RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3778-14T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

R.U.,

Defendant-Appellant,

and

T.E.,

Defendant.

IN THE MATTER OF L.E., a minor.

Argued September 13, 2016 – Decided February 21, 2017

Before Judges Ostrer and Leone.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FN-09-0253-14.

Sarah L. Monaghan, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Monaghan, on the briefs).

Alaina M. Antonucci, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Antonucci, on the brief).

Joseph H. Ruiz, Designated Counsel, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Mr. Ruiz, on the brief).

PER CURIAM

Defendant R.U. (Rachel)[1] appeals from the Family Part's February 14, 2014 order finding that she abused or neglected her daughter, L.E. (Libby), by resorting to excessive corporal punishment. The trial court relied chiefly on the fact that Rachel caused bruises on Libby's buttocks by striking her with a spoon. As the court did not resolve several disputed, material facts, we are constrained to remand for additional findings.

We defer to the Family Court's fact-finding because of the court's "special expertise" in family matters and the court's "superior ability to gauge the credibility of the witnesses who testify before it[.]" N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448 (2012); see also Cesare v. Cesare, 154 N.J. 394, 413 (1998). Although we will not disturb a trial court's fact-finding "when supported by adequate, substantial, credible evidence[,]" Cesare, supra, 154 N.J. at 412, we

[1] We utilize pseudonyms for the reader's convenience.

scrutinize more closely a "trial judge's evaluation of the underlying facts and the implications to be drawn therefrom[.]" N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (internal quotation marks and citations omitted). We review issues of law de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In order for an appellate court to exercise effective review, the trial court sitting without a jury must "state clearly its factual findings and correlate them with the relevant legal conclusions." Curtis v. Finneran, 83 N.J. 563, 570 (1980); see R. 1:7-4. If the trial court does not, the appellate court is "left to conjecture as to what the judge may have had in mind[,]" and its review is frustrated. Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990).

That is the case here. To demonstrate how the trial court's findings were incomplete, we turn first to the governing principles of law.

Determining whether excessive corporal punishment has occurred is a particularly fact-sensitive endeavor. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 33 (2011). N.J.S.A. 9:6-8.21(c)(4)(b) prohibits excessive corporal punishment, not corporal punishment generally. See Dep't of Children & Families, Div. of Youth & Family Servs. v. K.A., 413

N.J. Super. 504, 510 (App. Div. 2010) (stating "a parent may inflict moderate correction such as is reasonable under the circumstances") (internal quotations and citation omitted), certif. dismissed as improvidently granted, 208 N.J. 355 (2011). When a parent's actions do not rise to the level of per se excessive corporal punishment, then the court must examine the surrounding circumstances. Id. at 512.[2] The facts require "careful, individual scrutiny." P.W.R., supra, 205 N.J. at 33. The addition or subtraction of one or two facts may make the difference between a positive or negative finding. "[F]or example, one ought not assume that what may be 'excessive' corporal punishment for a younger child must also constitute unreasonable infliction of harm, or excessive corporal punishment in another setting involving an older child." Ibid.

Three recent cases demonstrate this point. See P.W.R., supra; K.A., supra; and Dep't of Children & Families, Div. of

[2] Per se excessive corporal punishment consists of:

> A situation where the child suffers a fracture of a limb, or a serious laceration, or any other event where medical intervention proves to be necessary . . . provided that the parent or caregiver could have foreseen, under all of the attendant circumstances, that such harm could result from the punishment inflicted.
>
> [Id. at 511.]

Youth & Family Servs. v. C.H., 416 N.J. Super. 414 (App. Div. 2010), certif. denied, 207 N.J. 188 (2011). In K.A., a mother hit her eight-year-old daughter four or five times on the shoulder with a closed fist because the child defied the mother's instructions to stay inside her room during a time-out. K.A., supra, 413 N.J. Super. at 505-06. The strikes left a round bruise with several smaller dotted bruises above it on the child's shoulder. Id. at 506. Notwithstanding the administrative code's reference to "bruises, abrasions, [or] welts" as the types of injuries that may constitute abuse under N.J.A.C. 10:129-2.2, we found no per se excessive corporal punishment. See id. at 512-13.

Instead, we considered: "(1) the reasons underlying [the mother's] actions; (2) the isolation of the incident; and (3) the trying circumstances which [she] was undergoing . . . ." Id. at 512. We stated, "[t]hese factors form the prism through which we determine whether [the parent's] actions were indeed 'excessive.'" Ibid. Furthermore, we did not preclude the consideration of additional factors when appropriate.

With these principles in mind, we noted the child was diagnosed with "pervasive development disorder and attention deficient [sic] disorder" at the time of the incident. Id. at 506. The mother also lacked a support network and was

overwhelmed by the difficulties in raising a disabled child largely on her own. Id. at 512. Additionally, the mother did not lacerate the child's skin, the child did not need medical intervention, and the visible bruises did not expose the child to further harm if left untreated. Ibid. The mother also took full responsibility for her actions, was contrite, and complied with the Division's services. Ibid. In light of those surrounding circumstances, we concluded there was no excessive corporal punishment. Id. at 512-13.

We reached a different conclusion in C.H., supra. In that case, the parent struck her five-year-old child in "multiple locations, including a vulnerable area" — the face. 416 N.J. Super. at 416. There were "red demarcations on the right side of [the child's] face, three to four inches long, and . . . dark red scratches, two inches in length, on [the] right elbow and left cheek, as well as a greenish demarcation on the middle of the child's back." Ibid. As for the related circumstances, we discerned sufficient evidence in the record that the infliction of harm was not an isolated incident. Id. at 416-17. The parent admitted she began administering corporal punishment when the child was three, and had spanked the child most recently because she told a neighbor the family did not have electricity.

Ibid. The parent also expressed no remorse and declined to participate in counseling. Id. at 417.

In P.W.R., supra, the Court upheld the Division's finding that an allegation of excessive corporal punishment was unfounded, where a parent occasionally slapped a sixteen-year-old daughter in the face as a form of discipline. 205 N.J. at 21-22. The Court stated, "[t]here was no evidence developed in this record showing the existence of bruises, scars, lacerations, fractures, or any other medical ailment[.]" Id. at 35-36 (citing K.A., supra, 413 N.J. Super. at 511-12). The Court also held that the age of the child punished is a relevant factor. See id. at 33. While not approving corporal punishment, the Court stated, "the statutory language plainly recognizes the need for some parental autonomy in the child-rearing dynamic that, of necessity, may involve the need for punishment." Id. at 36.

Turning to the case before us, it was undisputed that Rachel spanked Libby with a spoon three times on or near her buttocks. The incident occurred on Monday, May 27, 2013, less than a week short of Libby's sixth birthday. The court found that Rachel caused "significant bruising" on Libby's left buttock. Based on that fact, the court found that Rachel placed Libby at a substantial risk of harm, and the corporal punishment

was excessive. The court found that another bruise, located on Libby's right buttock, resulted from a different cause: Libby fell on a paver block while playing at a party the day before the corporal punishment incident.

We shall not disturb the court's finding that Rachel struck Libby and caused bruising, as it was supported by sufficient, credible evidence in the record.[3] However, we are not satisfied that the court adequately addressed the surrounding circumstances. The court reviewed, but did not choose between, Rachel's and Libby's divergent versions of the circumstances that preceded the spanking and Rachel's general approach to disciplining her daughter.[4] Findings on these matters could favor a different outcome, as in K.A., or provide essential support for the court's finding, as in C.H.

[3] We note, however, that Rachel insisted that none of the bruises resulted from her use of the spoon, and the bruises resulted from two falls at the party. According to Rachel's aunt, a Dominican nun, Libby fell off a bike, and was struck in the buttocks by the handlebars. Additionally, according to Rachel's sister, Libby later fell on a paver-block while playing around a tree. The sister explained that after each fall, she observed a red mark on Libby's buttocks, and gave her an ice pack to relieve the pain.

[4] Neither testified at the fact-finding hearing, but the Division introduced into evidence a county prosecutor's office detective's separate video-recorded interviews of the mother and child.

The record reflects that Rachel lived alone, except on the weekends and summertime when she had parenting time with Libby. Libby's father, T.D. (Ted) had primary residential custody. Ted lived with his fiancé and a two-year-old child. Rachel told a prosecutor's office detective that she yielded her role as the primary residential parent during a period of unemployment, financial stress, and depression.[5] According to Division records, she used marijuana daily six years earlier, but had used only twice in the two months before the incident. At the time of the investigation, Rachel, then thirty-eight, was taking anti-depressants, was attending school for a career in massage therapy, and was the superintendent of her apartment building. She relied on family members for financial support.

In her interview with the detective, Rachel complained that Libby was prone to throwing tantrums when she was with her and that they were difficult for her to manage. She also accused Ted of not offering to help. According to Division records, Ted told a detective that Libby did not throw tantrums at his house and that Rachel and Libby frequently argued. He said Rachel did not set clear boundaries for their daughter, and treated her like a friend instead of a child. The trial court did not weigh

[5] Rachel also claimed she was a victim of domestic violence. She alleged that in 2008 Ted broke her wrist and dislocated her knee.

this testimony regarding the parenting challenges that Rachel allegedly faced, nor did it consider whether those challenges were comparable to the trying circumstances we found significant in K.A.

As for the corporal punishment incident, Rachel explained that she struck Libby after she threw a tantrum that lasted close to two hours. Denied candy before dinner time, Libby screamed so loudly in protest that she could be heard outside the apartment building that Rachel managed. Rachel worried that the tantrum would disturb other tenants. She said that when she tried to console Libby with a hug, Libby punched her. Rachel then sent Libby to her room for "time-out," but found her using Rachel's laptop computer, something that was not permitted during "time-out." When Rachel powered off the computer, telling Libby that the computer was off limits, Libby threw the computer to the floor. Only at that point did Rachel resort to striking Libby on the buttocks three times with a plastic spoon. That quickly brought the tantrum to an end.

Libby gave a different version of events. She told the detective that her mother hit her only because she was talking too much.[6] Ted also told the detective that his daughter said

[6] Since the detective interviewed Libby before interviewing Rachel, she did not ask Libby if she screamed, struck her mother, or threw the laptop on the floor.

she was struck because she would not be quiet. Libby described the spoon as made of wood, not plastic.

The court may have been compelled to reach a different result, in light of our caselaw, if the court had made findings crediting the circumstances testified to by Rachel. It would be significant if Rachel resorted to corporal punishment only after the prolonged tantrum, as Rachel described it: Libby's tantrum lasted close to two hours; Libby risked provoking a negative reaction from tenants; non-physical efforts to calm Libby were unavailing; and the tantrum escalated to the point of physical violence and property damage by Libby. The court did not address these circumstances.

The method of applying corporal punishment is also significant. A closed fist may pose a greater risk of harm than an open hand — although use of a closed fist did not compel a positive finding in K.A. See 413 N.J. Super. at 512-13. An instrument may generally be worse than a hand, but it depends on its size, weight, and rigidity. Rachel insisted she used a plastic spoon. Although she described its size and shape, the record does not reflect whether it was a soft, flexible spoon, or a hard, rigid one capable of inflicting greater harm. The court made no findings on this issue.

Libby also insisted that she experienced no pain. The court did not state whether it credited that statement, or dismissed it as an effort by Libby to protect her mother. Although Ted took Libby to the pediatrician after discovering the bruise, the record is silent on the physician's diagnosis or whether Libby required any treatment. The court characterized the bruises as "significant" but the basis for that characterization is not apparent, particularly since they were not painful, according to Libby.

Rachel and Libby also presented differing versions of Rachel's approach to discipline. Libby explained that her mother often used the spoon as a form of discipline. She said she was lucky that her mother only resorted to three strikes with the spoon, since more blows would hurt. Rachel admitted she sometimes "swatted" Libby with the spoon — demonstrating it as a single movement — but usually resorted to sending her to her room when she misbehaved. Had the court found that Rachel frequently resorted to corporal punishment with a spoon, that may have weighed in support of the court's finding. However, the court did not resolve the dispute between Rachel and Libby on this point.

Finally, the record indicates that Rachel cooperated in availing herself of parenting classes, but delayed in submitting

to a substance abuse evaluation and treatment. Although the fact-finding hearing occurred over eight months after the incident, the trial court did not consider the degree to which Rachel complied with services, was contrite, or otherwise evidenced she would not engage in inappropriate corporal punishment. This factor, along with others, may have had a material impact on the court's determination.

In sum, it was incumbent upon the court to consider the totality of circumstances surrounding this incident. We are therefore constrained to remand so the trial court may make further findings of fact, apply those findings to the standards set forth in K.A., C.H. and P.W.R., and determine anew whether the corporal punishment Rachel used was excessive. We leave it to the trial court, in the exercise of its discretion, to determine whether to reopen the record for the presentation of additional evidence, such as the findings of the pediatrician.

Vacated and remanded. We do not retain jurisdiction.