

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2541-15T4

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

M.C.,

Defendant-Appellant,

and

J.C. and J.R.,

Defendants.

IN THE MATTER OF THE GUARDIANSHIP
OF C.C., M.R. and J.R.,

Minors.

Argued March 2, 2017 – Decided April 5, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Atlantic
County, Docket No. FG-01-21-15.

Catherine Reid, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Reid, on the briefs).

Leah A. Schmidt, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Schmidt, on the brief).

Caitlin McLaughlin, Designated Counsel, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. McLaughlin, on the brief).

PER CURIAM

Defendant, M.C., is appealing from an order terminating her parental rights over her three children.¹ Because the court reopened the guardianship proceeding sua sponte and terminated defendant's parental rights, we vacate and remand.

Defendant is the mother of Caleb, Maddie, and Jack.² This case commenced on October 26, 2012, when defendant, pregnant with Maddie, went to the hospital following a seizure and tested positive for opiates. The Division of Child Protection and

¹ To protect the identity of the children and for ease of reference, we use pseudonyms. Defendant has a fourth child who is not part of this litigation and who was born sometime after the hearings in this case.

² J.C. is the father of Caleb, and J.R. is the father of Maddie and Jack. In February 2015, default was entered against J.C. J.R. executed a voluntary surrender of his parental rights. Neither father has appealed the decision in this matter.

Permanency (Division) received a referral regarding the incident. The referral was unfounded, but a protection plan was put in place requiring defendant's care of Caleb be supervised by an approved relative. The Division received another referral on December 2, 2012, following the birth of Maddie. Maddie tested positive for illegal substances, but defendant had been given morphine during the birth; therefore, it was unclear what substance caused the positive result.

The Division filed a complaint for care and supervision of Caleb and Maddie in December 2012, which the court granted. Custody remained with defendant while she continued attending substance abuse treatment. On April 10, 2013, the court granted the Division care, custody, and supervision of Caleb and Maddie, after the Division received another drug-related referral and determined the approved supervisors could no longer properly supervise defendant and the children. The children were subsequently removed from defendant's care. Defendant was then incarcerated at some point after the children's removal.

In May 2014, the Division received another referral following Jack's birth, because Jack suffered from withdrawal symptoms and was diagnosed with neonatal abstinence syndrome (NAS). Defendant tested positive for opiates and admitted she relapsed and was using cocaine. Jack remained in the NICU in the hospital for one

month, then was placed in a relative resource home, separate from Maddie and Caleb. Caleb and Maddie were initially placed with a maternal great aunt following removal. In June 2013, the great aunt requested the children be removed, and since then Maddie and Caleb have lived with foster parents in a resource home. All of the children's resource parents are willing to adopt them. Bonding evaluations were conducted between the children and their resource parents. Jo Anne Gonzalez, Ph.D. noted,

If returned to either one of their parents, [Caleb] and [Maddie] will be living with parents with whom they have not maintained any kind of consistent relationship. Neither parent has been able to reach a consistent level of stability . . . that will allow them to reduce the possible harm [they] would face if they are not successful in maintaining themselves free of drug use.

Dr. Gonzalez recommended Caleb and Maddie be adopted by their resource parents. Dr. Gonzalez made the same recommendations for Jack and his resource parents.

Throughout the litigation, the Division attempted to help defendant get substance abuse treatment. Our review of the record demonstrates these efforts had very limited success. However, defendant did successfully complete parenting classes through the Family Life Center during her involvement with the Division, and she graduated from the program on June 26, 2015.

Defendant underwent a psychological evaluation and bonding evaluations with her children, performed by Dr. Gonzalez on April 21, 2015. Dr. Gonzalez diagnosed defendant with bipolar disorder, opioid dependence (in early remission), cocaine abuse, and unspecified personality disorder (with borderline and antisocial traits). Dr. Gonzalez recommended defendant's rights be terminated because she was "not in a position . . . to provide a safe and stable environment for her children."

Dr. Gonzalez opined the children loved their mother, and she loved them but described their bond as "insecure." She recommended contact between defendant and the children be supervised and the children remain with their foster families. She recommended a goal of adoption for the children following termination of parental rights.

Defendant also underwent a psychiatric evaluation by Alexander Iofin, M.D., on April 28, 2015. Dr. Iofin diagnosed defendant with substance abuse, as well as various personality disorders. Dr. Iofin opined "[I]t will be unreasonable to anticipate that she will be able to function psychiatrically in a way that will allow her to be considered for changing the goal of termination of parental rights to reunification with her children in the foreseeable future."

The guardianship trial occurred on December 7, 2015, December 9, 2015, and January 6, 2016. The Division presented the testimony of the Division caseworker and Dr. Gonzalez. Dr. Gonzalez testified as to her evaluations with defendant and the children. The caseworker summarized defendant's involvement with the Division and the services the Division offered. Defendant also testified. She stated she had been working full-time for Bayview Cottage, a nursing home owned by J.J.,³ J.R.'s grandmother, for about four years. She worked there, "so that [her] house is taken care of and my utilities are taken care of." Defendant did not recall the caseworker ever asking for a pay stub, and stated she did not provide the Division with J.J.'s contact information because J.J. is in and out so much that she would not answer if they called. She testified she helped with cooking, cleaning, serving meals, and paperwork.

Defendant also testified she had not let the Division investigate her home because she "didn't see it as a problem" and "felt that it might be a little invasive" to her roommates at the time. She informed the court J.J. owned the house she lived in, and the house had running water, heat, and electricity.

³ We use initials to protect the identity of a non-party witness.

On January 26, 2016, the trial judge issued a decision finding the Division had satisfied prongs one, three, and four of the four-prong "best interests of the child" test, N.J.S.A. 30:4C-15.1(a), but had not met the requirements to satisfy prong two by clear and convincing evidence. The judge stated the matter was dismissed without prejudice but would be subject to reinstatement, conditioned upon M.C. allowing the Division access to her home for inspection within ten days, as well as providing proof of employment within ten days. Failure to comply would result in "FG litigation being reopened by the court," and the matter was to "return . . . under the FN docket for review of the above mandates."

The court reconvened on February 9, 2016.⁴ The Division then presented testimony from J.J., who informed the court defendant has not worked for her in more than three years but did occasionally run errands for her. J.J. also testified she owns the house where defendant resides, but was not paying the mortgage on the house and did not pay for the utilities.

The Division also presented testimony from the caseworker who investigated defendant's home. The caseworker testified there was no heat in the home, but defendant was using multiple space heaters to heat the living room and kitchen areas. Defendant informed her

⁴ The trial judge confirmed the FG was dismissed at that time.

the gas was not turned on at the house. There were additional safety hazards, including a broken step on the basement stairs and no covering on an entrance to the basement from the backyard. The caseworker observed what she thought was mold in a corner of the basement. There was a crib for Jack, but no beds for Caleb or Maddie. A boarded up window was located at the front of the house.

The next day, the court opened the record stating "we're here in the associated matters of DCP&P v. [M.C.] and [J.C.], docket number FN-[01][[]]-[165][[]]-[13][[]], and in the matter of the guardianship of [C.C.], [M.R.] and [J.R.], docket number FG-[01]-21-15." Defendant's counsel stated she was representing defendant in both docket types.

Defendant testified in response to the prior testimony, explaining she began making payments on the electric bill, and she had the gas turned on recently. Additionally, she testified she was waiting to have the furnace fixed and had recently ordered a part for it. She stated once the furnace was fixed, she would no longer use the space heaters. In response to J.J.'s testimony, defendant testified she worked for J.J. three to five times a week and was paid under the table. She stated she did not need public assistance at that time, so she did not see the point in applying. She stated if her children were coming home, she would apply. She

was unaware no one was making payments on the house, but did not plan to stay there long-term anyway.

At the close of the evidence, the judge heard the arguments of defendant's attorney who expressed concern regarding the ambiguity of the procedural posture of the case, and argued for continuation of the matter under the FN docket. The Deputy Attorney General asked the judge to reopen the guardianship because the Division had presented new evidence to establish prong two.

The judge agreed with the Division and issued an order terminating defendant's parental rights on February 10, 2016. The order stated, "The guardianship docket FG-01-21-15 was reopened sua sponte by the court as contemplated by its 1/26/16 order, and after a full plenary hearing on the issues of [defendant's] housing and employment, the court granted the Division guardianship." The order further indicated the court "reverse[d] its findings with regard to Prong 2."

The judge supplemented the record with the testimony from J.J. and the Division caseworker, both of whom the court found to be reliable and credible. The judge found defendant "ha[d] perpetrated a fraud upon the court and was dishonest in her testimony on 1/6/16, and was dishonest in her testimony [on 2/10/16]." Further, defendant "is not willing or able to provide a safe and stable home for the children, lacks employment or any

means to provide for the children's safety, health or development." This appeal followed.

On appeal, defendant argues the evidence regarding her housing and employment was insufficient to establish the second prong, and the conduct of the proceedings deprived her of due process. Because we agree with defendant's second premise, we are constrained to vacate the judgment of guardianship, and remand the matter for further proceedings for the reasons that follow.

Parents have a constitutionally protected right to raise their biological children, even if the children are placed in foster care. In re Guardianship of J.C., 129 N.J. 1, 9-10 (1992) (citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)). Although a parent's "rights are fundamentally important, they are not absolute, and 'must be balanced against the State's parens patriae responsibility to protect the welfare of children.'" N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382, 397 (2009), (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)). "In balancing those competing concerns, a court must ensure that the statutory and constitutional rights of the parent or guardian are scrupulously protected." Ibid. (citing J.C., supra, 129 N.J. at 10). Among these rights is "[d]ue process [which] requires adequate notice and a fair opportunity to be heard." Div. of Youth & Family Servs. v.

M.Y.J.P., 360 N.J. Super. 426, 464 (App. Div. 2003). Additionally, "due process is flexible and calls for such procedural protections as the particular situation demands." N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 119 (2011).

In R.D., supra, 207 N.J. at 108-09, our Supreme Court addressed the differences between a Title Nine abuse and neglect proceeding and a Title Thirty guardianship proceeding. Under a Title Nine proceeding, "any determination that the child is an abused or neglected child must be based on a preponderance of the evidence." N.J.S.A. 9:6-8.46(b). By contrast, in a Title Thirty termination of parental rights proceedings, courts must apply the more rigorous clear and convincing evidentiary standard to the Division's evidence proving each of the statutory prongs of the best interest test set forth in N.J.S.A. 30:4C-15.1(a). R.D., supra, 207 N.J. at 113. However, "a Title Nine court that reasonably foresees its proceedings ripening into a subsequent Title Thirty proceeding may seek to short-circuit the duplication of presenting proofs in a later Title Thirty proceeding" by applying the clear and convincing standard in the Title Nine proceeding. Id. at 120.

To do so, the Title Nine court must provide "clear and unequivocal" advance notice to the parties that it will make findings under the Title Thirty "clear and convincing evidence"

standard. Ibid. The court must also "make clear to the parties that . . . the determinations made in [the Title Nine proceeding] may have preclusive effect on the final, permanent relief arising out of a Title Thirty proceeding." Id. at 121. Lastly, the "Title Nine court must relax the time deadlines and, to the extent necessary, use in the Title Nine proceeding the admissibility of evidence standards applicable to Title Thirty proceedings." Ibid.

Here, the trial court dismissed the Title Thirty complaint because the Division had not met the clear and convincing standard of proof under prong two and warned the Title Thirty complaint was subject to renewal, but proceeded under Title Nine. The judge ultimately applied the clear and convincing standard at the end of the Title Nine proceeding and sua sponte entered an order of guardianship. However, R.D. makes clear the transition between a Title Nine proceeding and a Title Thirty proceeding is not so fluid.

Here, the trial court did not provide the necessary notice to defendant that it would apply the clear and convincing standard of a Title Thirty proceeding when he resumed the litigation under the Title Nine matter. "[U]nless the parties are on notice that the Title Nine proceedings are to be conducted under the higher, clear and convincing evidence standard constitutionally required for Title Thirty proceedings and appropriate accommodations are

made for the fundamentally different natures of these disparate proceedings," no "collateral or preclusive effect" may be given to the Title Nine proceeding "in any subsequent and related Title Thirty proceedings." Id. at 93.

We reject the idea the error here was harmless because defendant was on notice the guardianship proceeding might be re-opened and she did not suffer prejudice as a result of the hearing. The Division had not re-filed a Title Thirty proceeding seeking termination of defendant's parental rights and did not request such relief until the close of the hearing. The record demonstrates the nature of the proceeding was, at best, ambiguous. The trial judge could have signaled to the Division his conclusion the evidence supported the re-opening of the guardianship proceeding rather than omit the constitutionally required protection of having the Division re-file the Title Thirty guardianship complaint to re-litigate prong two. We understand the court's decision, however, the rules provided a remedy if the judge determined he needed additional evidence. Rather than dismiss the original guardianship proceeding the judge could have continued the guardianship proceeding pursuant to Rule 5:9-3, which permits the court at any time during or after the hearing to require the production of additional evidence and continue the hearing as the situation requires. Because the judge here failed

to comply with the requisite procedural safeguards, we vacate the judgment of guardianship and remand for additional proceedings after proper notice and sufficient time to allow defendant to be heard on the issues.

Vacated and remanded for additional proceedings consistent with this opinion within twenty-one days. Within twenty-one days, the court shall continue the trial and allow the parties to present additional testimony and evidence regarding prong two of the best interests of the child test. Within seven days of the completion of the trial, the court shall issue its final decision and opinion. We retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION