RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0610-16T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

K.L. and H.R.,

Defendants,

and

A.M.,

Defendant-Appellant.

IN THE MATTER OF A.R. and A.M.,

Minors.[1]

Submitted November 28, 2017 – Decided December 15, 2017

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Cumberland County, Docket No. FN-06-0108-16.

---

[1] A.M. ("Adam") is the only minor relevant to this appeal.

Joseph E. Krakora, Public Defender, attorney for appellant (Laura M. Kalik, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Jennifer Krabill, Deputy Attorney General, on the brief).

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

PER CURIAM

Defendant A.M. (Alfred), appeals from a September 1, 2016 Family Part order entered following a fact-finding hearing concluding he abused or neglected his eighteen-month-old son, Adam. Defendant contends the New Jersey Division of Child Protection and Permanency (the Division) failed to present sufficient evidence to support an abuse or neglect determination under N.J.S.A. 9:6-8.21(c). We affirm.

The following facts are taken from the record. Late in the evening of January 17, 2016, K.L. (Katie)[2] the biological mother of Adam brought him home to the apartment she shared with Alfred. Alfred was home with friends and drinking heavily. Alfred and Katie continued to drink and both became intoxicated.

[2] We use pseudonyms to protect the children's privacy.

By 2:00 am, Alfred's guests had left and he fell asleep. Katie found Alfred's cellular telephone and discovered messages between him and another woman. Katie assaulted Alfred while he was sleeping. Alfred awoke to her blows and the two engaged in mutual combat.

Katie was holding Adam during the fight. The parties exchanged blows and Adam fell from Katie's arms.

Alfred left the apartment, leaving Adam in Katie's care even though she was intoxicated. Katie also left the apartment, leaving Adam behind unaccompanied. Katie subsequently crashed her car and was arrested. Adam was found in the parties' home alone, but unharmed. The Division removed Adam and filed a complaint for custody, which the trial court granted.

The trial court conducted a fact finding hearing as to Alfred alone, pursuant to N.J.S.A. 9:6-8.21(c).[3] The Division presented testimony from Jamie Muronsky, the caseworker who responded on the evening of the incident. Alfred and Katie also testified.

The caseworker described Katie's condition after she was arrested. She described her as having "marks on her face and on her neck." Katie also had a clump of her hair in her pocket, which Alfred had ripped out during the altercation.

[3] Katie had previously stipulated to an act of abuse or neglect arising from the January 17 incident.

Katie testified she was holding Adam because he awoke during the fight and came to her. She testified Alfred knocked Adam out of her hands. Alfred denied he struck Katie once she was holding Adam. He also denied that he knocked Adam out of Katie's hands. However, Alfred conceded he "shov[ed] [Katie] out of the way[,]" and "mov[ed] her out the way so [he] could . . . go[.]"

The trial judge found Katie's testimony was truthful and credible. The judge found Alfred's "testimony to be suspect" because it was inconsistent with statements he gave to the Division regarding the night of the incident contained in the Division's Investigation Summary Report (ISR). Specifically, Alfred testified he did not strike Adam during the altercation, yet the ISR recorded he did not recall whether he struck the child and had to call Katie to ask her about the incident.

The trial judge concluded both parties had been drinking heavily on the night of the incident. The judge also found there was no dispute Katie was holding Adam during the altercation when Alfred pushed her. The judge determined Alfred struck Katie because she was in his way as he was trying to exit the home. The judge found the clump of hair in Katie's pocket was pulled out by Alfred and was evidence the parties engaged in mutual combat. Thus, the judge rejected Alfred's claims of self-defense. The judge concluded:

> [Alfred] was trying to get out of the house. He forced his way past [Katie] during that time and whether the baby fell out of her arms or whether the baby was punched by [Alfred], which [Katie] alleges did occur, I don't have to find that occurred.
>
> Because I find that just by pushing by her on this particular night and . . . when I look to the totality of the circumstances and [Alfred] pushing by [Katie] in a heightened state of agitation, after drinking . . . seven shots of Crown Royal, with a baby in [Katie's] arms[,]
>
> [w]hether [Alfred] was trying to get past [Katie] . . . by doing so he clearly put th[e] child's physical, mental and emotional condition in imminent danger of becoming impaired, as a result of his failure to exercise a minimum degree of care.
>
> And I do, in fact, find . . . by leaving the house, arguably by leaving that child with [Katie], who had been drinking, by [Alfred] drinking himself, that he was unreasonably putting this child at [a] substantial risk of harm.

Accordingly, the trial judge found Alfred abused or neglected Adam pursuant to N.J.S.A. 9:6-8.21(c)(4)(b). This appeal followed.

We begin with our standard of review. "[B]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413

(1998)). "Moreover, appellate courts 'defer to the factual findings of the trial court 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.'" M.C. III, 201 N.J. at 342-43 (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)).

"Although we defer to the trial court's findings of fact, especially when credibility determinations are involved, we do not defer on questions of law." N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 330 (App. Div. 2011) (citing N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88-89 (App. Div. 2006)). However, "[f]indings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). "[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Rova Farms, 65 N.J. at 484 (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)).

Alfred argues he could not have committed abuse or neglect of Adam because it was not his intent to assault the child, but rather to defend himself from Katie and flee from the residence. He argues any blows Adam suffered were accidental. Alfred also asserts he could not have known Katie would leave Adam alone, get into an automobile, and drive away. Therefore, he asserts the record lacks evidence of recklessness or gross negligence necessary to support a finding of abuse or neglect.

The purpose of a fact-finding hearing is "to determine whether the child is . . . abused or neglected." N.J.S.A. 9:6-8.44. An "[a]bused or neglected child" includes a minor 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 . . . (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[.]
>
> [N.J.S.A. 9:6-8.21(c)(4).]

"Courts need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." In re Guardianship of DMH, 161 N.J. 365, 383 (1999) (citing N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 616 n.14 (1986)).

Though a past risk of harm is not proscribed by the statute, "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." G.S. v. Dep't of Human Servs., 157 N.J. 161, 181 (1999).

"Whether the parent has exercised the requisite degree of care is to be analyzed in light of the dangers and risks associated with the particular situation at issue." N.J. Dep't of Youth & Family Servs. v. J.L., 410 N.J. Super. 159, 168 (2009) (citing G.S., 157 N.J. at 181-82). "The inquiry must focus on the harm to the child and 'whether that harm could have been prevented had the guardian performed some act to remedy the situation or remove the danger.'" Ibid. (quoting G.S., 157 N.J. at 182). "[T]he fact-sensitive nature of abuse and neglect cases turns on particularized evidence." N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 28 (2013) (citation omitted).

In making a finding of abuse or neglect, a court considers "the totality of the circumstances, since '[i]n child abuse and neglect cases the elements of proof are synergistically related. Each proven act of neglect has some effect on the [child]. One act may be "substantial" or the sum of many acts may be "substantial."'" V.T., 423 N.J. Super. at 329-30 (quoting N.J.

Div. of Youth & Family Servs. v. C.H., 414 N.J. Super. 472, 481 (App. Div. 2010)). Pursuant to N.J.S.A. 9:6-8.46(b), "[u]nder the preponderance standard, 'a litigant must establish that a desired inference is more probable than not.'" Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006) (quoting Biunno, Weisbard & Zegas, Current N.J. Rules of Evidence, cmt. 5a on N.J.R.E. 101(b)(1) (2005)).

We are satisfied the record supports the trial judge's finding of abuse or neglect. Alfred did not dispute he intentionally shoved or pushed Katie while she was holding Adam. There was no dispute both Alfred and Katie were intoxicated during the incident. The parties' intoxication and choice to engage in a physical altercation with Adam in between them demonstrates a reckless disregard for the child's safety. Also, Alfred's decision to leave Adam alone with Katie while she was intoxicated was grossly negligent.

Standing alone, perhaps Alfred's alcohol use or his leaving Adam alone with Katie would not suffice for a finding of abuse or neglect. However, given the totality of the circumstances and the trial judge's credibility findings to which we owe deference, we are satisfied the adequate, substantial, and credible evidence in the record supports the conclusion Alfred placed Adam at a

substantial risk of harm constituting abuse or neglect within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b).

Affirmed.