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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3884-15T1
A-3885-15T1

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

C.J.R. and C.R.A,

Defendants-Appellants.

IN THE MATTER OF THE
GUARDIANSHIP OF A.A.R.,
C.L.A. and C.A.,

Minors.

APPROVED FOR PUBLICATION

December 11, 2017

APPELLATE DIVISION

Argued November 13, 2017 – Decided December 11, 2017

Before Judges Sabatino, Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FG-07-0117-16.

Adrienne Kalosieh, Designated Counsel, argued the cause for appellant C.J.R. (Joseph E. Krakora, Public Defender, attorney; Adrienne Kalosieh, on the briefs).

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

Alan R. Blankstein, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Alan R. Blankstein, on the brief).

Cory H. Cassar, Designated Counsel, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Cory H. Cassar, on the brief).

The opinion of the court was delivered by

WHIPPLE, J.A.D.

Defendants C.J.R. (Cindy[1]) and C.R.A. (Charles) appeal from an April 27, 2016 judgment of guardianship terminating their parental rights to their three biological children, A.A.R. (Anne), C.L.A. (Claire), and C.A. (Chip). Because the trial court erred in giving preclusive effect, in the guardianship proceeding, to the prior finding of abuse and neglect based upon the burden shifting provisions of Title Nine, we reverse and remand for a new guardianship trial.

I.

We discern the following relevant facts from the record. On February 18, 2014, Charles and Cindy brought Chip to his

[1] All names used herein are pseudonyms, both for ease of reference and to protect the identity of the parties. By doing so we mean no disrespect to the parties.

primary care physician because two days earlier, they heard and felt a popping sensation when picking up Chip for feeding.

The doctor referred them to the emergency room where an X-ray revealed one, and possibly two, fractured ribs. The emergency room doctor reported the matter to the Division of Child Protection & Permanency (the Division) as a precaution.

During the course of the Division's investigation, Cindy denied allowing anyone else to care for Chip, and denied having anyone else in the home besides herself, Charles, her other two children, and her two nieces. Charles also reported no one but himself and Cindy cared for Chip, the other children were not permitted to handle Chip on their own, and he had never witnessed the other children harm Chip.

On February 19, 2014, the Division consulted with Dr. Monica Weiner, M.D., of the Metro Regional Diagnostic and Treatment Center. Based on the initial consultation and Dr. Weiner's review of Chip's medical records, the Division requested Cindy bring her children to the hospital for medical examinations. While at the hospital, Cindy again denied knowing how Chip was injured. On February 20, 2014, Chip underwent a skeletal survey, revealing four rib fractures; on February 21, 2014, a head CT scan was performed, revealing head trauma. The other children showed no signs of abuse or neglect.

The Division conducted an emergency removal of the children and placed them in resource homes. On February 24, 2014, the Division filed an order to show cause and verified complaint, and the children were placed in the custody, care, and supervision of the Division. The court granted Charles and Cindy weekly supervised visitation.

On February 25, 2014, Chip received an MRI, revealing brain contusions and subdural hematomas. Dr. Weiner, in her report to the Division's dated April 9, 2014, opined that the rib fractures could not be the result of a birth injury based on "the x-rays findings alone." Further,

> [p]osterior rib fractures can be caused when the chest is forcefully squeezed. They can also occur from a direct impact to the ribs. Both [Cindy] and [Charles] have stated that they were [Chip's] only caregivers and cannot provide an explanation for the fractures. Based on the information currently available, the fractures must be considered to be the result of physical abuse until proven otherwise.

Regarding the brain contusions and hematomas, Dr. Weiner opined,

> [p]arenchymal contusions of the brain with subdural hemorrhages are caused by head trauma. A shaking mechanism could cause the findings seen in [Chip], and could have also caused the posterior rib fractures. Therefore, abusive head trauma must be considered as a likely cause of the brain injuries. Brain contusions are also a rare complication of birth trauma. As the exact

> timing of [Chip's] brain findings cannot be determined, birth trauma as an explanation for the brain injuries cannot be completely ruled out.

On July 11, 2014, the Family Part judge entered an order continuing the custody, care, and supervision of the children with the Division, continuing the supervised visitation with Charles and Cindy, and requiring them to comply with services provided by the Division. Additionally, the judge conducted a fact-finding hearing, resulting in a finding of abuse against Cindy and Charles.

