

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5334-15T4

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

T.E.,

Defendant-Appellant,

and

V.S.,

Defendant.

IN THE MATTER OF C.B.,

Minor.

Argued December 4, 2017 — Decided January 24, 2018

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Cape May
County, Docket No. FN-05-0082-15.

Janet A. Allegro, Designated Counsel, argued
the cause for appellant (Joseph E. Krakora,

Public Defender, attorney; Janet A. Allegro, on the briefs).

Tara K. Catanese, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Tara K. Catanese, on the brief).

Olivia Belfatto Crisp, Assistant Deputy Public Defender, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Olivia Belfatto Crisp, on the brief).

PER CURIAM

Defendant T.E. (Theresa)¹ appeals from two orders of the trial court: (1) granting joint legal and physical custody of her son, C.B. (Carl), to his biological father, V.S. (Victor), and a resource family, K.D. (Kate) and her husband (collectively the resource family), and (2) terminating the litigation under the FN docket. For the reasons that follow, we reverse and remand.

I.

We discern the following facts from the record on appeal. Carl was born to Victor and Theresa in December 2013. When the Division of Child Protection and Permanency (Division) became involved, Victor and Theresa were not romantically involved, did not live together, and lacked a formal custody arrangement for

¹ We use pseudonyms to protect the identity of the parties and to allow for ease of reference. By doing so, we mean no disrespect to the parties.

Carl. On November 6, 2014, after the police responded to Theresa's house and arrested her for drug charges, they found evidence that Carl had recently been present in the home around drug activity, and notified the Division.

Theresa and Victor signed a safety protection plan (SPP), which required Theresa to be supervised by Victor whenever she spent time with Carl. Soon after, Victor submitted a sample for a drug screening, which returned as clean; Theresa also submitted a sample, which tested positive for marijuana and opiates. Additional Recovery Systems (ARS) reported to the Division that Theresa was discharged from its program twice due to non-compliance, including the continued use of drugs, and was not welcome back.

In November and December 2014, Theresa missed two scheduled substance abuse evaluations. From December 13 through December 19, 2014, Victor attended an ARS inpatient treatment program in Florida, while Carl remained in New Jersey under the supervision of Victor's father.

In early January 2015, the Division received a call from a detox center in Texas, where Theresa had entered and then checked out, against medical advice, to return to New Jersey. Shortly thereafter, the Division confirmed Theresa returned to New Jersey. Theresa repeatedly declined services offered by the Division,

including a substance abuse program, stating she wanted to try to get clean on her own.

Later that month, Theresa attended a substance abuse evaluation and was referred to a treatment program to begin in February 2015. That same month, the Division received reports that Victor was using drugs. He submitted two drug screenings; one returned negative and the other was being sent out for "further testing." Due to these concerns, the Division implemented another SPP, signed by Victor and his father, requiring Victor to be supervised when with Carl. Victor attended a substance abuse treatment program, and was scheduled to attend an intensive outpatient program (IOP) four times a week.

On February 2, 2015, the Division filed a complaint for care and supervision of Carl with restraints. When the parties appeared before the trial court, the judge ordered Theresa to complete an IOP, attend a psychological evaluation, and submit to random drug screenings. The judge also ordered Victor to attend a psychological evaluation, submit to random drug screenings, comply with substance abuse treatment recommendations, enroll in a twelve-step program, attend ninety meetings in ninety days, find a sponsor, obtain a group home, and comply with all recommendations. Both Theresa and Victor consented to these services.

On March 11, 2015, the parties appeared in court and reported they were currently seeking inpatient treatment to address their substance abuse issues. The parties agreed the Division would take custody of Carl, and Kate, would serve as the resource home and a supervisor for any parental visitation. The order setting forth Carl's placement stated there would be no change, absent exigent circumstances, without consent of counsel or court approval.

In April 2015, the parties entered into knowing and voluntary stipulations, accepted by the court, under N.J.S.A. 30:4C-12, that they were a family in need of services. Victor testified he had completed thirty-one days in an inpatient program in Florida, and since being back, he attends IOP three times a week and meetings on days when there is no IOP. Theresa testified she had completed a substance abuse evaluation, an inpatient detox program for seven days, and now attends an IOP program.

On November 4, 2015, the parties appeared in court, and the Division opposed an application by Theresa for unsupervised visitation with Carl, arguing that although she had recently started attending a substance abuse treatment center, she had tested positive throughout October. The Division indicated that if her time at the treatment center went well, it would consider a recommendation to expand her visitation. However, the Division

stated it was ready to expand Victor's visitation to include one night of overnight unsupervised visitation and represented it was pursuing reunification with Victor.

On February 10, 2016, the Division requested and received an extension on the deadline to file for termination of parental rights, because Victor had completed services but was not financially ready to have full custody; both the resource family and Theresa agreed to the extension. Theresa had not been compliant with her IOP, relapsed, and refused drug screenings in January, so she was again denied expanded visitation. Theresa returned positive drug screenings in March and April 2016.

On June 29, 2016, the parties met for a final permanency hearing. The Division declined to maintain custody and requested custody be shared under an arrangement between Victor and the resource family, where Carl's primary residence would be with the resource family, Victor would have unsupervised visitation time, and Theresa would have supervised visitation time. Further, the Division requested the court terminate the litigation, and direct that all future matters be referred to the FD docket. At that time, Victor had been sober and submitted clean screenings for a year, had completed all other services, and had physical custody of Carl four days a week. Although Theresa was compliant with services at that time, the Division was not ready to recommend

unsupervised visitation. However, she could "continue services and make an application in the future when it's appropriate to seek some unsupervised visitation."

That same date, the judge issued his decision terminating the litigation and transferring custody to Victor and the resource family. He declined to hold an evidentiary hearing, as requested by Theresa, stating he was not taking away any of her rights, and she could pursue remedies under the FD docket. Further, since Victor was an appropriate caretaker, and Theresa was not, there was no point in continuing the litigation.

The resulting order granted joint custody to Victor and the resource family, and stated that, while Theresa had recently been compliant with services, it was not and would not be safe to return Carl to her in the foreseeable future because of positive drug screenings in January and March. A separate order terminating the FN litigation indicated that joint legal/physical custody was transferred to Victor and the resource family, with Victor as the parent of primary residence. Theresa was granted supervised visitation² as arranged with the resource family.

This appeal followed.

II.

² On January 26, 2017, Theresa received unsupervised visitation with Carl three times a week.

On appeal, Theresa argues the trial court violated her due process rights by terminating her legal and physical custody rights to Carl without an evidentiary hearing, specifically a dispositional hearing under N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382 (2009).

Ordinarily, "because of the family courts' special jurisdiction and expertise in family matters, appellate courts . . . accord deference to family court fact-finding." Cesare v. Cesare, 154 N.J. 394, 413 (1998). However, "when no hearing takes place, no evidence is admitted, and no findings of fact are made, different principles apply. On those rare occasions, appellate courts need not afford deference to the conclusions of the trial court." G.M., 198 N.J. at 396. In such a case, we conduct a de novo review of the record. N.J. Div. of Child Prot. & Permanency v. S.W., 448 N.J. Super. 180, 189 (App. Div. 2017); D.W. v. R.W., 212 N.J. 232, 245-46 (2012).

Parents have a constitutionally protected right to maintain a relationship with their children. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (citing In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999)). Those rights are fundamentally important, though not absolute, and "must be balanced against the State's parens patriae responsibility to protect the welfare of children." N.J. Div. of Youth & Family

Servs. v. G.L., 191 N.J. 596, 605 (2007) (citation omitted). In balancing those competing concerns, a court must ensure that the statutory and constitutional rights of the parent or guardian are carefully protected. In re Guardianship of J.C., 129 N.J. 1, 10 (1992). "[T]he court's authority to remove children from the custody of their parents must be exercised with scrupulous adherence to procedural safeguards." N.J. Div. of Youth & Family Servs. v. J.Y., 352 N.J. Super. 245, 261 (App. Div. 2002).

In G.M., our Supreme Court mandated that, following a finding of abuse and neglect under Title 9, "[a] dispositional hearing must be held to determine the appropriate outcome of the case." 198 N.J. at 399.

Here, the court made no findings of abuse or neglect under Title 9. Instead, Theresa and Victor stipulated under Title 30 to being a family in need of services. These stipulations are not a substitute for an abuse and neglect proceeding. J.C., 423 N.J. Super. at 267.

In Division of Youth & Family Services v. I.S., the Supreme Court clarified a Family Court judge conducting an abuse and neglect fact-finding hearing may, without a finding of abuse or neglect under Title 9, enter an order continuing the Division's care custody and supervision of a child under Title 30 based on a determination that the court's continued assistance is required

if appropriate procedural due process is satisfied and the requisite evidentiary standards of each statutory scheme are met. 214 N.J. 8, 36-37 (2013). Here, neither such standards outlined under Title 9 nor Title 30 were satisfied.

We have said the requirement for hearings under G.M. may be applied to proceedings involving stipulations under Title 30. See N.J. Div. of Youth & Family Servs. v. N.D. (In re T.W.), 417 N.J. Super. 96 (App. Div. 2010); see also I.S., 214 N.J. at 8.

In N.D., a child was removed from his mother under Title 9, and at the fact-finding hearing, the mother entered into a Title 30 stipulation. 417 N.J. Super. at 101-02. At a permanency hearing, the court declined to allow the mother to "retry the removal," stating she had stipulated to child welfare concerns and to the court's jurisdiction. Id. at 107. After various presentations of testimony, the court considered whether the child could be safely returned to the mother's custody and awarded custody to the father. Id. at 108.

We reversed and remanded, finding the Title 30 stipulation "was not an adequate substitute for a Title 9 fact-finding hearing or sufficient to permit entry of a Title 9 order of disposition." Id. at 110. Thus, "without a finding or stipulation of abuse or neglect, the judge had no authority to enter any order of disposition under Title 9." Ibid. Even if the court had made

Title 9 findings, a G.M. hearing would have been required before placing the child "outside the home of the parent who had custody at the time of removal" Id. at 110-11 (quoting G.M., 198 N.J. at 402).

Here, there were no evidentiary hearings conducted as mandated by G.M. Instead, after hearing the unsworn legal and factual arguments from the attorneys and the parties, the judge ordered both legal and physical custody transferred from the Division to Victor and the resource family.

The Law Guardian urges us to find that the trial judge intended to maintain joint legal custody with Theresa, and only granted joint physical custody to Victor and the resource family. The Law Guardian asserts the trial court was unambiguous in the custodial status in its oral opinion, and thus the language of the order was merely a clerical error.

However, there was nothing unambiguous about the language of the judge's oral opinion regarding the custodial status of the parties. He stated "what we're talking about, is whether today is an appropriate end to the case with [the resource family] sharing custody with [Victor]." In the end, the result was "a joint custody order between [Victor] and the caretakers who've taken care of [Carl] for some 15 or 16 months." Furthermore, the court advised Theresa to pursue remedies under the FD docket.

The orders, meanwhile, explicitly grant joint legal/physical custody to Victor and the resource family, with Victor as the parent of primary residence. The oral statements, when paired with the very clear language of the orders, deprived Theresa of joint custody rights. She was granted only visitation.

Possibly, this transfer of custody without the benefit of a trial or evidentiary hearing was not the result intended by the trial court, and if so, the court must clarify the custodial status of the parties involved. However, if the removal of Theresa's custodial rights was the intended effect, the court must then conduct a full G.M. hearing to determine whether the child cannot be safely returned to her care.

III.

Theresa further argues the trial court erred by relying on the unsworn statements of the attorneys, the parties, and the resource parents in coming to its decision. We agree.

Appellate review of evidentiary rulings of a trial judge are ordinarily under the abuse of discretion standard. "Traditional rules of appellate review require substantial deference to a trial court's evidentiary rulings." Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999) (quoting State v. Morton, 155 N.J. 383, 453 (1998)). "Absent a manifest denial of justice, we do not disturb a trial judge's reasoned exercise of his or her broad

discretion when making relevance and admissibility determinations." N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 622 (App. Div. 2010) (citation omitted). "However, the trial judge has the ultimate responsibility of conducting adjudicative proceedings in a manner that complies with required formality in the taking of evidence and the rendering of findings." J.Y., 352 N.J. Super. at 264. Ultimately, when an evidentiary decision is made without a valid foundation, the trial court's actions constitute an abuse of discretion. See Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010).

In the fact-finding and dispositional hearings required by Title 9, the conclusions of the trial court must be based on "material and relevant evidence," and all "witnesses should be under oath and subject to cross-examination." G.M., 198 N.J. at 401 (citing N.J.S.A. 9:6-8.46(b) and (c)). In Title 30 hearings, "the Division must provide sufficient competent and credible evidence to satisfy the court." N.J. Div. of Youth & Family Servs. v. T.S., 426 N.J. Super. 54, 65 (App. Div. 2012) (citation omitted).

Judicial findings based on unspecified allegations, hearsay statements, unidentified documents and unsworn colloquy from attorneys and other participants erodes the foundation of the twin pillars upon which the statute rests: (1) that no child should be exposed to the dangers of abuse or neglect at the hands

of their parent or guardian; and, commensurately, (2) that no parent should lose custody of his/her child without just cause.

[J.Y., 352 N.J. Super. at 265.]

At the permanency hearing, there were no sworn witnesses, the attorneys made factual representations which were accepted by the court in lieu of sworn testimony, and the resource family addressed the court without being sworn in or subject to cross examination.

Furthermore, the court report was admitted at the last minute, without any established foundation, and over counsel's objection. Under N.J.R.E. 902(a) "[a] document purporting to bear a signature affixed in an official capacity by an officer or employee of the State of New Jersey or of a political subdivision, department, office, or agency thereof" does not require extrinsic evidence to establish its authenticity. It may be that this report qualifies as a business record exception to the general prohibition on hearsay evidence, N.J.R.E. 803(6). However, the court did not hear arguments on this issue and made no findings of fact or law concerning the evidentiary status of this document; it merely accepted the report into evidence, over the objection of counsel. Taken together, the procedures followed and evidentiary decisions of the trial court are not entitled to our deference.

Reversed and remanded. On remand, the court should clarify the custodial status of Theresa and Victor regarding Carl within

forty-five days. If the effect of the court's decision is to deprive Theresa of joint legal custody, a G.M. hearing must be conducted to determine whether or not the child may be safely returned to her custody, upon which only relevant and material evidence may be considered. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION