SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2135-16T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

A.L.,

Defendant-Appellant,

and

L.B.,

Defendant.

IN THE MATTER OF S.L.,

a Minor.

Submitted March 20, 2018 – Decided April 4, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FN-12-0229-15.

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

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Todd Wilson, Designated Counsel, on the brief).

PER CURIAM

Defendant A.L. appeals from the Family Part's December 12, 2016 order terminating litigation after issuing a March 18, 2016 fact-finding order, finding he abused and neglected his infant daughter, S.L. (Shayna)[1] in March 2015 (the March incident) and again in April 2015 (the April incident).[2] For the reasons that follow, we affirm.

[1] We refer to the infant by pseudonym for anonymity and ease of reference.

[2] Defendant's notice of appeal states he appeals from the Family Part's December 12, 2016 order; however, that order only terminated Title 9 litigation filed by the Division of Child Protection and Permanency (the Division). Based upon defendant's brief, he clearly intended to appeal from the March 18, 2016 adverse fact-finding order. Because all counsel fully briefed the issues defendant intended to raise, we exercise our discretion and consider defendant's challenge to the March 18, 2016 order. But see W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008) ("It is clear that it is only the orders designated in the notice of appeal that are subject to the appeal process and review.").

I

Shayna was born in December 2014 to defendant and L.B. In March 2015, a South Plainfield police officer reported to the Division that Shayna was at the hospital because she was hurt during a domestic violence dispute.

L.B. described the incident as occurring during an argument between her and defendant. She stated she wanted to give Shayna a bath, but defendant disagreed, so he pushed her while she was holding Shayna, causing the infant's head to bump into a door. Defendant stated he and L.B. began arguing when he would not let L.B. take Shayna from him; he said L.B. grabbed Shayna out of his hands, and when he tried to take Shayna back, L.B. jerked away and hit the infant's face on the door. Shayna spent five days in the hospital, while her doctors investigated the cause of her facial bruising and swelling; ultimately, they concluded she sustained a "facial contusion."

On March 23, 2015, the Division filed a verified complaint for care and supervision of Shayna, pursuant to N.J.S.A. 9:6-8.21. The Family Part granted the Division's application, and ordered Shayna's physical custody split between defendant and L.B., with alternating weeks of care.

On April 12, 2015, the police reported to the Division that Shayna was again injured. The reporter stated Shayna had spent

the preceding week with defendant, and defendant returned the infant to her maternal grandparents because L.B. was at work. After receiving the infant, the maternal grandparents discovered Shayna had blood in her eyes and a bruise on her check. They immediately called the police.

Paramedics determined Shayna had "a bruise to the left facial che[e]k, a lump to the soft spot of her head, her pupils [were] fixed and not responding to light, and two red spots of blood [were in] her eyes." Later, a nurse at the hospital reported to the Division that Shayna "had bilateral hematoma to the eyes and a bruise to the left cheek," but the infant was eating and "appeared [to be] in good health."

Defendant described the incident as follows. On Friday, April 10, 2015, he applied a new brand of lotion on Shayna, including her hands, and Shayna then rubbed her eyes. The following day, Shayna had pimples on her face and she continued to rub her eyes; defendant believed the pimples were a reaction to the lotion. The same day, defendant noticed blood in Shayna's eyes, but by Sunday, April 12, 2015, the day he returned Shayna to her maternal grandparents, one eye had cleared up. He further claimed Shayna's cheek was swollen because her "car seat strap was too far up" and she "hit her cheek when she fell asleep."

Investigators spoke with defendant's mother, sister, brother-in-law, and other extended family. Defendant's mother noticed red in Shayna's eyes, and defendant told her the lotion caused an allergic reaction. She denied seeing bruises on Shayna.

Defendant's sister also stated she saw redness around Shayna's eyes and red marks that "look[ed] like pimples." The sister and brother-in-law also stated defendant told them Shayna rubbed her eyes after he applied lotion. Two nieces reported they saw redness in Shayna's eyes, but did not know the cause, and other extended family denied seeing anything "wrong" with Shayna. All extended family members denied seeing bruising on Shayna.

The Division arranged for Dr. Gladibel Medina to examine the infant. In her initial report, the doctor reviewed defendant's narrative and timeline, and stated:

> [Shayna's] facial bruising and subconjunctival hemorrhages were clearly present when she was dropped off to the maternal grandparents. These injuries suggest traumatic events. They were not observed by father's adult sister prior to [Shayna] going to [the] paternal grandmother's home. These specific injuries were not present the couple of days following application of [the] lotion. Father and sister spoke about "some reaction" on [Shayna's] face at the end of the week due to the lotion but the "reaction" was not described and bruising was definitely not mentioned. Sister only spoke about dot-like red dots which were not present when the child received medical attention that weekend.

> Inflicted trauma remains as an etiology to be strongly considered since this child was [four] months old at the time of the injury and would not self-inflict vascular trauma. Father did not report any accidental incidents such as falls or objects falling on [Shayna's] face.

The Division filed an amended verified complaint for care and supervision of Shayna, and indicated it would seek a finding of abuse and neglect against defendant and L.B. under Title 9, based upon both the March and April incidents. The Family Part held a fact-finding hearing on February 8 and 9, 2016.

During the hearing, Dr. Medina testified regarding both the March and April incidents. She stated the injuries Shayna suffered because of the March incident were consistent with her face hitting a door, as defendant and L.B. described.

Regarding the April incident, Dr. Medina testified she could not determine the cause of Shayna's injuries; however, she stated defendant's explanations could not have caused the injuries Shayna suffered. When asked about defendant's claim that Shayna hit her cheek while falling asleep in her car seat, the doctor explained:

> Just leaning against the seat, the frame that hold[s] the head of the infant it . . . could cause redness for sure. Redness and irritation. But, a bruise is actually vascular trauma. Broken blood vessels underneath the skin and the bruise itself is just basically blood in the subcutaneous tissue. So, that doesn't happen from leaning on a surface.

Regarding the blood in Shayna's eyes, Dr. Medina stated "subconjunctival hemorrhages are just blood vessels that are traumatized. And the blood seeps out of them. That could happen from a poking, a pressure type force, an impact to the globe of the eye." The doctor testified that these injuries could have been caused by multiple impacts, someone or something falling on the child, or someone "pressuring [Shayna's] face" with his or her hands.

When asked if she could "rule out child abuse," Dr. Medina responded:

> So, child abuse is a diagnosis of exclusion. . . . [W]e are not there to witness the injury so we have to exclude medical ideologies and also accidental ideologies as provided by the care takers who were with the child in order to . . . make an assessment whether that can be consistent. In this case, we didn't have a medical explanation that could account for all of [Shayna's] injuries. And we didn't have an accidental mechanism at least as explained by the biological father to the care takers involved with their child's care, not care takers but to the people that are involved in the investigation and caring for this child as to what could have happened.

She opined with a reasonable degree of medical certainty that Shayna's injuries occurred while under defendant's care, and that defendant's explanations did not account for Shayna's injuries.

In a March 18, 2016 oral decision, the Family Part judge found defendant abused and neglected Shayna during both the March

and April incidents. Regarding the March incident, the judge found L.B.'s narrative credible,[3] and found defendant pushed L.B. while she was holding Shayna, thus causing Shayna's injuries. The judge found that although defendant may not have intentionally injured Shayna, defendant intentionally pushed L.B., thereby disregarding a foreseeable risk that Shayna would sustain injury.

Regarding the April incident, the judge found that defendant's narrative lacked credibility and was inconsistent with Shayna's injuries. Specifically, he found

> by a preponderance of the evidence the [Division] has proven that [Shayna's] injuries were caused while in the care and custody of . . . [defendant]. The [c]ourt finds that while the [Division] was not able to prove how those injuries occurred, there was sufficient evidence to establish that the injuries occurred while in his care. And that there is no explanation that was provided [by] him as to how those injuries occurred. Accordingly this Court accepts the testimony of Dr. Medina . . . where Dr. Medina opined that the injuries to the child in April were caused by trauma or pressure to the child and that it was done . . . while under the care of [defendant.]
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> . . . .
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> [T]he court finds that the Division did meet its burden of proof by demonstrating by a preponderance of the evidence that . . . [Shayna] was abused and neglected as a result of [defendant's] failure to

[3] The judge found the Division failed to establish L.B. abused or neglected Shayna, and dismissed the Title 9 action against her.

> exercise a minimum degree of care . . . causing physical injury to the child both in March and April.

II

The scope of our review of a trial court's factual findings is limited. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278 (2007). We accord deference to a family court's factual findings, largely because the family court "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." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (citing M.M., 189 N.J. at 293). Accordingly, the family court's factual findings "should not be disturbed unless 'they are so wholly insupportable as to result in a denial of justice,' and should be upheld whenever they are supported by 'adequate, substantial and credible evidence.'" In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)). However, the "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference," but rather are subject to plenary review. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

On appeal, defendant disputes the sufficiency of the evidence supporting the judge's finding of abuse and neglect, and argues the judge mistakenly burdened him with proving he did not abuse Shayna. The adjudication of abuse and neglect is governed by Title 9, N.J.S.A. 9:6-8.21 to -8.78, which is designed to protect children who suffer serious injury inflicted by other than accidental means. G.S. v. N.J. Div. of Youth & Family Servs., 157 N.J. 161, 170 (1999) (citing N.J.S.A. 9:6-8.8).

An "abused or neglected child" is defined as:

> a child less than [eighteen] years of age whose parent or guardian . . . inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ . . . .
>
> [N.J.S.A. 9:6-8.21(c).]

Further, in a fact-finding hearing, to determine the allegations of abuse or neglect:

> 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 a child of, or who is the responsibility of such person is an abused or neglected child . . . .
>
> [N.J.S.A. 9:6-8.46(a)(2).]

It is well-established the Division bears the burden to prove, by a preponderance of the evidence, that a child is abused or neglected. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 32 (2011) (quoting N.J.S.A. 9:6-8.46(b)). When identifiable persons have had custody of an infant who suffers injuries while in their care, an inference of abuse and neglect arises and "[t]he burden would then be shifted, and such defendants would be required to come forward and give their evidence to establish non-culpability." N.J. Div. of Youth & Family Servs. v. J.L., 400 N.J. Super. 454, 468 (App. Div. 2008) (alteration in original) (quoting In re D.T., 229 N.J. Super. 509, 517 (App. Div. 1988)); see also N.J. Div. of Youth & Family Servs. v. S.S., 275 N.J. Super. 173, 181 (App. Div. 1994) (requiring the mother and her paramour to prove their non-culpability after the Division established a prima facie case of abuse for her minor child). "The criteria for application of the . . . burden-shifting paradigm . . . requires that a defined number of people have access to the child at the time the abuse definitively occurred." Id. at 469.

Alternatively, when a child who suffers injury has been exposed to a number of individuals over a period of time and it is unclear exactly when and where the injuries occurred, when "the Division establishes a prima facie case of abuse or neglect under

N.J.S.A. [9:6-8.46(a)(2)], the burden will shift to the parents to come forward with evidence to rebut the presumption of abuse or neglect." Id. at 470. In such an instance,

> parents are not obligated to present evidence. They may choose to rest and allow the court to decide the case on the strength of the Division's evidence. They may present evidence tending to refute the Division's prima facie case by showing, for example, that the child was not in their care when the injury occurred or that the injury could reasonably have occurred accidentally, with or without any acts or omissions on their part.
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> [Id. at 472 (internal citation omitted).]

In either case, the Division must always establish abuse or neglect.

III

Regarding the March incident, defendant first argues the judge erred in finding he acted with gross negligence or recklessness; rather, he argues his actions at most were "inadvertent or accidental." Defendant's claim lacks merit.

Our Supreme Court has stated "[n]othing in the plain language of N.J.S.A. [9:6-8.21(c)] compels the conclusion that accidental injuries cannot form the basis for a finding of neglect under that provision." G.S., 157 N.J. at 173. Further, the Court concluded, "Where an action is deliberate, and the actor can or should foresee that his conduct is likely to result in injury, as a matter of

law, that injury is caused by 'other than accidental means.'" Id. at 175 (citing N.J.S.A. 9:6-8.8).

Here, the record contains sufficient evidence for the judge to find defendant intentionally pushed L.B., thereby disregarding a foreseeable risk that Shayna would sustain injury. As the judge noted,

> [defendant] should have been aware that his act of pushing or shoving [L.B.] . . . when she had an infant in her hands had a high likelihood of causing serious harm to the child; whether it was the child being pushed into the door, [L.B.] dropping the child, [L.B.] falling. [Defendant] was aware that the child was in [L.B.'s] arms when he . . . created a dangerous situation for both [L.B.] and . . . [Shayna].

Accordingly, we find no error in the judge's finding defendant's intentional actions caused Shayna's injuries in the March incident.

Regarding the April incident, defendant argues the judge erred in shifting the burden of proof to him to demonstrate he lacked culpability for Shayna's injuries. We disagree.

The record lacks evidence the judge shifted the burden to defendant. Instead, he considered the totality of the parties' evidence, and found defendant's narrative incredible. Further, he placed significant weight on Dr. Medina's medical testimony,

and found defendant's explanations for Shayna's injuries contrary to the medical evidence.

Moreover, the judge found Shayna's injuries occurred while under defendant's care, stating:

> the court is also aware that [defendant] indicated that for one night the child was not with him, but rather the child stayed alone at his parents' house. This [c]ourt, however, does not find that testimony to be significant as [defendant] has not indicated the child displayed any additional injuries or looked any differently when he picked the child up on Sunday from when he dropped the child off the day before.

Accordingly, the judge did not shift the burden of proof to defendant, but rather appropriately found the Division satisfied its burden by a preponderance of the evidence.

Affirmed.