SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3446-15T4

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

K.H.,

Defendant-Appellant,

v.

N.K. and M.K.

Defendants.

IN THE MATTER OF K.K.,

Minor.

Argued November 27, 2017 – Decided December 21, 2017

Before Judges Accurso, O'Connor and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FN-13-0234-13.

Steven E. Miklosey, Designated Counsel, argued the cause for appellant (Joseph E.

Krakora, Public Defender, attorney; Steven Edward Miklosey, on the briefs).

Elizabeth H. Wallace, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa Raksa, Assistant Attorney General, of counsel, Elizabeth H. Wallace, on the brief).

Olivia Belfatto Crisp, Assistant Deputy Public Defender, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Olivia Belfatto Crisp, on the brief).

PER CURIAM

Following a fact-finding hearing in this Title Nine action, the Family Part court determined defendant K.H. abused or neglected her granddaughter, K.K. (child or granddaughter), because defendant was under the influence of prescription medications while caring for the child. Defendant appeals from this determination, primarily arguing the court improperly relied upon the opinions of an emergency room nurse and a Division of Child Protection and Permanency (Division) caseworker to conclude defendant was impaired when her granddaughter was in her care. We affirm.

I

The pertinent evidence is as follows. As of January 2013, defendant, defendant's husband (grandfather), the child's mother (mother), and the child had been living in the same household

for eight years. During the evening of January 24, 2013, the mother, a recovering heroin addict, filled a prescription for Xanax, ingested approximately twelve pills, and passed out. The child, then ten years of age, discovered her mother on the floor of the mother's bedroom and, when the child could not rouse her mother, alerted defendant. Defendant responded and succeeded in getting the mother into bed, where the mother slept for the rest of the night. Defendant did not seek assistance from any medical professional.

The following morning, the mother went to a methadone clinic she regularly attended for treatment. A physician at the clinic noticed the mother was staggering and appeared drowsy. Suspecting the mother had overdosed on a substance, the physician arranged to have the mother transported to the hospital. A clinic employee contacted defendant to report the mother was in the hospital.

Defendant, along with a friend, arrived at the hospital at 11:30 a.m. The hospital staff noticed both appeared to be under the influence. Specifically, the staff noticed defendant kept "nodding off." At the hearing, an emergency room nurse, who was trained in "substance abuse" and often encountered patients under the influence of substances, testified she observed defendant was "very lethargic," and her eyes were "very heavy"

and closed "frequently" while the nurse spoke to her. Defendant also spoke very slowly and had a very dry mouth.

The nurse mentioned the mother had informed her that defendant was a drug addict. The nurse did not specifically ask defendant if she had taken any medications that day or test her for substances because defendant was not a patient. Because of her demeanor, the nurse concluded defendant was under the influence of a mood altering substance.

According to the emergency room record, defendant advised the staff she was tired from tending to the mother during the night. However, defendant did not clarify why she needed to be awake if the mother merely slept and defendant clearly did not regard the mother's condition sufficiently serious to warrant medical attention.

Defendant informed the staff she would care for the child while the mother was in the hospital.[1] Concerned about the child's welfare under defendant's care, the staff contacted the police and the Division. A police officer responded to the hospital, but informed the staff defendant could not be detained. The record does not reveal the basis for the police officer's determination or if the officer actually assessed

[1] The mother was hospitalized for six days.

defendant. In addition, there is no indication defendant either intended to or did drive from the hospital to her next destination.[2]

Division caseworker Jessica Ronan also testified. She commented she had been trained to recognize the "indicia" of being under the influence of substances. She met with the mother in the hospital the day she was admitted. The mother informed the caseworker defendant was a drug addict and under the influence of prescription medications daily, taking more medication than the prescribed dose, and often was observed "nodding out."

The caseworker met with defendant in her home early that evening. Defendant appeared to be under the influence of a substance; specifically, she had droopy eyelids, glassy eyes, and moved and spoke slowly. Defendant told the caseworker she took four pills that day, specifically, two OxyContin pills, and one Oxycodone and one Soma[3] pill. When the caseworker asked to see defendant's prescription bottles, defendant initially resisted but did turn them over to the caseworker.

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[2] The police also advised the hospital staff defendant's friend could not be detained. We note the friend drove from the hospital, got into a car accident, was returned to the emergency room for treatment, and was charged with driving under the influence.

[3] Soma is a muscle relaxant.

In addition to producing bottles containing the three aforementioned medications, defendant also provided a bottle containing Xanax. The caseworker noted the date each prescription was filled and the number of pills defendant was to consume daily, and determined over one hundred pills were missing. The unaccounted medication consisted of thirty-five Soma, seventy-seven Oxycodone, twenty-three OxyContin, and three Xanax pills.

Defendant claimed the mother stole the missing medication. The mother denied such claim and, while hospitalized, tested positive for only benzodiazepine, reflecting the Xanax she ingested. The mother's drug screen did not reveal the presence of any narcotics, indicating the mother had not ingested either Oxycodone or OxyContin. However, the mother did have three Soma pills in her possession when admitted into the emergency room.

While in defendant's home, the caseworker also discovered the grandfather was confined to a hospital bed, where he was recovering from back surgery. None of his pain medication was missing. He did not appear to be under the influence of any substance. There is no evidence he was capable of caring for or did care for the child.

Just before the fact-finding hearing, the mother stipulated she abused and neglected the child by placing her at risk of

harm when the mother ingested Xanax the night before her hospitalization. The hearing against defendant proceeded; defendant did not testify or seek to admit any other evidence.

At the conclusion of the hearing, the court noted the caseworker and emergency room nurse were credible, and found defendant abused and neglected the child because she was under the influence of her medication after the mother was hospitalized and defendant assumed care of the child.

II

On appeal, defendant principally contends the court erred by according weight to the nurse and caseworker's opinion that defendant was under the influence the day the mother was admitted into the hospital. Defendant argues neither had the expertise to render such opinion. We disagree.

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, 278-79 (2007). Our task is to determine "whether the findings made could reasonably have been reached on substantial credible evidence present in the record when considering the proofs as a whole." N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 442-43 (App. Div. 2001) (citing Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Special deference is afforded to a Family Part court's

fact-finding because of such court's expertise in family matters. 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)).

The purpose of Title Nine, N.J.S.A. 9:6-8.21 to -8.73, is to protect children from circumstances that threaten their welfare. G.S. v. Dep't of Human Servs., Div. of Youth & Family Servs., 157 N.J. 161, 176 (1999). The burden is on the Division to prove abuse or neglect by a preponderance of the "competent, material and relevant evidence[.]" N.J.S.A. 9:6-8.46(b); N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 18 (2013).

Where there is no evidence of actual harm to the child, "a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm." A.L., 213 N.J. at 23 (citing N.J.S.A. 9:6-8.21(c)(4)(b)). A "minimum degree of care," as required by N.J.S.A. 9:6-8.21(c)(4)(b), "refers to conduct that is grossly or wantonly negligent, but not necessarily intentional." Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 299-300 (2011) (citation omitted).

"Conduct is considered willful or wanton if done with the knowledge that injury is likely to, or probably will, result." G.S., 157 N.J. at 178. The essence of gross or wanton

negligence is that it "implies that a person has acted with reckless disregard for the safety of others." Id. at 179 (citing Fielder v. Stonack, 141 N.J. 101, 123 (1995)). Gross negligence requires "an indifference to the consequences," Banks v. Korman Assocs., 218 N.J. Super. 370, 373 (App. Div. 1987) (citation omitted), but a parent's actual intent to cause harm is not necessary. G.S., 157 N.J. at 179.

Although the Division must demonstrate "the probability of present or future harm" to the child, "the court 'need not wait to act until a child is actually irreparably impaired by parental inattention or neglect.'" N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004) (quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)). While an abuse and neglect finding is not necessarily indicated every time a parent or guardian ingests an illicit substance or abuses prescription medication, we have noted that "a parent should not exercise visitation, even supervised visitation, while impaired." N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 331 (App. Div. 2011).

Here, on the question of defendant's alleged use of substances, we are guided by State v. Bealor, 187 N.J. 574 (2006). Although that matter concerned whether the defendant violated N.J.S.A. 39:4-50(a) by operating a vehicle under the

influence of a drug beyond a reasonable doubt, the case is instructive here.

First, the Court noted the definition of "under the influence" means "a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit producing drugs." Id. at 589 (citing State v. Tamburro, 68 N.J. 414, 421 (1975)). A motorist is deemed to be under the influence of a substance if it altered his coordination and mental faculties to the point where it was unsafe for him to drive. State v. DiCarlo, 67 N.J. 321, 328 (1975).

Second, the Court made it clear establishing a party is under the influence may be accomplished through a lay person's observations of such party, together with proof the party ingested a substance. Bealor, 187 N.J. at 577. If such proofs are present, expert testimony is unnecessary. Id. at 591. Thus, "determining whether [a] defendant was under the influence of [a drug is] not 'beyond the ken of the average [finder of fact.]'" Id. at 591 (quoting DeHanes v. Rothman, 158 N.J. 90, 100 (1999)). Further, the cause of intoxication "is largely irrelevant," id. at 588-89; the specific substance or the

quantum of the substance ingested need not be identified, id. at 589 (quoting Tamburro, 68 N.J. at 421).

Observations that support a person is under the influence of a substance can include the person's demeanor, appearance, and speech. Id. at 587-89; see also State v. Oliveri, 336 N.J. Super. 244, 251-52 (App. Div. 2001) (finding that defendant's eyes were watery and his speech slow and slurred sufficient to sustain a DWI conviction).

Guided by these principles and our review of the record, we discern no error in the Family Part court's determination to warrant appellate intervention. Here, the nurse testified defendant was "very lethargic," and her eyes were "very heavy," and closed "frequently" while the nurse spoke to her. In addition, defendant also spoke very slowly and had a very dry mouth. The caseworker testified defendant had droopy eyelids, glassy eyes, and moved and spoke slowly. The witnesses' observations were the same or similar to those found in State v. Oliveri, 336 N.J. Super. 244 (App. Div. 2001), in which we affirmed a finding the defendant was under the influence of alcohol. In addition, defendant admitted she had taken two OxyContin pills, one Oxycodone and one Soma pill.

Accordingly, the requisite proofs existed to establish defendant was under the influence of the substances she

ingested. The description of defendant's conduct clearly showed she was too impaired to care for the child. Defendant also argues there was insufficient proof she was the one who ingested the pills missing from her prescription bottle, but we regard this argument as irrelevant, for the reasons previously outlined.

The quantum of medication defendant ingested is immaterial; the point is the amount of medication she took, as shown by the conduct she exhibited, negatively impacted her ability to function and properly care for the child. Even if defendant did not intend to put the child at substantial risk of harm, nevertheless she did so. While perhaps a ten year old may not be as vulnerable to a guardian's impairment as an infant or toddler, the observed degree of the grandmother's impairment would put a child of such tender years at risk.

We have considered defendant's remaining arguments and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.