RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1766-16T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.B.,

Defendant-Appellant,

and

D.G.,

Defendant.

IN THE MATTER OF M.B.,

a minor.

Submitted May 8, 2018 – Decided May 16, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FN-20-0010-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Ifeoma A. Odunlami, Designated Counsel, on the brief).

Gurbir S. Grewal, Attorney General, attorney; Jason W. Rockwell, Assistant Attorney General, of counsel; Tarabeth LeFurge, Deputy Attorney General, on the brief.

Joseph E. Krakora, Public Defender, Law Guardian, attorney; Melissa R. Vance, Assistant Deputy Public Defender, on the brief.

PER CURIAM

Defendant J.B. appeals from an order entered by the Family Part on February 3, 2015, finding she abused or neglected her minor child, M.B. The Law Guardian supported the finding in the trial court and, on appeal, joins the New Jersey Division of Child Protection and Permanency (Division) in urging us to affirm. Having reviewed the record in light of the contentions advanced on appeal, we affirm.

I.

By way of background, J.B. became known to the Division on October 7, 2011, when at around midnight, the Rochelle Park police reported that J.B. and then two-year-old M.B. were in the lobby of a local hotel, and apparently had no place to go. The Division's worker investigated the referral, and attempted to provide J.B. with assistance. The following day, after additional efforts to find housing for J.B. and M.B. were unsuccessful, the Division removed the child from J.B.'s custody and care.

On October 12, 2011, the Division filed a verified complaint and order to show cause, pursuant to N.J.S.A. 9:6-8.21 and N.J.S.A. 30:4C-12, seeking the custody, care and supervision of the child. In February 2012, the court conducted a fact-finding hearing to determine whether J.B. had abused or neglected M.B. The judge found that M.B. was an abused or neglected child, as those terms are defined in N.J.S.A. 9:6-8.21(c)(4), because J.B.: failed to use available resources to maintain appropriate housing; did not immediately seek welfare's assistance in having her utilities turned back on; decided to leave Paterson, where social service agencies were available to her; failed to secure appropriate food and necessities for the child, even though she had available resources to do so; did not adequately supervise the child; failed to properly clothe two-year-old M.B. even though she had clothes for her; and did not provide appropriate information about family resources to the Division's representatives.

The judge noted there were no signs of physical abuse, such as scars or marks, and the child appeared well when the Division's workers saw her. The judge determined, however, that J.B. had placed the child at risk of harm. The judge accordingly entered an order dated February 9, 2012, finding J.B. had abused or neglected the child. J.B. appealed, and we affirmed in an

unpublished opinion. N.J. Div. of Child Prot. & Permanency v. J.B., No. A-2761-12 (App. Div. June 18, 2014) (slip op. at 10).

J.B. complied with services, including a Mentally Ill, Chemically Addicted (MICA) treatment program. On January 3, 2013, the court dismissed the litigation after M.B. was returned to J.B.'s custody and the court found the conditions requiring M.B.'s removal had been remediated.

On December 11, 2013, the Division was advised that J.B. set fire to her home and was psychiatrically hospitalized. J.B. arranged for M.B. to be cared for by a maternal aunt, J.M., while J.B. was in the hospital.

Following J.B.'s release from the hospital, on December 24, 2013, the Division received a referral from the Roselle Police Department reporting that M.B. was walking around unclothed and unsupervised. J.B. advised she left M.B., who was napping, with her eleven-year-old brother while she went to buy cigarettes.

As a result of these December referrals, J.B agreed to engage in substance abuse counseling and medication monitoring. J.B. also continued to receive mental health services and was assigned a Catholic Charities' Integrated Case Management Services (ICMS) worker.

II.

The present appeal arises out of an incident that occurred on July 3, 2014. The Division received a referral from ICMS that J.B. was having mental health issues and "acting bizarre." J.B.'s ICMS case manager, Laryssa Lukiw, reported that J.B. "did not look good" and she had found J.B. "having a conversation with herself" and "laughing and crying" repeatedly for "no reason." Lukiw informed the Division that J.B. was diagnosed with bipolar disorder, was not taking care of herself, was not feeding M.B. or herself, and there was little food in the home. Lukiw further advised that J.B. would be taken to Trinitas Hospital, and although there was another "family member at the home, . . . she [was] not willing to take the child without receiving money from [the Division]."

Division caseworkers responded to the home where they met with Lukiw and J.M. and observed M.B. J.M. also advised that J.B. suffered from bipolar disorder, and she had stopped taking her medication eight months earlier. J.M. visited the home daily to make sure J.B. and M.B. were "doing okay." The workers observed that the home was unkempt and disorganized, there was rotten food on the floor, and there was limited food, including rotten milk, in the refrigerator. The workers were unable to find any of M.B.'s clothes in the home, and J.M. reported J.B. "had stop[ped] cleaning

her house a couple of months ago." The Division conducted an emergency removal and placed M.B. in J.M.'s care.

Division workers met with J.B. at Trinitas Hospital on July 8, 2014. The workers observed that J.B. appeared to be coherent, in good spirits, and respectful. J.B. admitted she was talking and laughing hysterically five days earlier. When questioned about the allegation that she was rolling on the grass, J.B. responded, "What? I can't have a picnic now?" J.B. further admitted she had not been taking her medication or attending therapy for her mental health problems. J.B. stated she relied on J.M., a Division worker, and Lukiw for food and a phone. She also reported, "I neglect myself, but not [M.B.]."

The Division filed a verified complaint and order to show cause seeking custody, care, and supervision of M.B. On July 8, 2014, the court approved the Division's removal of M.B. and granted the Division temporary custody of M.B. due to J.B.'s mental health issues and hospitalization. The court continued custody of M.B. with the Division at the return of the order to show cause on July 31, 2014.

On October 1, 2014, a case management review hearing was held and the court was notified that J.B. had been discharged from mental health treatment, but failed to follow through with aftercare. She had obtained and then lost employment, and admitted

to her caseworker and ICMS worker that she "had been off her medication for a few days." The court ordered J.B. to attend mental health treatment, and visitation was to be allowed "on a liberal basis," but "supervised by the caretaker." On December 15, 2014, it was reported that J.B. was "doing well," in her treatment and was participating in supervised visits with M.B.

The fact-finding trial took place on February 3, 2015. Three witnesses testified for the Division: Division intake worker Maritza Gill, Division supervisor Olivia Yearns, and ICMS case manager Lukiw. Prior to the start of the hearing, Lukiw testified that she attempted to bring J.B. to court that day, but J.B. refused to attend. Lukiw explained she worked with the "very mentally ill," and she provided services to J.B. at least once a week. She planned on serving as J.B.'s "social support" during the hearing. With the consent of all counsel, the trial proceeded in J.B.'s absence.

Gill testified with respect to the July 3, 2014 incident that resulted in M.B.'s removal. Lukiw called Gill from J.B.'s home and reported that on her arrival she found J.B. "talking to herself. She was crying, laughing hysterically and repeatedly for no reason." It also appeared to Lukiw that J.B. "was not taking care of [M.B.'s] hygiene and that she was not feeding [M.B.]."

Gill responded to the home where she met with other Division workers who advised that M.B. was taken to "Trinitas Hospital due to the fact that she had a mental health breakdown." Gill observed that M.B. "appeared to be healthy . . . and that she was fed." J.M. agreed to care for M.B., "but she said she was not going to do it without the Division assisting her financially."

Photographs taken by Gill depicting the dirty and messy conditions inside the home were admitted in evidence at the hearing. Gill also recounted the details of her July 8, 2014 meeting with J.B. at Trinitas Hospital. At the conclusion of the investigation, the Division substantiated J.B. for neglect "[b]ecause there was no food in the house and because [of] her mental health."

Yearns testified regarding the Division's involvement with the family, including the October 2011 incident that led to the prior finding of abuse and neglect, and the two December 2013 referrals. Due to those referrals, J.B. was supposed to be complying with substance abuse counseling, medication monitoring, and mental health services. However, as of July 2014, when M.B. was again removed from the home, J.B. was not compliant with any of those services.

According to Yearns, in August 2014, the Division referred J.B. for a psychological evaluation and another substance abuse

evaluation. J.B. was also required to continue with services that were already in place with ICMS. However, J.B. did not attend mental health services and was non-compliant with two substance abuse programs despite efforts by the Division to assist J.B. with those services.

At the conclusion of the hearing, the trial judge found the Division satisfied its burden of demonstrating that M.B. was an abused or neglected child pursuant to N.J.S.A. 9:6-8.21(c)(4). The judge found a continued pattern of J.B.'s lack of compliance with services put into place to assist her, both before and after M.B.'s July 2014 removal from the home. The judge noted the importance of the December 2013 referrals, which "dovetail[ed] into the July 2014 referral." Specifically, the judge found "[a]t the time of the July 2014 referral, services were already being attempted, and they were ignored and rejected by [J.B.]" and that J.B. "ignored the services [and] that put her in position in July [2014] to be inadequately prepared to be a parent." The "bottom line," according to the judge, was that as a result of J.B.'s lack of compliance with services, "the child wasn't properly attended to."

Thereafter, the trial court held permanency hearings and compliance reviews on May 13, August 19, and October 26, 2015, and on January 27, April 20, and July 20, 2016. On August 15, 2016,

the court rejected the Division's permanency plan, which included the termination of J.B.'s parental rights followed by adoption. However, on September 13, 2016, the court approved the Division's permanency plan, which included the termination of J.B.'s parental rights, stating: "we've reached a point . . . where I think it's in the best interest of [M.B.] . . . to move forward with some planning that would include . . . terminating parental rights."

On November 1, 2016, the Division filed a guardianship complaint. On November 9, 2016, the judge terminated the protective services litigation at the request of the Division. This appeal followed.

III.

J.B. argues that M.B. was not actually harmed, and that the Division failed to present sufficient evidence to prove the child was at substantial risk of harm. She further contends the trial judge improperly relied on N.J. Div. of Child Prot. & Permanency v. M.C., 435 N.J. Super. 405 (App. Div. 2014), in finding abuse or neglect. Finally, she argues the court should have dismissed the Title Nine action and continued the case under Title Thirty. We do not find these arguments persuasive.

We begin with a review of the applicable legal principles that guide our analysis. The Division brought this case under Title Nine, N.J.S.A. 9:6-8.21 to -8.73. Title Nine sets forth the

controlling standards for abuse and neglect cases. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 31 (2011). Title Nine's main precept is to protect children from circumstances and actions that threaten their welfare. G.S. v. Dep't of Human Servs., 157 N.J. 161, 176 (1999) (citing State v. Demarest, 252 N.J. Super. 323, 331 (App. Div. 1991)).

A fact-finding hearing must be held to determine whether a child is abused or neglected. N.J.S.A. 9:6-8.44. An abused or neglected child is one who is less than eighteen years of age and

> whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court[.]
>
> [N.J.S.A. 9:6-8.21(c)(4).]

"[A]ny determination that the child is an abused or neglected child must be based on a preponderance of the evidence and . . . only competent, material and relevant evidence may be admitted." N.J.S.A. 9:6-8.46(b). While the Division must demonstrate "the probability of present or future harm" to the child, "the court 'need not wait to act until a child is actually irreparably

impaired by parental inattention or neglect.'" N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004) (quoting In re Guardianship of DMH, 161 N.J. 365, 383 (1999)).

A minimum degree of care, as required by N.J.S.A. 9:6-8.21(c)(4), is less than a duty of ordinary care; it is something more than ordinary negligence and refers to grossly or wantonly negligent conduct, but not necessarily intentional conduct. G.S., 157 N.J. at 178. The essence of gross or wanton negligence is that it "implies that a person has acted with reckless disregard for the safety of others." Id. at 179. Thus, "a guardian 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." Id. at 181. The analysis does not focus on the intent of the parent or guardian, but rather the resulting injury, or resulting risk thereof, to the child. Id. at 176-77.

Abuse and neglect cases are fact sensitive and "[e]ach case requires careful, individual scrutiny" as many cases are "idiosyncratic." P.W.R., 205 N.J. at 33. The court must look at the totality of the circumstances in making its findings. Id. at 33-34 (citing N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 345 (2010)).

Although no physical abuse or neglect is alleged here, the mental illness of a parent may create an environment in which the parent is incapable of safely caring for his or her children. N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 439 (App. Div. 2001); see also N.J. Div. of Youth & Family Servs. v. I.Y.A., 400 N.J. Super. 77, 94 (App. Div. 2008) (noting "a psychiatric disability can render a parent incapable of caring for his or her children."). "That the parents may be morally blameless is not sufficient to tip the scales in their favor." A.G., 344 N.J. Super. at 438. Nonetheless,

> [m]ental illness, alone, does not disqualify a parent from raising a child. But it is a different matter if a parent refuses to treat his [or her] mental illness, the mental illness poses a real threat to a child, and the other parent . . . is unwilling or incapable of following court orders to shield [his or] her child from that danger.
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> [N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 450-51 (2012).]

The court "must consider the potential for serious psychological damage to the child inferential from the proofs." In re Guardianship of R.G. & F., 155 N.J. Super. 186, 194 (App. Div. 1977). Where a direct causal link exists between a parent's mental illness and neglect of his or her children, a failure to exercise the requisite degree of minimum care may be found. N.J.

Div. of Youth & Family Servs. v. C.M., 181 N.J. Super. 190, 202 (Camden Cty. Ct. 1981).

The scope of our review of a trial court's factual findings is limited. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278 (2007). These findings may not be disturbed unless "'they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974) (citation omitted). Moreover, "'[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding.'" M.C. III, 201 N.J. at 343 (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)) (alteration in original). "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 legal conclusions and the application of those conclusions to the facts are subject to plenary review. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Having reviewed the record, we conclude the proofs were sufficient for the Family Part to find by a preponderance of the evidence that J.B. neglected M.B. by continually failing to accept and complete treatment for her mental disorders. On December 11, 2013, J.B. set fire to her home while trying to teach M.B. how to cook and was psychiatrically hospitalized. Approximately two weeks later, M.B. was found walking around unclothed and unsupervised. Although J.B. agreed to continue receiving mental health services as a result of these referrals, the undisputed proofs show she stopped attending therapy and discontinued her medication several months before the July 3, 2014 incident, during which M.B. was present. That incident resulted in a second psychiatric hospitalization, and M.B. was again placed with J.M., with the Division's financial assistance. When Division workers arrived, the home was unsanitary, there was little food to eat, and the workers were unable to locate any of M.B.'s clothes.

The evidence establishes that, due to J.B.'s refusal to treat her mental illness, she was unable to care for herself or her child. As a result, M.B. was placed at substantial risk of harm.

It is true, as J.B. contends, that the trial judge specifically referenced M.C. in concluding at the fact-finding hearing that the Division established abuse or neglect by a preponderance of the evidence. In M.C., 435 N.J. Super. at 419,

the panel ruled that "imminent danger" and risk of harm must be evaluated as it exists at the time of the fact-finding hearing. The panel stated: "In our view, the Legislature's decision to require proof that a child 'is in imminent danger' requires an assessment of the evidence available at the time, which may be different when the complaint is filed than it is at the time of the fact-finding hearing." Ibid.

However, following the trial judge's decision in this case, the New Jersey Supreme Court remanded M.C. for reconsideration in light of its decision in Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 178 (2015). N.J. Div. of Child Prot. & Permanency v. M.C., 223 N.J. 160 (2015). In E.D.-O., the Court rejected the interpretation that proving "abuse and neglect" "requires a finding that the parent's conduct presents an imminent risk of harm to the child at the time of fact-finding rather than at the time of the event that triggered the Division's intervention." E.D.-O., 223 N.J. at 170. The Court noted that in enacting Title Nine, "the Legislature sought to squash the notion of a 'free pass' if the child did not suffer actual harm." Id. at 187. Thus, the court's focus must be on "a parent's conduct at the time of the incident to determine if a parent created an imminent risk of harm to a child." Id. at 189.

In this case, the trial judge considered J.B.'s conduct following the July 3, 2014 incident, properly relying on M.C., which was the controlling law at the time of his decision. Nonetheless, the judge did not solely rely on J.B.'s conduct at the time of the fact-finding hearing in determining that M.B. was in imminent danger. Rather, the judge also considered J.B.'s conduct at the time of M.B.'s removal on July 3, 2014, including the fact that J.B. had ignored services following the December 2013 referrals, which "put her into [a] position in July [2014]" where she was "inadequately prepared to be a parent."

Finally, we reject J.B.'s argument that "the Division's proofs at trial were inadequate to establish abuse and neglect as a matter of law, [and] the trial court should have dismissed the Title Nine action and continued the matter under Title Thirty in order to provide services to the family."

When abuse or neglect is not found, a trial court must dismiss a Title Nine action, but Title Thirty provides an alternative means for providing services to children in need. N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. I.S., 214 N.J. 8, 31 (2013) (citing N.J. Div. of Youth & Family Servs. v. N.D. (In re T.W.), 417 N.J. Super. 96, 109 (App. Div. 2010)). However, as explained above, there is sufficient, credible evidence in the record supporting the trial judge's ruling that

the Division proved by a preponderance of the evidence that J.B. neglected her young daughter. Accordingly, dismissal of the Title Nine complaint in favor of a Title Thirty proceeding was not warranted under the facts presented.

Affirmed.