

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5778-14T4

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

E.R.,

Defendant-Appellant.

IN THE MATTER OF L.C., a minor.

Submitted February 7, 2017 – Decided October 18, 2017

Before Judges Suter and Guadagno.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Hudson County,
Docket No. FN-09-0288-14.

Joseph E. Krakora, Public Defender, attorney
for appellant (Yesmin Diaz, Designated
Counsel, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Andrea M. Silkowitz,
Assistant Attorney General, of counsel; Sara
M. Gregory, Deputy Attorney General, on the
brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Lisa M. Black, Designated Counsel, on the brief).

The opinion of the court was delivered by
SUTER, J.A.D.

Defendant E.R. (Erica) appeals the July 16, 2014 order of the Family Division that found, pursuant to N.J.S.A. 9:6-8.21(c), she abused or neglected her child, L.C. (Lee).¹ We affirm the court's order. There was sufficient credible evidence that Erica's drug use harmed her infant child, who suffered withdrawal symptoms upon birth, requiring seven weeks of hospitalization.

Lee was born on August 17, 2013. Within a day, he tested positive for opiates and cocaine. His mother, Erica, also tested positive for the same substances. Erica admitted using cocaine and Vicodin purchased on the streets of Jersey City two days prior to Lee's birth. She admitted to the Division of Child Protection and Permanency (DCPP) caseworker that she had been using cocaine and heroin on and off for the past six years and moved to Florida to attend a drug rehabilitation clinic. She was not able to remain drug free. After she learned she was in her fifteenth week of

¹ Fictitious names have been used throughout the opinion to maintain the confidentiality of the parties.

pregnancy, Erica claimed to have stopped using drugs and started taking prenatal vitamins.

DCPP's complaint filed under Title Nine, N.J.S.A. 9:1-1 to -25, against Erica² alleged that her illegal drug use harmed Lee because he was born positive for opiates and suffered withdrawal symptoms requiring hospitalization. DCPP was granted care, custody and supervision of Lee in September 2013 while the child was still in the hospital.

A fact-finding hearing was held before Family Division Judge Lois Lipton on DCPP's claim that Lee was abused or neglected by Erica. Witnesses for DCPP testified that it was notified shortly after Lee was born that both the child and mother had tested positive for cocaine and opiates. Witnesses detailed DCPP's subsequent investigation. The child's treating physician at the hospital, Dr. Editha Ansay, a neonatologist, testified at the hearing as an expert witness in the field of pediatrics. She testified that she diagnosed Lee with Neonatal Abstinence Syndrome (NAS)³, which meant he was suffering from drug withdrawal. She

² The child's father was also included in the complaint but is not part of this appeal.

³ NAS is defined as "[a]ny of the adverse consequences in the newborn of exposure to addictive or dangerous intoxicants during fetal development." N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 170 n.5 (2014) (alteration in original) (quoting Taber's Cyclopedic Med. Dictionary 1158 (22d ed. 2013)).

testified that his diagnosis was based on her personal observations of Lee during his hospitalization, testing, and Erica's history of drug use. The symptoms of NAS were "irritability, poor feeding, increased muscle tone, vomiting, poor weight gain," "excessive, uncoordinated sucking" and "diarrhea." She testified that within two days of his birth, Lee exhibited "excessive[,] uncoordinated sucking," and that "he was irritable, jittery," and "had increased muscle tone." These symptoms of withdrawal were present "through the whole seven weeks of his hospitalization." He was treated with morphine sulfate to counteract the symptoms. Dr. Ansay testified she personally recalled the "Lipsitz Scoring System" being administered to Lee, although that part of the hospital records was not produced at the hearing. She testified Lee's score on that test was seven or above on three occasions, meaning that he was experiencing NAS. The doctor also testified that Erica's toxicology screening tested positive for opiates and cocaine after Lee's birth. Dr. Ansay's practice group treated Lee while he was in the hospital; she treated him for three of the seven weeks.

On July 16, 2014, Judge Lipton entered an order, finding that Erica had abused or neglected Lee within the meaning of N.J.S.A. 9:6-8.21(c)(4). All of the witnesses were found to be credible. The court found Dr. Ansay to be "extremely credible." Based on

all the evidence, the court found that Lee was positive for opiates and cocaine at his birth, as was Erica, and that he suffered from NAS, requiring his hospitalization for seven weeks and treatment with morphine. Judge Lipton found the child "suffered from those distressing symptoms and as a result was required to be given further medication for the withdrawal symptoms and spend the first [seven] weeks of his little life in the hospital . . . based on his mother's use of [CDS] during the pregnancy . . .," which was caused by "his mother's negligence."⁴

On appeal, Erica contends there was inadequate evidence to support the court's abuse and neglect finding, that the court misapplied applicable case law, and that the court relied on inadmissible evidence.

We generally defer to fact-finding made by our Family Part judges because of their "special jurisdiction and expertise in family matters" Cesare v. Cesare, 154 N.J. 394, 413 (1998); see also N.J. Div. of Child Prot. & Permanency. v. S.G., 448 N.J. Super. 135, 143 (App. Div. 2016). They have "the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; [and have] a feel of the case

⁴ The litigation was terminated in July 2015 and this appeal followed. The record reflects that Erica surrendered her parental rights to the maternal grandmother.

that can never be realized by a review of the cold record." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (quoting N.J. Div. of Youth and Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). Fact-finding that is supported by sufficient, substantial and credible evidence in the record is upheld. See N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 226 (2010); N.J. Div. of Child Prot. & Permanancy v. J.D., 447 N.J. Super 337, 350-51 (2016). However, the court's interpretation of the law or its legal conclusions are reviewed de novo. See State in Interest of A.B., 219 N.J. 542, 554-55 (2014) (citations omitted).

Title Nine defines an "[a]bused or neglected child" as:

[A] child less than 18 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)(1).]

Under Title Nine, the question is whether the child "'ha[s] been impaired' or [is] in 'imminent danger of becoming impaired' [because] of his [parent's] failure to exercise a minimum degree of care by unreasonably inflicting harm or allowing a 'substantial risk' of harm to be inflicted." N.J. Dep't of Children & Families,

Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 22 (2013). "[E]vidence of actual impairment to the child will satisfy the statute" Ibid. The Court in A.L. observed "proof that a child is suffering from withdrawal symptoms at birth could establish actual harm." Ibid. In the absence of "actual harm," abuse or neglect under the statute can be shown by proof of "imminent danger or a substantial risk of harm to a child by a preponderance of the evidence." Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-O., 223 N.J. 166, 178 (2015)(emphasis omitted) (quoting A.L., supra, 213 N.J. at 22).

In A.L., supra, the Court clarified that in a Title Nine case, "[t]he proper focus is on the risk of substantial, imminent harm to the child, not on the past use of drugs alone." 213 N.J. at 23. "If an expectant mother's drug use causes actual harm to the physical, mental, or emotional condition of a newborn child, a finding of abuse or neglect is appropriate[,]" but otherwise "the statute requires a showing of 'imminent danger' or a 'substantial risk' of harm." Id. at 8 (citation omitted). In A.L., there was no proof the child was actually harmed by mother's drug use.

In Y.N., supra, 220 N.J. at 181, the Court clarified that Title Nine was "not a strict liability statute." Courts must consider "the reasonableness of the parent's conduct." Ibid. In

Y.N., the Court did not find abuse or neglect under Title Nine where the newborn "suffered neonatal abstinence syndrome as a result of [the child's mother's] participation in a medically prescribed methadone maintenance treatment program." Id. at 183.

This is not the case here. Judge Lipton's finding of abuse or neglect was consistent with the standard set forth in A.L. She found that Lee tested positive for opiates and cocaine as a result of Erica using drugs during her pregnancy, which caused Lee to suffer withdrawal symptoms and require hospitalization for seven weeks. There was no evidence that Erica was in a treatment program when Lee was born. This is the type of actual harm cited in A.L. that fits the definition of abuse or neglect under Title Nine. We discern no error in the court's order or analysis, which was amply supported by the record.

We briefly address the evidentiary issues raised in the appeal. "Evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010) (citations omitted) (citing Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)). We reject the argument that Dr. Ansay's testimony was a net opinion. Her testimony was based in part on her personal observation. See

Townsend v. Pierre, 221 N.J. 36, 53 (2015) (holding that N.J.R.E. 703 requires that an expert's opinion be based on, among other things, "facts or data derived from (1) the expert's personal observations"). She testified Lee's diagnosis was based on testing, observation of the child and the mother's history of drug use. This provided the "why and wherefore" that supported her opinion.

As for the hospital records, Dr. Ansay's testimony established the records as business records under N.J.R.E. 803(c)(6). Although incomplete, their admission did not constitute reversible error because Dr. Ansay's testimony independently supported the Family Division's order, finding abuse or neglect.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION