SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1524-15T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

N.F.,

Defendant-Appellant.

IN THE MATTER OF N.F.S and N.L.F.,

Minors.

Submitted March 1, 2017 – Decided December 11, 2017

Before Judges Fuentes, Simonelli and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FN-09-0186-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Beth Anne Hahn, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Joyce

Calefati Booth, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Margo E.K. Hirsch, Designated Counsel, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

Defendant appeals from a May 1, 2015 Family Part order, finding that she abused or neglected her then five-year-old and seventeen-year-old sons[1] within the meaning of N.J.S.A. 9:6-8.21(c). The May 1, 2015 order was perfected for appeal by an October 27, 2015 order terminating the litigation. We affirm.

I.

The fact-finding hearing followed the Division of Child Protection and Permanency (Division) executing an emergency "Dodd"[2] removal of the seventeen-year-old on September 21, 2014, pursuant to N.J.S.A. 9:6-8.28.[3] At the fact-finding hearing

[1] The trial court dismissed the seventeen-year-old from the case when he reached the age of majority.

[2] 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).

[3] On September 23, 2014, at the order to show cause hearing, the trial court granted the Division legal and physical custody of the seventeen-year-old, and care and supervision of the five-year-old, who was placed in the custody of his biological father. The

conducted on May 1, 2015, three witnesses testified for the Division, Special Response Unit (SPRU) caseworker, Ragenie Suknanan, investigative caseworker, Betty Mata, and Jersey City Police Officer, Ishmael Cortes. Additionally, documentary evidence was admitted into evidence. Defendant did not testify or present any witnesses or documentary evidence.

The emergency removal stemmed from a police referral prompted by defendant's arrest. Cortes, an eleven-year veteran who had been involved in "about 2,000" narcotics-related arrests, testified that defendant was arrested at approximately 7:00 p.m. on September 21, 2014, and charged with child endangerment, drug possession and drug distribution offenses, when police found large quantities of suspected narcotics and live ammunition in her apartment while executing a search warrant. Cortes testified that he applied for the search warrant after he and other officers conducted a vertical patrol[4] of defendant's building and detected a strong odor of PCP on the second floor of the building. During the patrol, Cortes followed J.N., whom he knew from other encounters did not reside in the building, and observed J.N. enter

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children have different fathers. The seventeen-year-old's father resided in West Virginia.

[4] Cortes explained that "vertical patrol" involves canvassing the building for trespassers or intruders.

defendant's apartment on the third floor. Cortes also knew defendant from prior complaints made by management about "a lot of traffic in and out of [her] apartment."

When defendant opened the door to her apartment during the ensuing police encounter, the odor of PCP "became a lot stronger" and emanated directly from defendant's apartment. Inside the apartment, Cortes observed J.N. sitting on a coffee table fiddling with a cardboard box containing two glass jars of PCP and a cell phone. Defendant's seventeen-year-old son was standing in the living room while Cortes talked to defendant. Defendant's five-year-old son "was coming up the stairs" accompanied by another individual and "heading towards the apartment[.]" Once the officers decided to apply for a search warrant, they secured the apartment by removing all the occupants, including the children. The children were temporarily placed in the custody of their godmother, who resided on the floor above defendant's apartment in the same building.

Upon obtaining and executing the search warrant, Cortes and four other officers found suspected PCP, heroin, crack, cocaine and marijuana. They found 172 bags of heroin, fifty-five bags of crack, a bag of cocaine, various bottles of PCP, and six bags of PCP inside the refrigerator beside children's medication. Subsequent testing confirmed that the substances were, in fact,

illicit drugs. They also found "Ziploc bags[,]" which, according to Cortes, "are commonly used by drug dealers to package the specific narcotics in smaller [b]aggies for distribution purposes." Inside a woman's purse, they found six bags of heroin, crack cocaine and green Ziploc bags. Defendant was reportedly the only female residing in the apartment. In addition, the officers found various bullets, including forty-three nine millimeter rounds of hollow point bullets, thirty-two .380 caliber bullets, and one box of nine millimeter ball rounds in the hallway closet.

Cortes described the apartment as being in "disarray." In addition to the PCP odor, there was "a foul odor like old garbage in the apartment" and "garbage on the floor." "There were clothes scattered throughout the apartment" and the couches were cut open. There was a cat litter box in front of the coffee table and cat litter was "sprinkled all over the place." There were "roaches" and "mice running throughout the apartment" as well as "a whole bunch of flies[.]" Inside the children's bedroom, there were two two-liter bottles containing "urine" and a "strong odor of urine" emanated from the mattresses, which were on the floor. The bedroom was so dark that the officers had to use flashlights to conduct the search. In addition, "[t]here was feces smeared . . . throughout the house on . . . certain parts of the walls."

According to Cortes, because of the strong odor of PCP and the deplorable condition of the apartment, the officers were supplied hazmat suits to conduct the search, a safety precaution that was rarely used. Nonetheless, some of the officers, including Cortes, became ill; "[s]ome started throwing up" and "[s]ome officers began to complain about headaches." As a result, paramedics were called to the scene. Although Cortes felt nauseous, he did not require medical attention. For recording purposes, an officer was assigned to photograph the scene. However, when the photographs were taken, the search was already underway. No photographs were produced at the hearing.

When Division staff responded to the scene, they were denied access to the apartment by the police. However, the children were interviewed. The seventeen-year-old was interviewed on the same day, and the five-year-old was interviewed the following day at his father's home. The five-year-old's father was unaware of any drug use in defendant's home but stated "the condition of the home was unlivable." He explained that the only reason he had not removed his son previously was due to his inability to provide stable housing for himself.

Both children were asked about the presence of drugs in the apartment and the condition of the apartment. The five-year-old, who was upset that he was not with his mother, "denied knowing

what drugs were" and denied that his house was dirty. He stated that the police came to the house and "destroyed all his property."

The seventeen-year-old, who was obese and had poor hygiene with a foul odor emanating from his person, denied the presence of drugs, drug activity or weapons in the apartment. He stated that the only people in the apartment other than himself, his brother and his mother were his godmother who visited occasionally and J.N.[5] who charged his phone in the apartment on a regular basis. He blamed the police for dumping the cat litter box on the floor, cutting the couches, damaging two television sets and a cable box, and throwing his computer and Xbox on the floor.

He also denied that the apartment was filthy but stated that he and his mother were in the process of cleaning when the police arrived. He denied that there was feces on the walls or urine in containers in his bedroom. He attributed the urine odor in his bedroom to a prior "bladder problem" that caused him to urinate in the bed. Further, he explained that there were remnants of pizza on the wall in his bedroom from two years ago when a visiting relative vomited on the wall. When questioned about the vermin infestation, he explained that it was a building-wide problem.

[5] J.N. was also arrested along with defendant.

The children were later examined by medical personnel but no physical harm was found.

Defendant was interviewed at the Hudson County Jail on September 25, 2014. She denied the allegations and explained that she allowed J.N. to charge his phone in her apartment about once or twice a week but was unaware of anything else. She also denied that the apartment was in a deplorable condition, indicated that she and her son were in the process of cleaning the apartment, and claimed that the police made the mess and destroyed her property, a claim that was vehemently denied by Cortes. Although defendant's criminal charges were still pending at the time of the fact-finding hearing, she was released from jail on March 3, 2015.

After the fact-finding hearing, in an oral opinion, the trial court determined "by a preponderance of the evidence that [defendant] did abuse or neglect her children pursuant to [Title 9]." The court found Cortes' testimony "credible" and "crucial in the Division's case[,]" particularly given his extensive experience with narcotics-related investigations. As a result, the court made detailed factual findings consistent with his testimony. The court rejected the exculpatory statements made by the children that conflicted with Cortes' testimony. The court found that the statements were biased and motivated by the fact

that the children "do love their mother" and wanted "to stay with their mother."

Although the court agreed with defense counsel that "it would have been helpful to have the photographs in evidence[,]" the court was satisfied that "the condition of the apartment as described by the detective, as well as the drugs that were found in this apartment" placed the children at imminent risk of harm. The court credited Cortes' testimony that the "quantity" of drugs and the paraphernalia found, specifically the Ziploc bags, indicated that the drugs were not intended solely "for personal use," but for distribution purposes. Further, the court noted that a "logical" and "reasonable" inference could be drawn that the purse containing heroin, crack cocaine and Ziploc bags belonged to defendant who was the only female residing in the apartment. This appeal followed.

On appeal, defendant presents the following arguments for our consideration:

> THE TRIAL COURT ERRED IN FINDING THAT [DEFENDANT] ABUSED AND NEGLECTED [HER CHILDREN].
>
> A. THERE WAS INADEQUATE SUPPORT FOR THE TRIAL COURT'S FINDING THAT THE ALLEGED PRESENCE OF DRUGS IN THE HOME HARMED THE CHILDREN OR EXPOSED THEM TO AN IMMINENT RISK OF SUBSTANTIAL HARM.

> B. THE TRIAL COURT ERRED IN FINDING THAT [DEFENDANT] FAILED TO PROVIDE HER CHILDREN WITH ADEQUATE SHELTER.

The Law Guardian supports defendant's appeal and presents the following argument:

> THE TRIAL COURT SHOULD BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FINDING THAT [DEFENDANT] ABUSED OR NEGLECTED HER CHILDREN PURSUANT TO [N.J.S.A.] 9:6-8.21(C).

II.

Our Supreme Court has set forth the standard that governs our review of Title 9 cases as follows:

> [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." . . . "[B]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding."
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> [N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (first quoting N.J. Div. of Youth and Family Servs. v. E.P., 196 N.J. 88, 104 (2008); then quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)).]

"Thus, if there is substantial credible evidence in the record to support the trial court's findings, we will not disturb those findings." N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 226 (2010). However, "if the trial court's conclusions are

'clearly mistaken or wide of the mark[,]' [we] must intervene to ensure the fairness of the proceeding." Id. at 227 (first alteration in original) (quoting E.P., supra, 196 N.J. at 104). We owe no deference to the trial court's legal conclusions, which we review de novo. N.J. Div. of Youth & Family Servs. v. A.R., 419 N.J. Super. 538, 542-43 (App. Div. 2011).

"To prevail in a Title 9 proceeding, the Division must show by a preponderance of the competent and material evidence that the defendant abused or neglected the affected child." N.J. Div. of Child Prot. & Permanency v. B.O., 438 N.J. Super. 373, 380 (App. Div. 2014) (citing N.J.S.A. 9:6-8.46(b)). The trial court in turn determines whether the child is abused or neglected by "the totality of the circumstances[,]" Dep't of Children & Families v. G.R., 435 N.J. Super. 392, 401 (App. Div. 2014), because "the elements of proof are synergistically related." N.J. Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472, 481 (App. Div. 2010) (quoting N.J. Div. of Youth & Family Servs. v. C.M., 181 N.J. Super. 190, 201 (App. Div. 1981)), certif. denied, 207 N.J. 188 (2011). Consequently, whether a parent has engaged in acts of abuse or neglect is considered on a case-by-case basis and must be "analyzed in light of the dangers and risks associated with the situation[,]" N.J. Dep't of Children & Families v. R.R., 436 N.J. Super. 53, 58 (App. Div. 2014) (quoting G.S. v. Dep't of Human

Servs., 157 N.J. 161, 181-82 (1999)), and evaluated "at the time of the event that triggered the Division's intervention." N.J. Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 170 (2015) (citing N.J.S.A. 9:6-8.21(c)(4)(b)).

An "abused or neglected child" means, in pertinent part, a child under the age of eighteen years

> whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of [the] 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[.]
>
> [N.J.S.A. 9:6-8.21(c)(4).]

The proper focus of a Title 9 inquiry is on the harm to the child regardless of the caregiver's intent. G.S., supra, 157 N.J. at 180. Where there is no evidence of actual harm to the child, however, "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 Children & Families v. A.L., 213 N.J. 1, 8 (2013) (quoting N.J.S.A. 9:6-

8.21(c)). Thus, "[a] court need not wait until a child is actually harmed or neglected before it can act to address parental conduct adverse to a minor's welfare." N.J. Div. of Youth & Family Servs. v. S.I., 437 N.J. Super. 142, 154 (2014).

Imminence of danger and risk of harm are determined by looking to whether the parent exercised a minimum degree of care under the circumstances. A.L., supra, 213 N.J. at 22. The standard "refers to conduct that is grossly or wantonly negligent, but not necessarily intentional." G.S., supra, 157 N.J. at 178. "Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result." Ibid. (citing McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970)). Consequently, "under a wanton and willful negligence standard, a person is liable for the foreseeable consequences of [his or her] actions, regardless of whether [he or she] actually intended to cause injury." Id. at 179. Where "[a]n ordinary reasonable person would understand the perilous situation in which [a] child [has been] placed, . . . [a] defendant's conduct amount[s] to gross negligence." E.D.-O., supra, 223 N.J. at 185 (first alteration in original) (quoting A.R., supra, 419 N.J. Super. at 546). Alternatively, 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 179 (quoting G.S., supra, 157 N.J. at 181).

Here, defendant and the Law Guardian argue there was insufficient evidence to support the court's finding of abuse and neglect because the Division presented no evidence, other than defendant's arrest, demonstrating that the drugs belonged to her or "that the children were ever exposed to the drugs[.]" Similarly, defendant argues the Division did not prove that she "failed to provide her children with adequate housing." According to defendant, the court "resorted to inference, filled in missing information, and made categorical judgments." We disagree.

As the court explained, by residing in the apartment with her children and exposing them to the conditions therein, defendant failed to exercise a minimum degree of care and placed her children at imminent risk of harm. The deplorable condition of the apartment in conjunction with the presence of live ammunition and substantial quantities of illicit narcotics was adequate to establish abuse or neglect under the totality of the circumstances. See N.J. Div. of Youth & Family Servs. v. K.M., 136 N.J. 546, 551-53 (1994) (affirming a finding of abuse or neglect based, in part, on deplorable living conditions).

Further, although it was not necessary for the Division to prove that the drugs belonged to defendant, the court correctly

inferred that the purse containing drugs and Ziploc bags belonged to defendant, as she was the only female residing in the apartment. Regardless of the level of defendant's involvement in drug activities, the use of her apartment as a base of operation for drug dealing clearly exposed the children to imminent danger or a substantial risk of harm. "Violence and danger are intrinsic to the activities of drug dealing, including fights over drug turf, retribution for selling 'bad' drugs, violence to enforce rules within drug-dealing organizations and fighting among users over drugs or drug paraphernalia." Nat'l Center on Addiction and Substance Abuse at Columbia University, No Safe Haven: Children of Substance-Abusing Parents 15 (1999).

Defendant also argues that the court erroneously "dismissed [her] request [for an adjournment] out-of-hand, referencing the differing burdens of proof." Defendant asserts that the adjournment request was based on "the pendency of the criminal matter" and the denial of the request deprived her of "a due process-rich proceeding." Defendant's argument is belied by the record.

In her summation after the fact-finding hearing, the Law Guardian requested that the court "dismiss this action . . . to allow this matter to be addressed in the [c]riminal forum[,] [o]r

at least entertain the possibility of a suspended judgment[6] until the criminal action is resolved." The following colloquy with the court ensued:

> [COURT]: Why? . . .
>
> [LAW GUARDIAN]: Because . . . if she's found guilty in the criminal case[,] I think . . . we have a different result here. If . . . she's acquitted in the criminal case, I think[] that supports the dismissal.
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> [COURT]: Even though it's a different standard[,] . . . this is the first time I'm hearing it, that's why I'm posing this argument to you?
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> [LAW GUARDIAN]: Yes, . . . I would submit the Division has . . . not met that minimal burden of . . . a preponderance of the evidence here. Because of the absence of pictures. My clients very consistent testimony about what happened in the house when the police arrived.

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[6] In N.J. Div. of Youth & Family Servs. v. R.M., 411 N.J. Super. 467, 481-82 (App. Div.), certif. denied, 203 N.J. 439 (2010), we determined that

> the suspended judgment provision of N.J.S.A. 9:6-8.51(a)(1) is generally applicable when a Family Part judge has held a dispositional hearing and is not prepared to enter an order returning the child to the parent or placing the child with the Division, but instead proposes to give the parent an opportunity to maintain the family unit based upon adherence to the particular remedial requirements established pursuant to N.J.S.A. 9:6-8.52(a).

The provision does not necessarily obviate a finding of abuse or neglect.

> And their assertion that there was no drug activity in the house.
>
> For those reasons we think the dismissal is appropriate and the Division has not met its burden here. . . .
>
> [DIVISION'S ATTORNEY]: Judge, with regard to any suspended judgment[,] I obviously object to that, and that needs to be done by a motion and the Division had no prior notice of that and I don't think it's appropriate to raise it at this time.
>
> [COURT]: Understood.

Defendant did not join the Law Guardian's application.

This court "'will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). We reject defendant's argument because there is absolutely no evidence in the record that defendant requested an adjournment of the fact-finding hearing. Moreover, the issue is neither jurisdictional in nature nor does it substantially implicate the public interest.

Affirmed.