RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2526-16T2
A-2527-16T2

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

D.C. and D.W.,

Defendants-Appellants.

IN THE MATTER OF D.W., JR., and B.W., Minors.[1]

Submitted February 12, 2018 — Decided March 1, 2018

Before Judges Sabatino, Whipple and Rose.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FN-03-0315-15.

Joseph E. Krakora, Public Defender, attorney for appellant D.C. (Joan T. Buckley, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant D.W. (Andrew R. Burroughs, Designated Counsel, on the briefs).

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[1] We use initials to protect the minors' privacy interests. R. 1:38-3(d)(12).

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Stephanie Kozic, Deputy Attorney General, on the brief).

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

PER CURIAM

After a fact-finding hearing in the Family Part, the court determined that defendants D.C. and D.W., the parents of two then-minor sons D.W., Jr. and B.W.,[2] had committed abuse or neglect in violation of N.J.S.A. 9:6-8.21(c) by housing the sons in a residence that lacked electricity, running water, and other sanitary facilities. The trial judge found the conditions at the house, which had a placard on display declaring it to be an unsafe structure, placed the sons "at imminent risk of substantial harm." In addition, the judge found that "another safe alternative was reasonably available" for housing the sons.

In their consolidated appeal, the parents contend the evidence at the hearing was inadequate to support the trial court's findings. They contend their sons sustained no actual harm, nor had they been imperiled by the risk of any serious harm. The

[2] D.W., Jr. is now emancipated. B.W., who is now age sixteen, was initially placed with an aunt and uncle, but has since been returned to the custody of the parents.

parents stress that during the time frame in question, the sons bathed, washed their clothes, and addressed their hygiene needs at the residence of their maternal grandmother. They further emphasize that school officials had observed their sons to be well groomed, wearing clean clothes, maintaining good grades, and having steady attendance.

As a central theme of their appeal, the parents argue the trial court unfairly penalized them because of their poverty. They stress their financial distress had been compounded by factors beyond their control, including damage to their home caused by Superstorm Sandy and a subsequent fire, the mother's ongoing disability, the father's recent loss of work, and multiple rejections of his application for SSI benefits. In essence, they contend they looked after their sons' needs the best they could while coping with difficult circumstances.

The Division of Child Protection and Permanency ("Division") and the Law Guardian oppose the parents' appeal. They contend the record contains ample credible evidence to support the judge's findings of abuse or neglect, and that the judge did not improperly base those findings upon the parents' impoverished status.

I.

The portion of N.J.S.A. 9:6-8.21(c) relevant to this case defines an "abused or neglected" child as one

> 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 . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so . . . .
>
> [N.J.S.A. 9:6-8.21(c)(4)(emphasis added).]

To make a finding of neglect under this provision, the court must be persuaded that: (1) the child has a physical, mental or emotional condition that is either impaired or in imminent danger of being impaired; (2) such impairment is or would be the result of the parent's failure to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter, education, medical, or surgical care; and (3) the parent is financially able to do so, or he or she can do so through offered aid or other "reasonable means." See Doe v. G.D., 146 N.J. Super. 419, 430 (App. Div. 1976), aff'd o.b., 74 N.J. 196 (1977).

The statute does not require that a child experience actual harm. N.J.S.A. 9:6-8.21(c)(4); see also N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 449 (2012) (explaining that

the Division need not wait until a child experiences an actual injury). Instead, a court may find a child has been abused and neglected if his or her physical, mental, or emotional condition has been "impaired or is in imminent danger of becoming impaired." N.J.S.A. 9:6-8.21(c)(4).

The Supreme Court has instructed that this abuse and neglect standard is satisfied when the Division demonstrates at a hearing by a preponderance of the evidence that a parent has failed to exercise a minimum degree of care. See, e.g., G.S. v. Dep't of Human Servs., 157 N.J. 161, 181 (1999) (citation omitted). A "minimum degree of care" encompasses conduct that was grossly or wantonly negligent, but not necessarily intentional. Id. at 178. Wanton negligence is conduct that was engaged in with the parent's knowledge that injury is likely to result. Ibid. A parent's action or inaction can rise to the level of wanton negligence even if he or she did not intend to cause a child injury. Id. at 179. The Court has thus recognized that a parent should be liable for the foreseeable consequences of his or her actions and inactions. Ibid.

In applying these standards in abuse or neglect cases brought by the Division, our courts must bear in mind that the purpose of Title 9 is "to protect children 'who have had serious injury inflicted upon them' and make sure they are 'immediately

safeguarded from further injury . . . .'" N.J. Div. of Youth & Family Servs v. A.L., 213 N.J. 1, 18 (2013)(quoting N.J.S.A. 9:6-8.8(a)). Therefore, in such cases, the focus is on "promptly protecting a child who has suffered harm or faces imminent danger." Ibid. (citing N.J.S.A. 9:6-8.21(c)(4)).

Appellants appropriately remind us that a parent's "poverty alone is not a basis for a finding of abuse and neglect." N.J. Div. of Child Prot. and Permanency v. L.W., 435 N.J. Super. 189, 195 (App. Div. 2014). In L.W., a mother, who was incarcerated for drugs, received services and had her child returned to her. Id. at 191-92. The mother relocated to Georgia, but later returned to the Division, explaining that she could not find housing. Id. at 192. The children were temporarily placed into foster care. Ibid. When brought to the Division, the children were clean, well-fed, and well-clothed. Ibid. The mother had returned to New Jersey due to a death in her fiancée's family, but did not have the funds to return to Georgia. Id. at 193. The mother was unsuccessful in finding a job or housing. Ibid.

The trial judge in L.W. found the mother was not credible because he did not believe that welfare authorities would have offered a program but deny necessary child care and that the mother was irresponsible in booking a plane ticket with insufficient funds to return. Id. at 193-195. We reversed, finding that the

evidence in the record did not justify the trial judge's finding that the mother was not credible. Id. at 195. We found that the trial judge had improperly assumed that welfare programs function in an optional way. Ibid. We also noted that the mother's poor planning was a side effect of poverty, and that she had made efforts to find housing and employment. Id. at 196. We observed that parents should be encouraged to seek aid without fear of being found neglectful. Ibid. In L.W., the mother had done the responsible thing to seek such aid from the Division. Ibid.

In N.J. Div. of Youth and Family Serv. v. P.W.R., 205 N.J. 17, 37 (2009), the Supreme Court reversed a finding of abuse and neglect that had been based, in part, on the absence of heating in the child's home. The Court recognized that the failure of the Division to offer the parents assistance to remedy the deficient heat was "troubling, particularly to the extent that the deficient central heating component of the home was used as a basis for removing [the child]." Ibid.

The Court distinguished the circumstances in P.W.R. from those in N.J. Div. of Youth and Family Servs. v. K.M., 136 N.J. 546, 550 (1994), in which a finding of abuse or neglect was upheld. Id. at 34. In K.M., the parents had been physically and financially capable of providing for their children's basic needs of food, clothing, and shelter but failed to do so. K.M., 136

N.J. at 550-551. Additionally in K.M., the neglect continued even after the Division had provided assistance and services. Id. at 551-52.

II.

Guided by these principles, we have reviewed the record in this case, according due deference to the expertise of the Family Part and the trial judge's first-hand opportunity to evaluate the factual proofs. We generally defer to the factual findings of the Family Part if they are sustained by "adequate, substantial, and credible evidence" in the record. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014). However, "[w]here 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) (citations and internal quotation marks omitted).

Having completed our assessment of the record in light of these review standards and the applicable law, we affirm the trial court's findings in part and remand in part for additional proceedings.

A.

With respect to the trial judge's determination that the parents placed their minor sons at risk of serious harm, we agree

this finding is supported by substantial credible evidence in the record. Although the sons apparently did not become ill as the result of the lack of working utilities in their parents' home, the trial judge rightly found the unsanitary conditions posed a serious risk of harm. According to the sons, the conditions had persisted "for months[,]" which the judge deemed to be an extensive and unacceptable period of time.

As one graphic example of the conditions, the children were forced to use a makeshift hole in the ground as an outdoor toilet. Although they were able to wash and use a bathroom at their grandmother's residence, that arrangement was not appropriate for an extended period of time. We reject the parents' claim they were penalized simply because of their poverty, as there is no indication the Division would have withheld services had they been requested. We therefore affirm this key aspect of the trial judge's decision, i.e., that the parents had failed to provide their sons with "adequate . . . shelter." N.J.S.A. 9:6-8.21(c)(4).

B.

The second aspect of the judge's findings relates to the statutory criterion of whether the parents had "other reasonable means" to meet their sons' needs. Ibid. On this point the judge specifically found that "another reasonable safe alternative existed in the home of the maternal grandparents, where the

children could have stayed in place of a home without running water or electricity."

As was revealed at subsequent proceedings, it appears the judge's key assumption about the availability of the grandparents' residence may have been mistaken. Information that emerged at a later permanency hearing indicates the grandparents live in an age-restricted community with rules[3] that limit the amount of allowable overnight stays by minors apparently to one month. Hence, the judge's assumption that the sons could have moved in with their grandparents on an ongoing basis may have been incorrect. The judge made no finding that the boys' aunt and uncle, with whom they ultimately were placed after their removal, were a viable and willing alternative for the parents before the time of the Division's involvement.

We are cognizant there is hearsay evidence that in a previous referral, a Division caseworker had observed the children's sleeping arrangements and personal items at the maternal grandparents' residence, and that the parents told Division caseworkers their sons had been staying overnight with the grandparents. However, neither parent testified about this subject, nor about the community rules that allegedly limit to one

[3] The information was presented through an unsworn representation to the court by the Law Guardian.

month the frequency and duration of such overnight stays. Nor did the grandparents or any witnesses from their community testify.

Given the significance of what may have been a mistaken pivotal assumption within the trial court's fact-finding analysis, we are constrained to remand this case to develop the record further on the discrete issue of "reasonable alternatives." The parties are encouraged to adduce further proofs on the subject on remand.

As part of the remand, we invite the parties and the court to delve into whether the parents had deliberately misled caseworkers[4] about material facts, and if so, whether such false statements compel the application of the doctrine of invited error, see N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340-42 (2010), or equitable estoppel, see W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 557 (1989).

Affirmed in part and remanded in part. The remand shall be completed within ninety days. We do not retain jurisdiction.

[4] We do not make such an inference ourselves, as it is conceivable the parents' representations to caseworkers about where the sons were then staying might have occurred during the community's allowable "one-month" visiting period.