

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1644-22

IN THE MATTER OF K.G.,
a minor.

Submitted June 6, 2023 – Decided September 5, 2023

Before Judges Rose and Gummer.

On appeal from an interlocutory order of the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FC-16-0177-19.

Joseph E. Krakora, Public Defender, attorney for appellant/cross-respondent K.G. (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Jennifer Sullivan and Tumaiya N. Settihalgere, Assistant Deputy Public Defenders, of counsel and on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent/cross-appellant New Jersey Division of Child Protection and Permanency (Sookie Bae-Park, Assistant Attorney General, of counsel; Julie B. Colonna, Deputy Attorney General, on the briefs).

PER CURIAM

In this post-termination-of-parental-rights case, a Family Part judge ordered the appointment of a "mental health surrogate" for K.G. (Karly), a

twelve-year old who was under the guardianship of the Division of Child Protection and Permanency (the Division).¹ In a November 14, 2022 order, the judge changed the title of "Mental Health Surrogate" to Guardian ad Litem (GAL), appointed someone to that position, and required the Office of the Law Guardian (OLG) to pay the costs and fees incurred by the GAL. On leave granted, Karly appeals the aspect of the order requiring the OLG to pay for the GAL's costs and fees, and the Division cross-appeals the appointment of the GAL. We affirm the appointment of the GAL and reverse the aspect of the order imposing the GAL's costs on the OLG.

I.

On April 7, 2022, a judge terminated the parental rights of Karly's biological parents and placed Karly under the guardianship of the Division. The judge also approved the Division's permanency plan of "[s]elect home" adoption for Karly.

At the next hearing, which took place on June 13, 2022, counsel for the Division acknowledged "the neglect and abuse that [Karly] was put through while she was in the care of her mother." Counsel reported that since the April

¹ We use initials and fictitious names to protect privacy interests, to maintain the confidentiality of the record, and for ease of reading. See R. 1:38-3(d)(12).

7, 2022 hearing, Karly had been "in and out of psychiatric hospitals," "admitted to the hospital several times for cutting herself," "purging . . . and throwing up after eating," on "psychotropic medication," and "seen by a psychiatrist on a very regular basis." According to the Division's counsel, Karly was then in "a group home, specializing in the care for adolescents . . . with [her] behavior . . . [under] close supervision just to prevent [her] from trying to harm herself" and "[t]he goal [was] to transition her into a more structured setting, a treatment program." A Division caseworker reported that Karly was "on home instruction."

"A child who is the subject of a Title Nine or Title Thirty proceeding is . . . entitled to representation by counsel employed in a separate unit of the Public Defender's Office, referred to as a 'law guardian.'" N.J. Div. of Child Prot. & Permanency v. G.S., 447 N.J. Super. 539, 556 (App. Div. 2016) (quoting J.B. v. W.B., 215 N.J. 305, 332 (2013)). The OLG is the unit that provides "the day-to-day representation of children." Id. at 558. Karly's law guardian and counsel complained Karly was "not enrolled in any extracurricular activities," which was "making her situation m[uch] worse," because she lacked two vaccinations and contended being enrolled in school was "critical for this child," including for her "social, emotional well-being." The law guardian contended that although

Karly had been "in the system for four years . . . nothing [was] helping [her] same challenges." He asserted "[w]hen it comes to mental health, the Division says it is not in our domain" but was in the domain of "PerformCare and the [Care Management Organization (CMO)]," which had different positions in this case.² He pointed out that a Court Appointed Special Advocate (CASA) volunteer, see R. 5:8C, had "lamented that [Karly] has been the brunt of the system's shortcomings and meeting the system's needs, rather than [her needs]." Because of those "ongoing concerns, both with regard to educational and mental health," the law guardian made a "strong request" for the appointment of "a surrogate to address the educational and mental health services."

The Division's counsel objected to the request for a surrogate, stating she had never heard of the appointment of a surrogate involved in determining the medical or educational needs of a child and contended the Division, having custody of Karly, was responsible for overseeing the services provided to Karly,

² PerformCare works with the Division "to help identify appropriate behavioral health treatment services for child welfare involved youth." See Division of Child Protection and Permanency (DCP&P) Staff Resources, N.J. Child.'s Sys. of Care, <https://www.performcarenj.org/provider/dcpp/index.aspx> (last viewed Aug. 29, 2023). "'Care Management Organization (CMO)' means the community-based . . . contracted entity that is responsible for creating, coordinating, and implementing an individualized plan of care for children with emotional and behavioral disturbances that are in need of intensive care coordination services." N.J.A.C. 10:75-1.2.

under the supervision of the court and with the assistance of CASA. At the end of the hearing, the judge "order[ed] the Division and the [l]aw [g]uardian to explore a surrogate to address [Karly's] mental health and education concerns." The law guardian asserted the Division should be responsible for costs, if any, related to the surrogate. The judge again directed counsel to discuss the issue. The judge memorialized that instruction in a June 13, 2022 order, requiring "[t]he Division and Law Guardian [to] explore an Educational and/or Mental Health Surrogate for [Karly]."

The next hearing was held on July 22, 2022. The Division's counsel advised the judge Karly had been hospitalized since July 19, 2022, "after several attempts to jump out of a moving vehicle, [an] attempt to jump out of her bedroom window, and reporting to staff she did not feel safe."

Karly's law guardian called as a witness Dr. Stephen Mateka, "an attending psychiatrist, medical director and chief of psychiatry at Inspira Health [Center]," who had treated Karly. Dr. Mateka explained that although Karly had made "a good amount of progress under our care," her discharge had not been scheduled "due to the concerns over her not having [a] clear disposition and discharge planning." Dr. Mateka testified the "repeated attempts" to stabilize Karly while she was in the Division's custody over the prior four years had been

unsuccessful and opined that "if we [want] different results, we would have to go about things differently." He recommended the appointment of a "mental health surrogate" to monitor Karly's treatment and progress.

On cross-examination, the Division's counsel asked Dr. Mateka to explain why he believed a surrogate should be appointed.

[Dr. Mateka:] . . . I think just by evidence . . . of this call that there are . . . several different components and . . . people involved in decision-making for this child, and . . . in my two years, I've had significant experiences of the difficulty and miscommunication and the lack of communication certainly in timely manners where everyone needs to be on the same page for a decision to move forward, that having a level of oversight over all of that would be in the best interest of [Karly].

[Division's counsel:] But how would that be different than working with the Division now? Well, if you have a mental health surrogate, well, how would that be different to what is going on now with the Division?

[Dr. Mateka:] That . . . it would [be] more comprehensive, and it would be another person from perhaps maybe a more objective position . . . in the decision-making.

The Division did not present any witnesses during this hearing. The Division's counsel advised the judge the Division agreed to the appointment of an educational surrogate but objected to the appointment of a mental health surrogate. After hearing argument, the judge granted the law guardian's request

to appoint "an educational surrogate and . . . mental health surrogate" for Karly and issued an order requiring the appointment of the surrogates.

The Division moved for reconsideration. After hearing argument on September 26, 2022, the judge placed a decision on the record and issued an order denying the motion. The judge made extensive factual findings in support of his decision:

[Karly] was exposed to severe abuse and neglect while in the care of her mother. She was diagnosed with several mental health conditions, including major depressive disorder, recurrent and severe, with anxious distress, unspecified impulse control disorder and attention deficit hyperactivity disorder unspecified.

[Karly] had exhibited increased anxiety and panic attacks. She also had a history of self-injurious behavior which included cutting herself, punching walls, hitting and biting herself, and at some point suicidal ideations stating that she felt better off dead than living.

. . . .

. . . [O]n April 29, 2022, [Karly] was placed in a STAS, which is Stabilization Assessment Services bed at the Crossroads Program at Kerry House, and this followed hospitalizations in March of 2022 and April of 2022 where there was a recommendation of a higher level of care. CMO was able to submit an out-of-home referral to PerformCare to reassess [Karly's] level of care based on her medical needs. On May 20, 2022, [Karly] was approved for psychiatric residential . . . placement.

Then on June 19, 2022, [Karly] was sent to Capital Hill Hospital for crisis intervention. She was admitted to Inspira Bridgeton for [Children's Crisis Intervention Services (CCIS)] stabilization for a period of seven days.

. . . That June 19 date came after several attempts by [Karly] to jump out of a moving car, [an] attempt[] to jump out of her bedroom window, and reporting to staff that she did not feel safe. On June 22, 2022, [Karly] was then transferred to Inspira CCIS Unit for further observation. She completed a psychiatric evaluation, was diagnosed with disruptive mood dysregulation disorder and post-traumatic stress disorder. The treating psychiatrist recommended [Karly] be transferred to an . . . intermediate bed in the Adolescent Unit which would allow [Karly] to receive an additional four weeks of mental health services and support. She was transferred to the Intermediate Unit at Inspira on July 5, 2022.

[Karly] was transferred from Inspira on August 17, 2022, and placed in the [Youth Consultation Service (YCS)] Bright Star residential facility where she is, according to the Division, addressing her mental health needs. According to the Division, her daily routine includes attendance in multiple individual and group activities that promote personal strength and peer relationships. She has begun to address the trauma she experienced while under the care of her biological mother, along with feelings of depression and anxiety she faces on a daily basis. [Karly] currently denies thoughts of self harm or purging and is not on any type of bathroom restriction, according to the Division. The youth is followed by the Advanced Practitioner Nurse at the YCS facility. She has been monitoring [Karly's] progress and administering her daily medication.

According to the Division, [Karly] had not had any medication changes since her discharge from Inspira.

The judge found "these were very serious incidents this child was involved in. . . . Very, very serious" and that "[t]his is a special sort of a situation."

The judge also described a letter signed by Dr. Mateka and a licensed clinical social worker who was the clinical supervisor at Inspira:

The hospital's treatment team is in agreement that a mental health surrogate, not a consultant, is needed due to the previous consultant's lack of face-to-face evaluation of the patient despite making ongoing recommendations regarding medication and treatment, as well as inconsistent reporting on the patient by the Division in regard to diagnoses and behaviors. Much of the patient's history as reported by the Division was quite different from the patient's own report, and patient's report was consistent throughout her stay and the treatment team considered [the] patient's report to be truthful as a result. . . . As such, this team feels confident[] that a surrogate would make the most appropriate decisions related to her mental health moving forward, and agree with the law guardian that it is necessary to have a surrogate appointed for [Karly].

The judge acknowledged he had "granted the Division guardianship of [Karly] for all purposes including adoption."

Accordingly, the Division has the responsibility to make educational and medical decisions on behalf of [Karly]. Decisions to consent to [] treatment recommendations, including recommendations for medical or for placement in high-level of care centers

are made by the Division in consultation with their experts in addition to the child's treating physicians.

Citing Rule 5:8B and New Jersey Division of Youth and Family Services v. M.F., 357 N.J. Super. 515, 525-26 (App. Div. 2003), the judge held the "[c]ourt has the authority to review all of the Division's decisions regarding a child's welfare, especially as to the placement and the . . . services . . . the child will be receiving." He also held the court "had the power to appoint a [GAL] to monitor the mental health of this minor child as guided by the legislative policy which is found under [N.J.S.A.] 30:4C-1, . . . stat[ing], '[t]he safety of children shall be of paramount concern, and the best interest[s] of children shall be of primary consideration.'" He found "it's in the best interest of this child . . . that we can have someone appointed . . . who can look at what the Division is doing or had done, and make sure that those diagnoses or recommended treatments or recommended medication[s] . . . are in the best interests of this child." The judge issued an order denying the reconsideration motion, permitting additional "submissions as to open issues," and scheduling another hearing.

The judge heard additional argument on October 13 and 25, 2022, regarding the allocation of costs and fees, the "scope" and duration of the surrogate appointment, and the person to be appointed. During the October 13, 2022 hearing, the Division's counsel asked that the title of the appointment "be

a [GAL], not a mental health surrogate." The law guardian did not object to that request.

During the November 10, 2022 hearing, the judge stated he was "still stand[ing] by [his] reasoning" for the appointment of "a mental health surrogate." He held he was amending the September 26, 2022 order to reflect the appointment of a GAL, and not a "mental health surrogate" and that the "scope" of the appointment would be "determined by the law guardian" and the duration initially would be "indefinite" but subject to the court's review and determination. The judge named the person recommended by the law guardian to serve as the GAL because the person proposed by the Division was unable to serve. The judge found "the Division [was] complying with the statutes and providing these services" and that the services to be provided by the GAL were "important, but . . . additional services." Because he could not "point to law . . . that says the Division is in a position where they can be ordered to provide these services," the judge held the OLG was responsible for paying the GAL's fees and costs, noting he had had "other cases where [the] law guardian has their own expert, pays for their own expert."

In a November 14, 2022 order, the judge held the "Mental Health Surrogate approved by the [c]ourt shall be referenced as [Karly's GAL] in this

matter," the September 26, 2022 order was amended to reflect that title change, the court would determine the scope and duration of the GAL's representation and the requirements for the GAL to issue reports and provide testimony, and the OLG would pay the costs and fees incurred by the GAL. The judge also named the person appointed as GAL and, at the request of the parties, stayed the order.

We granted Karly's motion for leave to appeal from the aspect of the November 14, 2022 order requiring the OLG to pay the GAL's fees and costs. Karly argues the judge misapplied the law in determining the party responsible for covering the GAL fees. Karly contends the OLG, as Karly's legal counsel, cannot be required to pay the costs of a GAL, appointed by the court to serve as a neutral voice in addressing Karly's mental health challenges.

We also granted the Division's motion for leave to cross-appeal from the aspect of the November 14, 2022 order appointing a GAL to monitor Karly's mental health treatment and progress. According to the Division, the judge abused his discretion in appointing a GAL for Karly because "there was no need to" do so. The Division argues the judge erred in appointing a GAL, contending the parties had agreed to Karly's recommended treatment protocol and placement, the judge had not found any significant flaws in the care provided by

the Division, and Karly did not need a GAL. The Division also argues the judge abused his discretion by appointing a GAL without defining the GAL's role, scope of representation, or duties.

II.

Our review of family-court decisions is "limited." N.J. Div. of Child Prot. & Permanency v. J.B., 459 N.J. Super. 442, 450 (App. Div. 2019) (quoting Cesare v. Cesare, 154 N.J. 394, 411 (1998)). "[W]e apply a deferential standard in reviewing the family court's findings of fact because of its superior position to judge the credibility of witnesses and weigh the evidence," N.J. Div. of Child Prot. & Permanency v. J.R.-R., 248 N.J. 353, 368 (2021), and "because it possesses special expertise in matters related to the family," N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448 (2012). Thus, we are bound to accept the trial court's factual findings as long as they are supported by sufficient credible evidence. N.J. Div. of Child Prot. & Permanency v. A.D., 455 N.J. Super. 144, 155 (App. Div. 2018); see also N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007) (holding a trial court's findings are entitled to deference "unless it is determined that they went so wide of the mark that the judge was clearly mistaken"). We review de novo a Family Part judge's rulings on pure questions of law. N.J. Div. of Child Prot. & Permanency v. B.H., 460

N.J. Super. 212, 218 (App. Div. 2019). We review a trial court's order on a reconsideration motion under an abuse-of-discretion standard. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

"The decision to appoint a [GAL] is reposed in the discretion of the trial judge, . . . and rightly so because the decision is informed by the experience the judge gains as the judge sifts through a daily docket of contested matters." J.B., 215 N.J. at 333. "A judge is also charged with protecting the best interests of a child." Ibid.; see also N.J.S.A. 30:4C-1 ("This act is to be administered strictly in accordance with the general principles . . . which are declared to be the public policy of this State, whereby the safety of children shall be of paramount concern and the best interests of children shall be a primary consideration."). "[T]he basic role of the guardian ad litem is to assist the court in its determination of the incompetent's or minor's best interest." In re Adoption of a Child by E.T., 302 N.J. Super. 533, 539 (App. Div. 1997).

"Our court rules contemplate the appointment of a [GAL] in two contexts: an action to determine the incapacity of a person, R. 4:86; and actions to resolve custody or parenting time/visitation disputes, R. 5:8B." J.B., 215 N.J. at 332. However, "[t]here are other contexts in which either a law guardian will be appointed or a third party will be required to conduct an investigation to assure

that the best interests of the child or children are advanced and protected." Ibid. Thus, the appointment of a GAL is not limited to "cases in which custody or parenting time/visitation is an issue." R. 5:8B. See J.B., 215 N.J. at 333 (in a case in which custody or parenting time was not an issue, court finds judge did not err in appointing GAL to investigate and report on whether a special needs trust was in a child's best interest).

Similarly, "[t]he appointment of a [GAL] is expressly provided for in only two sections of the adoption statute," N.J.S.A. 9:3-47(b), -48(d). E.T., 302 N.J. Super. at 539-40. In a case in which "neither" of those sections was "applicable," we acknowledged a judge could appoint a GAL in an adoption proceeding for other reasons and found "[a]ll other appointments of guardians ad litem in adoption actions are, therefore, made pursuant to the inherent authority of the court, acknowledged by the adoption statute, to take that action in the protection of the child's best interests." Id. at 540.

Rule 5:3-3 authorizes a court to appoint an expert "[w]henver the court, in its discretion, concludes that disposition of an issue will be assisted by expert opinion." R. 5:3-3(a).

While this rule constitutes a significant expansion of the express authorization of the court to appoint experts to assist in the resolution of specific issues involved in family litigation, the authority of the court to do so has

long been regarded as a matter within its inherent power, and such appointments have been routinely made in family as well as in other civil actions without express rule authorization.

[Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 5:3-3 (2023).]

See also Prol v. Prol, 226 N.J. Super. 394, 395 (Ch. Div. 1988) (recognizing "this practice of appointing experts has endured for a considerable period of time. The prerogative of the court to so appoint has long been regarded as a matter within its inherent discretionary power"). "Because the welfare of a child is the central concern, it is important that courts thoroughly inform themselves of the subject matter. . . . Moreover, the court should not hesitate to call on independent experts." In re Guardianship of J.C., 129 N.J. 1, 22 (1992).

Whether labelled a "mental health surrogate," a GAL, or an expert by some other name, the judge had the authority to appoint a neutral third party to assist him in fulfilling his obligation to determine what is in Karly's best interest. We perceive no abuse of that discretion given the substantial, credible evidence in the record supporting the appointment. The Division does not dispute the judge's detailed findings regarding Karly's extensive mental-health history; in fact, the Division's counsel reported much of that history to the judge. That history demonstrated little improvement over the years Karly was in the

Division's care. The need for the appointment of a neutral third party also was supported by the uncontradicted testimony of Karly's treating psychiatrist and the written submission of that psychiatrist and a licensed clinical social worker. We also note that the appointment of a GAL in this case was premised on the judge's finding that Karly's situation was "special" given her involvement in "[v]ery, very serious" incidents. Cf. E.T., 302 N.J. Super. at 541 (finding the appointment of a GAL "must not be routine but must be reserved for those actions in which . . . the court clearly requires the specific assistance the appointee can render"). Accordingly, we affirm the aspect of the order appointing a neutral third party as GAL.

Reviewing the transcripts of the hearings conducted by the judge, the purpose and role of the GAL is clear to us: to monitor and review Karly's treatment and progress and to aid the judge in reviewing the Division's decisions regarding Karly's placement, the services she is receiving, and what is in her best interests. The judge, however, erred in failing to set forth in an order the responsibilities of the GAL. The August 12, 2022 order provided only that a "Mental Health Surrogate shall be appointed for [Karly]." The November 14, 2022 order provided that "[t]he scope of representation of the [GAL] and duration of the [GAL's] term shall be as determined by the [c]ourt," but the judge

did not issue any additional order detailing the "scope" of the GAL's representation.³ "[T]he order of appointment should delineate, at least to the extent practical, the reasons for the appointment as a guide to the appointee of the nature of the services expected by the court to be performed." E.T., 302 N.J. Super. at 541; see also S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 276-77 (2020) (finding the trial court "properly exercised its discretion in appointing a [GAL]" but should have in its order "made clear the role to be played by the GAL"). We remand the case with instructions to the judge to issue an order with clear directives for the GAL to follow.

The judge also erred in ordering the OLG, not the Division, to pay the GAL's fees and costs. A trial judge has the discretion to allocate between the parties the fees of a court-appointed GAL or expert. Rs. 5:3-3(i), 5:8B(d). "The services rendered by a [GAL] shall be to the court on behalf of the child,"

³ We acknowledge the judge initially on the record indicated the "scope" of the appointment would be "determined by the law guardian." The judge corrected that error in the November 14, 2022 order by providing the court would make that determination. We also note the judge correctly did not delegate to the GAL any decision-making authority that properly belongs with the Division, as Karly's guardian, or the court. See P.T. v. M.S., 325 N.J. Super. 193, 216 (holding, "we cannot allow experts to shoulder excess responsibility or authority, nor trial judges to cede their responsibility and authority. The court must not abdicate its decision-making role to an expert").

R. 5:8B(a), and "the fees allowed a [GAL] are more properly considered to be costs of the proceedings," E.T., 302 N.J. Super. at 542.

The judge's perceived need for the GAL arose out of legitimate concerns, based on the evidence before him, about the sufficiency and efficacy of the mental-health treatment rendered to Karly while in the Division's custody and the services provided by the Division to Karly. The judge appointed the GAL not as Karly's expert but as a neutral third party "who [could] look at what the Division is doing or had done, and make sure that those diagnoses or recommended treatments or recommended medication[s] . . . are in the best interests of this child" and who thereby could aid him in fulfilling his obligation to determine what was in Karly's best interest. Under those circumstances, the judge abused his discretion in ordering the OLG, as Karly's counsel, and not the Division, to bear the costs of the GAL.

Affirmed as to the appointment of the GAL; reversed as to imposing the costs and fees of the GAL on the OLG; remanded for the issuance of an order and further proceedings consistent with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION