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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3559-16T1

NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

M.L.,

Defendant-Appellant.

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IN THE MATTER OF P.P., III,

Minor.

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Submitted January 29, 2018 - Decided February 28, 2018

Before Judges Ostrer and Rose.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Warren County,  
Docket No. FN-21-0143-16.

Joseph Krakora, Public Defender, attorney for  
appellant (Stephania Saienni-Albert,  
Designated Counsel, on the briefs).

Gurbir S. Grewal, Attorney General, attorney  
for respondent (Jason W. Rockwell, Assistant  
Attorney General, of counsel; Amy McKinsey,  
Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Linda Vele Alexander, Designated Counsel, on the brief).

PER CURIAM

Defendant M.L.<sup>1</sup> appeals from an October 21, 2016 order of the Family Part finding defendant abused or neglected her son by actively using heroin while caring for him. We affirm.

I.

We derive the salient facts from the record developed at the fact-finding hearing. Defendant, and her husband P.P.,<sup>2</sup> are the biological parents of Paul, born in October 2015. The family had no history with the Division of Child Protection and Permanency ("Division"). At the time of the incident, defendant, P.P., and Paul resided with P.P.'s mother, D.S., and P.P.'s stepfather, J.S.

On February 22, 2016, the Division received a referral from a physician that Paul had been admitted to the hospital with a left femur spiral fracture. The reporter indicated the parents brought four-month-old Paul to the emergency room because he was unable to move his left leg and was crying. The physician reported further Paul's injuries were inconsistent with the parents'

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<sup>1</sup> We use initials, and a pseudonym for the child, to protect the privacy of the parties. See R. 1:38-3(d)(12).

<sup>2</sup> P.P. does not appeal from the October 21, 2016 order that determined he also abused or neglected Paul.

account that the child caught his leg in a blanket when rolling over in bed.

The Division referred the investigation to the Warren County Prosecutor's Office. Detectives interviewed both parents at the hospital. Defendant claimed she and the baby went to sleep around midnight. Defendant awoke at 9:00 a.m. to the sound of Paul screaming.

P.P. stated Paul began to cry at 9:00 a.m. P.P. gave the infant a bottle and sat next to him. The blankets were "all bunched up" and defendant was sleeping facing the wall and away from Paul. P.P. heard a "pop" when the infant rolled over. P.P. then attempted to wake defendant and inform her that there was something wrong with Paul, to which defendant replied, "why, he's not crying?"

The Division requested urine tests from both parents to be administered the following day. Defendant's drug test was positive for marijuana and opiates, but she denied drug use before and after she received the results. P.P. tested positive for opiates, and also denied drug use. During the pendency of the Family Part proceedings, both parents failed to adhere to random urine screens.

A hospital pediatrician advised the Division and the detectives that, in addition to the spiral femur fracture, Paul also had a healing rib fracture. According to the doctor, these

injuries were consistent with child abuse. Paul remained hospitalized for two days. Following his release from the hospital, the Division executed an emergency Dodd removal<sup>3</sup> of Paul and placed him in a non-relative resource home.

In addition to the testimony of two caseworkers adduced at the three-day fact-finding hearing, the Division presented the testimony of Dr. Gladibel Medina, who was qualified by the court as an expert in pediatrics and child abuse. The Division also played the video-recorded statements of defendant and P.P. Defendant testified and presented the testimony of D.S. and M.B., Paul's maternal grandmother. The law guardian and P.P. did not call any witnesses.

Dr. Medina testified that a spiral fracture involves "torsional forces." She opined that a four-month old infant cannot generate sufficient force to cause a spiral fracture while in a prone position. Rolling over, as contended by P.P., cannot cause this type of injury. Paul's injury was less than seven to ten days old.

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<sup>3</sup> A Dodd removal is an emergent removal of a minor without a court order pursuant to N.J.S.A. 9:6-8.21 to -8.82, known as the Dodd Act. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 26 n.11 (2011).

Dr. Medina testified further Paul suffered a rib injury, which appeared to be healing. Dr. Medina could not pinpoint the specific cause of this injury. However, she opined "in the absence of an accidental mechanism[,]" inflicted trauma should strongly be considered as the cause of Paul's injuries. In sum, Paul was incapable of inflicting either of the two unexplained injuries upon himself.

Defendant testified she was sleeping the morning Paul was injured. However, she was aware Paul was on the bed, and P.P. was taking care of him. Defendant did not turn around and observe Paul nor P.P. until the infant was screaming. Defendant did not observe Paul sustain the injury to his femur. Defendant claimed her recollection of the events are based on what she was told by P.P.

Further, defendant admitted at the time of the incident, she was using one to two bags of heroin every two to three days. She ingested heroin in the bathroom while her son was in the bedroom. Defendant claimed she was not under the influence of drugs the day of the incident. She had no reason to believe P.P. used heroin or was under the influence of any drugs on the day of the incident. However, defendant acknowledged both she and P.P. lied about the use of illicit substances to avoid culpability.

Finding Paul's injuries to be "indisputable," and that defendant and P.P. were home alone with Paul when he sustained the spiral femur fracture, Judge Kimarie Rahill determined defendant and P.P. abused or neglected Paul. The court agreed with the uncontroverted testimony of the Division's medical expert that "such a fracture involves a direct, twisting force applied to the site of the injury . . . . [and] given [Paul's] age, the limits in the child's mobility, and the implausible explanation given by the parents for the injury, the injury was indicative of trauma or abuse." In so doing, the court did not find credible P.P.'s testimony about the cause of Paul's femur fracture. Further, Judge Rahill found defendant and P.P. admitted to using heroin while caring for Paul; the parents' tested positive for opiates on February 23, 2016; and they continued to fail to adhere to random urine screens throughout the Family Part proceedings.

In assessing defendant's credibility, the trial judge found implausible defendant's version of Paul's femur fracture. In rejecting defendant's account, the trial court cited defendant's "pattern of dishonest conduct [and] her positive urine screen the day after the injury, along with her contradictory testimony about the sequence of events of the morning of the injury."

The trial court did not find defendant or P.P. responsible for Paul's rib injury. Although the court found the "rib injury

was indicative of abuse," it concluded the Division failed to establish the specific timing of the injury and that the parents had exclusive care of Paul when the rib injury occurred.

The court concluded the Division proved by a preponderance of the evidence the injury to Paul's leg was "a result of inflicted trauma"; P.P. has a heroin problem and was "likely using while in a caretaking role of [Paul]"; defendant abused or neglected Paul "by actively using heroin while in a caretaking role of [Paul]"; and, defendant "was more likely than not under the influence during the period of time where [Paul] sustained the femur injury."

On appeal, defendant contends there was insufficient evidence to support the trial court's finding she abused or neglected Paul. Specifically, because the court concluded P.P. caused Paul's injury, the court erred in finding defendant abused or neglected her son. Defendant argues the trial court improperly shifted the burden to defendant to prove she was not culpable, pursuant to our decision in In re D.T., 229 N.J. Super. 509 (App. Div. 1988). Defendant claims further her substance abuse fails to support an abuse or neglect finding. The Division and law guardian urge us to affirm the court's order. After reviewing the record in light of the contentions advanced on appeal, we affirm.

## II.

We begin with a review of the applicable legal principles that guide our analysis in abuse or neglect matters, as set forth by our Supreme Court:

[A]ppellate 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. Indeed, we recognize that [b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court fact [-]finding.

[N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (second alteration in the original) (internal quotation marks and citations omitted).]

"[I]f there is substantial credible evidence in the record to support the trial court's findings, we will not disturb those findings." N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 226 (2010). However, "if the trial court's conclusions are 'clearly mistaken or wide of the mark[,]'" an appellate court must intervene to ensure the fairness of the proceeding." Id. at 227 (alteration in original) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). We also owe no deference to the trial court's legal conclusions, which we review de novo. State v. Smith, 212 N.J. 365, 387 (2012).



A.

Like any other Title Nine case, the Division was required to prove abuse or neglect by a preponderance of evidence. N.J. Div. of Youth & Family Servs. v. V.M., 408 N.J. Super. 222, 235 (App. Div. 2009). Here, the judge credited and relied on medical testimony that the injuries were caused by physical abuse. The circumstances permitted application of N.J.S.A. 9:6-8.46(a)(2), which states,

proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or guardian shall be prima facie evidence that [the] child . . . is an abused or neglected child.

