

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0391-16T1

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.E.,

Defendant-Appellant,

and

J.M.,

Defendant-Respondent.

IN THE MATTER OF J.M.,

Minor.

Submitted February 13, 2018 – Decided February 23, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex
County, Docket No. FN-12-0250-14.

Joseph E. Krakora, Public Defender, attorney
for appellant (John A. Salois, Designated
Counsel, on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent New Jersey Division of Child Protection and Permanency (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Salima E. Burke, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent J.M. (Arthur David Malkin, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Nancy P. Fratz, Assistant Deputy Public Defender, on the brief).

PER CURIAM

Defendant S.E. (Sherry)¹, appeals from a July 15, 2016 decision following a best interests hearing, which awarded primary residential custody of her daughter J.M. (Jennifer) to Jennifer's father, J.M. (Jeffrey). We affirm.

I.

The following facts are taken from the record. Sherry and Jeffrey are the biological parents of Jennifer, who was born in August 2011. The parties lived together for approximately one year after Jennifer's birth. Following their separation, Sherry and Jennifer lived with Sherry's mother. Sherry became the primary caretaker of Jennifer and Jeffrey exercised parenting time. The parties had no formal custody or parenting time agreement.

¹ We use pseudonyms to protect the child's privacy.

On November 1, 2013, the Division of Child Protection and Permanency (Division) received a referral that Sherry was abusing drugs. The anonymous caller reported Sherry had "'crashed up' several cars while being high," observed Sherry nodding off in public, and stated she was using heroin or prescription pills. Initially, when the Division caseworker spoke with Sherry regarding the allegations she denied having a drug problem and stated she had been prescribed oxycodone because she injured her lower back when she was pregnant. However, during a subsequent drug screen by the Division, Sherry tested positive for opiates and marijuana, but negative for oxycodone.

Because of Sherry's positive drug test, a safety plan was implemented, which required her to be supervised with Jennifer until further assessment. A subsequent drug abuse evaluation, resulted in a referral for Level II substance abuse treatment.

Thus, in January 2014, the Division filed for care and supervision of Jennifer pursuant to N.J.S.A. 9:6-8.21 and N.J.S.A. 30:4C-12. The trial judge granted the Division care and supervision with Sherry's consent. A safety protection plan was implemented, which required the maternal grandmother and great grandmother to supervise contact between Sherry and Jennifer. The court also ordered Sherry to continue substance abuse services, and submit to urine screenings. Jeffrey was not ordered to

complete any services, and was permitted unsupervised visitation. Sherry maintained physical custody of Jennifer, subject to supervision, and Sherry and Jeffrey shared legal custody.

The Division declined to proceed with a Title 9 fact-finding due to the "lack[] [of] evidence . . . Sherry took drugs while caring for Jennifer." Instead, the Division requested the matter be converted to a Title 30 action only. Therefore, the trial judge dismissed the Title 9 matter and continued care and supervision by the Division under Title 30.

That same day a compliance hearing was held, and the Division reported Sherry continued to test positive for cocaine and heroin in March and April 2014. As a result, Sherry attended a five-day detoxification program at Bergen Regional Medical Center (BRMC). The trial judge ordered Sherry to attend inpatient treatment. However, Sherry felt an intensive outpatient program would better suit her needs. As a result, the trial judge requested the Division to identify treatment programs, which she would consider at an upcoming compliance review hearing in May 2014.

Before the hearing, the Division arranged for Sherry to receive another drug abuse evaluation. After the assessment, her alcohol and drug counselor and the Division agreed that Sherry would participate in a Mentally Ill Chemically Addicted (MICA) outpatient program. Sherry also agreed "if she tested positive

within two weeks she would voluntarily enroll in inpatient treatment." The trial judge signed an order memorializing the agreed-upon treatment course for Sherry.

Within two weeks of starting the MICA program, Sherry tested positive for marijuana. However, she did not enter inpatient treatment as she had previously agreed to do. At a July 2014 case management conference Sherry's counsel represented that Sherry had left the MICA program because "she did not feel comfortable at that program," but she was presently enrolled in an intensive outpatient treatment program. However, the trial judge ordered Sherry to return to inpatient treatment and mental health counseling.

A compliance review hearing occurred in September 2014, and Sherry had just completed another five-day detoxification at BRMC. Later in the month, Sherry began her inpatient treatment at New Hope, but she was discharged after only one week in the program because "[s]he did not want to continue with the residential program." Shortly afterwards, Sherry moved out of her mother's home, stopped contacting the Division, and did not provide information on her whereabouts.

In November 2014, the Division filed an amended verified complaint for care, custody, and supervision of Jennifer pursuant to N.J.S.A. 9:6-8.21 and N.J.S.A. 30:4C-12. Because of Sherry's

ongoing substance abuse problems, her failure to comply with Division services, and Jeffrey, who was then incarcerated, the trial judge granted the Division legal and physical custody of Jennifer. Jennifer was placed with her maternal great grandmother. The judge also ordered Sherry to attend inpatient substance abuse treatment and to attend outpatient treatment until space became available in an inpatient program. Jeffrey was ordered to attend Intensive Outpatient Program (IOP) substance abuse treatment.

In December 2014, Jeffrey, who was then no longer incarcerated, informed the court he planned to seek custody of Jennifer. In addition, Jeffrey represented he had completed a substance abuse evaluation and had begun intensive outpatient therapy.

At a March 2015, summary hearing, the trial judge learned Sherry was again in a detox program at BRMC. Jeffrey had completed fifteen sessions of intensive outpatient treatment and was determined to be qualified for unsupervised visitation in public places. The trial judge concluded continued services to both parents were necessary for Jennifer's health, safety, and welfare. The judge also granted Jeffrey unsupervised visitation.

In May 2015, the trial judge held a compliance review hearing. Jeffrey reported he completed his intensive outpatient treatment, and was "still on probation, . . . doing well, [and] complying

with probation." He requested overnight visitation, and stated he ultimately desired custody of Jennifer. In contrast, although Sherry had represented she was in a detox program, the caseworker discovered she was not. Rather, Sherry had been admitted to inpatient treatment at New Hope and was scheduled to be discharged near the end of May 2015.

The trial judge concluded:

[Sherry] is going to complete her program at New Hope. Hopefully it's a successful completion at New Hope. Then she'll be referred to Stress Care where then she's go[ing to] get . . . the follow up for substance abuse and the mental health treatment.

For now then, she will remain supervised with her visits by the Division or any approved supervisor and . . . [Jeffrey] . . . can supervise.

All right. [Jeffrey] completed his IOP. He's on probation, but doing well. No one is objecting at this point to moving to overnights. And then once we have a couple of those, and [we] do weekends . . . I . . . think what we're really waiting for is for him to move. Then, . . . he'll give the [housing] information to the caseworker. She's go[ing] [to] check out the apartment.

So, there's I believe no objection on a self executing basis once all of that checks out, to then placing the child in the custody of [Jeffrey].

A compliance review hearing was held in August 2015. By that time, Jennifer had been returned to Jeffrey on July 28, 2015, and

they both had moved in with his fiancé's family. Sherry had completed the New Hope program in May 2015, but relapsed before starting outpatient services with Stress Care in June 2015. Because Sherry's participation with Stress Care was inconsistent, she was placed on an attendance contract to assure her compliance. Sherry was also attending Alcoholics Anonymous and Narcotics Anonymous, and tested negative for all substances except for Suboxone, for which she had a prescription.

As a result, the judge granted Jeffrey physical custody of Jennifer, and awarded Jeffrey and Sherry joint legal custody. Sherry's counsel informed the judge that Sherry's goal was to have residential custody of Jennifer, or share custody with Jeffrey. Jeffrey expressed that "he'd like to seek custody going forward, to give [Jennifer] stability" The trial judge also ordered Sherry to comply with treatment and all treatment recommendations. The judge ordered continued care and supervision of Jennifer by the Division, and authorized the Division to make announced and unannounced visits of Jeffrey's home.

A compliance review hearing took place in October 2015. During the hearing, the parties discussed residential custody of Jennifer and represented they would reach a custody agreement between themselves, or with the aid of counsel if necessary. The parties then agreed to schedule another compliance review, and

discussed a possible dismissal of the case in late November 2015. The trial judge executed an order that required Sherry to continue treatment, and granted her unsupervised visitation including overnights.

