RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2051-15T1

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

S.B.,

Defendant-Appellant.

IN THE MATTER OF I.A.B., a minor.

Submitted May 2, 2017 – Decided August 14, 2017

Before Judges Koblitz, Rothstadt and Sumners.

On appeal from Superior Court of New Jersey Chancery Division, Family Part, Essex County, Docket No. FN-07-0240-15

Joseph E. Krakora, Public Defender, attorney for appellant (Eric R. Foley, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Joseph J. Maccarone, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Danielle Ruiz, Designated Counsel, on the brief).

PER CURIAM

In this Title 9 action, defendant S.B.[1] appeals from the Family Part's February 24, 2015 fact-finding order determining that, within the meaning of N.J.S.A. 9:6-8.21(c), she abused or neglected her son, I.A.B. (Ian), who was born on October 30, 2014.[2] Prior to Ian's birth, plaintiff New Jersey Division of Child Protection and Permanency (Division) substantiated defendant for causing the death of her other child, I.B. (Ida), for which she was charged criminally. After her arrest, defendant was released on bail, subject to conditions that prohibited her from having custody or contact with her newborn son, unless otherwise ordered by the Family Part.

After Ian was born, the Division substantiated defendant for abuse or neglect because defendant could not care for Ian under the Law Division's order and she exposed him to an imminent risk of harm based upon defendant's alleged role in her daughter's death. The Division initiated this action and, at the conclusion of the fact-finding hearing, a Family Part judge found that the Division proved Ian was an abused or neglected child because

[1] We use initials and pseudonyms to protect the identity of the child that is the subject of this action.

[2] S.N. (Seth), Ian's father, was a party to the Title 9 action. He is not a party to this appeal.

defendant exposed him to a substantial risk of imminent harm and there were no safe plans for his care.

On appeal, defendant contends that the Division failed to prove that Ian was abused or neglected as a result of her exposing him to a substantial risk of harm because she had not been convicted of any crime and had made adequate plans for her newborn son. We disagree and affirm.

At the fact-finding hearing held on February 24, 2015, the Division called Patricia Reynolds, one of its caseworkers, who was the only witness to testify for either party. Prior to her testimony, the court admitted into evidence various Division records without objection. Those records consisted of Division investigation summaries, as well as Ida's hospital records and the Law Division's October 29, 2014 order memorializing its July 7, 2014 oral decision setting forth defendant's bail restrictions. The facts adduced from the caseworker's testimony and the documents admitted into evidence were undisputed and are summarized as follows.

The Division received a referral on September 16, 2013, regarding bruising observed on three-year-old Ida's body, which led to an investigation of defendant for physical abuse. Ida initially reported to her daycare provider that her mother had hit her, but then stated the bruising occurred when she and defendant

had fallen while getting out of a car. The next day, a Division investigator interviewed Ida and observed the bruises. When questioned about the bruising, Ida said "mommy" and then began to cry.

The investigator also met on several occasions with defendant, who provided inconsistent reasons for the bruising on Ida's body. She denied causing bruising to Ida's arm and initially stated she did not know where the bruising came from, then stated it was the result of Ida scratching a rash, but later admitted that she caused the bruising when she grabbed Ida's arm as they crossed a street. Defendant also explained that bruises on Ida's face were caused by a fall, but also attributed them to beads the child wore while sleeping. She denied using corporal punishment, but conceded she would sometimes "pop" Ida on the buttocks or hand. The Division determined that the allegations of defendant causing her daughter's bruising had been "established" by its investigation.[3]

[3] Allegations that a child has been abused or neglected can either be "substantiated," "established," "not established," or "unfounded." N.J.A.C. 3A:10-7.3(c). In order for an allegation to be either "substantiated" or "established," the Division must show by a preponderance of the evidence that the child at issue met the definition of "abused or neglected." Ibid.

On September 20, 2013, Ida was brought to the hospital in cardiac arrest, and she was pronounced dead shortly after her arrival. Hospital personnel notified the Division of her death, and it eventually learned from the medical examiner's office that the child's death was deemed "suspicious." After an autopsy, the police charged defendant with aggravated manslaughter. The Division learned that Ida's death was caused by "blunt force trauma to [her] torso, chest and [and that she sustained a] laceration to her liver." Ultimately, the Division substantiated defendant for having caused her daughter's death.

After defendant's arrest, she appeared for a bail hearing on July 7, 2014, and because she was pregnant at the time, the Law Division imposed the restriction against her having custody or contact with her child after she delivered. The day before Ian's birth, the court entered an order memorializing its July 7 bail restrictions. The order provided that defendant was prohibited from having any contact with the anticipated newborn as a condition of her bail, subject to any visitation ordered by the Family Part.

When the Division learned about the restriction placed on defendant, it began to make arrangements for the baby's placement, working with defendant to find a suitable home with relatives. During discussions with a Division caseworker, defendant denied having caused her child's death. Despite defendant's suggestions

and the Division's efforts, various relatives had to be ruled out from being caregivers for Ian for a variety of reasons.[4]

After Reynolds testified, counsel for the parties presented their closing arguments. In her closing statement, counsel for defendant argued that "there was no risk of harm to [Ian] posed by [defendant]" because the bail restriction ordered "she not have custody of any child, nor any unsupervised contact [with] any child. . . . The issuance of that condition of bail in that court order at that time eliminated any substantial risk of harm that [defendant] posed to [Ian]." Moreover, counsel contended that defendant "had a plan in place" in which "she presented both her sister, . . . her mother, . . . and a paternal relative" to care for Ian and that "[t]his [action] would be appropriately proceeding under Title 30 and not under Title 9."

The Family Part judge rejected defendant's arguments and entered a fact-finding order that stated Ian was at a "substantial

[4] Reynolds stated Ian was not placed with Seth because he had a criminal trial pending and, in any event, he did not offer to take his child. Moreover, defendant did not want the child placed with the father. Additionally, the Division could not place the child with his maternal grandmother because defendant was living in the home with her mother. Although defendant offered to move in with her sister, so the child could stay with the grandmother, the sister's lease prevented her from allowing defendant to live with her. Finally, a paternal aunt expressed willingness to care for the child, but she was a "chain smoker." Accordingly, the Division considered her a "last resort."

risk of harm due to the death of the older child in the home" and the fact that defendant was "facing criminal charges related to the death of the child." Addressing defendant's arguments about her having a plan for Ian, the judge stated in his oral decision that "[c]onsidering the nature of the seriousness of the charges, [the] prior substantiation, the fact that the order provides that a [f]amily [c]ourt [j]udge has to determine the conditions of visitation," he was concerned about allowing defendant to make arrangements for placement of the newborn child with family members that would create a "likelihood that there's going to be a violation of [the bail] order."

After the fact-finding hearing, the judge approved the Division's permanency plan for termination of parental rights followed by adoption and, on December 10, 2015, it entered an order terminating the abuse or neglect litigation as the Division had filed its guardianship complaint.

On appeal, defendant argues that the criminal charge "had not yet resulted in a conviction" and "the record does not and cannot demonstrate any correlation between the death of [Ida] and any neglect [by defendant]." Accordingly, she argues, the criminal charge "cannot form the basis of" an abuse and neglect finding. Moreover, defendant avers the court's reliance on the bail restriction is misplaced, as defendant "had a plan to have a

relative care for [Ian] at the time of his birth in anticipation that she would continue to face the bail restriction." Defendant contends the court failed to explain how "the existence of the criminal charges, the bail restriction and prior Division involvement with another child" placed [Ian] at an imminent risk of harm. We disagree.

We begin our review by recognizing it is limited and narrow. In recognition of the special expertise of Family Part judges in matters of parental abuse and neglect, we defer to findings supported by substantial credible evidence in the record. N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 226 (2010). We intervene, however, to ensure fairness if the judge's "conclusions are 'clearly mistaken or wide of the mark.'" Id. at 226-27. (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). "Where the issue to be decided is an 'alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom,' we expand the scope of our review." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188-89 (App. Div. 1993)). The trial judge's interpretation of the law and the application of such legal conclusions to the facts are subject to plenary review. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366,

378 (1995). In our review, we consider the totality of the circumstances in abuse or neglect proceedings. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 39 (2011).

"New Jersey's child-welfare laws balance a parent's right to raise a child against 'the State's parens patriae responsibility to protect the welfare of children.'" N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 178 (2014) (quoting N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 17-18 (2013)). "The adjudication of abuse or neglect is governed by Title 9, which is designed to protect children who suffer serious injury inflicted by other than accidental means." N.J. Div. of Youth & Family Servs. v. S.I., 437 N.J. Super. 142, 152 (App. Div. 2014) (citing G.S. v. Dep't of Human Servs., 157 N.J. 161, 171 (1999)); see also N.J.S.A. 9:6-8.21 to -8.73. Title 9 is intended to safeguard children who have been abused or are at risk of imminent harm. A.L., supra, 213 N.J. at 18, 22. "To that end, Title [9] provides for the civil prosecution of a parent or guardian who abuses or neglects a child." Y.N., supra, 220 N.J. at 178 (citing N.J.S.A. 9:6-8.33).

N.J.S.A. 9:6-8.21(c)(4) provides that a child is "abused or neglected" when his or her

> physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure

> of his [or her] parent or guardian, as herein defined, 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, . . . or by any other acts of a similarly serious nature requiring the aid of the court . . . .

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." Dep't of Children and Families v. E.D.-O., 223 N.J. 166, 179 (2015) (quoting G.S., supra, 157 N.J. at 181). Therefore,

> the primary question under Title 9 is whether [the child] . . . "ha[d] been impaired" or was in "imminent danger of becoming impaired" as a result of [his or her parent's] failure to exercise a minimum degree of care by unreasonably inflicting harm or allowing a "substantial risk" of harm to be inflicted.
>
> [A.L., supra, 213 N.J. at 22 (second alteration in original) (quoting N.J.S.A. 9:6-8.21(c)(4)(b)).]

"Accordingly, Title 9 initially looks for actual impairment to the child. . . . [W]hen there is no evidence of actual harm, the focus shifts to whether there is a threat of harm." E.D.-O., supra, 223 N.J. at 178. "[T]he standard is not whether some

potential for harm exists." Id. at 183 (quoting N.J. Dep't of Youth & Family Servs. v. J.L., 410 N.J. Super. 159, 168-69 (App. Div. 2009)). "[A] finding of abuse and neglect [must] be based on proof of imminent danger and a substantial risk of harm." Id. at 178 (quoting A.L., supra, 213 N.J. at 23). "Predictions as to probable future conduct can only be based upon past performance. . . . We cannot conceive that the Legislature intended to guarantee parents at least one chance to . . . abuse each child." N.J. Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472, 482 (App. Div. 2010) (quoting J. v. M., 157 N.J. Super. 478, 493 (App. Div.), certif. denied, 77 N.J. 490 (1978)), certif. denied, 207 N.J. 188 (2011). "[A] court need not wait until a child is actually harmed by parental inattention or neglect before it acts in the welfare of such child." N.J. Div. of Youth & Family Servs. v. V.M., 408 N.J. Super. 222, 235-36 (App. Div.) (citing In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)), certif. denied, 200 N.J. 505 (2009). Nor does harm to the child need to be intentional in order to substantiate a finding of abuse or neglect. N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 344 (2010).

"Strict adherence to the statutory standards . . . is important because the stakes are high for all parties concerned." Y.N., supra, 220 N.J. at 179. 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., supra, 157 N.J. at 181-82), and evaluated "at the time of the event that triggered the Division's intervention." E.D.-O., supra, 223 N.J. at 170.

At a fact-finding hearing, N.J.S.A. 9:6-8.44, the Division must prove abuse or neglect by a preponderance of the evidence, and "only competent, material and relevant evidence may be admitted." N.J.S.A. 9:6-8.46(b)(2); see also P.W.R., supra, 205 N.J. at 32 (holding the State bears the burden to present proofs to establish abuse or neglect, as defined in the statute); N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004) (explaining the State must "demonstrate by a preponderance of the competent, material and relevant evidence the probability of present or future harm" to the minor child), certif. denied, 182 N.J. 426 (2005). Proof of exposing a child to an imminent danger and a substantial risk of harm includes evidence of a parent's abuse or neglect of another child. N.J.S.A. 9:6-8.46(a)(1) ("[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of . . . the parent or guardian . . . ."). A

risk of harm may be shown "not only from [a parent's] past treatment of the child in question but also from the quality of care given to other children in [his or her] custody." N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 573-74 (App. Div. 2010) (quoting J. v. M., supra, 157 N.J. Super. at 493).

Applying these guiding principles, we conclude that the Family Part judge's finding of abuse or neglect was supported by substantial credible evidence of the harm caused by defendant to her deceased older child and defendant's inability to provide for her newborn son's care. We find defendant's arguments to the contrary to be without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following brief comment regarding the impact of a defendant's bail condition on the determination of whether a child was abused or neglected.

A condition of pretrial release that restricts a parent's contact with his or her child is subject to revision or vacating by the Family Part. See R. 3:26-1(b); R. 5:12-6(a); see also S.M. v. K.M., 433 N.J. Super. 552, 558 (App. Div. 2013). Contrary to defendant's argument, the Family Part judge here did not rely on the existence of the bail condition in determining that defendant abused or neglected her son. Rather, the judge properly considered

the effect of the Law Division's order on defendant's ability to be available to care for her son or have a safe plan for his care. Absent an application by defendant or any of the other parties to modify the restriction, see e.g. S.M., supra, 433 N.J. Super. at 554, the court's consideration of the restriction as entered by the Law Division was proper.

Affirmed.