The Division offered services to Charles and Cindy, in the form of parenting skills classes, psychological evaluations, couples therapy, and individual therapy. Both parents completed all recommended services. Additionally, Charles underwent a substance abuse evaluation, which concluded he was not in need of substance abuse treatment. On October 3, 2014, Anne, Claire, and Chip were returned to their parents' custody.

On November 18, 2014, an ambulance brought Chip to the hospital. Cindy reported Chip had been listless and not eating well, and she had gone upstairs to give her daughters a bath when Charles called to tell her Chip was "breathing funny," at which point she went downstairs and witnessed Chip having a seizure. She reported that a few weeks earlier Chip had fallen to the floor from a sitting position and hit his head. A CT

scan revealed subdural hematomas in the form of bleeding in the frontal and right temporal area of the brain, and an eye exam revealed "extensive multi-layered retinal hemorrhages."

The emergency room doctor reported the incident to the Division, indicating Chip's injuries were consistent with abuse. On November 19, 2014, the Division executed another removal of all children in the household, placing them with the same resource families.

Dr. Weiner prepared another report for the Division, and found, "[Chip's] previous brain contusions and subdural hemorrhages had resolved by July 2014 and were not the cause of the current findings. There were no infectious, metabolic, hematologic, or other organic medical causes found for the intercranial and eye injuries, leaving recent trauma as the remaining explanation." She went on to state,

> [s]ubdural hemorrhages can be caused by an acceleration-deceleration ("shaking") mechanism with or without impact or by impact alone. The acute appearance of the subdural hemorrhages on [Chip's] CT scan, plus [Chip's] sudden onset of symptoms, suggests that head trauma occurred within a few days of [Chip] presenting to University Hospital on 11/18/14.
>
> . . . .
>
> No accidental or other trauma was reported which would explain the subdural and retinal hemorrhages. At this time, no reasonable medical or other explanation has been

> provided which would account for [Chip's] injuries and they must be considered to be the result of physical abuse, specifically abusive head trauma, until proven otherwise.
>
> There is now evidence for two additional episodes of unexplained head trauma leading to additional injuries. Head injuries are the number one cause of morbidity and mortality due to child abuse and returning [Chip] to the environment in which these injuries occurred put him at risk for further severe injury or death.

On December 12, 2014, Chip was discharged from the hospital and placed with his previous resource home. In March 2015, the Division recommended continued services for Cindy and Charles, in the form of therapy, parenting skills, and visitation. Both parties completed all required services.

On March 17, 2015, the Division sent a letter to counsel for Charles and Cindy. The letter alerted defendants that the Division intended to ask the court to take judicial notice of the previous fact-finding order and "the Division is requesting that the court make a finding of abuse against [Charles and Cindy] by clear and convincing evidence." If the court elects to make such a finding, the Division informed, "it will have a preclusive effect on any subsequent guardianship proceeding." The letter concluded, "the Division, upon establishing its prima facie case against [Charles] and [Cindy], intends to request

that the Court shift the burden of proof to them to prove their non-culpability with respect to the injury sustained by [Chip]."

On April 10, 2015, the parties appeared for a fact-finding hearing. As the above letter warned, the Division sought a finding by clear and convincing evidence against Cindy and Charles for Chip's injuries. The Division presented Dr. Weiner and the Division caseworker as witnesses.

The caseworker testified about the Division investigations and the removal of the children from defendants' care. Dr. Weiner testified, as an expert witness, about the injuries sustained by Chip in both February and November, and her opinions as to the cause of the injuries. Specifically, consistent with her medical report, she testified Chip's injuries were likely caused by shaking, and that neither Cindy nor Charles provided alternate explanations to account for the injuries. The doctor testified that a fall from a sitting position onto a hardwood floor would not be sufficient to cause Chip's injuries. At the close of this hearing, the judge[2] found,

> the case law is clear . . . the Division has made a prima facie case where the burden shifting would come into play in that there were two caretakers, the mother and the father that apparently were admitted to the caseworker to be the primary caretakers of

[2] The same family court judge has presided over this case from its inception through the judgment of guardianship.

> the child. And, therefore, the burden shifting would apply to this case.

The hearing continued on April 30, 2015, and Cindy testified about the trip to the hospital with Chip in November, what the doctors told her about his injuries, and about the fall in which he was sitting up and hit his head on the floor. There were no other accidents where Chip hurt his head, neither she nor Charles had ever used corporal punishment on Chip, and she had never observed Claire, Anne, or her nieces roughhousing or harming Chip. Furthermore, the only times another person was Chip's caretaker during the relevant time period,[3] was one night in which Chip's resource parents babysat for him, and a second day where Cindy's mother babysat for him. The defense put forth no expert witnesses.

The judge issued a decision from the bench saying, "I found Dr. Weiner to be extremely credible and experienced" and "there's still no explanation . . . how this could have occurred other than abuse and neglect." Further, he stated, "an explanation that the child fell over from it sitting on the floor on its side and caused these type of horrendous injuries . . . is just not believable or credible." The court concluded,

[3] The testimony did not involve the February 2014 incident, as the parties had asked the court to take judicial notice of the July 11, 2014 fact-finding where Cindy and Charles were found to have been the cause of Chip's February injuries.

"I'm satisfied the Division has proven its case by clear and convincing evidence that there was abuse and neglect in this particular case which caused these injuries . . . as to both defendants."

In May 2015, Dr. Sean Hiscox, Ph.D., an expert for the Division, issued a report recommending the Division change the case goal from reunification to termination of parental rights and adoption. In June 2015, the court approved the Division's plan of termination of parental rights followed by adoption for Claire, Anne, and Chip. In August 2015, the Division filed a complaint for guardianship, and the court issued an order terminating the Title Nine litigation.

Charles and Cindy continued to participate in services provided by the Division, including individual therapy and several psychological evaluations. Charles "presented as cooperative and conversational." He "appeared to benefit from the supportive nature of the therapy" and "expressed understanding of the seriousness of the situation[]," but he "denied wrongdoing in both instances." The reports, provided by the therapists, indicated that "at the beginning of treatment, [Cindy] presented as viewing therapy as 'pointless' and 'unnecessary,' but later came to view it as helpful and useful." At the close of her therapy, the therapist opined, "[Cindy]

might benefit from additionally family therapy," whether the eventual plan was reunification or termination. In September, Cindy requested, and the court granted, a separate visitation schedule from Charles, as they had separated.

Between November 2015 and January 2016, Dr. Carolina Mendez, Ph.D., evaluated Cindy, Charles, Anne, Claire, Chip, and the respective resource parents individually and in combinations. The purpose of these evaluations was to assess the parenting ability of Charles and Cindy, the nature and quality of the bonds between the children and their biological parents, and the bonds between the children and the resource parents. She also reviewed medical records, Division records, and all previous psychological evaluations.

During their evaluations, Charles and Cindy asserted they were no longer in a relationship, and were no longer living in the same residence. Again, neither parent had an explanation for the injuries sustained by Chip.

The bonding evaluation between Chip, his biological parents, and his resource parents, showed that while Chip "has developed relationships with all of the adults, the relationship he has developed with his resource parents is deeper and more meaningful than the relationship he has with his biological parents." Dr. Mendez opined, "[Chip] would likely have a deeper

reaction to losing the relationship he has with his resource parents than losing the relationship he has with his biological parents." She concluded, he "has already begun to solidify his attachment to his resource parents, as they have been consistent parental figures in this child's life shy of six weeks. Therefore, it is recommended that [Chip] maintain the relationship he has with his resource parents."

The bonding evaluation between Anne, Claire, their biological parents, and their resource parent showed they were attached to both sets of parents. Dr. Mendez opined, "[s]hould they lose any of these relationships, they are likely to have a negative reaction to the loss. However, . . . maintaining the relationship with the resource parent would mitigate the harm caused by the loss of the relationship with their biological parents." Dr. Mendez acknowledged the reverse was also true, that maintaining the relationship with the biological parents would mitigate the harm from the loss of the resource parents. However, there were additional risk factors to staying with the biological parents, since Chip's injuries were still unexplained.

Overall, Dr. Mendez concluded, "[Claire, Anne, and Chip] clearly require consistency and permanency, . . . [and]

[t]ermination of parental rights followed by adoption would produce more good than harm."

On March 28, 2016, the court conducted an emergent hearing regarding the Division's request for a ruling on the preclusive effect of the April 30, 2015 "clear and convincing" finding. The judge opined, "[New Jersey Division of Youth and Family Services v. R.D., 207 N.J. 88 (2011)] . . . does specify and require that the parties be on notice in the fact-finding prior to the determination." The judge then found,

> [i]n this particular case, I made the clear and convincing finding with notice to the parties and the opportunity to be heard on those issues, and I think based on that and based on the case law in Division v. R.D., it is a preclusive finding for purposes of the guardianship hearing, and I will so rule that the Division does not need to relitigate the Prong One.

That same day, the court issued an order confirming this, and further stated, "the Division has satisfied prong one of the best interest test, that [Chip] was harmed by his parental relationship with [Cindy] and [Charles]."

The guardianship trial began on March 30, 2016, continued on April 18 and 20, 2016, and concluded on April 27, 2016. Dr. Andrew Brown, III, Ph.D., testified as expert for Cindy. Dr. Brown had conducted psychological evaluations of Cindy in July and December 2015. He testified that in between the two

evaluation dates, Cindy and Charles had separated, were no longer living together, and had separate visitation schedules with their children. He stated, "she underwent fifteen weeks of individual psychotherapy . . . [and] her awareness has improved sufficiently to the point where she should be able to parent and keep her children safe."

Dr. Brown further testified that based on testing, in July 2015, for child abuse potential, Cindy did not score in a range indicative of a potential to commit child abuse. He then testified the children were deeply bonded to Cindy, and "that the children would suffer traumatic harm if the relationship . . . was severed with their natural mother." He further testified the resource parents would not be able to mitigate the harm to Chip caused by the separation from his natural mother. Finally, he opined that a kinship legal guardianship, as an alternative to termination of parental rights, would serve the best interests of the children because it would allow for Cindy to remain in contact.

Also, adoption caseworker Latoya Bowers testified to the services provided to Cindy and Charles by the Division. She also testified to the unsuccessful efforts of the Division to find relatives who would be appropriate for placement of the children. Further, Ms. Bowers had discussed kinship legal

guardianships with the resource parents, who declined in favor of adoption, with continued contact between the children and the biological parents.

The law guardian's expert, Dr. Eric Kirschner, Ph.D., testified. Dr. Kirschner conducted bonding evaluations between the children, the resource parents, and the biological parents. He concluded the children were "adequately bonded" to the resource parents, and there was a bond between the children and their biological parents. Nonetheless, he advised the appropriate course of action would be termination of parental rights followed by adoption, because the "multiple instances of life-threatening injuries occurring to a very young child . . . makes it for all intents and purposes . . . impossible to come to a conclusion" that the children could be safely returned to Cindy and Charles.

Dr. Kirschner stated, while termination of the parental relationship would cause psychological harm to the children, the "presence of that [resource] parent relationship and bond is able to serve as an offsetting or mitigating factor helping the children to cope with the loss." He concluded termination of the parental rights would not do more harm than good for the children.

Cindy took the stand to testify in her defense. She recounted the events leading to the second DODD removal, and how Chip had suffered a minor fall in October 2014, which she did not feel required a hospital visit. She stated it would be safe for her to be reunited with her children because, "I did not hurt my son. I would never hurt any of my children, and . . . I feel that my son got hurt under his father's watch." She explained she separated from Charles in July 2015, for "multiple reasons." She stated she would do "anything and everything" to protect the children if they were returned, and the risk had been removed because she felt the risk was Charles. She concluded her testimony stating, "someone hurt my son. So I can only assume because I didn't see it happen, I can only assume that [Charles] hurt my son." The judge asserted his intentions to not "retry the fact-finding when there's been a finding by clear and convincing evidence" with regard to the first prong of the test under N.J.S.A. 30:4C-15.1(a).

Dr. Hiscox testified for the Division, and emphasized his concerns about a non-offending parent even if he or she did not cause the injuries. Dr. Hiscox also disagreed with Dr. Brown's assessment of the risk posed by Cindy. He concluded Dr. Brown based his assessment on the fact that Cindy separated from Charles, and she had "a higher level of insight because she was

not minimizing what the problem was." Further, for Dr. Brown to conclude he did not see Cindy as the wrongdoer was "beyond the purview of . . . a forensic psychologist . . . , there's no [psychological] tests or indices . . . that would determine whether somebody engaged in a criminal act or not."

