

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3089-22

DEPARTMENT OF CHILDREN
AND FAMILIES,

Petitioner-Respondent,

v.

M.R.,

Respondent-Appellant.

Submitted May 30, 2024 – Decided June 18, 2024

Before Judges Susswein and Vanek.

On appeal from the New Jersey Department of Children and Families, Division of Child Protection and Permanency, Docket No. AUH 21-0237.

Williams Law Group, LLC, attorneys for appellant (Alvin Eugene Richards, III, of counsel and on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Sara M. Gregory, Assistant Attorney General, of counsel; Jessica B. Ort, Deputy Attorney General, on the brief).

PER CURIAM

Defendant M.R.¹ (Mary) appeals the April 17, 2023 State of New Jersey, Department of Children and Families, Division of Child Protection and Permanency (DCF) final decision adopting the Administrative Law Judge's (ALJ) initial decision affirming DCF's substantiation of child neglect and inadequate supervision against her. Because we find no error with the determination that the allegations of neglect of the minor child, A.A. (Anne), are substantiated against defendant, we affirm.

I.

We recount only the salient facts in the record material to our disposition. This appeal pertains to an April 27, 2021 incident, involving defendant and her granddaughter Anne, then one month old. Anne's mother, J.A. (Jane), tested positive for cocaine, oxycodone, fentanyl and marijuana during her pregnancy, and Anne tested positive for cocaine and oxycodone at birth. DCF implemented a safety protection plan (SPP) where defendant and Anne's godmother, E.A.

¹ In accordance with Rule 1:38-3(d)(12), and to protect the privacy of the family at issue in this appeal, we refer to the individuals involved by initials and pseudonyms.

(Ella), were the only two individuals approved to supervise Anne during visitation with Jane. Anne was not to be left alone with her mother.

On April 27, 2021, DCF received a referral from Anne's maternal uncle, E.A. (Earl), alleging defendant violated the SPP by leaving Anne unsupervised in the presence of Jane. Jessica Capasso, Jane's DCF caseworker, and another DCF representative, Angela Fitzgerald, separately responded to defendant's home the same day to investigate the referral and assess Anne's safety.

On June 16, 2021, following an investigation, DCF determined child neglect and inadequate supervision of Anne was substantiated. Defendant appealed, and an administrative hearing was held before an ALJ on December 7, 2022. Capasso testified at the hearing that the SPP included DCF approval of defendant and Ella as the only two individuals who could supervise Anne while she was with Jane. Capasso testified in order for an individual to be an approved supervisor they would need to be vetted by DCF.

Fitzgerald then testified she received a referral from a central hotline with concerns about Anne being left in the care of Jane without approved supervision. When Fitzgerald arrived at defendant's home that evening, Jane was shocked to see her, as Capasso had already visited the home earlier. Fitzgerald testified defendant was also in the home and told her she had been with Anne all day,

asserting she had taken the baby with her to New York because she had a work emergency. Based on Jane's agitated and argumentative behavior, defendant told Capasso "her daughter was under the influence of more than one beer on this date based on her speech and demeanor."

Fitzgerald further testified that while at the house, she had a private conversation with defendant's son, J.K. (John), who had a different story. John told Fitzgerald defendant left the house very early to go to work and left Anne alone with Jane. John also reported "the baby was crying hysterical[ly] and that he did not know how to tend to [her]. So he reached out to [Earl], who was trying to instruct him on how to care for the child."

After considering both accounts from defendant and John, Fitzgerald advised defendant that her story differed from John's. Defendant admitted she lied to Fitzgerald and she actually left Anne with Jane during the day. As a result, Anne was removed from defendant's home and placed in Earl's care.

At the hearing, Earl corroborated Fitzgerald's testimony that he had called DCF on April 27, 2021, after he assisted John over the phone in calming Anne. No one identified any other individual as having been in the house with Anne.

Earl also testified the incident on April 27, 2021, was not the first time defendant had left Anne unsupervised with Jane. Earl testified that, among other

incidents, after Anne was born defendant went on vacation and did not make alternate plans to have someone supervise Jane's parenting of Anne in her absence. Earl also testified he let defendant know if it happened again, he would call DCF and let them know the SPP was being violated.

Defendant then testified on her own behalf that she was present at her residence for part of the morning on April 27, 2021, but "had an emergency and . . . left for a couple of hours." Defendant works as a property manager in New York and testified "one of [her] locations had a fire incident [a]nd [she] had to report to the fire." Defendant confirmed she left the house around 11:00 a.m. and did not return home until about 4:00 or 5:00 p.m. Defendant testified she was not aware her daughter was left alone with Anne and that the baby was left with her husband and John. Defendant conceded both her husband and John were not DCF approved supervisors.

Defendant then testified that April 27, 2021, was the only time Anne was left with Jane without approved supervision and on every other occasion, Jane was supervised by either herself or Ella. Defendant admitted she had lied to the DCF caseworker who visited the home stating "I did say the baby was with me . . . I panicked at that moment . . . I lied. But then I retracted because I knew the consequences that would have happened." Defendant then testified she was

unaware of any concerns that Anne was harmed while in her care by anyone, including Jane.

Defendant's son John testified he was present at the home on April 27, 2021, along with his mother, stepfather, grandmother, and several of his stepfather's workers. John asserted that his mother was at the residence in the morning but left for a work emergency. John also testified his stepfather was supervising Jane while she was in the residence with Anne but "stepped outside one moment . . . to talk to his workers" with a baby monitor.

The ALJ ultimately found the testimony of the DCF workers credible and defendant's and John's testimony not to be credible. The ALJ concluded the findings of neglect of Anne against defendant were substantiated and issued a final decision affirming DCF's final decision. Defendant appealed.

II.

Defendant argues DCF failed to prove by a preponderance of the evidence she neglected or inadequately supervised Anne and the ALJ failed to appropriately weigh the aggravating and mitigating factors in substantiating the finding. Based on our careful review of the record and prevailing law, we affirm.

We "review[] agency decisions under an arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019); see also Melnyk v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist., 241 N.J. 31, 40 (2020) (explaining an administrative agency's decision "is entitled to affirmance so long as the determination is not arbitrary, capricious, or unreasonable"). "An agency's determination on the merits 'will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.'" Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). The party challenging the administrative action bears the burden of making that showing. Lavezzi v. State, 219 N.J. 163, 171 (2014).

"Abuse and neglect cases 'are fact-sensitive.'" Dep't of Child. & Fams., Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 180 (2015) (quoting Dep't of Child. & Fams., Div. of Youth & Fam. Servs. v. T.B., 207 N.J. 194, 309 (2011)). "An appellate court is not in a good position to judge credibility and should not make new credibility findings." State v. Dispoto, 383 N.J. Super. 205, 217 (App. Div. 2006). "A trial judge has the opportunity to judge the

demeanor of the witnesses. Accordingly, the judge's credibility findings are entitled to our deference." Ibid.

Title 9 governs our review of the adjudication of abuse and neglect. See N.J.S.A. 9:6-8.21 to -8.73. Under N.J.S.A. 9:6-8.21(c)(4), an abused or neglected child is

a child 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 (a) 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, or (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; or by any other acts of a similarly serious nature requiring the aid of the court.

"'[M]inimum degree of care' refers to conduct that is grossly or wantonly negligent, but not necessarily intentional." G.S. v. Dep't of Human Servs., Div. of Youth & Fam. Servs., 157 N.J. 161, 178 (1999). "[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.

"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." N.J. Dep't of Child. & Fams., Div. of Youth & Fam. Servs. v. A.L., 213 N.J. 1, 23 (2013). "The legislative history of Title 9, precedent and public policy support the conclusion that a Title 9 inquiry must focus on the circumstances leading up to the injury and on the harm to the child, and not on the [parent or] guardian's intent." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 344 (2010) (alteration in original) (quoting G.S., 157 N.J. at 176). "[W]hether the [parent or] guardian intended to harm the child is irrelevant. . ." Ibid. (second alteration in original). If "a parent or guardian commits an intentional act that has unintended consequences, that action is considered "'other than accidental'" within the meaning of Title 9." Ibid.

Defendant argues DCF failed to meet its burden of proof to establish defendant neglected Anne and improperly grounded its decision on evidence that was not competent, material, or relevant. Defendant posits the ALJ based the decision against defendant solely on the testimony of the two DCF witnesses who testified at the December 7, 2022 hearing without making credibility determinations and failed to consider the testimony of defendant and her witnesses.

We find no error with the ALJ's substantiated finding of abuse or neglect under N.J.S.A. 9:6-8.21 since it was predicated on detailed credibility findings as to the testifying witnesses. We decline to disturb those factual findings grounded in the credible evidence in the hearing record.

The ALJ found that "[d]ue to the conflicts between defendant's testimony, [John's] testimony and the report from [John] relayed in Fitzgerald's testimony, and the physical evidence presented on the record, a determination of credibility [was] required." The ALJ explained Fitzgerald's testimony was credible because "she explained how she supervised the case workers in this matter. At the conclusion of all the reports and interviews, she weighed the aggravating and mitigating factors to determine her findings."

The ALJ further concluded defendant's testimony was not credible as to who was present with Anne on April 27, 2021. The ALJ first recognized that "[defendant] admitted to leaving the infant with [Jane], when she spoke with Fitzgerald, knowing that she should not have." After that, the ALJ referenced contradictory testimony by defendant who "testified that she left [Anne] with her husband . . . and stated that the husband had stepped outside to supervise workers who were doing repairs in the yard and that the husband had taken the baby monitor with him." The ALJ found it was "incredulous as [defendant's]

husband was never mentioned before, not even the night of the incident when [DCF] workers were at her home" and concluded "if he had a baby monitor, he should have heard the child crying and return[ed] to console her." Finally, "[t]he record revealed that [John] had to call his brother to tell him how to console a crying infant."

The ALJ properly concluded defendant knowingly violated the SPP as she later admitted to Fitzgerald she lied about bringing Anne with her to New York because "[she] knew the consequences that would have happened" should DCF uncover her lie. Although there have been differing accounts as to the number of times defendant has left Anne unsupervised with Jane, we discern no error in the ALJ's conclusion that defendant exposed Anne to an unnecessary risk that fell below the minimum degree of care by leaving her unsupervised with Jane.

The credible evidence in the record established defendant did not exercise the minimum degree of care to ensure there was no imminent risk of serious injury to Anne. The record establishes defendant was aware of the need for the SPP to protect Anne and "all parties that were approved on the plan had been made aware of serious drug use by [Jane] prior to the plan even being implemented." It is undisputed that under the SPP, Anne could not be left with Jane absent a DCF approved supervisor. However, on April 27, 2021, defendant

knowingly left Anne in the house unsupervised with Jane, who according to defendant, was under the influence of "more than one beer."

We briefly address the Court's recent decision in N.J. Div. of Child Prot. & Permanency v. B.P., ___ N.J. ___, ___ (2024) (slip op. at 7), reversing a finding of abuse or neglect pursuant to N.J.S.A. 9:6-8.21(c)(4)(a). In B.P., the defendant and her daughter were referred to the New Jersey Division of Child Protection and Permanency (DCPP) after both testing positive for marijuana immediately after the baby's birth. Id. at ___ (slip op. at 8). With the infant still in the hospital, the defendant left and did not return. Id. at ___ (slip op. at 25).

The defendant thwarted DCPP's efforts to locate her and the baby was placed with a resource family. DCPP filed an abuse or neglect action against the defendant arguing she failed to exercise a minimum degree of care in supplying her daughter with food, clothing, and shelter. Id. at ___ (slip op. at 7-8). DCPP commenced a Title 9 action and, after a fact-finding hearing, the trial court entered judgment in favor of DCPP substantiating a finding of abuse and neglect against the defendant. We affirmed. Id. at ___ (slip op. at 14-15).

The Court in B.P. reversed, finding DCPP failed to prove by a preponderance of the evidence the child's "'physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired' and

'[t]he statute does not state that the mere possibility of the child being impaired is sufficient.'" Id. at ____ (slip op. at 27). The Court held that the child did not suffer any actual impairment and was not placed in imminent danger because the defendant left her daughter at a hospital, where she was provided with food, clothing shelter, and medical care. Id. at ____ (slip op. at 26).

Here, the credible proofs in the record establish that defendant engaged in gross and wantonly negligent conduct by placing Anne, then only one month old, in imminent danger of impairment through knowingly allowing Jane to watch Anne without a DCF-authorized supervisor pursuant to the SPP. Defendant's conduct created the foreseeable risk of imminent danger to Anne as Jane left the infant unattended, as evidenced by John finding Anne alone and crying. It is on this factual predicate of imminent danger of impairment to an infant, that we affirm the ALJ's conclusion the credible evidence in the record substantiated a finding of abuse and inadequate supervision under N.J.S.A. 9:6-8.21(c)(4).

III.

We next address defendant's contention that the ALJ failed to appropriately weigh the aggravating and mitigating factors in substantiating a finding of abuse or neglect against her. We are unpersuaded.

"[B]oth 'substantiated' and 'established' allegations involve findings by 'the preponderance of the evidence . . . that a child is an "abused or neglected child"' under" N.J.S.A 9:6-8.21. N.J. Dep't of Children and Families v. R.R., 454 N.J. Super. 37, 41 (App. Div. 2018). "To defeat a preponderance-of-the-evidence finding, the evidence that a child was not abused or neglected must be at least equal to or greater than the evidence the child was abused or neglected." Ibid.

Accordingly, DCF can find a "substantiated" case of abuse by means of two distinct and independently sufficient methods. First, if any one of the six enumerated "absolute" circumstances under N.J.A.C. 3A:10-7.4 is proven by a preponderance of the evidence, DCF must find the incident to be "substantiated."²

² The six absolute circumstances are:

1. The death or near death of a child as a result of abuse or neglect;
2. Subjecting a child to sexual activity or exposure to inappropriate sexual activity or materials;
3. The infliction of injury or creation of a condition requiring a child to be hospitalized or to receive significant medical attention;

The second classification method involves a greater degree of discretion. Under this method, DCF considers seven aggravating factors³ and four

4. Repeated instances of physical abuse committed by the perpetrator against any child;

5. Failure to take reasonable action to protect a child from sexual abuse or repeated instances of physical abuse under circumstances where the parent or guardian knew or should have known that such abuse was occurring; or

6. Depriving a child of necessary care which either caused serious harm or created a substantial risk of serious harm.

[N.J.A.C. 3A:10-7.4.]

³ The aggravating factors are:

1. Institutional abuse or neglect;

2. The perpetrator's failure to comply with court orders or clearly established or agreed-upon conditions designed to ensure the child's safety, such as a child safety plan or case plan;

3. The tender age, delayed developmental status, or other vulnerability of the child;

4. Any significant or lasting physical, psychological, or emotional impact on the child;

mitigating factors.⁴ N.J.A.C. 3A:10-7.5. If the preponderance of the evidence indicates that a child has been abused or neglected, but the applicable mitigating factors outweigh the aggravating factors, the case is "established." N.J.A.C.

5. An attempt to inflict any significant or lasting physical, psychological, or emotional harm on the child;

6. Evidence suggesting a repetition or pattern of abuse or neglect, including multiple instances in which abuse or neglect was substantiated or established; and

7. The child's safety requires separation of the child from the perpetrator.

[N.J.A.C. 3A:10-7.5(a).]

⁴ The mitigating factors are:

1. Remedial actions taken by the alleged perpetrator before the investigation was concluded;

2. Extraordinary, situational, or temporary stressors that caused the parent or guardian to act in an uncharacteristic abusive or neglectful manner;

3. The isolated or aberrational nature of the abuse or neglect; and

4. The limited, minor, or negligible physical, psychological, or emotional impact of the abuse or neglect on the child.

[N.J.A.C. 3A:10-7.5(b).]

3A:10-7.3(c)(2). If the aggravating factors outweigh the mitigating factors, the case is "substantiated." N.J.A.C. 3A:10-7.3(c)(1).

Defendant contends there are no "absolutely substantiated" circumstances under N.J.A.C. 3A:10-7.4 and therefore, the substantiated findings must be based on considerations of the aggravating and mitigating factors pursuant to N.J.A.C. 3A:10-7.5. Defendant argues there are multiple mitigating factors applicable to this matter and, as a result, we should overturn DCF's findings against her. Defendant contends the ALJ failed to consider she took remedial steps to mitigate the situation on April 27, 2021. Defendant testified this was an isolated incident and on no other occasion was Anne left unsupervised with Jane. Lastly, defendant argues there was no physical, psychological, or emotional impact on Anne resulting from the incident on April 27, 2021.

The ALJ's conclusion that the aggravating factors outweighed the mitigating factors and DCF's determination the allegation of abuse or neglect was substantiated is supported by the evidence adduced at the hearing. The ALJ found aggravating factor two was met "based on the perpetrator's failure to comply with court orders or clearly established or agreed-upon conditions designed to ensure the child's safety, such as a child safety plan" because defendant left Anne alone with Jane without approved supervision, which she

knew violated the SPP. The ALJ also found aggravating factors three, "[t]he tender age, delayed developmental status, or other vulnerability of the child" and seven, "[t]he child's safety requires separation of the child from the perpetrator" were met as Anne was only one month old at the time of this incident and because defendant purposely left Anne with Jane who is incapable of caring for the baby because of her substance abuse.

The ALJ was unconvinced by defendant's argument that mitigating factors one ("[r]emedial actions taken by the alleged perpetrator before the investigation was concluded"), two ("[e]xtraordinary, situational, or temporary stressors that caused the parent or guardian to act in an uncharacteristic abusive or neglectful manner"), and four ("[t]he limited, minor, or negligible physical, psychological, or emotional impact of the abuse or neglect on the child") were established in the record. The ALJ found there was no remedial action taken by defendant since she first stated she took Anne to work with her and later recanted. Additionally, the ALJ did not find any extraordinary, situational, or temporary stressor mitigating defendant's actions. The impact on the child was considered by the ALJ who found defendant acted with inexcusably poor judgment stating

It is incredulous to believe that her husband was there and this was never told to the [DCF] workers; [John] did not mention him or even consult him on how to take care of [Anne] when he found her alone crying on April

27, 2021. It is further incredulous to also believe that the husband who reportedly was to be watching [Anne], had a monitor when he stepped out, and did not hear her crying inconsolabl[y]. If this was the case, it is a further indication of [defendant's] poor judgement which is inexcusable and resulted in neglect and violation of the SPP.

We find the ALJ properly weighed the aggravating and mitigating factors in substantiating a finding of abuse or neglect against defendant. The record supports the ALJ's finding defendant did not take any remedial actions to ensure Anne was properly supervised in the presence of Jane while she was at work. Nor did the ALJ err in finding that there were no mitigating circumstances. The record also supports the ALJ's conclusion that defendant exhibited inexcusably poor judgment.

The record establishes there were multiple aggravating factors present to merit a substantiated finding of neglect against defendant. Defendant knowingly violated the SPP by leaving Anne at home unsupervised with Jane. Regardless of whether defendant's husband was home with Anne, he was not an approved supervisor. Defendant also told one of DCF workers she believed Jane was under the influence of "more than just one beer" on April 27, 2021, substantiating the serious safety concerns presented by leaving Anne unsupervised with her mother.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original of
the subject
[Signature]
CLERK OF THE DISTRICT COURT