SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4799-14T1
A-4769-15T1
A-5090-15T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

C.C.,

Defendant-Appellant.

IN THE MATTER OF J.C., Ti.B., and Ty.B., Minors.

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

C.C. and A.B.,

Defendants-Appellants.

IN THE MATTER OF THE GUARDIANSHIP OF J.C., Ti.B., and Ty.B., Minors.

Submitted May 9, 2017 – Decided June 29, 2017

Before Judges Ostrer, Leone and Moynihan.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket Nos. FN-09-265-14 and FG-09-256-15.

Joseph E. Krakora, Public Defender, attorney for appellant C.C. (Kisha M. Hebbon, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant A.B. (Daniel DiLella, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Jonathan Villa, Deputy Attorney General, on the brief in A-4799-14; Lauren J. Oliverio, Deputy Attorney General, on the brief in A-4769-15 and A-5090-15).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors J.C., Ti.B. and Ty.B. (James J. Gross, Designated Counsel, on the briefs).

PER CURIAM

In these three children-in-court cases, we affirm the trial court's August 25, 2014 decision, finding that defendant-mother C.C. neglected her three children; and the court's June 29, 2016 termination of C.C.'s parental rights and those of defendant-father A.B. Since October 2013, the children, J.C., Ti.B. and

Ty.B. — born in 2010, 2012 and 2013 — have lived with their maternal grandmother M.C., who wishes to adopt them.[1]

In summary, while C.C. was the children's sole caretaker, she repeatedly left the children alone or with unwilling or unnotified adults. As a result, the children were removed and placed with M.C., after A.B. was unable to assume the role of custodial parent. At the Title 9 fact-finding hearing, the Division of Child Protection and Permanency presented evidence of three separate incidents where C.C. left the children home alone. At this hearing, the Division called M.C.; C.C.'s adult brother, G.C.; and a Division caseworker. C.C. did not testify or call witnesses.

In the months that followed the fact-finding hearing, the parents were generally non-compliant with services and failed to complete psychological evaluations. The parents' visitation was inconsistent and both parents allowed extended periods of time to pass without visitation. The Division's plan for the family eventually changed from reunification to termination.

The Division presented its case for termination through the testimony of M.C. and the caseworker. A.B. did not appear at the guardianship trial and his attorney offered no witnesses. C.C.

[1] For purposes of this opinion, we consolidate the abuse or neglect appeal with the parents' respective termination-of-parental-rights appeals, which were already consolidated.

testified in her own defense, and offered the testimony of her paramour. Neither the Division nor the parents offered expert testimony.

The Law Guardian now agrees with the Division that C.C. neglected the children. The Law Guardian also supports the finding that the Division met its burden under the best-interests test for terminating the parents' rights.

I.

In the abuse or neglect appeal, C.C. presents the following issues:

> A. C.C.'s Due Process Rights Were Violated By a Lack Of Sufficient Notice Of DCPP's Intent To Seek a Finding Of Abuse and Neglect Based Upon The Children Being Left At Home Alone Or Unsupervised.
>
> B. The Trial Court Erred In Failing To Exercise Its Discretion To Dismiss The Title Nine Action and Continue The Matter Under Title Thirty.

At the Title 9 hearing, the trial judge found that C.C. neglected the children by leaving them "home unsupervised on [three] occasions [and] thereby failed to exercise a minimum degree of care putting the children at a substantial risk of harm." The court also found C.C. at other times left the children with unwilling or unknowing caretakers in the home, which included her mother, M.C.; her adult brother, G.C.; and homemakers placed by

the Division in the home after C.C. had previously left the children. Also in the home were C.C.'s younger siblings, who were then eighteen and thirteen years old. However, the judge found these incidents, although inexcusable, did not constitute neglect because the adults' and teenagers' presence countered the risk of harm.

In support of its "home alone" findings, the court credited the testimony of G.C., who reported finding the three children by themselves in the house after he returned from work; and the testimony of M.C., who experienced a similar incident, and also once found two of the children in the bathtub alone, while C.C. was standing outside the house on the sidewalk.

C.C. contends that because the Division's complaint did not specify the three "home alone" incidents in its verified complaint for custody, it violated her due process right to fair notice. We disagree.

A defendant's due process rights include a right to "notice defining the issues and an adequate opportunity to prepare and respond." J.D. v. M.D.F., 207 N.J. 458, 478 (2011) (internal quotation marks and citation omitted). "There can be no adequate preparation [for trial] where the notice does not reasonably apprise the party of the charges, or where the issues litigated at the hearing differ substantially from those outlined in the

notice." N.J. Div. of Youth and Family Servs. v. B.M., 413 N.J. Super. 118, 127 (App. Div. 2010) (internal quotation marks and citation omitted); see also N.J. Div. of Youth & Family Servs. v. P.C., 439 N.J. Super. 404, 413 (App. Div. 2015) (stating an abuse or neglect complaint must adequately notify the defendant of all charges).

In B.M., supra, we reversed a judgment terminating parental rights where the Division introduced at trial, without prior notice, an expert report asserting the child was born with fetal alcohol syndrome. 413 N.J. Super. at 127. Prior thereto, the Division had focused on the newborn's positive test for cocaine, the mother's history of drug abuse, and her inability to care for her other children. Id. at 123. Several factors led to our conclusion of harmful error. We noted the evidence came as a surprise. Id. at 127. The court's repeated use of the report before it was offered in evidence indicated an objection would have been futile. Id. at 128. The defendant had no opportunity to challenge the expert's report with an expert of her own. Id. at 127. And the report played a significant role in the court's findings and the trial outcome, because the evidence of cocaine in the newborn's system, without more, fell short of proving harm to child, while proof of fetal alcohol syndrome did establish harm. Id. at 128.

In J.D., supra, a case under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, the Court reversed a final restraining order based on a due process violation, where the plaintiff presented evidence of prior acts of domestic violence that she did not include in her complaint. 207 N.J. at 478-82. Notably, the defendant inartfully objected and sought a continuance, stating he was unprepared to meet the new allegations. Id. at 468-69. However, no continuance was granted. Id. at 469.

The Court recognized that evidence at trial may often go beyond that set forth in the complaint. Id. at 479. "That reality is not inconsistent with affording defendants the protections of due process to which they are entitled." Ibid. A court must recognize that if it allows expansion of the allegations in the complaint, "it has permitted an amendment to the complaint and must proceed accordingly." Id. at 479-80. The court must also consider whether the expansion prejudices the defendant, and whether an adjournment or other remedy is warranted.

> To be sure, some defendants will know full well the history that plaintiff recites and some parties will be well-prepared regardless of whether the testimony technically expands upon the allegations of the complaint. Others, however, will not, and in all cases the trial court must ensure that defendant is afforded an adequate opportunity to be apprised of those allegations and to prepare.
>
> [Id. at 480.]

Although neither B.M. nor J.D. addressed Rule 4:9-2, those decisions are consonant with the principles set forth in the rule, which permits the amendment of complaints to conform to the evidence. First, the failure to object tends to support permitting a party to introduce new issues or claims. "When issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order." R. 4:9-2 (emphasis added). Second, a formal amendment is not necessary. "Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party . . . ; but failure so to amend shall not affect the result of the trial of these issues." Ibid. (emphasis added).

Finally, if there is an objection, then the court should freely allow amendment if the objecting party would not be prejudiced, and should grant a continuance if that would be sufficient to enable the objecting party time to prepare.

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would be prejudicial in

> maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.
>
> [Ibid.]

See Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 457 (1998) (stating power of amendment should be liberally exercised absent undue prejudice).

Applying these principles, we discern no basis to disturb the court's finding of neglect on due process grounds. The verified complaint did not include the three "home alone" incidents among the many specifically identified in the complaint and described in Division documents. However, C.C. was generally apprised of potential proofs that the children were left alone. In compliance with the court's pre-trial order, the Division advised the court and defendant that it sought a finding that C.C. "repeatedly failed to arrange appropriate supervision for her children with a willing caretaker" and a separate finding that "if an appropriate caretaker was available, [C.C.] failed to notify that individual that they were being left in a caretaking role . . . ." The first requested finding encompassed leaving the children home alone when no appropriate caretaker was available.

