

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0869-22

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

L.B.,

Defendant-Respondent,

and

M.W. and C.M.,

Defendants.

IN THE MATTER OF Ma.B.
and Me.B.,

Minors-Appellants.

Argued January 24, 2023 – Decided February 15, 2023

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FN-20-0058-22.

Nichole Lane, Assistant Deputy Public Defender, argued the cause for appellants (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Meredith Alexis Pollock, Deputy Public Defender, of counsel; Alaina Ramsey, Assistant Deputy Public Defender, of counsel and on the brief).

Sharon A. Walli, Deputy Attorney General, argued the cause for respondent New Jersey Division of Child Protection and Permanency (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Sharon A. Walli, on the brief).

Avris Daniels, Assistant Deputy Public Defender, argued the cause for respondent L.B. (Joseph E. Krakora, Public Defender, attorney; Avris Daniels, of counsel and on the brief).

PER CURIAM

Following a fact-finding hearing, see N.J.S.A. 9:6-8.44, the Family Part judge determined defendant L.B. had not abused or neglected her two sons, eight-year-old Ma.B. (Marcus) and six-year-old Me.B. (Melvin).¹ The judge's September 9, 2022 order set October 3, 2022, for a dispositional hearing. See N.J.S.A. 9:6-8.50.

¹ We use initials and pseudonyms pursuant to Rule 1:38-3(d)(12).

At the start of the dispositional hearing, the judge mistakenly assumed he had made a finding of abuse and neglect against defendant. However, when corrected by counsel, the judge stated, "[W]e're going to just change it into a Title [Thirty] and keep the case opened for the best interest of the children." The court's October 8, 2022 order, however, did not reflect that the court had dismissed the Title Nine complaint or that the litigation had been converted to proceedings under Title Thirty.

Through their Law Guardian, Marcus and Melvin sought leave to appeal from the fact-finding order. We granted their motion, issued an accelerated briefing schedule, and heard arguments.

The Law Guardian contends the judge erred by not finding defendant had abused the children based on her administration of excessive corporal punishment as prohibited by N.J.S.A. 9:6-8.21(c)(4)(b) and relevant precedent. The Division of Child Protection and Permanency (the Division) echoes this argument, asserting that the judge's finding was "manifestly unsupported by and inconsistent with the competent evidence adduced at the factfinding." Both the Law Guardian and the Division alternatively argue that even if the judge correctly determined defendant had not abused or neglected the children, he failed to make the necessary findings to maintain the Division's custody of

Marcus and Melvin by converting the proceedings to litigation under Title Thirty.

Defendant argues the judge properly concluded the Division failed to prove by a preponderance of the evidence that she had abused or neglected her children. Defendant also contends that at the dispositional hearing, the judge orally converted the litigation to a proceeding under Title Thirty so the Division could continue to provide services to the family.

We reverse the judge's order and remand for the entry of an order finding defendant had abused and neglected Marcus and Melvin and for further proceedings consistent with this opinion. We therefore need not address any issues regarding conversion of the litigation to a proceeding under Title Thirty.

I.

Division intake investigator Dawn Greene testified at the fact-finding hearing regarding the circumstances that led to the children's removal from defendant's custody. Greene had responded to a referral involving the family in February 2022, when Marcus was admitted to Trinitas Hospital for psychological evaluation after aggressively acting out at home and "banging his head violently on a glass window." At that time, Marcus reported to Greene that

his mother had hit him with "laptop charger cord"; Greene observed bruising on the child's arm.

While the Division's case remained open, on March 23, 2022, both boys reported to personnel at their respective schools that defendant had hit them the night before. Each school independently notified the Division of the children's allegations. Greene interviewed Melvin at his school. She observed a bruise on the child's head that Melvin said had been caused by defendant striking him. Greene took a photograph of the bruise.

Greene also interviewed Marcus at his school. The child told her that defendant had started hitting him the night before when he began to cry; Marcus said he ran out of his house and when he returned, defendant hit him again using a cord. Greene observed and documented with photographs the bruising and scarring on the child's body, as well as a bite mark on Marcus's upper arm. The photographs were admitted in evidence. Marcus told Greene that he had nothing to eat the night before and stayed awake all night because he was scared defendant would hit him again. Marcus also said he feared for his younger brother if Melvin was left alone at home with defendant.

Greene also interviewed defendant, who admitted she had hit Marcus ten times with an open hand the night before but denied using a cord. When asked

about the bite mark on Marcus's arm, defendant first said Melvin did it. Greene challenged defendant, saying Melvin was too "small." Defendant then said Marcus did it to himself.

The Division arranged for medical evaluations of the children at the Dorothy B. Hersh Regional Child Protection Center (DBH). Felicia Greulich, a pediatric nurse practitioner, saw the children at the DBH on March 25, 2022, and the court accepted her as an expert in the field of child-abuse pediatrics. In addition to physically examining Marcus, Nurse Greulich reviewed the photos taken by Greene of the marks and bruises on his body. She observed a red abrasion on Marcus's head; a laceration behind his ear; abrasions to his neck; a bruise to his lower back; a large circular bruise with small internal abrasions on his upper right arm which Marcus said was a bite mark caused by defendant; multiple bruises on his right forearm; multiple bruises to his legs; and multiple bruises and linear curved marks to his right leg.²

² Nurse Greulich was the first witness at the hearing and also examined Melvin. But the judge excluded her testimony regarding Melvin because Nurse Greulich testified the child "did not want to engage in conversation . . . during the evaluation." The judge concluded that because Melvin had not "report[ed] anything and didn't disclose" any abuse, the evidence was irrelevant and highly prejudicial to defendant. Nevertheless, the judge allowed defense counsel to cross-examine Nurse Greulich and elicit her opinion that she was unable to "make a diagnosis of [suspected] child abuse" as to Melvin. The issue was not

Nurse Greulich said Marcus told her defendant had hit him "a lot of times," he feared defendant, and, in the past, he had seen defendant hit Melvin with her hand and sometimes a cord. Nurse Greulich's diagnosis of Marcus was "suspected child physical abuse and excessive use of corporal discipline." Nurse Greulich opined that the linear curved marks and bruises on Marcus's body were consistent with his version of the events, i.e., they appeared to be caused by a cord, there was no evidence they were self-inflicted, and Marcus could not have sustained his injuries from ten open hand slaps, as defendant claimed.

The court qualified Dr. Sarah Seung-McFarland, Ph.D., a psychologist, as an expert, and she testified about the psychosocial evaluation of Marcus she had conducted on April 21, 2022. She was aware of Marcus's history of repeated tantrums and his past psychiatric hospitalization. Marcus told the doctor that defendant hated him, had hit him with "a belt and a cord" when he "[did not] do something . . . [he was] supposed to do," and had not been feeding him. Dr.

revisited after Greene later testified that Melvin told her defendant also had hit him.

We agree it was error to exclude Nurse Greulich's testimony in this regard, because it was subject to conditional admissibility and would have been admissible after Greene testified. Her testimony and Nurse Greulich's testimony corroborated Melvin's report that defendant had struck him.

McFarland opined that Marcus was a victim of physical abuse and recommended the Division consider alternatives to reunification and that Marcus not be left alone with defendant.

The Law Guardian did not present any witnesses or evidence at the hearing, nor did defendant.³ Immediately following the attorneys' summations, the judge rendered his oral decision.

The judge said the Division was relying "principally" on the out-of-court statements of the children and defendant, which, though admissible pursuant to N.J.S.A. 9:6-8.46(a)(4), were never subjected to cross-examination.⁴ The judge stated "unequivocally that if the[] bruises . . . came from [defendant] hitting her child[ren] with a cord," then he had "no problem saying that that is excessive

³ There was a dispute about some of the documentary evidence the Division sought to introduce. The judge admitted the Division's reports from the earlier February referral, the Division's March 23, 2022 investigative summary, and pictures Greene had taken of Marcus's injuries. The judge excluded photos of Melvin's injuries and the experts' reports. The Law Guardian contends the judge erred in excluding this evidence, citing New Jersey Division of Youth & Family Services v. Robert M., 347 N.J. Super. 44, 68 (App. Div. 2002). Given our disposition, we need not resolve this evidentiary dispute.

⁴ N.J.S.A. 9:6-8.46(a)(4) states: "[P]revious statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence; provided, however, that no such statement, if uncorroborated, shall be sufficient to make a factfinding of abuse or neglect."

corporal punishment." Noting defendant had "an obvious incentive to deny excessive corporal punishment," the judge concluded Marcus also "ha[d] a motive to claim excessive corporal punishment."

Without any specificity, the judge said, "There is evidence that [Marcus] yearned for more material things. He wanted to be returned to a resource family care where he had been before and apparently has more material things in that situation." Focusing on this alleged motive and Marcus's history of behavioral issues and psychiatric problems, the judge reasoned there was "evidence that [Marcus] may have been making the physical abuse allegations up in order to be in a more comfortable material setting." The judge said, "[I]f a child has tantrums and is acting out, that does not excuse excessive corporal punishment, but it does explain or it provides a possible explanation for where these bruises come from. He [is] throwing himself all over the place."

The judge acknowledged there was "plenty of evidence to suspect improper corporal punishment by [defendant]," noting the "significant marks" on Marcus's body "certainly could have come from a cord" or "from the mother whipping her child." The judge questioned, however, whether the bite mark on Marcus's arm evidenced abuse. Finding it "ambiguous" evidence, the judge

speculated it could have been self-inflicted, and he questioned if a mother would "bite her children . . . to use corporal punishment[.]"

Although the judge found Nurse Greulich to be quite credible, he discounted her testimony because "she was relying on what [Marcus] told her was the source of the physical markings." He reached the same bottom line regarding Dr. Seung-McFarland. Her testimony was largely credible he said, but she too was "principally relying upon . . . [Marcus's] statements about the physical corporal punishment abuse."

The judge concluded "the evidence [wa]s in equipoise" and "[i]n the context of this specific case, the children, particularly [Marcus], ha[d] a motive to claim excessive corporal punishment." He entered an order finding that defendant had not abused the children.

II.

Our standards of review are well-known. "We will not overturn a family court's factfindings unless they are so 'wide of the mark' that intervention is necessary to correct an injustice." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448 (2012) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). Appellate courts defer to a trial court's factual findings "because it has the opportunity to make first-hand credibility judgments about

the witnesses who appear on the stand; it has a feel of the case that can never be realized by a review of the cold record." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 342–43 (2010) (quoting E.P., 196 N.J. at 104). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Cesare v. Cesare, 154 N.J. 394, 413 (1998).

However, "[t]here is an exception to th[e] general rule of deference[.]" N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007). "[W]here the focus of the dispute is . . . alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom,' the traditional scope of review is expanded." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188–89 (App. Div. 1993)). "[W]e give no 'special deference' to the court's 'interpretation of the law.'" N.J. Div. of Child Prot. & Permanency v. P.D., 452 N.J. Super. 98, 119 (App. Div. 2017) (quoting D.W. v. R.W., 212 N.J. 232, 245 (2012)).

Title Nine's focus is "not [on] the 'culpability of parental conduct' but rather 'the protection of children.'" N.J. Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 178 (2015) (quoting G.S v. Div. of Youth & Fam. Servs.,

157 N.J. 161, 177 (1999)). The statute's purpose is "to ensure children's rights will be adequately protected by the appropriate courts and social service agencies." N.J. Div. of Youth & Fam. Servs. v. P.W.R., 205 N.J. 17, 31 (2011) (citations and quotation marks omitted).

Pursuant to N.J.S.A. 9:6-8.21(c)(4)(b), an "abused or neglected child" is:

a child less than [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 or guardian . . . to exercise a minimum degree of care . . . (b) 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

[(Emphasis added).]

"Excessive corporal punishment" is not defined by the statute. N.J. Div. of Youth & Fam. Servs. v. S.H., 439 N.J. Super. 137, 145 (App. Div. 2015) (quoting N.J. Div. of Youth & Fam. Servs. v. K.A., 413 N.J. Super. 504, 511 (App. Div. 2010)). Rather, "[a]buse and neglect cases are generally fact sensitive. Each case requires careful, individual scrutiny." P.W.R., 205 N.J. at 33.

We have not hesitated in the past to find the administration of excessive corporal punishment where the defendant used an instrument with such force

that it created visible marks on the victim. See e.g., S.H., 439 N.J. Super. at 146–47 (finding excessive corporal punishment where a mother hit her fifteen-year-old son with a golf club and bit him on the shoulder, causing bruising and marks); N.J. Div. of Youth & Fam. Servs. v. C.H., 414 N.J. Super. 472, 476 (App. Div. 2010) (finding abuse where the defendant mother inflicted excessive corporal punishment by beating her daughter with a paddle in the face, arms, and legs); N.J. Div. of Youth & Family Servs. v. B.H., 391 N.J. Super. 322, 335, 340 (App. Div. 2007) (affirming finding that the mother used excessive corporal punishment when she hit her six-year-old son with a belt in the face and elsewhere, leaving a welt).

Further, "the test for determining excessive corporal punishment [is not] any different when the child has a disability." S.H., 439 N.J. Super. at 149. "While these children may be more difficult to control, present additional challenges to a family, and be unresponsive to traditional forms of discipline, they are entitled to the same protection under Title Nine as non-disabled children." Id. at 149–50.

Here, the judge concluded Marcus's physical injuries were indicative of excessive corporal punishment. We have no doubt they were. However, the judge found the evidence was in "equipoise" as to whether defendant caused the

injuries or whether they were self-inflicted. We agree with the Law Guardian and the Division that the judge's conclusion that the evidence equally supported both scenarios is based on speculation and unsupported by any credible evidence in this record.

"Judges . . . cannot fill in missing information on their own or take judicial notice of harm," much less the cause of that harm. N.J. Div. of Youth & Fam. Servs. v. A.L., 213 N.J. 1, 28 (2013). A "judge's opinion . . . cannot be used to substantiate legal conclusions." N.J. Div. of Youth & Fam. Servs. v. S.I., 437 N.J. Super. 142, 157 (App. Div. 2014). "Instead, the fact-sensitive nature of abuse and neglect cases . . . turns on particularized evidence." Ibid. (quoting A.L., 213 N.J. at 28).

The expert testimony established Marcus was the victim of excessive corporal punishment. Although the judge found both Nurse Greulich and Dr. Seung McFarland credible, he discounted their testimony because it "principally relied" on what Marcus had told them. However, Nurse Greulich observed the actual marks and wounds on Marcus's body, noting that they were on multiple planes and unlikely caused by child's play. She also observed the bite mark on the child's arm. Nurse Greulich rejected any assertion that his injuries were self-inflicted. Nurse Greulich also concluded not only were the injuries consistent

with the child's version of his mother's physical abuse, but the wounds belied defendant's version of only slapping the child with an open hand ten times.

Dr. Seung McFarland was the principal source of information regarding Marcus's prior hospitalization and his behavioral problems. Nevertheless, she reached a diagnosis that attributed the child's problems to the trauma he suffered at defendant's hands. During cross-examination, defense counsel asked the question, "And your basis for your diagnosis of child physical abuse, is that because that's what the child reported?" The judge seemingly forgot the doctor's actual answer: "It's because everyone that I met, including the background information, supported that."

The judge found defendant had a motive to deny the accusations of abuse but also that Marcus had at least an equal "motive to make this up" because he "wants to get out of that house, he wants material things and this is a way to do that." The judge based that finding on Marcus's statements to Dr. Seung McFarland about how angry he was at his mother, and how he enjoyed being in the company of his grandfather and his resource parents because they had internet access and more material things. However, the judge himself first questioned the relevancy of this evidence.

During cross-examination, the judge sua sponte interrupted and asked defense counsel why evidence of Marcus's prior placements was relevant. Counsel explained it showed the child "doesn't want to be with his mother, therefore he's acting out to not be with his mother because they lack the resources. I believe that is a theme in this witness' testimony[.]" The judge responded that the doctor already had "testified that's one of [Marcus's] senses, . . . for whatever it's worth, that point is made, so move on to something else, please." Nevertheless, this "theme" was adopted by the judge as the motive for Marcus falsely reporting abuse by his mother.

Although Nurse Greulich opined unequivocally that Marcus's injuries were not self-inflicted, the judge pointed to the prior February referral, where Marcus, in anger, banged his head against a glass window. He concluded the child might be responsible for his injuries because he was always "throwing himself around." That conclusion was "so wholly insupportable as to result in a denial of justice[.]" C.W., 435 N.J. Super. at 140 (alteration in original) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)).

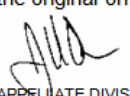
In short, "[t]he record contains no expert evidence or even admissible documentary evidence supporting [the judge's] assertion" that Marcus's injuries were self-inflicted, much less evidence that was equivalent to the substantial

evidence that defendant had inflicted excessive corporal punishment on the child. S.I., 437 N.J. Super. at 157. "Indeed, the record reflects only the judge's opinion, which cannot be used to substantiate legal conclusions." Ibid. We therefore reverse the September 9, 2022 order and remand to the Family Part for entry of an order finding defendant abused Marcus and Melvin. See N.J.S.A. 9:6-8.46(a) ("[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child[.]").

Because the judge made credibility findings, all further proceedings should be conducted before another Family Part judge. See, e.g., Graziano v. Grant, 326 N.J. Super. 328, 349 (App. Div. 1999) ("recogniz[ing] . . . authority to direct that a case be assigned to a new judge upon remand . . . when there is a concern that the trial judge has a potential commitment to his or her prior findings" (citing N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 617 (1986))).

Reversed and remanded. 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