all of Adam's allegations were accurate. The father testified the child was not confined to his room, unless he were ill or being punished. However, Adam was restricted from touching the baby when he was ill, or was required to wash his hands before touching her. When Adam had a bad cold in February, he was prohibited from opening the refrigerator door, using the remote control, and touching the doorknob of the nursery. The father noted Adam was defiant at times and kissed the baby's hand when he was ill, which concerned the father because the baby then put her hand in her mouth.

It is not disputed that during his last visit to the father's home, which commenced the evening of Thursday, March 21, 2013 and ended on Sunday, March 24, 2013, Adam was recovering from a stomach virus. In fact, Adam had to stay home from school on Wednesday, March 20, 2013, because he was too ill to attend. Adam did return to school the following day, Thursday, March 21, 2013, but was still exhibiting some symptoms.

Believing the child still might be contagious, the father confined Adam to his room from the time he arrived at his home early Thursday evening. The father also restricted Adam to his room after school on Friday. Because confined to his bedroom, Adam ate dinner on Thursday and Friday evening in his room, as well. Otherwise, Adam never had any meals in his bedroom, except on the few occasions he was sent to his room as punishment for some transgression and had to eat in his room.

The stepmother testified, disputing many of the statements Roberts attributed to her. It is not necessary to address the stepmother's testimony in depth, although we briefly summarize that testimony the court credited and, in fact, found corroborative of the child's testimony.

The stepmother stated Adam became ill with a bad cold in February 2013, and often wiped his nose with his hands and did

not cover his mouth when he coughed. Adam's pediatrician told the stepmother to keep the child out of the common areas of the house and to limit his contact with common items.

Accordingly, while he was sick, Adam was limited to using only the telephone in his bedroom; could not kiss the baby; was required to ask his father or stepmother to change the channel on the television remote control; and was prohibited from touching the refrigerator door. If he wanted food from the refrigerator, he had to ask the stepmother or father to retrieve what he wanted. In addition, when the stepmother's mother visited, her mother slept on one of the two couches in the living room; Adam was restricted from using that particular couch.

The court found Adam, Roberts, and Conlon's testimony credible and credited those portions of the stepmother's testimony we summarized. The court did not find the father credible, even though some of his testimony was consistent with the child's.

On the substantive question, the court found the father abused and neglected the child by isolating him, specifically, by confining him to his room whether he was sick or well, and that such isolation caused the child emotional harm. Although not the basis for finding he abused and neglected the child, the

court also found fault with the father for making the child take a shower when he came home from school; forcing Adam to sit in a seat furthest from him at the dinner table those "few" times Adam ate a meal outside of his room; prohibiting Adam from touching the refrigerator, the remote control, and the doorknobs in the home; restricting the child to sitting on only one chair in the living room; and limiting Adam's contact with the baby.

II

On appeal, the father asserts the following arguments for our consideration:

POINT I: THE EVIDENCE AT THE FACT-FINDING HEARING DID NOT ESTABLISH ABUSE OR NEGLECT BUT ACTUALLY WAS CORROBORATIVE OF C.M.'S DEFENSE THAT A.M. WAS NOT EMOTIONALLY ABUSED OR NEGLECTED.

POINT II: THE JUDGE ERRED BY DENYING C.M.'S RECUSAL MOTION WHICH SOUGHT THE JUDGE'S RECUSAL BECAUSE SHE HELD AN IMPROPER EX PARTE MEETING WITH A.M. WHICH CONSTITUTED PREJUDICIAL ERROR.

We defer to the factual findings of the Family Part, but only if "supported by adequate, substantial, and credible evidence" in the record. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014). But even if a court's factual findings are supported by adequate, substantial, and credible evidence, we owe no special deference to the trial court's "interpretation of the law and the legal consequences that flow

from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). A reviewing court is compelled to reverse if the trial court failed to consider all the controlling legal principles, or reached a determination that "could not reasonably have been reached on sufficient credible evidence present in the record after considering the proofs as a whole." Heinl v. Heinl, 287 N.J. Super. 337, 345 (App. Div. 1996).

N.J.S.A. 9:6-8.21 provides:

"Abused or neglected child" means . . . (4)
. . . a child 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
. . . 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 . . . ; 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).]

The case G.S. v. Dep't of Human Servs., 157 N.J. 161 (1999)
is instructive on what constitutes "a minimum degree of care":

The phrase "minimum degree of care" denotes
a lesser burden on the actor than a duty of
ordinary care. If a lesser measure of care
is required of an actor, then something more
than ordinary negligence is required to hold
the actor liable. The most logical higher
measure of neglect is found in conduct that
is grossly negligent because it is willful

or wanton. Therefore, we believe the phrase "minimum degree of care" refers to conduct that is grossly or wantonly negligent, but not necessarily intentional.

[Id. at 178.]

"Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result."

Ibid. "[A]ctions taken with reckless disregard for the consequences" are encompassed within "willful or wanton" conduct. Ibid. "Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others. . . . [A] person is liable for the foreseeable consequences of her actions, regardless of whether she actually intended to cause injury." Id. at 179.

Therefore, "a [parent] 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. Courts must look at "the dangers and risks associated with the situation" when determining whether the parent failed to exercise a minimum degree of care. Id. at 181-82.

Here, there is evidence Adam told Roberts and Conlon he was confined to his bedroom for the duration of his parenting time. However, the court found credible Adam's testimony, which was

markedly different from what he imparted to Roberts and Conlon. Adam's testimony was he was confined to his room only when he was ill, needed to complete his homework, or was being punished. Other portions of his testimony exposed the fact he was not confined at all in the manner he reported to Roberts and Conlon. Accordingly, the court's finding the father abused and neglected Adam because he restricted the child to his room for the duration of his parenting time is not supported by the credible evidence, warranting reversal.

Certainly, what the child reported during his testimony would not have merited a finding of abuse and neglect. Confining a child to his bedroom because he is sick, being disciplined, or needs to complete a task, such as homework, is not a grossly or wantonly negligent act. The reasonableness of restricting a child to his room for any one of these reasons is so eminently obvious an analysis or discussion on this point is unwarranted.

Although the court's conclusion the father abused and neglected the child was based upon the child's alleged confinement during his parenting time, but for the occasional outing to other parts of the house, the court was critical of the father in other respects. For the sake of completeness we briefly address these points.

The court chided the father for requiring Adam to shower and change his clothes when he came home from school, and for imposing restrictions on how he was to contact the baby and handle various objects in the house. However, it must be borne in mind that, during the subject three-month period, the father and the stepmother were responsible for caring for a newborn. There is unrefuted evidence Adam had a bad cold in February and a stomach virus in March 2013. The father and stepmother understandably wanted to shield the baby from these illnesses and limit the baby's exposure to Adam.

Moreover, corroborating the father's and stepmother's concern, the baby's pediatrician told the new parents to keep the baby from large crowds, persons with illnesses, and school age children who may carry illnesses. The measures these new parents implemented were consistent with this advice, aimed at reducing the spreading of germs in an effort to protect the baby. More important, none of these measures was so unduly burdensome that it can be said the father was grossly or wantonly negligent in his care of this child.

Reversed.

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


CLERK OF THE APPELLATE DIVISION