Paul is an infant, incapable of identifying who may have harmed him, or describing the cause of his injuries, and the Division did not otherwise have access to information as to the identity of the culpable person other than what might have been provided by defendant and P.P. In these circumstances, we have held that "[t]he burden would then be shifted, and such defendants would be required to come forward and give their evidence to establish non-culpability." D.T., 229 N.J. Super. at 517; see also N.J. Div. of Youth & Family Servs. v. S.S., 275 N.J. Super. 173, 181 (App. Div. 1994). We conclude Judge Rahill properly utilized the D.T. standard because of the nature of Paul's

injuries, the small class of potential responsible parties, and the brief period during which the injuries occurred.

Once the burden shifted, defendant was required to demonstrate her non-culpability. Defendant claims, however, because P.P. admitted wrongdoing, the court should not have applied the D.T. burden-shifting standard to her. To support her position, defendant relies heavily on our decision in N.J. Div. of Child Prot. & Permanency v. K.F., 444 N.J. Super. 191 (App. Div. 2016).

In K.F., however, the mother acknowledged full responsibility for injuries to her child. K.F., 444 N.J. Super. at 200. Thus, we held because no reason existed to suspect the father of abuse or neglect, and the mother always claimed responsibility for the incident, applying the burden-shifting paradigm would be a mistake of law. Id. at 203.

Conversely, here, P.P. never claimed responsibility for the injuries sustained by Paul. Rather, P.P. claims the child inflicted the spiral fracture on himself. Secondly, unlike the parents in K.F., both defendant and P.P. were in the same room, within reach of Paul. Moreover, Judge Rahill found defendant's testimony incredible. Thus, the trial court appropriately shifted the burden to both defendant and P.P. in this matter. Any other approach would be contrary to the intent of Title Nine, which was enacted "to provide for the protection of children . . . who have

had serious injury inflicted upon them by other than accidental means." N.J.S.A. 9:6-8.8(a). As explained in Title Nine itself, this legislation was intended "to assure that the lives of innocent children are immediately safeguarded from further injury and possible death and that the legal rights of such children are fully protected." Ibid.; see G.S. v. Dep't of Human Servs., 157 N.J. 161, 171 (1999).

B.

Further, our courts have recognized a parent's use of drugs while caring for an infant places the infant at risk at "the slightest parental misstep." N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 331 (App. Div. 2011). However, proof of a parent's drug use itself was not sufficient to sustain a finding of abuse or neglect on the facts in V.T., where a parent used drugs prior to his visits with an eleven-year-old child. Ibid.

Similarly, we reversed a finding of abuse and neglect based solely on a mother's use of marijuana, on one occasion, while the child was in her care, in N.J. Div. of Child Prot. & Permanency v. R.W., 438 N.J. Super. 462, 468-70 (App. Div. 2014). In R.W., we noted the absence of detailed proof regarding the "circumstances of [the mother's] ingestion" of drugs, whether "the baby was solely

in her mother's care when she was intoxicated," and "the magnitude, duration, or impact" of the intoxication. Id. at 470.


Unlike the parent in V.T., defendant used heroin while caring for Paul on multiple occasions. Further, based on the urine screening and defendant's description of her drug use, the trial judge concluded "it was more likely than not [defendant] was under the influence" the day Paul was injured. The facts of the instant matter are also distinguishable from R.W. Here, unlike in R.W., proof was presented with respect to defendant's intoxication through the results of a urine screening; defendant testified as to the frequency of her drug use; and it was undisputed that Paul was solely in P.P. and defendant's care when he was injured. In addition to the presence of heroin in defendant's system, Judge Rahill found defendant's drug use was "pervasive and done while caring for her vulnerable, infant child."

Further, the trial court did not find defendant abused or neglected her infant son based solely on the fact that she used illicit substances. Rather, the trial court considered the totality of the circumstances surrounding the incident; the severity and potential cause of Paul's injury; Dr. Medina's unrefuted expert testimony; the testimony of the Division caseworkers; and the incredible testimony of defendant.

We conclude, therefore, Judge Rahill's findings of abuse or neglect are supported by substantial credible evidence and the totality of the circumstances. Her assessment of the weight and credibility of the evidence commands our deference.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION