RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5608-15T2

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

K.B.,

Defendant-Appellant,

and

B.K.,

Defendant.

IN THE MATTER OF Z.E.K.,

A Minor.

Submitted October 12, 2017 – Decided February 16, 2018

Before Judges Haas, Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FN-07-0532-14.

Joseph E. Krakora, Public Defender, attorney for appellant (Dana Citron, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Alexander B. Stockdale, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Caitlin A. McLaughlin, Designated Counsel, on the brief).

PER CURIAM

Defendant appeals from an October 17, 2014 Family Part order, finding that she neglected her then nine-year-old son, Z.E.K.,[1] within the meaning of N.J.S.A. 9:6-8.21(c), by failing to ensure he attended school regularly and on time during the first, second and third grades. The fact-finding order was perfected for appeal by a July 18, 2016 order terminating the litigation. We affirm.

The fact-finding hearing followed the Division of Child Protection and Permanency (Division) executing an emergency Dodd removal of Z.E.K. on April 18, 2014, pursuant to N.J.S.A. 9:6-8.29 and 9:6-8.30,[2] after defendant was hospitalized for exhibiting

[1] We use initials to protect the identity of those involved and to preserve the confidentiality of these proceedings. R. 1:38-3(d)(12).

[2] The Division's removal of a child on an emergent basis without a court order, commonly called a "Dodd removal," is authorized by

"bizarre behaviors[.]" She was diagnosed with psychosis, not otherwise specified, prescribed medications, and directed to undergo ongoing psychiatric treatment. At the time, defendant had sole custody of Z.E.K.[3] The Dodd removal was subsequently upheld by the trial judge, who ordered that Z.E.K. remain under the Division's care, custody, and supervision at the return of the order to show cause on June 2, 2014 and a subsequent review.

At the fact-finding hearing conducted on October 17, 2014,[4] three witnesses testified for the Division, Special Response Unit (SPRU) caseworker Patricia Ransome, investigative caseworker Eliana Pazos, and permanency worker Sharon Miles. Additionally, the Division moved eight exhibits into evidence, over defense counsel's objection, consisting of Division screening and investigation summaries, including a prior Division involvement with defendant in 2013; a 2013 Division contact sheet; defendant's compliance and therapy records; and certified school records for

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the Dodd Act, which, as amended, is found at N.J.S.A. 9:6-8.21 to -8.82.

[3] Defendant had sole custody of Z.E.K. pursuant to a final restraining order entered on her behalf against B.K., Z.E.K.'s father, under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35.

[4] Although B.K. participated in the proceedings, there were no allegations in the Division's complaint against him and he has not participated in the appeal.

Z.E.K. In admitting the exhibits, the judge ruled that any third party statements would be inadmissible. Defendant testified on her own behalf.

At the hearing, Ransome testified that she responded to defendant's apartment on April 18, 2014, after receiving a referral from the mother of one of Z.E.K.'s friends, reporting defendant's bizarre behavior, nonsensical statements, and "glazed" eyes during the boys' sleep over at the reporter's home. Ransome's observations of defendant were consistent with the reporter's account. When Ransome asked defendant about marijuana use, she evaded the question. In addition, although defendant admitted living in the apartment with Z.E.K., who was not there at the time, the apartment had "no furnishings," "no food[,]" and "there was a pile of trash in every room." Ultimately, with defendant's assistance, Ransome located Z.E.K. at her sister's home. After talking to defendant's sister, Ransome transported defendant to the hospital for a mental health assessment. Defendant was later admitted to a psychiatric unit, Z.E.K. was placed with his paternal grandmother, and an investigation ensued.

During the course of the investigation,[5] Pazos obtained collaterals[6] consisting of Z.E.K.'s school records, which raised concerns about excessive absences and tardiness at school. Pazos had reviewed an earlier referral from May 2013 when the Division had substantiated defendant for educational neglect based on Z.E.K. being "absent [thirty-eight] times, and tardy [fifty-nine] times" in the second grade. The 2013 investigation had followed a school referral to the Division that "[Z.E.K.'s] excessive absences and tardiness were causing him to fall behind academically . . . ." Despite meetings with school officials and receiving a referral for services to address these concerns, defendant made no effort to improve Z.E.K.'s attendance. In a February 26, 2013 letter, defendant was notified by the school that "State and district policy consider[ed] students with ten or more unexcused absences to be considered truant[,]" and "lateness to school [was] considered an absence for the time missed."

During the 2013 investigation, defendant had explained to the caseworker that sometimes Z.E.K. did not want to wake up to go to

[5] During the investigation, defendant denied exhibiting any bizarre behavior. However, she claimed "she may have possibly been drugged" and admitted to Pazos that she took "a puff of marijuana the day of the referral[.]" However, a drug screen administered at the hospital was negative.

[6] According to Pazos, the Division routinely utilized collaterals in making findings in the course of an investigation.

school. She had also attributed his excessive absences and tardiness to the weather and her work schedule. As a result, the caseworker developed "a plan" with defendant, wherein defendant agreed to wake Z.E.K. at 6:30 a.m. beginning in September 2013, to ensure that Z.E.K. attended school regularly and timely during the upcoming school year. Thereafter, the case was closed.

When the Division reopened defendant's case as a result of the April 18, 2014 referral for mental health issues, the fact that Z.E.K.'s current school records for the 2013 to 2014 school year showed continued excessive absences and tardiness raised additional concerns because "a pattern was established." Specifically, according to Z.E.K.'s school records, in first grade, Z.E.K. was absent fifty-two times and tardy seventy times. In a second grade progress report, the school indicated that it had met with defendant "to discuss possible retention." In third grade, Z.E.K. was absent twenty-four-and-one-half times and tardy fifty-three times. In a third grade progress report, the school reported that Z.E.K. was below grade level and continuing to fall behind due to his frequent absences and tardiness. As a result, the Division again substantiated defendant for educational

neglect, rather than mental health issues,[7] although the educational neglect had not been the basis for the removal.

When questioned during the investigation about Z.E.K.'s excessive school absences and tardiness, defendant told Miles that "sometime[s] he may have not felt well," "some days he didn't want to go[,]" and some days he was marked late despite only being "a few minutes late . . . ." Defendant also explained that "she just was concerned about [Z.E.K.] at that school" and "wanted him to go to a new school." At the fact-finding hearing, defendant testified that in 2012 when Z.E.K. was in the second grade, the school he attended was over one-half-mile away from her apartment and she had "[t]ransportation issues" getting him to and from school, particularly in bad weather. Although "[t]he school tried to work with [her]," they denied her request for bus transportation because defendant lived less than one mile away from the school, which reportedly amounted to a ten-minute walk.

[7] Defendant was not substantiated for the mental health issues that prompted the April 18, 2014 referral and removal because "there was no[] history" or "evidence that she knew that she was decompensating," and, based on her diagnosis, it could not be determined "that she was aware that she had a mental health issue, and was not treating it." Nonetheless, Miles testified that from the time the case was reopened on April 18, 2014 to July 21, 2014, defendant had not attended any follow-up mental health treatment as directed.

Defendant acknowledged that the school Z.E.K. attended in third grade was "much better." However, Z.E.K.'s attendance record did not improve because defendant "was going through domestic issues at the time . . . ." In addition, defendant claimed she did not learn until much later that "three tardies would be considered absent." Defendant denied being told by the school principal that Z.E.K.'s attendance or academic record could result in his retention.[8] Defendant testified further that when the Division intervened in 2013, she was not offered any assistance. Instead, the Division "gave [her] advice . . . [as] far as [her] scheduling and things like that."

After the hearing, in an oral decision, Judge Stephen J. Bernstein found "the Division ha[d] proven its case by a preponderance of the evidence . . . ." The judge noted that although there was no "basis for substantiating based on" the "bizarre behavior . . . which resulted in the removal," "it was later discovered that, in fact, the issue that resulted in the substantiation a year earlier, . . . the educational neglect was still an ongoing problem that [defendant] ha[d] never really addressed."

[8] Miles testified that since Z.E.K.'s placement with his paternal grandmother, he had been attending school regularly and "doing well."

The judge found it significant that Z.E.K. "was an [eight] or [nine][-]year[-]old kid[,]" as opposed to a teenager, and stated:

> There's no reason that this child was not going to school regularly. . . . [T]he report card is replete with instances of failure to finish work, . . . of having problems, and . . . bad grades. I mean this child needed to get education. And if there's one thing that['s] a parent's obligation, if nothing else, it's to make sure their kid gets to school, gets to school on time, and get's an education so that they have a . . . future life where they can succeed. . . . [T]he Division was already involved, already substantiated for . . . educational neglect, and she repeats the same behavior the following year. This is just not acceptable, this is abuse and neglect.

The judge rejected defendant's explanations as "not believable" and "not credible[.]" The judge described defendant's testimony as "really just excuse after excuse after misunderstanding . . . ." The judge concluded that Z.E.K. suffered "actual harm" due to defendant's "repeated failures to meet his educational needs by her repeated failure to send him to school and her repeated failure to send him to school on time." The judge noted, "more than neglect[,] it is abuse of a child to keep them away from getting a good education." A memorializing order was entered on the same date and this appeal followed.

On appeal, defendant argues that the judge failed to satisfy the requirements of Rule 1:7-4 because he "did not correlate the factual findings to proper legal conclusions[,]" but rather "made a blanket statement that [defendant] committed educational neglect without a reasoned explanation based on the provisions of the statute . . . ." Defendant argues further that the judge never determined "whether [defendant] failed to exercise a minimum degree of care, as required by the statute" and asserts "[t]here is no evidence in the record that she acted with gross negligence or reckless conduct." Instead, according to defendant, she "did not purposely or recklessly encourage the truancy of her child because she lacked the mental capacity to do so" as a result of her "undiagnosed" and "untreated mental illness . . . ." We disagree.

Our task as an appellate court is to determine whether the decision of the family court is supported by substantial credible evidence in the record and is consistent with applicable law. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). We owe particular deference to "the family courts' special jurisdiction and expertise . . . ." Id. at 413. Unless the judge's factual findings are "so wide of the mark that a mistake must have been made[,]" they should not be disturbed, even if we would not have made the same decision had we heard the case in the first instance.

N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting C.B. Snyder Realty, Inc. v. BMW of N. Am., Inc., 233 N.J. Super. 65, 69 (App. Div. 1989)). "It is not our place to second-guess or substitute our judgment for that of the family court, provided that the record contains substantial and credible evidence to support" the judge's decision. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012). "Just as important, the trial court must state the grounds for its disposition." N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382, 401 (2009) (citing N.J.S.A. 9:6-8.51(b)).

Through the admission of "competent, material[,] and relevant evidence," the Division must prove by a preponderance of the evidence that the child was abused or neglected. N.J.S.A. 9:6-8.46(b). In pertinent part, N.J.S.A. 9:6-8.21(c)(4)(a) defines an "abused or neglected child" as a child under eighteen years of age:

> 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 . . . to exercise a minimum degree of care (a) in supplying the child with adequate . . . education . . . though financially able to do so or though offered financial or other reasonable means to do so . . . .

In New Jersey, parents are required to ensure that their children either regularly attend the public schools of the district

in which they reside or receive instruction equivalent to that provided in the public schools. N.J.S.A. 18A:38-25. Attendance of a school age child is compulsory, Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 176 N.J. 568, 641 (2003), and a parent who fails to comply with the attendance requirements "shall be deemed to be a disorderly person . . . ." N.J.S.A. 18A:38-31. "The reference to education contained in N.J.S.A. 9:6-8.21(c)(4)(a) concerns parental encouragement to truancy of a school age child, or other interference with normal educative processes." Doe v. Downey, 74 N.J. 196, 199 (1977) (quoting Doe v. G.D, 146 N.J. Super. 419, 431 (App. Div. 1976), aff'd, 74 N.J. 196 (1977)).

Applying these standards, we affirm the finding of educational neglect substantially for the sound reasons expressed by Judge Bernstein in his oral decision. Contrary to defendant's argument, the judge's factual findings were adequately explained and fully supported by the record. In light of those facts, his legal conclusions are unassailable. The record also fully supports the judge's finding that Z.E.K. suffered harm as a result of defendant's neglect. His school records showed that Z.E.K. was doing poorly in several classes, and was in danger of being retained. Even if this were not the case, however, a court "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." N.J. Dep't of Children &

Families, Div. of Youth & Families Servs. v. A.L., 213 N.J. 1, 23 (2013) (quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)). "In the absence of actual harm, a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm." Ibid. (citing N.J.S.A. 9:6-8.21(c)(4)(b)). That is clearly the case here because Z.E.K.'s poor attendance record placed him at serious risk of suffering an educational deficit.

Defendant argues that her mental illness precludes a finding of educational neglect. Judge Bernstein rejected this argument, and so do we. The existence of a mental illness, whether known or unknown, does not preclude a finding of child abuse or neglect under Title 9. The language in N.J.S.A. 9:6-8.21(c)(4) concerning failure "to exercise a minimum degree of care" has been interpreted by our Supreme Court as referring to "conduct that is grossly or wantonly negligent, but not necessarily intentional" and "reckless disregard for the safety of others . . . ." Dep't of Children & Families, N.J. Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 305-06 (2011) (quoting G.S. v. Dep't of Human Servs., 157 N.J. 161, 177-79 (1999)); see also N.J. Div. of Youth & Family Servs. v. S.N.W., 428 N.J. Super. 247, 254-56 (App. Div. 2012).

Although it is clear that the phrase implies more than simple negligence, it can apply to situations ranging from "slight inadvertence to malicious purpose to inflict injury." McLaughlin

v. Rova Farms, Inc., 56 N.J. 288, 305 (1970). "Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him or her responsible for the injuries" caused. G.S., 157 N.J. at 179 (citing McLaughlin, 56 N.J. at 305).

Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result. McLaughlin, 56 N.J. at 305. Because risks that are recklessly incurred are not considered unforeseen perils or accidents in the eyes of the law, actions taken with reckless disregard for the consequences also may be wanton or willful. Ibid.; Egan v. Erie Railroad Co., 29 N.J. 243, 254-55 (1959). So long as the act or omission that causes injury is done intentionally, whether the actor actually recognizes the highly dangerous character of her conduct is irrelevant. See McLaughlin, 56 N.J. at 305. Knowledge will be imputed to the actor.

Affirmed.