

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0903-11T1

NEW JERSEY DIVISION OF YOUTH
AND FAMILY SERVICES,

Plaintiff-Appellant,

vs.

K.T.,

Defendant-Respondent.

IN THE MATTER OF S.T.,

A Minor.

Submitted: May 31, 2012 - Decided: June 19, 2012

Before Judges Cuff and Waugh.

On appeal from the Superior Court of New Jersey, Chancery Division-Family Part, Union County, Docket No. FN-20-129-11.

Jeffrey S. Chiesa, Attorney General, attorney for appellant (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Christian A. Arnold, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent (Justin J. Walker, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for the minor (Melissa R. Vance, Assistant Deputy Public Defender, on the brief).

PER CURIAM

In this appeal, we review an order finding no abuse or neglect under Title Nine, N.J.S.A. 9:6-8.21 to -8.73. The trial judge held that the corporal punishment meted out by K.T. to her seven-year-old daughter S.T. was within her right as a parent to discipline her child. We reverse.

On June 7, 2011, the Division of Youth and Family Services (the Division) received a referral from a teacher at S.T.'s school stating S.T. had arrived at her kindergarten class with "bruises and marks on her arms, legs and buttocks." The teacher had not previously seen these marks on S.T.¹

An intake worker for the Division arrived at S.T.'s school to investigate the referral. S.T. told the intake worker that, on a Friday, K.T. had beaten her with a belt upon learning she had kissed a boy during class. S.T. also stated her mother made her spell the word "sorry" and continued to hit her with the belt until S.T. spelled the word correctly. S.T. did not recall how many times she was hit. The caseworker determined the punishment occurred on or about May 31, 2011.

¹ S.T. had been absent from school on June 1, 2011. When she arrived at school on June 2 and 3, she was wearing long sleeves.

S.T. also informed the caseworker that K.T. had instructed her to lie if anyone asked about the punishment. If she did not lie, K.T. would hit her again. S.T. informed the Division K.T. usually hit her with her hand. According to the caseworker, S.T. stated "on numerous occasions" during the interview she wanted to go to her aunt's house, rather than back to her mother's, because she feared K.T. would hit her again.

During a subsequent recorded interview, S.T. stated K.T. had hit her on her left and right arms, back, side, and buttocks, with the part of the belt that goes "around the waist." While K.T. hit S.T., K.T. asked, "Why are you sitting on that boy's lap? Why are you hitting?"² S.T. stated K.T. had hit her on three prior occasions, but she could not recall the dates. At the conclusion of the interview, S.T. said she did not know the difference between a truth and a lie, but stated her mother had told her to lie and knew that if she told a lie in school, she would get in trouble.

That day, the Division took nine pictures of S.T.'s arms, legs, back, and buttocks. The pictures, all admitted in evidence, reveal bruises on the child's right and left arms,

² S.T. also told the caseworker that K.T. learned S.T. had hit another student; however, school records did not identify any other behavioral problems exhibited by S.T., and K.T. did not state any other basis beyond the kissing for S.T.'s punishment.

back, buttocks, and right and left thighs. She also suffered lacerations to her buttocks and right outer thigh, probably caused by the prong of the buckle.

During a recorded interview with K.T., she conceded hitting her daughter with a belt for "a couple of minutes" because S.T. had been sitting on a boy's lap and had been disruptive in school. She asserted, however, that she had aimed for S.T.'s buttocks only, and S.T.'s squirming around during the incident caused the bruises on other parts of her body. K.T. also admitted to using a belt on other occasions to discipline her daughter. She denied, however, having told S.T. to lie about the punishment or having tried to hide S.T.'s bruises. When asked if she "realize[d] that what [she] did was wrong," she replied, "No, because that's pretty much how I was raised."

On June 9, 2011, the Division filed for and was granted custody of S.T.; physical custody was granted to the child's father M.H.³ On September 7, 2011, the trial court held a fact-finding hearing. In support of its complaint, the Division introduced the video-taped interviews of K.T. and S.T. and the

³ K.T. and M.H. had joint legal custody of S.T.; however, she resided with K.T. during the week and M.H. on the weekends. K.T. cancelled S.T.'s scheduled weekend visit with M.H. on June 4 and 5, stating she wanted to take S.T. to a church conference. Accordingly, M.H. was not aware of the bruises.

pictures taken during S.T.'s school interview. The Division and Law Guardian argued S.T.'s punishment, which left bruises, marks and lacerations on her body that were "visible and clear seven days [after the punishment]," constituted excessive corporal punishment under Title Nine. K.T. argued the punishment, which left "no permanent injury[,]" did not constitute excessive corporal punishment.

The trial judge found the Division failed to provide sufficient facts to substantiate any abuse or neglect. The judge stated:

[K.T.] was very alarmed that her child was exhibiting sexual behavior at such a young age, seven, . . . and she felt the best thing to do was to . . . show how serious this is and put a stop to it.

The child was not unduly harmed by this. The child did[not] even seem that upset about it when she was interviewed She understood it. You know, I misbehave, I might . . . get physically disciplined by my mother.

The judge determined S.T.'s bruises, most of which were located on her buttocks, were not in what "the Supreme Court and the appellate courts have referred to as vulnerable areas. In fact, getting a spanking on the rear end is sort of customary" Although the judge did "not condon[e] corporal punishment[,]" he noted "that doesn't mean that we label someone as an abusive parent, a label that will last for the rest of the

parent's life." Accordingly, he found the punishment was not "extraordinary, unusual or excessive" as required for a finding of abuse and neglect under Title Nine. The judge entered an order terminating the litigation and granted joint legal custody to K.T. and M.H. and physical custody to M.H.

On appeal, the Division argues K.T.'s conduct, in striking S.T. with a belt and leaving bruises on the child's body and lacerations on her buttocks, constitutes excessive corporal punishment. K.T. counters, relying on New Jersey Division of Youth and Family Services. v. P.W.R., 205 N.J. 17 (2011), that her actions fall within her constitutional right to use this form of corporal punishment, and the record is barren of "any objective evidence that K.T., in spanking her child, recklessly created a risk of serious injury to S.T."

Our review of a trial court's findings of fact is limited. Such findings are "binding on appeal when supported by adequate, substantial and credible evidence." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (citing N.J. Tpk. Auth. v. Sisselman, 106 N.J. Super. 358 (App. Div.), certif. denied, 54 N.J. 565 (1969)). "Deference to a trial court's fact-findings is especially appropriate when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108,

117 (1997) (citation omitted). "Because a trial court 'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)) (alteration in original). Hence, we will 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, supra, 65 N.J. at 484 (citation omitted).

Here, the facts are largely undisputed. It is of no consequence whether K.T. told S.T. to lie or whether S.T. had to correctly spell "sorry" to permit the spanking to stop. It is also undisputed that S.T. had bruises on her arms, thighs, and buttocks and lacerations on her buttocks seven days after her mother used a belt on her. The issue before this court is whether the trial judge properly applied the governing law to the facts.

"The Legislature charged the Division with the responsibility of protecting the health and welfare of the children of this state." N.J. Div. of Youth & Family Servs. v.

G.M., 198 N.J. 382, 397 (2009) (citing N.J.S.A. 30:4C-4). Abuse and neglect proceedings initiated by the Division are governed by Title Nine. N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 108 (2011) (citations omitted). As "[t]he safety of the children served shall be of paramount concern[,]" N.J.S.A. 9:6-8.8a, the Division, before applying for a court order, may immediately remove a child from the parent's care if there exists an "imminent danger to the child's life, safety or health," N.J.S.A. 9:6-8.29.

Title Nine defines an abused or neglected child, in relevant part, as

a child less than 18 years of age 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 . . . 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[.]

[N.J.S.A. 9:6-8.21c.]

The trial court must find the child was abused or neglected by a preponderance of the evidence at a fact-finding hearing. N.J. Div. of Youth & Family Servs. v. K.M., 136 N.J. 546, 557 (1994).

Although the statute does not define "excessive corporal punishment," the trial judge was not without guidance to

determine the meaning of this term. N.J.A.C. 10:129-2.2 provides the classes of injuries that amount to abuse or neglect under this statute. They include, in part:

1. Child death;
2. Head injuries;
3. Internal injuries;
4. Burns;
5. Poison or noxious substances;
6. Wounds;
7. Bone fractures;
8. Substantial risk of physical injury or environment injurious to health and welfare;
9. Cuts, bruises, abrasions, welts or oral injuries;
10. Human bites;
11. Sprains or dislocations;
12. Mental or emotional impairment; and
13. Risk of harm due to substance abuse by the parent/caregiver or the child.

[N.J.A.C. 10:129-2.2(a) (emphasis added).]

This court has also approved the following jury charge used when this offense is submitted to a jury for determination: "[T]he law does not prohibit the use of corporal punishment. The statute prohibits the infliction of excessive corporal punishment. The general proposition is that a parent may inflict moderate correction such as is reasonable under the

circumstances of a case." State v. T.C., 347 N.J. Super. 219, 239-40 (App. Div. 2002) (alteration in original) (internal quotation marks omitted), certif. denied, 177 N.J. 222 (2003). Accord Dep't of Children & Families, Div. of Youth & Family Servs. v. K.A., 413 N.J. Super. 504, 510 (App. Div. 2010), certif. disp'd as improvidently granted, 208 N.J. 355 (2011). We evaluate a claim of abuse by the harm suffered by the child not the mental state of her mother. Id. at 511.

The Supreme Court has provided further guidance as to what constitutes "excessive corporal punishment." In P.W.R., the Division was notified that a father and stepmother were taking their sixteen-year-old child's earnings and "slapping her around." 205 N.J. at 23. The father admitted to the Division that the stepmother had used some of the child's money for the cable bill and had slapped her two years earlier, after she skipped school. Id. at 24. The stepmother conceded she used some of the child's money for the cable and phone bills, but stated the remainder was placed in a bank account. Id. at 25. She added that the child had "a behavioral problem," and was "disrespectful," as well as "a liar." They had "issues" with the child's "sexual experimentation; an undesired, pending school transfer; and a boyfriend relationship." Ibid. (internal quotation marks omitted). The child admitted to being sexually

active and stated the stepmother was "'always slapping her around' and 'hitting her in the face.'" Ibid.

Upon the conclusion of a fact-finding hearing, the trial court determined the Division proved by clear and convincing evidence⁴ the child was abused and neglected, based in part on the stepmother's corporal punishment. Id. at 29. This court affirmed the order; however, the Supreme Court reversed. Justice LaVecchia stated:

Although hardly admirable, we agree that such occasional discipline does not fit a common sense application of the statutory prohibition against "excessive" corporal punishment. There was no evidence developed in this record showing the existence of bruises, scars, lacerations, fractures, or any other medical ailment suffered as a result of [the stepmother]'s actions.

. . . .

A slap of the face of a teenager as a form of discipline with no resulting bruising or marks does not constitute "excessive corporal punishment" within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b). . . . [B]y qualifying the prohibition with the term, "excessive," 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. . . . In this matter, where [the Division] labeled the physical abuse "unfounded," the trial court abused its discretion by utilizing the slaps as a

⁴ The "quantum of proof" in a Title Nine fact-finding hearing is preponderance of the evidence. P.W.R., supra, 205 N.J. at 32.

basis for a finding of physical abuse. . . .
The proofs simply were insufficient to
support a finding that [the stepmother]
physically abused [the child].

[Id. at 35-37 (emphasis added).]

The Court also noted what may constitute excessive corporal punishment against a younger child, may not amount to excessive corporal punishment against an older child. Id. at 33.

Ultimately, abuse and neglect cases are "fact sensitive[, e]ach case require[ing] careful, individual scrutiny." Ibid. For example, excessive corporal punishment has been found where a father, after having an argument with his children, choked his thirteen-year-old daughter and hit her stomach and back. N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 333, 345 (2010). Similarly, where a mother hit her a five-year-old child "in multiple locations, including a vulnerable area[,"] causing "red demarcations" on the child's face, right elbow, left cheek, and back, and admitted to using corporal punishment on the child starting at three years of age once or twice per month, we found excessive the corporal punishment used by the mother. Dep't of Children & Families, Div. of Youth & Family Servs. v. C.H., 416 N.J. Super. 414, 416-17 (App. Div. 2010), certif. denied, 207 N.J. 188 (2011).

In contrast, in K.A., we found no excessive corporal punishment where a mother hit her "psychologically disruptive"

eight-year-old child "five times on the shoulder with a closed fist," but "the force used did not lacerate the child's skin and did not require any type of medical intervention," and the "[b]ruises, although visible, never exposed [the child] to any further harm if left untreated." 413 N.J. Super. at 512-13. Although the mother's behavior was an isolated, aberrational event, we stated that even "a single incident of violence against a child may be sufficient to constitute excessive corporal punishment[,]" such as when "the child suffers a fracture of a limb, or a serious laceration, or any other event where medical intervention proves to be necessary[.]" Id. at 511-13.

K.T.'s reliance on P.W.R. and her focus on S.T.'s bruises and lacerations on non-vulnerable areas, i.e., other than the face, are misplaced. Multiple strikes with a belt to a seven-year-old child, which left bruises and marks all over the child's body that were visible seven days after the incident, is hardly the occasional discipline of a wayward or incorrigible teenager condoned by the Court in P.W.R. Moreover, no case law, statute or regulation suggests the location of the injuries is decisive, although it may evidence punishment beyond what is reasonable under the circumstances. See N.J.A.C. 10:129-2.2(a)9 (providing "[c]uts, bruises, abrasions, [or] welts[,]" without a

distinction as to location, may satisfy a finding of abuse or neglect). Here, the pictures taken seven days after the incident reveal large bruises on S.T.'s right and left arms, back, buttocks, and right and left thighs, and lacerations to her buttocks and right outer thigh.

Furthermore, the punishment meted out by K.T. cannot be considered a "moderate correction" that is "reasonable under the[se] circumstances" State v. T.C., supra, 347 N.J. Super. at 240. Neither the school nor K.T. asserts S.T. exhibited other behavioral problems or was generally a difficult child. The punishment inflicted by K.T. is hardly a "customary" spanking.

Accordingly, applying the law to the undisputed facts of this case, we hold that K.T.'s acts against her daughter are excessive corporal punishment and support a finding that S.T.'s "physical, mental, or emotional condition . . . is in imminent danger of becoming impaired as the result of the failure of [K.T.] . . . to exercise a minimum degree of care . . . by unreasonably inflicting . . . excessive corporal punishment" upon S.T. N.J.S.A. 9:6-8.21(c).

Reversed.

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


CLERK OF THE APPELLATE DIVISION