At the November 2015 hearing, it was reported that Sherry had been exercising overnight visits with Jennifer since October 2015. The parties had mutually agreed to a parenting schedule whereby Jeffrey had Jennifer from Saturday night to Wednesday and Sherry had her from Wednesday to Saturday, but had not agreed that Jeffrey would continue to be the primary caretaker. In addition, Sherry continued to comply with mental health and substance abuse services. As a result, the Division stated it "would be satisfied to end th[e] protective services litigation because there [was] no longer any risk of harm to the child." However, the Division indicated that because the parties had not agreed on a residential custody arrangement the case would need to remain open.

The trial judge informed the parties they could either continue with a best interests hearing in this matter, or the court could dismiss the matter and Sherry could seek custody by filing a non-dissolution complaint. The parties agreed to continue to attempt to reach an agreement, and in the event they were unsuccessful, the trial judge would conduct a best interests hearing under the FN docket.

On March 2, 2016, the trial judge conducted a summary hearing to determine whether the Title 30 action should continue. The judge considered the Division's court reports, Stress Care, reports submitted by the Division, and a letter from Sherry's psychiatrist, Felix Geller, M.D. In his letter, Dr. Geller stated that he advised Sherry was sober, complying with medication, and had not exhibited any signs of relapse or erratic behavior. After reviewing the documentation submitted, the trial judge concluded that there was a need to keep the Title 30 litigation open because Sherry continued to need mental health treatment.

The trial judge also commenced the best interests hearing to determine residential custody of Jennifer. Sherry testified and discussed her current treatment at Stress Care as well as her ability to care for Jennifer. Sherry also offered testimony from her mother and grandmother. Sherry and both witnesses alleged Jeffrey had committed acts of domestic violence. Sherry argued Jennifer was safer with her and that it was in her best interests for the judge to award her primary residential custody.

Jeffrey and his fiancée testified. Jeffrey denied he ever committed domestic violence. He asserted he desired to continue the current parenting time arrangement, and maintain primary residential custody to provide stability for Jennifer.

On July 15, 2016, the trial judge issued a written opinion addressing the factors set forth in N.J.S.A. 9:2-4(c). The judge determined it was in Jennifer's best interest "for the current custody and parenting time arrangement to remain unchanged." Specifically, the judge awarded the parties joint legal custody of Jennifer, and determined Jeffrey should maintain residential custody. Thereafter, the litigation was dismissed. This appeal followed.

On appeal, Sherry argues the trial judge erred by concluding the Division's services were still required where the Division indicated it considered the matter closed. Sherry argues the trial judge violated her right to due process by conducting the summary hearing outside of the six month time frame set forth in N.J.S.A. 30:4C-12. She argues the delay in conducting the hearing prejudiced the expeditious return of Jennifer to her.

Sherry also argues the trial judge's decision to award primary residential custody to Jeffrey relied on the wrong standard because the judge required Sherry to demonstrate a change in circumstances, which improperly shifted the burden of proof to her to modify custody as opposed to establish custody. Sherry also asserts the judge failed to consider the role of domestic violence between the parties in awarding Jeffrey custody in addressing the factors of N.J.S.A. 9:2-4(c).

II.

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.'" Id. 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)).

III.

Sherry argues the trial judge did not hold the summary hearing in a timely fashion, which prejudiced her because Jennifer remained in Jeffrey's de facto custody for a lengthy period of time. Specifically, Sherry asserts that pursuant to N.J.S.A. 30:4C-12, a March 2015 order which granted the Division care, custody, and supervision of Jennifer and required Sherry to receive services, mandated the summary hearing occur in September 2015. However, the summary hearing was held six months later on March 2, 2016, allegedly in violation of the statute and Sherry's right to due process.

Generally, the Division is charged with protecting the health and welfare of children. N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382, 397 (2009). Under Title 9, N.J.S.A. 9:6-8.21 to -8.83, the Division may remove a child from a parent's custody if there is "imminent danger to the child's life, safety or health[.]” N.J.S.A. 9:6-8.29(a). If a child has been removed, and the court has not made a Title 9 finding of abuse or neglect,

N.J.S.A. allows the Division to "'seek a court order to intervene and require a [parent] to undergo treatment, or seek other relief, if the best interests of the child so require[.]" N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 9 (2013).

N.J.S.A. 30:4C-12 states:

The court, at a summary hearing held upon notice to the [D]ivision, and to the parent, parents, guardian, or person having custody and control of the child, if satisfied that the best interests of the child so require, may issue an order as requested . . . provided, however, that such order shall not be effective beyond a period of six months from the date of entry unless the court, upon application by the division, at a summary hearing held upon notice to the parent, parents, guardian, or person having custody of the child, extends the time of the order.

Once an order of care, custody, or supervision is entered pursuant to N.J.S.A. 30:4C-12, the court may continue such order if it finds "the Division has proven by a preponderance of the evidence that it is in the best interests of the child to enter the relief requested." N.J. Div. of Youth & Family Servs. v. I.S., 214 N.J. 8, 15 (2013). On the other hand, if the court determines the Division's supervision or care is no longer needed, the court should dismiss the matter. N.J. Div. of Youth & Family Servs. v. T.S., 426 N.J. Super. 54, 66 (App Div. 2012).

We conclude that Sherry is precluded from arguing on appeal that the court erred by failing to conduct the summary hearing

within the time required by N.J.S.A. 30:4C-12. "[T]rial errors that were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal[.]" State v. A.R., 213 N.J. 542, 561-62 (2013). Invited error "operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010).

Sherry consented to the delay by acceding to numerous compliance review hearings before the summary hearing occurred. The record reflects no objection to the timeliness of the summary hearing. Therefore, Sherry's acquiescence in the delay is not cause to disturb the trial judge's decision.

IV.

Sherry also argues the trial judge's decision to continue services under Title 30 was not supported by the evidence. Specifically, Sherry asserts the judge erred by keeping the case open because letters were submitted attesting to her progress in substance abuse and mental health treatment, and the Division was not requesting that services continue. We disagree.

The record demonstrates the trial judge considered various records including the Division's report, Stress Care's report, and

a recent report from Sherry's doctor before deciding whether to keep the matter open for services. The judge discussed the evidence at length:

So . . . when the [c]ourt looks to determining whether services need to continue, it obviously looks to the assistance from the provider that [Sherry] is working with. . . . The Division's position is . . . that mental health needs to . . . be complied with and continued until successful discharge or even that she must continue that. And there's also a stable housing component. Although the Division, isn't really doing anything for the stable housing, the stable housing becomes important . . . regarding the best interest as well.

There's a January 11th . . . letter . . . indicating . . . [Sherry] was last seen for an individual psychotherapy appointment on November 13th of 2015. She had to cancel her next scheduled appointment due to transportation issues, but did . . . not reschedule. [Sherry] met with the agency psychiatrist on [December 22, 2015] [who] reported, "She was doing well, continued to be clean from all substances at that time of the appointment. I reached out to [Sherry] to discuss future treatment but was unable to speak with her. At this time it's recommended that [Sherry] continue with treatment at a facility that is able to work with her financial limitations, is close to home, and can provide both individual counseling and medication management. . . ."

Now the February 17th, 2016 letter states, "This letter is in regard to [Sherry]. [Sherry] completed the PHP and the IOP at this facility. She was referred to individual psychotherapy sessions and medication . . . management and monitoring by the agency's

psychiatrist to ensure she maintained all changes made during her treatment. [Sherry] has been participating in monthly individual psychotherapy sessions voluntarily and she is being seen by the agency psychiatrist for . . . Suboxone management. . . ."

"Her most recent appointment with the psychiatrist was on [February 4, 2016]. At this time it would be beneficial for [Sherry] to continue attending monthly individual psychotherapy sessions along with her medication management to ensure she is continuing to maintain all positive changes she has made. . . ."

. . . .

The most recent letter from March of 2016 is a letter for [Sherry]. "As I have been her treatment provider for the last ten months and she has been obtaining services at the above clinic since May 2015 when she completed the partial hospitalization and intensive outpatient program. Since completing those programs and seeing this provider on a monthly basis, the patient has maintained sobriety and stability, has been medication compliant, not displayed any erratic or relapsing behavior and is making progress in her mental health treatment. At this time the patient does not display a higher chance of relapse than any other patient with a history of addiction."

Lastly, for context on Sherry's progress, the judge referred to an early letter dated October 20, 2015, which had been previously entered into evidence, and concluded it was "clear to the [c]ourt that it was ordered that she do the mental health counseling and that she's been working with Stress Care." Thus, although many of the reports contained positive updates on Sherry's

progress, the court concluded based on the most recent letter, Sherry continued to require mental health treatment as outlined in the October 2015 letter.

There was ample evidence for the trial judge to conclude Jennifer's best interests required Sherry to continue to receive substance abuse and mental health services, and therefore for the Division to retain care and supervision of Jennifer. Although Sherry argues the Division had not requested the continuation of services and that its failure to present witnesses at the summary hearing was indicative of its position, the record demonstrates otherwise.

Indeed, at the hearing, the Division's representative stated "we would like the mental health treatment to continue." Furthermore, the record demonstrates Sherry continued to require services and benefitted by the delay in the summary hearing because she utilized the services to rehabilitate herself. The trial judge's decision to require continued services for Sherry is supported by the adequate credible evidence in the record.

V.

Sherry argues the trial judge erred and shifted the burden to her to establish a change in circumstance to modify custody. Sherry claims both parties were on "equal footing" because they were both seeking a change in the current custody arrangement and

therefore, "there was no reason to impose on Sherry the burden of proving changed circumstances."

Although N.J.S.A. 30:4C-12 does not mandate a dispositional hearing, the Supreme Court has held that Title 30 proceedings require a dispositional conclusion. See I.S., 214 N.J. at 14. The standard for the dispositional hearing is the best interests of the child under N.J.S.A. 9:2-4. Id. at 40. As a result, a parent seeking the return of his or her child bears the burden to prove a change in circumstances warranting the child's return to that parent's custody. Id. at 39-41; see also N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382, 402 (2009).

The record does not support Sherry's claim that both she and Jeffrey were seeking to modify custody. As we noted, the de facto custody arrangement pursuant to the parties' agreement was to designate Jeffrey the primary residential custodian. Indeed, prior to the commencement of the best interests hearing Jeffrey's counsel stated Jeffrey desired to "maintain the status quo, . . . given the fact that [he] ha[d] completed his services and ha[d] documented the completion[, and] . . . had custody since July 28, [2015]." It is apparent from the record Sherry sought to modify custody. Therefore, the trial judge correctly held that Sherry had the burden to prove a change in circumstances warranting such a change.

Sherry argues this case is different than I.S. because in that case custody had been transferred from the parent to a residential facility, and the parent seeking the return of her child had not completed services. Sherry claims because she had primary residential custody before the litigation commenced, and completed the services requested by the Division, she should not have to prove a change in circumstances. However, there is nothing in I.S. which suggests that either the child's placement or the parent's level of compliance with services was determinative of whether the change in circumstances standard applied.

VI.

Finally, Sherry argues the trial judge's best interest analysis was flawed because the judge did not accord enough weight to the alleged incidents of domestic violence. As we noted, the judge considered the testimony of Sherry, Sherry's mother, Sherry's grandmother, Jeffrey, and Jeffrey's fiancé regarding the alleged incidents of domestic violence. The judge also noted "[Jeffrey] . . . ha[s] a Final Restraining Order (FRO) entered against him from a previous relationship."

The judge concluded:

The alleged incidences of domestic violence, when given the weight they are due and considered in conjunction to the other relevant factors, do not warrant a change in custody. The parties are no longer in a

relationship so the risk of the child's exposure to domestic violence between her parents has been virtually eliminated. No recent incidences of domestic violence have been alleged. Additionally, [Jeffrey's] fiancé testified that there had been no domestic violence in her relationship with [Jeffrey]. There is no evidence that the child was exposed to domestic violence between her parents or that she herself has endured any abuse. This [c]ourt does not excuse domestic violence nor does it take such accusations lightly. However, considering the time that has lapsed since the alleged incidents, the fact that the parties are not in a relationship and no longer reside with one another, and the fact that the child has resided safely with [Jeffrey] for the past year, the [c]ourt cannot find that these incidents, standing alone, warrant a change in custody.

The judge also addressed Sherry's credibility. The judge stated:

Most notable, however, is that [Sherry] never raised her concerns regarding [Jeffrey's] behavior and the potential for harm to the child in July of 2015 when the [c]ourt contemplated transferring physical custody to [Jeffrey]. In fact, Sherry failed to raise any of these concerns for the past year, during which time [Jeffrey] has had physical custody of the child. It (sic) is unclear why [Sherry] feels, after a year of incident-free parenting on behalf of [Jeffrey], that [he] poses a threat to the child.

The judge clearly addressed and rejected Sherry's assertions regarding domestic violence in light of the evidence presented and

Sherry's credibility. We find no abuse of discretion in the judge's consideration of this factor under N.J.S.A. 9:2-4(c).

Moreover, the judge addressed each of the other thirteen factors of N.J.S.A. 9:2-4(c) and determined they weighed in favor of the then-existing custody arrangement. The judge concluded both parties had "a history of working cooperatively to manage the care of their daughter." The judge rejected Sherry's claim that on one occasion Jeffrey had threatened to prevent her from having parenting time.

The trial judge found "[b]oth parties [were] willing to accept custody and allow one another to enjoy parenting time with [Jennifer]." The judge found both parties had testified Jennifer had a positive relationship with each of them and with Jeffrey's fiancé. The judge concluded both parties had provided a safe environment for Jennifer in their respective homes. The judge found Jennifer had expressed a desire to live with both of the parties, which was not unusual for a four-year-old child.

The trial judge found both parties were capable of meeting Jennifer's needs, including her education. However, the judge determined Jeffrey offered Jennifer a more stable home environment than Sherry. Specifically, the judge found

[Jeffrey] lives with his fiancé who aids him in caring for the child. [Jeffrey] and [his fiancé] testified to working alternate work

schedules so that an adult is always available to care for the child. [Jeffrey's fiancé] testified that she has a good relationship with the child and that the two enjoy spending time together. On the contrary it is unclear what [Sherry's] living arrangements currently are or will be in the coming months. . . . What is of great concern to this [c]ourt is that [Sherry] has a boyfriend who is required to be supervised with the child due to an aggravated assault charge. [Sherry's] boyfriend is also a recovering addict.

Considering both parties' histories of substance abuse and the fact that [Jeffrey], along with his fiancé, is already providing a stable and healthy home environment for the child, the [c]ourt finds that upholding the current arrangement will offer the child the most stability. [Sherry] has never lived independently, is currently working, and is maintained on Suboxone. A move to another town, alone, with a child who has enjoyed living with her father for the past year does not offer stability. Instead, such a situation creates many uncertainties for both [Sherry] and the child.

The trial judge found although both parties had historically struggled with substance abuse, Sherry's fitness as a parent did not "surpass[]" Jeffrey's. Rather, the judge concluded Jennifer "will experience greater stability with both parents continuing to care for her pursuant to the current arrangement."

The judge found Sherry's intent to move did not favor granting her custody. The judge concluded if Sherry were to move as she had indicated was her intention, Jennifer would "be further away from Jeffrey and . . . other immediate family members. While a

ten to fifteen minute driving distance is not significant, it still separates the child from the town where she has lived for her entire life."

The trial judge found although Jeffrey's work schedule occasionally required long hours, his "fiancé is able to fill in and care for the child in his absence." Sherry's thirty-five hour work week also provided her with flexibility. However, the judge noted that Sherry had changed her employment on more than one occasion, which made her circumstances less stable.

The judge concluded the statutory factors did not weigh in Sherry's favor and that "the only change in circumstances seems to be that [Sherry] is less stable." The judge found Sherry's

housing plans are uncertain [and that she] has not presented [the] [c]ourt with any concrete plan for how or when she will obtain housing . . . or how she will manage the child's care while living independently for the first time. . . . It is also unclear whether [Sherry] will be able to manage her [thirty-five]-hour per week work schedule and [Jennifer's] care on her own. . . . The [c]ourt has significant concerns about [Sherry's] ability to live and parent independently, something she has never done.

Sherry does not challenge these findings. Therefore, given that we have rejected Sherry's challenges to the judge's findings regarding domestic violence, the judge's decision to maintain primary residential custody with Jeffrey, award the parties joint

legal custody, and continue the parties' shared parenting arrangement was not an abuse of discretion.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION