

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1688-15T4

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.P.,

Defendant-Appellant,

and

A.P.,

Defendant.

IN THE MATTER OF C.P.,

A Minor.

Telephonically Argued April 27, 2017 – Decided November 28, 2017

Before Judges Suter and Grall.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Bergen County,
Docket No. FN-02-0161-15.

Richard A. Foster, Assistant Deputy Public
Defender, argued the cause for appellant (Joseph E.
Krakora, Public Defender, attorney; Mr. Foster, of
counsel and on the brief).

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

Charles Ouslander, Designated Counsel, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Mr. Ouslander, on the brief).

The opinion of the court was delivered by

SUTER, J.A.D.

S.P. appeals the February 19, 2015 order that dismissed without prejudice the Division of Child Protection and Permanency's (DCPP) Title Nine litigation in which she requested a hearing to contest DCPP's administrative finding that "established" she abused and neglected her child, C.P.¹ Although the Title Nine action was properly dismissed without prejudice, because S.P. requested a hearing to contest DCPP's administrative decision that established she abused and neglected C.P., we remand that issue to DCPP for transmittal to the Office of Administrative Law (OAL) for a hearing.

¹ S.P. also appealed the April 9, 2015 Summary Finding Order entered under Title Thirty following trial that continued services to S.P. and her child because she "[was] unable to adequately care for the child." Because her brief does not address this order, she has abandoned the issues raised in the Title Thirty trial. See Muto v. Kemper Reinsurance Co., 189 N.J. Super. 417, 420-21 (App. Div. 1983).

S.P. had a one-car accident in November 2014, when she passed out behind the wheel after leaving church. C.P. was not in the car. The police found a bottle of prescribed oxycodone in the car and charged S.P. with driving under the influence.² The hospital where S.P. was treated contacted DCPD.

S.P. was the subject of five earlier referrals to DCPD for neglect, all regarding alleged substance abuse and all determined to be unfounded. S.P. told DCPD that she was addicted to opiates, which were first prescribed for her in 1996 for back injuries from a car accident. She had attended inpatient and outpatient substance abuse treatment programs and suffered occasional relapses. After this accident, she increased her attendance at an intensive outpatient program from three to five days per week. Her treating physician confirmed prescribing oxycodone, but was not aware of a current addiction. C.P.'s father told DCPD he believed S.P. was addicted to prescription opiates as she "has always abused her prescribed medications." S.P.'s hair follicle test was positive for oxycodone and benzodiazepines.

DCPD's "Investigation Summary" from December 11, 2014, concluded that "the allegations of [s]ubstantial [r]isk of [p]hysical [i]njury/[e]nvironment [i]njurious to [h]ealth and

² The charge was dismissed in April 2015.

[w]elfare against [S.P.] were ESTABLISHED." The summary reported that S.P. "failed" to stay drug free and "[a]ll along [S.P.] was caring for her child [C.P.] and using prescribed medications for her alleged back pain." The record does not show whether or how S.P. was advised by DCPD of its determination.

On December 2, 2014, DCPD filed a verified complaint in the Family Part under N.J.S.A. 9:6-8.21 to -8.73 (Title Nine) and N.J.S.A. 30:4C-11 to -15.4 (Title Thirty) for the care and supervision of C.P. The court upheld removal of C.P. from S.P.'s physical custody, placed the child under DCPD's care and supervision and continued the child's physical custody with his father, A.P. S.P. was ordered to attend various evaluations and substance abuse treatment. Her visitations with the child were supervised.

At a case management hearing in February 2015, DCPD presented its Investigation Summary that "established" S.P. abused or neglected her son. S.P.'s counsel requested "a fact-finding on the issue of abuse and neglect," but the judge granted DCPD's request to withdraw the Title Nine complaint without prejudice, denied S.P.'s request for a hearing or for a dismissal with prejudice, and continued the proceeding solely under Title Thirty.

Following a hearing, the judge issued an order on April 9, 2015, that the child was in need of "care and supervision or

custody" by DCPD because S.P. was unable to care for him based on her "extensive history of treatment and ongoing treatment for drug and alcohol abuse." The judge found that S.P.'s "failed attempts at recovery occurred [when she] . . . had custody of the child."

In subsequent compliance reviews, S.P. was compliant with services, tested negative for drugs, and was allowed to exercise unsupervised visitation with C.P. The parties were able to agree on custody and parenting time as memorialized in a consent order. The Title Thirty litigation was terminated on November 5, 2015, after a finding by the court that "conditions have been remediated."

On appeal, S.P. contends she was denied due process when, because of the dismissal without prejudice of the Title Nine case, she was not able to have a fact-finding hearing in the Family Part to contest DCPD's administrative finding under N.J.A.C. 10:129-7.3(c) that "established" she abused and neglected C.P. Based on our decision in N.J. Div. of Child Prot. & Permanency v. V.E., 448 N.J. Super. 374 (App. Div. 2017), we agree that S.P. should have had an administrative hearing to contest DCPD's finding that "established" her abuse and neglect.

An abused or neglected child is defined in pertinent part as:

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 . . . 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).]

DCPP investigates allegations of child abuse and neglect under that statute by following "the defined child protection investigation process, as authorized by N.J.S.A. 9:6-8.11 and promulgated regulations, N.J.A.C. 3A:10-7.3(b)." V.E., supra, 448 N.J. Super. at 386.

DCPP's regulations allow for four types of findings: substantiated, established, not established, and unfounded. See N.J.A.C. 3A:10-7.3(c)(1)-(4). While "substantiated" and "established," require a finding by DCPP of child abuse under N.J.S.A. 9:6-8.21(c), the other two findings, "not established" and "unfounded," are made when DCPP's investigation does not indicate child abuse. N.J.A.C. 3A:10-7.3(c)(1)-(4).

An "established" finding occurs when "the preponderance of the evidence indicates that a child is an 'abused or neglected child' as defined, but the act or acts committed or omitted do not warrant a finding of substantiated." N.J.A.C. 3A:10-7.3(c)(2). The regulations allow for a fact finding hearing only when DCPP's

investigation has "substantiated" child abuse or neglect, but not when the finding of child abuse or neglect is "established."

We recently held in V.E., supra, 448 N.J. Super. at 402, that "when [DCPP] finds parental conduct establishes abuse or neglect of a child, subjecting the individual to the ramifications of disclosure set forth in various identified statutes, a party who seeks to challenge that finding shall be entitled to an administrative hearing."

In V.E., DCPP investigated an allegation that V.E. had abused or neglected her child. DCPP made a finding under N.J.A.C. 3A:10-7.3(c)(2) that "established" abuse and neglect by V.E. DCPP filed a complaint under Title Nine and Title Thirty for the care, custody and supervision of the child. When DCPP sought to dismiss the Title Nine portion of the complaint and proceed solely under Title Thirty, V.E. objected, and asked for a hearing on the administrative finding that established her abuse and neglect. The judge denied V.E.'s request, and ordered the Title Nine action dismissed without prejudice.

We concluded in V.E. that due process required an administrative hearing because DCPP's determination that "established" V.E.'s abuse or neglect had "broad impact." V.E.,

supra, 448 N.J. Super. at 395.³ We agreed that the Title Nine litigation was properly dismissed without prejudice because reunification was achieved and DCPD concluded abuse and neglect was not substantiated. Also, appellate review alone was not adequate because "the determination of disputed facts, including credibility determinations, [was] not the function of this court." Id. at 401-02 (citing N.J. Div. of Youth & Family Servs. v. M.R., 314 N.J. Super. 390, 411-12 (App. Div. 1998)). Thus in V.E., we affirmed the dismissal of the Title Nine litigation, reversed the DCPD's denial of an adjudicative hearing and remanded the matter to the OAL for a hearing. 448 N.J. Super. at 404.

V.E.'s holding applies here. Using the same regulations that we examined in V.E., DCPD made an administrative finding that the allegation of abuse or neglect against S.P. was "established." Similar to V.E., S.P. requested a hearing in the Title Nine litigation but that litigation was withdrawn by DCPD, leaving her without a hearing on DCPD's finding of abuse and neglect. We agree the Family Part judge correctly ordered the dismissal without

³ The impact included the release of DCPD's "abuse and neglect records" pursuant to N.J.S.A. 9:6-8.10a(b) to "[a] lengthy list of institutions, governmental entities, and persons," set forth in N.J.S.A. 9:6-8.10a(b)(1) to (23), -8.10a(c) to (g). Id. at 392. The records could be used by DCPD for future actions involving childcare placement and termination of parental rights. Ibid.

prejudice of the Title Nine litigation when DCPD requested this. However, under DCPD regulations, S.P. could not obtain an administrative hearing to contest the finding that established her abuse and neglect. As we held in V.E., "an administrative hearing is required to contest the [DCPD's] conclusion abuse or neglect is established." 448 N.J. Super. at 400.

S.P. contends the hearing should be conducted in the Family Part. However, S.P. is challenging a decision by DCPD. This court has exclusive jurisdiction to review the final decisions of State agencies. R. 2:2-3(a). Because we determine a hearing is necessary, we remand this matter to DCPD for transmittal to the Office of Administrative Law (OAL) for a hearing.

Affirmed and transferred to DCPD for transmittal to the OAL for a hearing.

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


CLERK OF THE APPELLATE DIVISION