Furthermore, C.C.'s counsel did not object to G.C.'s or M.C.'s testimony about the "home alone" incidents. C.C. claims she did

object, mistakenly relying on her trial counsel's objection to a line of questioning involving an incident when one of the children apparently fell out of bed and M.C. had to assist in C.C.'s absence. First, the questioning did not involve one of the "home alone" incidents. Second, defense counsel objected on relevance, not due process, grounds. The Division defended the line of the questioning, contending it demonstrated that an unwilling adult's presence did not obviate all risk of harm.

Unlike in J.D., C.C. did not seek an adjournment, nor did she assert that she was unprepared to respond to the allegations. Although C.C. did not testify or call witnesses, her counsel vigorously cross-examined the two witnesses, noting that neither had previously conveyed these allegations to the Division. Also, unlike the defendant in B.M., C.C. did not need help from an expert to meet unanticipated testimony. In sum, absent proper objection and a showing of undue prejudice, we reject C.C.'s contention that the neglect finding should be set aside on due process grounds.

C.C.'s remaining argument that there was insufficient evidence to support the neglect finding lacks sufficient merit to warrant extended discussion. R. 2:11-3(e)(1)(E). We defer to the trial judge's fact findings that are rooted in the judge's familiarity with the case, opportunity to make credibility judgments based on live testimony, and expertise in family matters.

Cesare v. Cesare, 154 N.J. 394, 411-13 (1998). We will affirm a Family Part's decision when substantial credible evidence in the record supports the court's findings. N.J. Div. of Youth and Family Servs. v. E.P., 196 N.J. 88, 104 (2008). When reviewing abuse and neglect cases, we consider the totality of the circumstances. N.J. Div. of Youth and Family Servs. v. P.W.R., 205 N.J. 17, 39 (2011). However, we are not bound by the trial court's legal conclusions. N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 183 (2010).

Given that deferential standard of review, we conclude there was ample support for the trial judge's finding that C.C. failed to exercise "a minimum degree of care . . . in providing [her children] with proper supervision," and thereby created a "substantial risk" of harm. See N.J.S.A. 9:6-8.21(c)(4)(b). C.C. left her three children, all under five and the youngest under a year old, home alone and, in one case, two of them alone in the bathtub. That C.C. may have done so briefly, or had been close by, but outside the residence, did not mitigate the risk.

C.C.'s actions are far more egregious than those of the parent in Department of Children and Families v. T.B., 207 N.J. 294 (2011), upon which she misplaces reliance. In a single isolated incident, the mother in T.B. presumed – negligently – that the child's grandparents were in the home, based on the presence of

their car in the driveway and their typical schedule. Id. at 309. By contrast, there is no evidence that C.C. presumed the presence of adults. Furthermore, unlike in T.B., C.C.'s actions were not "totally out of the ordinary." Id. at 310. She left the children home alone on three occasions, she repeatedly left the children home with unwilling or unnotified adults, and she continued to violate the Division's safety protection plan.

Under the totality of these circumstances, the trial court was justified in finding that C.C.'s conduct was "willful and wanton" so as to support a finding of neglect. See G.S. v. Dep't of Human Servs., 157 N.J. 161, 178 (1999); N.J. Div. of Youth and Family Servs. v. A.R., 419 N.J. Super. 538, 543 (App. Div. 2011).

II.

We turn next to the guardianship appeal. "A parent's right to enjoy a relationship with his or her child is constitutionally protected." In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999). In order to overcome this fundamental right, the Division must satisfy the four-factor best interests test, as set forth under Title 30, by clear and convincing evidence:

> (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).]

See also N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 604-11 (1986) (setting forth the standards of proof for termination of parental rights cases). The four factors are interrelated. K.H.O., supra, 161 N.J. at 348. Factors one and two in particular overlap. In re Guardianship of DMH, 161 N.J. 365, 378-79 (1999).

In their appeal from the June 2016 judgment terminating their parental rights, C.C. and A.B. challenge the trial court's findings regarding each of the four elements of the best interests test. N.J.S.A. 30:4C-15.1(a)(1)-(4). Applying our deferential standard of review, we reject these arguments and affirm substantially for the reasons set forth in Judge Bernadette DeCastro's written opinion. We limit ourselves to the following additional comments.

In challenging the court's findings under factors one and two, both defendants contend the Division failed to prove actual or significant risk of harm. C.C. contends the court erred in depreciating her trial testimony that she had obtained stable housing and employment. A.B. argues the court gave undue weight to his use of marijuana, housing instability, and poverty. We disagree.

"Serious and lasting emotional [and] psychological harm to children as [a] result of the action or inaction of their biological parents can constitute injury sufficient to authorize the termination of parental rights." In re Guardianship of K.L.F., 129 N.J. 32, 44 (1992). "A parent's withdrawal of that solicitude, nurture, and care for an extended period is in itself a harm that endangers the health and development of the child." DMH, supra, 161 N.J. at 379. In particular, "[t]he lack of a permanent, safe, and stable home" may warrant termination of parental rights. Id. at 383. The absence of physical abuse or neglect is not conclusive; the court must also consider the potential for serious psychological damage. A.W., supra, 103 N.J. at 605; N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 440 (App. Div. 2001), certif. denied, 171 N.J. 44 (2002); In re Guardianship of R.G. and F., 155 N.J. Super. 186, 194 (App. Div. 1977).

Prong two focuses on parental unfitness. K.H.O., supra, 161 N.J. at 352. This factor "is aimed at determining whether the parent has cured and overcome the initial harm that endangered the health, safety, or welfare of the child, and is able to continue a parental relationship without recurrent harm to the child." Id. at 348. "[T]he second prong may be met by indications of parental dereliction and irresponsibility, such as the parent's continued or recurrent drug abuse, the inability to provide a stable and protective home, [and] the withholding of parental attention and care . . . ." Id. at 353.

Here, the record contains ample evidence supporting the trial court's determination that the children will continue to be endangered by the parental relationship, and that neither parent is able to eliminate that danger and provide a safe and stable home. For almost three years, the children remained in their grandmother's care and custody, while neither C.C. nor A.B. provided even "minimal parenting" to their children. See DMH, supra, 161 N.J. at 379. A.B. declined to present himself as a custodial parent when the children were first removed from C.C.'s care in October 2013. Both parents allowed extended periods of time to pass without seeing their children at all. M.C. testified about the emotional impact that defendants' inconsistent visits have had on the children. For instance, one child became upset

when C.C. left his birthday party, allegedly to get a gift from her car, and never returned; and when A.B. failed to appear as promised for a child's school field trip. Both C.C. and A.B. failed to complete psychological evaluations or substance abuse evaluations, despite numerous appointments. C.C. completed a parenting skills program, but she did so more than a year-and-a-half after it was ordered.

We defer to Judge DeCastro's credibility determination, which gave little weight to C.C.'s assertion that she achieved stability. Notably, neither C.C. nor A.B. provided documentary proof of employment, despite multiple court orders requiring it. We also reject A.B.'s argument that the court placed undue weight on his drug use and financial circumstances. The court's focus was on A.B.'s inability to provide a safe and stable home.

As for prong three, the record clearly supports the court's determination that the Division made diligent efforts to provide services for the parents. The court must assess the adequacy of the Division's efforts "in light of all the circumstances of a given case." DMH, supra, 161 N.J. at 393. The Division is only required to provide reasonable services; a parent's failure to become fit to care for his or her children "is not determinative of the sufficiency of [the Division's] efforts . . . ." Ibid.

The Division provided numerous services for the parents, but defendants were largely non-compliant. In addition to the parenting skills training that C.C. eventually completed, the Division offered homemaker services to A.B., which he refused, and to C.C., which she misused; substance abuse evaluations, which the parties failed to complete or follow; and psychological and bonding evaluations, which the parties failed to attend or complete. The Division also provided each with monthly bus passes and case-aides to personally drive them to scheduled appointments, and assisted them in visiting their children.

We discern no merit in C.C.'s argument that the Division was obliged to increase visits or grant unsupervised visits, once she secured stable housing. Before the children's removal in October 2013, C.C. repeatedly left them alone, or with unwilling or unnotified adults. She failed to complete psychological and substance abuse evaluations to demonstrate she was ready and fit for unsupervised visits. She also failed to present documentary proof of employment or her living situation. Under these circumstances, the Division was not obliged to offer C.C. unsupervised, overnight parenting time as part of its reasonable efforts.

We are also unpersuaded by A.B.'s argument that the Division failed to consider his sisters as alternative caregivers to M.C.

The Division is obliged to search for, and assess "relatives who may be willing and able to provide the care and support required by the child." N.J.S.A. 30:4C-12.1(a). However, "there is no presumption favoring the placement of a child with such relatives." N.J. Div. of Youth and Family Servs. v. J.S., 433 N.J. Super. 69, 82 (App. Div. 2013), certif. denied, 217 N.J. 587 (2014). Moreover, there is no evidence to suggest that either sister was willing and able to care for the children.

Lastly, both parents challenge the court's prong four finding that termination of parental rights would not cause more harm than good. Both highlight the fact that the Division did not offer an expert opinion that compared their bonds with the children against M.C.'s. Generally, "the [Division] should offer testimony of a 'well qualified expert who has had full opportunity to make a comprehensive, objective, and informed evaluation' of the child's relationship with both the natural parents and the foster parents." N.J. Div. of Youth and Family Servs. v. M.M., 189 N.J. 261, 281 (2007) (citation omitted). However, defendants should not be heard to complain about the absence of expert testimony, as they obstructed the presentation of such evidence by their repeated failure to submit to psychological evaluations. Cf. N.J. Div. of Youth & Family Servs. v. A.R., 405 N.J. Super. 418, 440 (App. Div.

2009) (stating "we can envision very few scenarios in which comparative evaluations would not be required").

Some background here is necessary. C.C. appeared for an initial session as part of a psychological evaluation by the Division's expert, Robert J. Miller, II, Ph.D., but failed to return for its completion or for a bonding evaluation. A.B. may have appeared for a bonding evaluation, but not for a psychological evaluation.[2] M.C. appeared for the bonding evaluation. Dr. Miller explained in his report that he could not offer opinions regarding the parents' psychological or parental functioning due to their lack of cooperation.

At a pretrial hearing, the Division offered the report for the sole purpose of demonstrating at trial the parents' lack of cooperation. C.C.'s counsel objected to the admission of Dr. Miller's opinions. A.B.'s counsel joined in a general objection to any embedded hearsay in Division documents, which included Dr. Miller's opinions. See N.J.R.E. 808. However, on the first day

[2] We note a discrepancy in the documentary record. According to a January 13, 2016 contact sheet, a caseworker transported the three children and A.B. to Dr. Miller's office for an evaluation on January 7, 2016. However, Dr. Miller's April 9, 2016 "Forensic Psychological and Bonding Evaluation" report listed A.B. as a "no show" for January 7, 2016.

of trial, the deputy attorney general stated she did not intend to offer Dr. Miller's report into evidence after all.[3]

Notwithstanding this background, A.B. relies on Dr. Miller's recorded impressions of the bonding evaluation with M.C. to support his challenge of the Division's prong four showing. We reject the argument because Dr. Miller's impressions were not in evidence. Indeed, one way or another, both defense counsel objected to the admission of Dr. Miller's opinions.

In the absence of expert testimony, Judge DeCastro credited the testimony of the Division's caseworker that the children were well-adjusted, well-cared for, and happy in their grandmother's home. The court gave little weight to the testimony of C.C.'s paramour that the children became upset when their visits with their mother ended, and that they wanted to go home with her. The court found more credible that the parents had "over and over again disappointed their children by missing visits, leaving visits without explanation, and not showing up when their children needed them the most."

[3] C.C.'s attorney then responded that the report was admissible as a consultant's report under Rule 5:12-4(d), apparently for the purpose of introducing the hearsay statements C.C. made to the evaluator, but "not the diagnostics." The court reserved decision. Notably, in its list of items admitted into evidence accompanying her order, the court included the report, but there is no indication that it was ever offered for the purpose of introducing Dr. Miller's opinions or "diagnostics."

In any event, the court need not, and Judge DeCastro did not, find that there was no bond or emotional connection between the children and their parents. Prong four does not require "a showing that no harm will befall the child as a result of the severing of biological ties." K.H.O., supra, 161 N.J. at 355. The court's prong four determination involved the choice between two options: (1) terminating parental rights followed by adoption by the grandmother who had served as a capable, loving caregiver in a stable home; or (2) continuing the uncertainty and lack of permanency in the children's lives, without any demonstrated likelihood that C.C. or A.B. would become fit to parent in the foreseeable future. We discern no error in the court's conclusion that termination would not do more harm than good.

Affirmed.