SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3527-16T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

B.A.,

Defendant-Appellant,

and

M.S.,

Defendant.

IN THE MATTER OF D.S., a Minor.

Submitted January 23, 2018 – Decided February 6, 2018

Before Judges Yannotti, Carroll and Leone.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FN-03-0030-17.

Joseph E. Krakora, Public Defender, attorney for appellant (Dana Citron, Designated Counsel, on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Jessica Downey, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Margo E.K. Hirsch, Designated Counsel, on the brief).

PER CURIAM

Defendant B.A. appeals from the Family Part's finding that, as a result of her prenatal use of unprescribed Subutex,[1] her son, D.S., was an abused or neglected child as defined in N.J.S.A. 9:6-8.21(c). For the following reasons, we affirm.

I.

The trial court held a fact-finding hearing on March 13, 2017. The Division of Child Protection and Permanency (Division) called three witnesses: Division caseworkers Zenia Bethea and Tiesha Valentine, and Dr. Michelle Kelly, a neonatologist who treated D.S. at Virtua Memorial Hospital (Virtua). Defendant testified on her own behalf and called the child's father, M.S., as a witness. We adduce the following facts from their testimony

[1] Subutex is a tablet form of buprenorphine that is approved for the treatment of opiate dependence by the U.S. Food & Drug Administration (FDA). FDA, Subutex (buprenorphine hydrochloride) and Suboxone tablets (buprenorphine hydrochloride and naloxone hydrochloride), https://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm191520.htm (last updated October 23, 2014).

and the documents introduced into evidence, which included the Division's investigation summary and D.S.'s certified birth records from Virtua.

Defendant, then twenty-seven years old, gave birth to D.S. at Virtua on June 21, 2016. The next day, the Division received a report that defendant tested positive for benzodiazepines and D.S. tested positive for benzodiazepines and buprenorphine.

Bethea responded and interviewed defendant at the hospital. Defendant stated she had been prescribed Diazepam (Valium) for anxiety, and Oxycodone to treat restless leg syndrome, which she had been diagnosed with five or six years earlier. Defendant informed Bethea that, two years earlier, her mother had spoken to defendant's physician about an alternative to Oxycodone, due to concerns about the addiction risk posed by Oxycodone use. At that time, the physician gave defendant's mother a script for Subutex. Defendant claimed she found the unused portion of that Subutex prescription while cleaning out her now deceased mother's home. Defendant told Bethea she took the Subutex rather than Oxycodone because her doctor advised her Subutex would not harm the baby.

On June 22, 2016, D.S. was diagnosed with neonatal abstinence syndrome (NAS). As a result, he was confined in the NICU and received morphine treatment at Virtua until July 11, 2016. Two days later, D.S. was ready to be discharged, but the Division

placed a hospital hold on his release pending the results of the parents' drug tests.

Defendant tested positive for amphetamines on July 13, 2016. Valentine went to defendant's house that day to inspect her prescription bottles because defendant had failed to provide them as previously requested. Valentine observed prescription bottles for Diazepam and Amphetamine Salts prescribed by Dr. Berkowitz, and a pharmacy label for Oxycodone, which had been prescribed by Dr. Juele. Notably, at no time during the Division's investigation did defendant produce a prescription for, or a bottle of, Subutex.

On July 14, 2016, M.S. tested positive for opiates. As a result of both parents' positive drug tests, Valentine implemented a safety protection plan, pursuant to which the paternal grandmother and a friend of defendant agreed to supervise the parents with D.S. On July 15, 2016, the Division removed the hospital hold and D.S. was discharged from Virtua.

On August 8, 2016, the Division filed a verified complaint for care and supervision of D.S. At the hearing on the Division's order to show cause, defendant consented to this relief. The court ordered both parents to attend substance abuse treatment at SODAT of New Jersey and to remain under supervision (per the safety protection plan) "until a positive collateral from SODAT and all negative urine screens . . . ." On August 26, 2016, the Division

removed the supervision restriction as to defendant, although it remained in place as to M.S.

The Division substantiated the charges of abuse or neglect against defendant at the conclusion of its investigation. The Division found D.S. "required hospitalization and medical treatment after birth" and "suffered withdrawals due to [defendant's] use of illicit substances during pregnancy."

On October 3, 2016, the court scheduled the fact-finding hearing for January 18, 2017. On that date, the court adjourned the hearing at defendant's request due to the unavailability of her proposed expert witness, Dr. Loretta Finnegan. In its order, the court rescheduled the hearing for March 13, 2017. The court expressly noted this was a "date certain," subject only to defense counsel's possible unavailability due to a trial in an unrelated matter.

On January 27, 2017, defendant's attorney sought a second adjournment because of Dr. Finnegan's continued unavailability. Counsel advised that Dr. Finnegan had undergone major surgery and would be recuperating another six weeks. On January 31, 2017, the court denied the adjournment application. On February 16, 2017, defense counsel sought reconsideration, and provided a letter from Dr. Finnegan's physician stating she would be unable to complete the tasks required of her as an expert witness before "the middle

of April at the earliest." On February 21, 2017, the trial court denied the request for reconsideration, explaining: "The court's position is that there has been adequate time to prepare for trial and find another expert since the initial adjournment was . . . denied."

As noted, in addition to Bethea and Valentine, the Division presented the testimony of Dr. Kelly at the March 13, 2017 fact-finding hearing. Dr. Kelly treated D.S. while he was hospitalized at Virtua in June and July, 2016. She explained that NAS is the medical term used to describe infants who are 'born dependent . . . .'" Dr. Kelly testified that D.S.'s symptoms were consistent with NAS. Those symptoms included increased crying, increased muscle tone, tremors, loose and watery stools, excessive yawning and sneezing, and a hyper alert state.

According to Dr. Kelly, D.S.'s symptoms were also "consistent with the medical history of Valium and . . . Subutex taken [by defendant] during the pregnancy." Valium is a benzodiazepine and not an opiate. Subutex is used to treat opiate addiction and is "essentially . . . an opiate." In utero exposure to opiates can cause "a dependence on the medication in the infant where the infant will have withdrawal symptoms after delivery when they are no longer being exposed to the medication." Dr. Kelly noted that

withdrawal symptoms, including seizures, "can be life threatening, if not treated."

Dr. Kelly also explained the NAS scoring system used to evaluate the severity of a child's withdrawal symptoms. Virtua uses a "modified Finnegan scoring system" that observes "physiologic and behavioral components of the baby, and gives a score that will give you an idea of how severe withdrawal is . . . at any given point." The higher the score, the more withdrawal symptoms the infant exhibits. A low score, up to five or six, indicates that withdrawal symptoms are well controlled. In contrast, a score greater than eight indicates the withdrawal symptoms are so severe that medication, typically morphine, is required to control them. Here, D.S. was administered morphine to control his withdrawal symptoms after his consecutive NAS scores were fourteen.

Defendant testified she took Oxycodone as prescribed but decided on her own to stop after she learned she was pregnant. She stated she found the Subutex while cleaning out her deceased mother's house. She then "looked [Subutex] up online, and it said that that's what they prescribe pregnant women so I took that." Defendant testified she took Subutex for about five months, but "stopped a little prior to giving birth to my son." She claimed to have discussed her use of Subutex with her prenatal doctors,

but did not change her use of that medication as a result of those conversations.

At the conclusion of the fact-finding hearing, the judge rendered an oral opinion in which he found the Division, by a preponderance of the evidence, proved defendant abused or neglected D.S. under N.J.S.A. 9:6-8.21(c)(2) and N.J.S.A. 9:6-8.21(c)(4)(b). The court credited all witnesses, particularly Dr. Kelly, who he found was "an excellent witness and very credible in her testimony."

The judge also noted that defendant was "for the most part believable." However, the judge determined defendant's use of Subutex was not prescribed, and placed D.S. at risk. The judge elaborated:

> [T]his is the key point here, the mother should have questioned or discovered about the Subutex. You know, she had lots of . . . prenatal care. She saw all kinds of doctors, she had all kinds of questions.
>
> She had prescriptions. She had Dr. [Juele], she had Dr. Berkowitz, and other[s] perhaps. But she took [Subutex] anyway, and that . . . is something that gives . . . a very strong inference that she took [Subutex] knowing she shouldn't have . . . .
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> She took something that was not currently prescribed to her, and that's really the big issue here. We know that the taking of that substance had an effect on the baby from opiate exposure.

The judge concluded defendant "at a minimum was grossly negligent in spite of her expressed belief that she was doing the right thing . . . ."

Following this finding, the Division requested dismissal of the litigation. Noting the Division no longer had safety concerns regarding defendant's care of D.S., the trial court granted the request in a separate order issued on March 13, 2017. This appeal of the court's fact-finding order followed.

II.

Defendant first argues the evidence was insufficient to support the finding of abuse or neglect under either N.J.S.A. 9:6-8.21(c)(2) or N.J.S.A. 9:6-8.21(c)(4)(b). We disagree.

N.J.S.A. 9:6-8.21(c), in relevant part, defines an "[a]bused or neglected child" as:

> [A] child less than 18 years of age whose parent or guardian . . . (2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; . . . (4) or 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 . . . to exercise a minimum degree of care . . . (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.

Title 9 provides for a fact-finding hearing at which the Division bears the burden of showing, by a preponderance of the "competent, material and relevant evidence[,]" that the child is an abused or neglected child. N.J. Div. of Youth & Family Servs. v. J.Y., 352 N.J. Super. 245, 262, 264 (App. Div. 2002); N.J.S.A. 9:6-8.46(b). The purpose of the hearing "is not to assign guilt to a defendant, but to determine whether a child is an abused or neglected child." N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320, 328 (App. Div. 2011); accord N.J.S.A. 9:6-8.44.

An appellate court has "a strictly limited standard of review from the fact-findings of the Family Part judge." N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 577 (App. Div. 2010). Due deference is owed "to factfindings of the family court because it has the superior ability to gauge the credibility of the witnesses who testify before it and because it possesses special expertise in matters related to the family." N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448 (2012) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)).

Consequently, we do not "second-guess or substitute our judgment for that of the family court," so long as "the record

contains substantial and credible evidence to support [its] decision . . . ." Id. at 448-49 (citation omitted). A family court's findings of fact should be disturbed only if "they are so 'wide of the mark' that our intervention is necessary to correct an injustice." Id. at 448 (citation omitted).

The protection of the abuse and neglect statute "is limited to the condition of a child after birth." N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 22 (2013). Therefore,

> the primary question under Title 9 is whether [the child], as a newborn, 'ha[s] been impaired' or was in 'imminent danger of becoming impaired' as a result of his mother's failure to exercise a minimum degree of care by unreasonably inflicting harm or allowing a "substantial risk" of harm to be inflicted.
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> [Ibid. (quoting N.J.S.A. 9:6-8.21(c)(4)(b)).]

"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." Id. at 8.

"[N]ot every instance of drug use by a parent during pregnancy, standing alone, will substantiate a finding of abuse and neglect in light of the specific language of the statute." Id. at 23; see also id. at 23 n.3 (noting that New Jersey has not joined those states whose laws treat prenatal drug use as per se child abuse); N.J. Div. of Youth & Family Servs. v. N.D., 435 N.J. Super. 488, 494 (App. Div. 2014) (same). Actual harm under the

statute can be established by offering proof that a child suffered drug withdrawal symptoms at birth or by "showing evidence of respiratory distress, cardiovascular or central nervous system complications, low gestational age at birth, low birth weight, poor feeding patterns, weight loss through an extended hospital stay, lethargy, convulsions, or tremors." A.L., 213 N.J. at 22-23.

Expert testimony is not always required to prove actual harm in an abuse and neglect case. Id. at 29; N.D., 435 N.J. Super. at 497. When "the evidence presented does not demonstrate actual or imminent harm, expert testimony may be helpful." A.L., 213 N.J. at 28; N.D., 435 N.J. Super. at 496. When, as here, there is actual harm, proof of such harm "may come from any number of competent sources including medical and hospital records, health care providers, [or] caregivers, [as well as] qualified experts." A.L., 213 N.J. at 23.

In N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165 (2014), the Supreme Court clarified that, under certain circumstances, proof of prenatal drug use coupled with the fact that a newborn suffered withdrawal symptoms is insufficient to establish abuse and neglect. The Court held,

> [A]bsent exceptional circumstances, a finding of abuse or neglect cannot be sustained based solely on a newborn's enduring methadone

> withdrawal following a mother's timely participation in a bona fide treatment program prescribed by a licensed healthcare professional to whom she has made full disclosure. In this case, a finding of abuse or neglect under N.J.S.A. 9:6-8.21(c)(4)(b) required proof that [Y.N.] unreasonably inflicted harm on her newborn and did so, at least, by acting with gross negligence or recklessness.
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> [Id. at 168-69.]

Defendant contends that, pursuant to Y.N., the finding of abuse and neglect must be reversed. Defendant's reliance on Y.N. is misplaced.

In Y.N., the sole drug identified as causing the newborn's withdrawal symptoms was methadone. The Court accepted the mother's testimony that she was taking methadone as part of a treatment program she entered prior to giving birth. Here, however, there is no credible evidence in the record that defendant was prescribed Subutex or that her use of Subutex during her pregnancy was authorized by a qualified physician after full disclosure. Nor did defendant use Subutex in conjunction with any bona fide treatment program.

Defendant admitted to using Subutex during her pregnancy. The medical records and Dr. Kelly's testimony as D.S.'s treating physician provide ample support for the conclusion that D.S.

suffered withdrawal symptoms following his birth and required medical treatment based upon a diagnosis of NAS.

As noted, Dr. Kelly testified that, absent treatment, NAS can cause seizures and be "life threatening." That evidence was sufficient to establish "a substantial or ongoing risk of physical injury to [D.S.] by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ." N.J.S.A. 9:6-8.21(c)(2).

In any event, the evidence clearly sufficed to show D.S.'s "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 . . . to exercise a minimum degree of care . . . by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . ." N.J.S.A. 9:6-8.21(c)(4)(b). The trial court's finding is therefore supported by sufficient credible evidence in the record.

III.

Defendant also contends the trial court abused its discretion when it denied her second request for an adjournment so that her expert witness, Dr. Finnegan, could testify. We do not find this argument persuasive.

New Jersey courts have long and consistently adhered to the general standard of review that an appellate court will reverse for failure to grant an adjournment only if the trial court abused its discretion, causing a party a "manifest wrong or injury." State v. Hayes, 205 N.J. 522, 537 (2011) (citation omitted); accord Allegro v. Afton Vill. Corp., 9 N.J. 156, 161 (1952) (holding that appellate courts should not second-guess "unless it appears an injustice has been done."); Kosmowski v. Atlantic City Med. Ctr., 175 N.J. 568, 575 (2003) (holding that the decision whether to adjourn a case due to the unavailability of an expert witness lies within the discretion of the trial court).

Here, defendant knew on January 27, 2017, that the expert would be unavailable for an additional six weeks. It is also apparent from the letter sent by Dr. Finnegan's treating physician on February 2, 2017, that Dr. Finnegan had not yet begun a review of the discovery that the Division had provided back on October 7, 2016, and had not begun preparing a report. We agree with the trial court that defendant had ample time to find a new expert to prepare the matter in advance of the March 13, 2017 rescheduled hearing date.

Additionally, as the Division correctly points out, "[t]o ensure that the safety of children is of paramount concern, when scheduling hearings . . . the court shall give priority to

proceedings under this act involving imminent or actual physical harm . . . . Any adjournment granted in the course of such a proceeding should be for as short a time as possible." N.J.S.A. 9:6-8.49. "Title Nine embodies clear legislative commands requiring that Title Nine proceedings be commenced, conducted and concluded with extreme dispatch, if not with considered and deliberate haste." N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 110 (2011).

The record demonstrates that Dr. Finnegan was unavailable until mid-April 2017, "at the earliest." An adjournment of such duration to accommodate Dr. Finnegan's availability would run counter to the expeditious resolution required in this Title Nine case. Accordingly, we discern no abuse of discretion in the court's decision to deny defendant's second adjournment application.

Affirmed.