On that same date, the trial judge issued his decision. With regards to the first prong of N.J.S.A. 30:4C-15.1(a), the judge stated,

> this Court really does not need to address the Prong One. I had previously made a ruling by clear and convincing evidence with regard to the abuse and neglect issue . . . and I ruled also that testimony was not necessary since there was established by clear and convincing evidence after the second incident.

Despite this, the judge made additional findings under the first prong. He stated he found Dr. Hiscox and Dr. Kirschner to be credible, and did not find the defense expert, Dr. Brown, to be credible. He then stated,

> you can't discount the fact that there were two horrible life-threatening physical injuries that were unexplainable other than physical abuse to this child, . . . if this doesn't prove continuous risk and continuous harm and the fact that the harm was not dissipated that occurred the first time, I don't know what else could prove this.

Additionally, the judge found specifically for the second prong,

> the risk factors are still exactly the same as they were. There are serious risk factors in here, returning these children to either of these parents, . . . would create a substantial risk, and . . . there's significant and ongoing risk involved here . . . that goes to Prong Two. We haven't alleviated this risk of harm. We don't know where it is and we haven't alleviated, we are still at the same spot.

For the third prong, the judge stated, "[the Division] made reasonable efforts [to provide services] but I don't know whether there is any service that would change that situation."

For the fourth prong, the judge found the termination of parental rights would not cause more harm than good. He found important that the children had been in resource homes for over two years, and it was really the only home that Chip had ever known. With regard to Anne and Claire, he found credible the testimony that their bond with the resource parents would mitigate any harm caused by the termination of parental rights.

Based on the foregoing, the trial judge terminated Charles and Cindy's parental rights, and granted guardianship over the children to the Division. The court granted both parents visitation pending their appeal. The children currently remain and are reportedly happy in their resource homes, which they have been in since their removal in February of 2014. Both sets of resource parents have indicated their intentions to proceed with adoption. These appeals followed.

II.

Our review of a trial judge's findings and decision to terminate parental rights is limited. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278-79 (2007). We do not reverse the family court's termination decision "when there is substantial credible evidence in the record to support the court's findings." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008).

We defer to the trial court's credibility findings and fact-findings because of its expertise in family matters and its ability to develop a "feel of the case that can never be realized by review of the cold record." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (citation omitted). This court should not disturb these findings unless they are "so wide of the mark that the judge was clearly mistaken." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007).

Parents have a constitutionally protected right to raise their biological children, even if placed in the care of a resource family. 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)). The State may act to protect the welfare of the children, but this is a limited authority,

applying to circumstances where the parent is unfit or the child has been harmed or placed at risk of harm. Id. at 10; N.J.S.A. 30:4C-12; see N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 600 (1986).

To prevail in a proceeding to terminate parental rights, the Division must establish each element of the "best interests test":

> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
>
> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
>
> (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
>
> (4) Termination of parental rights will not do more harm than good.
>
> [N.J.S.A. 30:4C-15.1(a).]

These four prongs "relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." In re Guardianship of K.H.O., 161 N.J. 352, 348

(1999). The State must prove each prong of this test by clear and convincing evidence. A.W., supra, 103 N.J. at 612. Additionally, courts may not use presumptions of parental unfitness and any "doubts must be resolved against termination of parental rights." K.H.O., supra, 161 N.J. at 347.

The first prong of the best interests test focuses on the "endangerment of the child's health and development resulting from the parental relationship." Id. at 348; N.J.S.A. 30:4C-15.1(a)(1).

Defendants argue the trial court erred in applying the fact-finding determination of abuse to satisfy the first prong of the best interest test. Neither defendant objected in the Family Part to this threshold ruling, therefore, we consider it under a plain error standard. Pursuant to Rule 2:10-2, "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result."

Charles argues the findings of the trial court are not entitled to this court's deference, because they are "so wide of the mark" as to warrant reversal. Further, Cindy argues the trial court erred in giving the Title Nine fact-finding preclusive effect because the burden-shifting force of N.J.S.A. 9:6-8.46 relieved the State of its burden to prove harm to the

child by clear and convincing evidence, as required by Title Thirty.

A Title Nine fact-finding, made by clear and convincing evidence, may be given preclusive effect in a later Title Thirty proceeding. However, defendant asserts this is a permissive standard, as "when the underlying finding of abuse, . . . is made by clear and convincing evidence and not merely by a preponderance of the evidence, it may support a termination of parental rights." R.D., supra, 207 N.J. at 105-06 (citations omitted). He asserts that R.D. is distinguishable from the present case because there is no specifically identified perpetrator of abuse against Chip, and therefore the trial court should have chosen not to give the finding preclusive effect.

In R.D., the trial court made a Title Nine finding by clear and convincing evidence that the defendant had abused his daughter, and gave these findings preclusive effect in a later Title Thirty proceeding. Id. at 99-100. We affirmed, id. at 104, and the Supreme Court of New Jersey reversed the decision because the defendant had not been placed on adequate notice that the finding could have preclusive effect. Id. at 121-22. The Court established a three-factor test which must be satisfied before a Title Nine fact-finding can be given preclusive effect in a Title Thirty proceeding. Id. at 120-21.

First,

> the Title Nine court must provide advance notice to the parties that, if supported by the proofs, it will make its findings using the higher Title Thirty 'clear and convincing evidence' standard; that notice must be clear and unequivocal, and must fairly and reasonably advise the parties that any Title Nine determinations made under the higher, clear and convincing evidence standard will have preclusive effect in any subsequent Title Thirty proceeding.
>
> [Id. at 120.]

Second, "the Title Nine court must make clear to the parties that, . . . the determinations made in respect of that interim relief - particularly those concerning harm to the child - may have preclusive effect on the final, permanent relief arising out of a Title Thirty proceeding." Id. at 121.

Third, "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, only two of the three factors were satisfied. The Division sent a letter to defendants stating "the Division is requesting that the court make a finding of abuse against [Cindy] and [Charles] by clear and convincing evidence." This letter gave them clear and unequivocal notice of the higher standard to be applied, and further informed them "[i]f the

court makes such a finding, it will have a preclusive effect on any subsequent guardianship proceeding." (Emphasis added). Thus this letter, sent three weeks before the first fact-finding hearing date, satisfied the first prong of the R.D. test as to notice.

Next, at the April 10, 2015 fact-finding hearing, the Division restated its request to have the finding made by clear and convincing evidence. The Family Part judge, after two days of hearings and witness testimony, found "the Division has proven its case by clear and convincing evidence that there was abuse and neglect in this particular case which caused these injuries. And I'm satisfied the Division has proven it by clear and convincing evidence as to . . . both defendants." This notice, coupled with the letter which stated a finding by clear and convincing evidence would have preclusive effect on later proceedings, serves to satisfy the second part of the R.D. test.

However, the third prong, requiring the use of the "admissibility of evidence standards applicable to Title Thirty proceedings," was not satisfied, because the statutory burden-shifting provision found in Title Nine is not present in Title Thirty.

Under Title Nine,

> proof of injuries sustained by a child or of the condition of a child of such a nature as

> would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or guardian shall be prima facie evidence that a child of, or who is the responsibility of such person is an abused or neglected child.
>
> [N.J.S.A. 9:6-8.46(a)(2).]

Additionally, when there is limited access to a child in a Title Nine litigation, especially an infant, the burden shifts to those with access to prove non-culpability. Matter of D.T., 229 N.J. Super. 509, 517 (App. Div. 1988). As we have said,

> were this a tort suit brought against a limited number of persons, each having access or custody of a baby during the time frame when a . . . abuse concededly occurred, no one else having such contact and the baby being then and now helpless to identify her abuser, would we not recognize an occasion for invocation of the Anderson v. Somberg[4] doctrine?
>
> [Ibid.]

Under this doctrine, once a prima facie case has been established, the burden shifts, and such defendants are required to come forward and give their evidence to establish non-culpability. See ibid. Here the court found a prima facie case was made out both by the injuries suffered by Chip, and because only Charles and Cindy had access to him. As such, the court

[4] Anderson v. Somberg introduced "conditional res ipsa loquitur," where once the prima facie case has been made out, even where more than one explanation exists, defendant bears the burden of rebutting with evidence. Anderson v. Somberg, 67 N.J. 291, 299-300 (1975).

shifted the burden to them to show their non-culpability in his injuries. See N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004), certif. denied, 182 N.J. 426 (2005).

However, in Division of Child Protection and Permanency v. T.U.B., we said the plain meaning of N.J.S.A. 9:6-8.46(a)(4) confines its discrete hearsay exception to abuse and neglect cases litigated in Title Nine proceedings, and "is not repeated or incorporated by reference anywhere within Title [Thirty]." 450 N.J. Super. 210, 230 (App. Div. 2017). Moreover, we recognized when Title Nine and Title Thirty were amended in 2005, the evidentiary provisions in N.J.S.A. 9:6-8.46(a) were not extended to Title Thirty proceedings. Id. at 233. Furthermore,

> the first line of [N.J.S.A. 9:6-8.46(a)] begins with this contextual and limiting phrase: "In any hearing under this act . . . ." By using the prefatory term "this act," the Legislature plainly conveyed that the evidentiary provisions set forth . . . are all special rules intended to override or qualify the general rules of evidence, but for Title Nine proceedings only.
>
> [Id. at 230.]

In the same vein, we do not read Title Nine or Title Thirty to allow the expansion of the burden-shifting provisions to permit the use of the finding in the current case with

preclusive effect in guardianship proceedings, for the reasons set forth above and additionally pursuant to the constitutional considerations stated by the United States Supreme Court in Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

In Santosky, the United States Supreme Court implicitly warned against shifting the burden to the defendant in a termination of parental rights case by comparing the due process considerations to those present in a criminal prosecution because of the weight and gravity of the interest at stake. 455 U.S. at 754-55. The Court recognized that the State's ability to present a case against a parent is much stronger than the parent's ability to mount a defense but declined to impose the reasonable doubt standard. Id. at 763. However, the Court explicitly warned, "at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable." Id. at 768. "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." Id. at 768 (quoting Addington v. Texas, 441 U.S. 418, 427, 99 S. Ct. 1804, 1810, 60 L. Ed. 2d 323, 331-32 (1979)).

As such, the trial court's decision to give the Title Nine fact-finding preclusive effect in the Title Thirty proceedings, shifting the burden to defendants, and requiring them to rebut the presumption of abuse and neglect through their own evidence created an unconstitutional asymmetry we consider plain error on a critical question of law warranting reversal. In reaching that conclusion, we are mindful that, before the present appeal, the legal issue had not been previously addressed in a published opinion.

III.

Charles argues that the trial court wrongfully applied preclusive effect to the entire four-prong test, "effectively act[ing] as a summary judgment determination." Additionally, Charles argues the trial court did not make specific findings under the first and second prong regarding Claire and Anne.

We recognize first that the trial court made specific findings under prongs two, three, and four regarding Chip, and there is "substantial credible evidence in the record to support the court's findings." E.P., supra, 196 N.J. at 104. However, these findings are built at least in part upon, and tainted by, the foundation established by the erroneous presumptions made

under the first prong.[5] As previously stated, the four prongs of the best-interest test "relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." K.H.O., supra, 161 N.J. at 348. We therefore find that reliance by the trial court on prong one was fatal to its determinations under the second, third, and fourth prongs as to Chip.

Furthermore, we note the trial court made no specific findings under prongs one or two[6] regarding Claire and Anne. While N.J.S.A. 9:6-8.46(a)(1) provides that "proof 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," this does not mean that harm to one child is conclusive proof of harm to another child. The Title Nine findings made by the judge were confined to consideration of whether Chip was abused; there were no explicit findings that either Anne or Claire were abused or neglected. Moreover, the Division

[5] While we acknowledge the limited findings made by the trial court under prong one, the fact remains that its overall reliance was on the Title Nine fact-finding hearing, and the effect was to shift the burden to the defendants to prove they were not the source of the harm.

[6] The judge made findings under both the third and fourth prongs: that the Division had made reasonable efforts to provide services, and the testimony asserting that Claire and Anne's bond with the resource parents would mitigate any harm caused by the termination of parental rights was credible.

caseworker conceded neither was harmed, meaning that any harm attributed to have been visited upon either girl was derived from the harm to Chip. Therefore, the determination of the judge terminating Charles and Cindy's parental rights to Claire and Anne was not supported by sufficient credible evidence, and was in error. We therefore vacate the judgment of guardianship entirely as to Claire and Anne.

Furthermore, we believe that going forward from here, the trial court should be allowed to consider each prong in the light of any developments since trial, and shall have the discretion to permit any updated evaluations or discovery that may be warranted.

Reversed and remanded for the Family Part to conduct a new trial, to be completed within sixty days. We do not retain jurisdiction.