**RECORD IMPOUNDED**



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4795-14T1
A-4796-14T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.B. and T.L.,

Defendants-Appellants.

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IN THE MATTER OF T.B.,

Minor.

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Argued May 17, 2017 – Decided July 13, 2017

Before Judges Alvarez and Accurso.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FN-02-298-13.

Steven E. Miklosey, Designated Counsel, argued the cause for appellant J.B. (Joseph E. Krakora, Public Defender, attorney; Mr. Miklosey, on the brief).

Andrew J. Shaw, Designated Counsel, argued the cause for appellant T.L. (Joseph E.

Krakora, Public Defender, attorney; Mr. Shaw, on the brief).
Ellen L. Buckwalter, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Buckwalter, on the brief).

Nancy P. Fratz, Assistant Deputy Public Defender, argued the cause for minor T.B. (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Fratz, on the brief).

PER CURIAM

Defendants T.L. (Tina) and J.B. (Jim)[1] appeal from an October 31, 2013 order of the Family Part, now final, finding they placed their infant daughter at substantial risk of harm by regularly abusing drugs while she was in their care in violation of N.J.S.A. 9:6-8.21c(4)(b).

Although the Law Guardian joined with the Division of Child Protection and Permanency in urging the trial judge to find defendants abused and neglected their daughter, a different assistant deputy public defender serving as Law Guardian on appeal has altered course and now joins with defendants in urging us to reverse. Because we agree with the Division that substantial credible evidence in the record supports the trial

[1] We refer to defendant parents by fictitious names in order to protect the privacy of their daughter.

judge's finding of neglect, we affirm, substantially for the reasons expressed by Judge Foti in her clear and concise opinion from the bench.

Only two witnesses testified at the fact-finding hearing, the Division employee responsible for investigating the abuse and neglect allegations and Dr. Hayman Rambaran, M.D., the Director of the Addiction Treatment Unit of Bergen Regional Medical Center.

The investigator testified, based on the screening summary and her investigation report admitted in evidence, that the Division received a referral on January 30, 2013, alleging defendants were using heroin and pills on an almost daily basis while caring for their infant daughter. The referent claimed Jim was unemployed and had gone to rehab but was using again, and that Tina had just been fired from her job. According to the referent, the couple had twice been evicted for failure to pay rent, were staying with a friend and taking the baby when they went to buy drugs in Paterson and Newark.

Although the Division made repeated efforts to contact defendants on the 30th, the investigator did not catch up with them until the following day. She found them in the emergency room of Bergen Regional attempting to enter a detox program. Tina told the investigator they had signed over temporary

custody of the baby, then eleven months old, to her sister while they sought treatment. She also claimed she and Jim had been on a waiting list for treatment "since last week."

Both Tina and Jim were cooperative with the Division and freely admitted their drug use. Tina told the investigator she had been using marijuana, cocaine "and pain killers called Roxy" a few times a week for the last four to five months. She claimed she did not use drugs while caring for her daughter, but admitted they were likely still in her system when she was with the baby. Tina also told the investigator she and Jim did not use drugs together. Indeed, she claimed neither was aware of "how much the other was using until recently," although she acknowledged both she and Jim "had an idea that the other was using drugs."

Jim told the investigator he had attended rehab for almost six weeks in Florida at the end of the summer and had been "clean" until December. He admitted he had been using Roxy for two months, but denied daily use or that he was taking any other drugs. Jim claimed to be responsible for watching the baby "full time," and, like Tina, denied using drugs when the infant was in his care. He told the investigator he used drugs when Tina was with the baby, that the two "rarely use[d] together" and "tend[ed] to do their own thing." The parties stipulated a

Division supervisor would testify that Jim told her he had attention deficit hyperactivity disorder and had had "a drug problem for some time." According to the supervisor, Jim told her he had been "using six to seven pills of Roxy, 30 milligrams each and every day for the last few months."

The investigator testified she visited the baby and found her appropriately dressed, playing and smiling and apparently well cared for. A check with the baby's doctor revealed she had been seen nine times in her eleven months, only once for a sick visit, and was up to date with her immunizations.

Dr. Rambaran testified regarding Tina's and Jim's participation in Bergen Regional's detox program, the drugs they were using and the effect of those drugs at the level defendants reported taking. The doctor explained the importance of getting an accurate account from persons entering the detox program of the drugs used, "how much they're using, [and] how often" in order to "decide upon their treatment." He also explained that people coming into the detox program are "in withdrawal, it means the . . . drug is getting out of their system, and we're seeing the signs of the lack of that substance which they are accustomed to using."

The doctor related that Tina, who was then twenty-six years old, reported using cocaine, marijuana and "Roxies," which he

explained were synthetic opiates branded as Roxicet or Roxicodone. According to the doctor, Tina reported she had been taking 100 to 300 milligrams of Roxy a day for two years without a prescription. He also testified that in addition to testing positive for opiates and cocaine on admission, Tina also tested positive for benzodiazepine, which she had not disclosed using.

Dr. Rambaran testified that Jim, then twenty-four, claimed on entering the program that he had been using cocaine since he was seventeen years old. He told Dr. Rambaran that he took 300 milligrams of Roxy a day, most recently the day before his admission, and used two grams of cocaine every day. Jim's blood test was consistent with that report.

On questioning from the court, Dr. Rambaran explained that Roxicet or Roxicodone are derivatives of morphine and are analgesics that cause euphoria. He testified that a person taking 100 to 300 milligrams of Roxy a day would likely suffer mental and physical impairment that would affect the individual's judgment and reflexes. A person's reaction time would slow and he or she would "get into the range" of risking overdose, causing a depressing of their respiratory center. The doctor also noted that combining an opiate, like Roxy, with a stimulant like cocaine "definitely . . . becomes more complex because of the receptors in the brain and how these work in

different ways." In addition to the risk of overdose, the drugs react synergistically, making the effect "difficult to accurately predict." The doctor, however, noted it would "definitely not [be] conducive to one having, you know, good judgment and being able to act in a, you know, prudent manner."

After hearing that testimony and accepting the Division's documents and the medical records in evidence, the court invited argument. Counsel for each of defendants argued the only thing the Division had proved was defendants' drug use, which both the Supreme Court in New Jersey Department of Children & Families v. A.L., 213 N.J. 7, 23 (2013), and this court in New Jersey Division of Youth & Family Services v. V.T., 423 N.J. Super. 320, 330-31 (App. Div. 2011), had declared was "not enough" to establish abuse and neglect. They claimed the Division presented no proof that either parent was under the influence while caring for their daughter. Defendants' counsel emphasized the child was well-cared for, that neither parent ever admitted using drugs when caring for her and that both parents had already signed themselves into treatment and arranged for care of the baby before the Division ever got involved in this matter.

The Law Guardian argued the case was not about whether Tina and Jim were "horrible parents," but whether "their actions,

before the Division got involved, put their child at a substantial risk of harm." Noting the doctor's testimony regarding the danger of using cocaine and opiates, as both parents admitted doing for, at least, several months prior to the Division's involvement, the Law Guardian asserted "the risk of harm was substantial." Focusing on the child, the Law Guardian argued, "[j]udge, we're talking about an infant who is not able to care for herself, dealing with the situation where her parents' judgment is impaired by — based on the level of drugs that were being used, and the combination of drugs that are being used." Based on the evidence in the record, the Law Guardian joined with the Division in asking that the court "make a finding."

Relying on a then recent unpublished decision of this court, the Division argued that "an ordinary reasonable person" would understand the risks posed to an infant by her parents' regular use of cocaine and opiates. Defendants' disregard of that risk, and its potential serious consequences for their child, could only mean they acted with reckless disregard for her safety. Notwithstanding defendants' voluntary decision to go into detox at the time of the referral, the Division contended it had carried its burden to prove "this child was placed at a substantial risk of harm based on the risks inherent

in the parents' drug use for the extended period of time and the levels that they were taking."

After weighing the evidence and the arguments of counsel, Judge Foti entered an order finding defendants had neglected their infant daughter. In a clear and comprehensive decision, she summarized the critical testimony, identified the pertinent law and explained its application to the facts as she found them. Relying on G.S. v. Department of Human Services, 157 N.J. 161, 181-82 (1999), the judge noted "that whether a parent or guardian has failed to exercise a minimum degree of care is to be analyzed in light of the dangers and the risks associated with the acts involved," here, drug use while responsible for the care of an infant.

The judge distinguished both A.L. and V.T., relied upon by defendants, on their facts. She deemed A.L. inapplicable because, while that case involved a newborn, the issue was the mother's use of cocaine during her pregnancy, not, as here, while caring for the newborn. See 213 N.J. at 27-28. The judge similarly found V.T. inapposite because there the father tested positive for drugs during his supervised visitation of his eleven-year-old daughter, not while he was alone responsible for her care. See 423 N.J. Super. at 331. Judge Foti noted, however, that in addition to the supervised setting, we also

found the age of the child significant in V.T., observing that, "[u]nlike with an infant, [the child] was not vulnerable during [the supervised] visits to the slightest parental misstep." Ibid.

Based on defendants' admissions regarding the amount and type of drugs they had been using, Judge Foti found that at the time of the referral both were abusing drugs and had been doing so for a significant period of time. The judge continued:

> They were drug addicted such that they entered a five-day detox program. They were abusing drugs at the time they were primary caretakers for an 11-month-old baby, and they admitted as such.
>
> Being under the influence of drugs while acting in a caretaking role placed [their daughter] at substantial risk of harm. The mother and father were impaired. The doctor testified as to the effects of the drugs taken by the parents. There was a risk of overdose while caring for this young child. A person's judgment, movement, and reflexes are impaired. An impaired parent caring . . . for a child, especially in this case, a young child, places this child at risk of harm.
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> Under the circumstances where an ordinary and reasonable person would understand that the situation poses risks, but nonetheless acts without regard for the potentially serious consequences, that person acts — that parent acts with reckless disregard for the safety of his, her young child.

> The Division has met its burden. The facts and law support a finding in this matter. The court finds that by virtue of their drug abuse while acting in a caretaking role, this amounted to gross negligence. The parents placed their child at substantial risk of harm, and I will make that finding.

Defendants reprise the arguments they made to the trial court, now joined by the Law Guardian on appeal, that there was insufficient evidence to support a finding of abuse and neglect. We disagree.

Title 9 defines an "abused or neglected child" as including

> a child 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 (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so, or (b) 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; or by any other acts of a similarly serious nature requiring the aid of the court[.]
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> [N.J.S.A. 9:6-8.21c(4).]

In G.S., the Court explained that "a minimum degree of care" denoted

> a lesser burden on the actor than a duty of ordinary care. If a lesser measure of care is required of an actor, then something more than ordinary negligence is required to hold the actor liable. The most logical higher measure of neglect is found in conduct that is grossly negligent because it is willful or wanton.
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> [157 N.J. at 178.]

Willful or wanton conduct includes those actions "done with the knowledge that injury is likely to, or probably will, result." Ibid. "Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others." Id. at 179. The Court likewise held that "[b]ecause risks that are recklessly incurred are not considered unforeseen perils or accidents in the eyes of the law, actions taken with reckless disregard for the consequences also may be wanton or willful." Id. at 178.

Although the Court in G.S. noted the difference between negligence and willful and wanton conduct cannot be clearly delineated in all cases, it made clear that

> [w]here an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him responsible for the injuries he causes. Thus, under a wanton and willful negligence standard, a person is liable for the foreseeable consequences of her actions, regardless of whether she actually intended to cause injury.

[Id. at 179.]

Accordingly, the Court held that

> a guardian fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child.
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> [Id. at 181.]

Having reviewed the record, we find no error in the judge's finding that defendants' admitted use of cocaine and Roxy, on a daily basis while they were the sole caretakers of their infant daughter, was grossly negligent or reckless conduct that put their child in imminent danger of a substantial risk of harm, thus constituting neglect under the statute. While it is by now axiomatic that a parent's drug use, without more, will not establish abuse or neglect, A.L., supra, 213 N.J. at 24, we agree with Judge Foti that maxim does not insulate these parents from a neglect finding.

When our appellate courts have refused to find abuse or neglect stemming from a parent's drug use, it is because the Division has failed to establish the extent of the use or its effect on the parent, thus making it impossible to accurately assess the risk to the child, see e.g., id. at 27-28; N.J. Div. of Child Prot. & Permanency v. R.W., 438 N.J. Super. 462, 470

(App. Div. 2014), or because the child's age or the presence of other caretakers made clear the parent's drug use posed no substantial risk to the child, see V.T., supra, 423 N.J. Super. at 331-32. In such cases, the Court has admonished trial courts not to fill in the gaps by assuming all parental drug use puts all children at risk. See A.L., supra, 213 N.J. at 28 ("Judges at the trial and appellate level cannot fill in missing information on their own or take judicial notice of harm.").

We have never held that daily use of opiates and cocaine while responsible for an infant is not grounds for neglect. Indeed, we have observed that "[p]arents who use illegal drugs when caring for an infant expose that baby to many dangers due to their impaired judgment." N.J. Div. of Child Prot. & Permanency v. B.O., 438 N.J. Super. 373, 385 (App. Div. 2014). The trial court did not need to fill any gaps in the proofs here. Defendants admitted the nature and extent of their daily drug use, and the physician directing the detox program they entered voluntarily explained how use at those levels would slow their reflexes and impair their judgment.[2]

[2] We reject defendants' argument that the court improperly admitted the Division's documents because based on hearsay and Dr. Rambaran's testimony because the Division did not produce a report containing his opinions prior to the fact-finding hearing. Judge Foti admitted the Division's screening summary (continued)

Defendants' argument that they only used illegal drugs when the baby was in the other's care is undercut by Tina's statement that neither parent was even aware of the extent of the other's drug use, although both suspected the other was using. A parent who in order to use illegal drugs, leaves his or her infant in the care of the other parent, whom the drug abusing parent suspects is also using drugs, practically defines a failure to exercise a minimum degree of care. It certainly cannot be termed a reasonable plan for the safe care of one's eleven-

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(continued)
and investigative report pursuant to Rule 5:12-4 and rejected defendants' objection to Dr. Rambaran's testimony at an N.J.R.E. 104 hearing. As is clear from the court's opinion, the only statements the judge relied on in the Division's documents and the Bergen Regional medical records, which were admitted without objection, were the properly admitted party admissions of defendants. See N.J.R.E. 803(b) (party admissions) and 803(c)(4) (statements made for purpose of medical diagnosis or treatment). The Division identified Dr. Rambaran as a witness a month before the fact-finding hearing and advised defendants it was seeking a finding pursuant to N.J.S.A. 9:6-8.21, based on "their use of non-prescription drugs while in a caretaking role." The doctor was a fact witness having expertise in the area of drug addiction and treatment. Given the non-technical nature of the opinions he expressed regarding the impairments defendants would suffer while under the influence of the substances they admitted taking, we cannot find the court abused its discretion in admitting the doctor's testimony notwithstanding the Division's failure to provide defendants with a report of his opinions. See Clark v. Fog Contracting Co., 125 N.J. Super. 159, 162 (App. Div.), certif. denied, 64 N.J. 319 (1973). Given the circumstances, we cannot find defendants could have been surprised by the doctor's testimony. See State v. LaBrutto, 114 N.J. 187, 205-06 (1989).

month-old baby. We are satisfied based on the properly admitted evidence in the record that the trial judge did not abuse her discretion in finding that defendants' daily use of Roxy and cocaine for many months prior to the Division's involvement amounted to neglect of their infant.

Although not critical to the outcome here, we cannot close without commenting on the Law Guardian's new position in this appeal. As we have noted, the Law Guardian, after having urged the trial judge to find defendants abused and neglected their infant daughter, abandoned that position and urged us to reverse the very finding it urged the trial court to make. This was done without advising us in its brief of the change in position, much less explaining why it was deemed necessary.

We addressed the question with the assistant deputy public defender at oral argument and raised the question of whether we should not reject the Law Guardian's change of heart as invited error. See N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010) (explaining that "'[t]he doctrine of 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'" (quoting Brett v. Great Am. Recreation, 144 N.J. 479, 503 (1996))). In a letter post-

argument, the Law Guardian contends the doctrine is inapplicable here because it did not appeal. Although there may well be sound reasons for not applying the doctrine of invited error against the Law Guardian given its institutional role in abuse and neglect matters, the one proffered is likely not among them.[3]

We need not decide the issue. We raise it, however, precisely because of the Law Guardian's important institutional role in these cases. See N.J.S.A. 9:6-8.23a; In re Maraziti, 233 N.J. Super. 488, 493, 499-500 (App. Div. 1989). We accept there may be good reason for the Law Guardian to advocate a different position on appeal than the one it advocated in the trial court. But we think it plain that the Law Guardian's institutional role precludes a switch in position because appellate counsel for the child views the facts differently from trial counsel in a close case, for example. If there is not guidance for when a deputy may alter course on appeal, perhaps there should be. At a minimum, the court should always be

[3] We likewise are not persuaded by the other two reasons proffered by the Law Guardian, candor to the tribunal and Administrative Directive #06-12, "Revision to the Appellate Division's Administrative Protocol for Termination of Parental Rights Appeals" (July 11, 2012), http://www.judiciary.state.nj.us/notices/2012/n120725a.pdf, which addresses the briefing schedule in circumstances where the Law Guardian takes a position different from the co-respondent. Again, we do not address these arguments in light of our disposition of the appeal.

alerted and the Law Guardian's reasons for the change in its position must be fully briefed.

Because there is substantial credible evidence in the record to support the finding of neglect here, we affirm, substantially for the reasons expressed by Judge Foti in her clear and concise opinion from the bench on October 31, 2013. Defendants' and the Law Guardian's remaining arguments, to the extent we have not addressed them, lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.