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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1263-15T4

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

S.C.,

Defendant-Appellant,

and

D.F. and K.F.,

Defendants.

IN THE MATTER OF Au.F. and Al.F.,

Minors.

Submitted March 30, 2017 – Decided April 6, 2017

Before Judges Lihotz and Hoffman.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FN-12-0218-15.

Joseph E. Krakora, Public Defender, attorney for appellant (John A. Salois, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent, (Melissa H. Raksa, Assistant Attorney General, of counsel; Carla Livingston, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Todd Wilson, Designated Counsel, on the brief).

PER CURIAM

Defendant S.C. appeals from the Family Part's order conditioning dismissal of this action filed pursuant to N.J.S.A. 30:4C-12, restricting defendant to supervised visitation with her children until she undergoes a substance abuse evaluation and engages in any recommended treatment. Defendant argues the trial court erred twice. First, the trial court had "no evidence that she behaved in any way that harmed her children or placed them at imminent risk of harm because of" her oxycodone prescriptions. Second, the court should not have ordered defendant to have only supervised contact with Aurora and Alice[1] until she underwent a substance abuse evaluation.

Defendant admitted taking up to five oxycodone pills a day. She went to three different doctors to obtain her prescriptions. Defendant tried to explain this behavior, but the trial court did not find her credible. We affirm the trial court.

[1] To protect their privacy, we refer to Au. F. as Aurora and Al. F. as Alice.

I.

On June 3, 2014, the Division filed a verified complaint requesting defendant undergo a substance abuse evaluation. The court dismissed the Division's complaint without prejudice on the same date. On March 4, 2015, the Division filed a verified complaint for care and supervision, requesting defendant undergo a substance abuse evaluation. After hearing testimony from a Division investigator, the court denied the Division's request "pending the completion of a Title 30 summary hearing," but permitted it to complete its investigation. The court continued physical custody of the children with their paternal grandmother and also required defendant to "sign appropriate releases . . . for all medical, educational, and pharmacological information."

On April 16, 2015, the court held a summary hearing. The Division presented testimony from one of its investigators, who said he began investigating defendant and her family in January 2015, after the Division received a referral alleging "substance abuse" and "medication use and sale." He went to the family's last known address, but they were not there. He consequently went to Aurora's and Alice's schools, where he separately interviewed each child.[2]

[2] Aurora was nine years old and in second grade at the time, and Alice was eight years old and in the first grade.

According to the investigator, Aurora said she lived at her maternal grandmother's house with her mother, father, and maternal grandmother. She described the house, where everyone slept, and where she liked to play with her "Barbie dream house." She said she no longer lived with her paternal grandmother, with whom the Division had thought she lived because the paternal grandmother had physical custody of Aurora and Alice. He asked whether anyone in her family took medicine, and she said no. He asked if they did when they were sick, and she said, "[D]o you mean pills?" "[S]he said we're not supposed to talk about pills." "[S]he said that her mom and dad take pills, but she's not supposed to talk about it." She thought the pills made them "sleepy," and "that's why they watch tv and sleep so much."

The investigator also spoke with Aurora's guidance counselor, who expressed concern about her attendance record. He consequently requested "written documents" regarding her attendance at school.

The investigator testified Alice "was very open and friendly" when he began interviewing her. When he asked her about whether anyone in her family took medicine, "her entire demeanor changed." She "froze up," "broke eye contact," and "looked at the floor." She refused to talk further.

The investigator followed the children home on their school bus, and he spoke with their maternal grandmother, who came to

take them home with her. She refused to let him see her home, but she came to his office to speak with him. The investigator also spoke with defendant and the father of the children. "They denied any illicit substance use" and denied "any sale." They further claimed the children's father had a "former employer," who was "using the Division as [a] means of harassment." They said they were only taking medications their doctor had prescribed, and they were taking them as their doctor had directed.

The investigator consequently spoke with the doctor, who said he had discharged defendant and the children's father in late 2014 with "a month's worth" of prescriptions. Defense counsel objected when the Division asked the investigator to identify defendant's pharmacy record. Defense counsel argued the investigator could not establish "a foundation on a document that's not a Division document." The Division replied, "[I]t's a certified document. There is a certification attached to the document. It was requested by the Division as a consultant from a release[] signed by . . . defendant." The court said, "[T]o the extent there's a hearsay objection to that one, it's overruled." After the investigator identified the document, the court told him to let the Division's counsel finish her questions, so counsel had "an opportunity to object." The investigator then said, after reviewing the pharmacy record, "the concerns at that point were

that there were other physicians on there." He also noted the additional doctors had prescribed narcotics. Defense counsel did not object to this testimony.

On cross-examination, defense counsel asked, "[W]hen you look at [the pharmacy record] and you see a 30 and a 150, could that mean [defendant] was prescribed [5] a day for 30 days?" The investigator replied, "I don't know what that means." He admitted he did not "know if these are the proper prescription amounts that she takes per month." Defense counsel asked, "So, you don't have any evidence that she misused it?" He said, "We have concerns." Defense counsel then stated, "But no evidence." He responded, "I would guess, no. I don't." He then added defendant's first doctor said he had discharged her because of allegations she had been abusing oxycodone, but he did not have a written statement from the doctor.

The investigator said he was concerned about the children because their schools reported someone had been repeatedly calling to excuse their attendance. The schools "had no knowledge" that the children's maternal grandmother had physical custody of them. "One of the schools didn't even know who [the maternal grandmother] was. They said that [defendant] was the one that was bringing them to school, picking them up, attending the meetings."

The investigator also testified the Division had received three or four previous referrals regarding defendant's substance abuse; the first was substantiated, and the remaining ones were not established. He further confirmed defendant received a prescription for oxycodone as recently as April 6, 2015, and had declined "numerous" requests to undergo a substance abuse evaluation to address the Division's concerns.

Defendant also testified at the court's summary hearing. She said she had signed releases for all of her doctors. Sometime in 2008 or 2009, she started seeing the first doctor involved in this case. He treated her for a "thyroid condition" and "pain." According to the pharmacy record's first prescription for oxycodone, dated January 19, 2015, she took five oxycodone each day for thirty days. The doctor stopped seeing defendant because "the same person that called the Division had also called him and made allegations."

Defendant consequently saw a second doctor, who prescribed four oxycodone per day for twenty-five days on February 17, 2015. Defendant then saw a third doctor, who prescribed three oxycodone per day for thirteen days on March 12, 2015. Defendant told the third doctor that the Division was investigating her for abusing her medication. The third doctor subsequently prescribed three oxycodone per day for eighteen days on March 23, 2015. The doctor

repeated this prescription for another twenty-seven days, but at half the dosage, on April 6, 2015.

Defendant explained she took oxycodone since 2008 because she has "dis[c] problems in [her] back and nerve problems throughout [her] body." She also testified Aurora and Alice lived with their paternal grandmother when this case began, and they still lived with her. Defendant claimed she lived with her mother, not Aurora or Alice; nevertheless, she admitted to spending "unsupervised" time with her children. When asked why her children said they live with her, defendant said she had told Alice that she still lived with her, but she was "just staying with [her paternal grandmother] for a while."

After the Division investigator and defendant testified, the court ordered defendant to undergo a substance abuse evaluation. Defendant filed a motion for reconsideration, which the court denied because defendant "testified to explain why there were so many doctors that prescribed her the medicine," and "her answers . . . were not sufficient for the [c]ourt to believe the medicine was prescribed in the [proper] manner[,] and it was being taken as required." The court explicitly said it was not considering Aurora's or Alice's statements "for the truth." The court explained, "[I]f you're not even to consider the [c]hildren's statements as accurate, they still nevertheless had an effect on

[the investigator] by requiring him to take further actions. Those further actions included obtaining the records of certain prescriptions."

On October 15, 2015, defendant consented to the court dismissing the complaint on the condition she have only supervised contact with Aurora and Alice until she underwent a substance abuse evaluation. This appeal followed.

II.

N.J.S.A. 30:4C-12 authorizes the Division to investigate complaints that a person responsible for a child "is unfit to be entrusted with the care and education of such child, or shall fail to provide such child with proper protection, maintenance and education, or shall fail to ensure the health and safety of the child, or is endangering the welfare of such child." N.J. Div. of Youth & Family Servs. v. T.S., 426 N.J. Super. 54, 64 (App. Div. 2012) (quoting N.J.S.A. 30:4C-12). The trial court must conduct a summary hearing before authorizing the Division's involvement, and it may place a child under the care and supervision of the Division if "satisfied that the best interests of the child so require." T.S., supra, 426 N.J. Super. at 65 (citation omitted). The term "best interests" is not statutorily defined, but courts have interpreted it to mean "protection of children from harm when the parents have failed or it is

'reasonably feared' that they will." Ibid. (quoting N.J. Div. of Youth & Family Servs. v. Wunnenburg, 167 N.J. Super. 578, 586-87 (App. Div. 1979)). Under the statute, "a court could order a parent to undergo treatment for substance abuse." N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 34 (2013) (citations omitted).

When an order of care and supervision has been entered pursuant to N.J.S.A. 30:4C-12, it is only effective for six months. T.S., supra, 426 N.J. Super. at 66. When services are needed for a longer period, the Division must establish grounds for an extension of its authority "at a summary hearing held upon notice to the parent, parents, guardian, or other person having custody of the child." Ibid. (citation omitted). "Absent a showing that services or supervision or both appear to be in the best interests of the child because the services are needed to ensure the child's health and safety, a case should be dismissed." Ibid.

On appeal, defendant also challenges the trial court's evidentiary rulings. "Because of the family courts' special jurisdiction and expertise in family matters," we owe particular deference to "family court factfinding." Cesare v. Cesare, 154 N.J. 394, 413 (1998). We will not disturb the trial court's decision so long as it is supported by substantial credible evidence. Id. at 411-12. However, we review the trial court's

legal interpretations de novo. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014).

"We grant substantial deference to the trial judge's discretion on evidentiary rulings." N.J. Div. of Youth & Family Servs. v. M.G., 427 N.J. Super. 154, 172 (App. Div. 2012) (citations omitted). Rule 5:12-4(d) permits the Division to submit in evidence "reports by staff personnel," but it must do so "pursuant to N.J.R.E. 803(c)(6) and 801(d)," which refer to the business record exception. Nonetheless, reports admitted pursuant to Rule 5:12-4(d) or N.J.S.A. 9:6-8.46(a)(3) are still subject to other hearsay limitations, including those imposed by N.J.R.E. 805, concerning embedded hearsay statements within the text of a record, and N.J.R.E. 808, concerning expert opinion included in a hearsay statement admissible under an exception. See, e.g., In re Guardianship of Cope, 106 N.J. Super. 336, 343 (App. Div. 1969).

New Jersey courts have long held when a party declines to object to hearsay evidence, it becomes evidential. State v. Ingenito, 87 N.J. 204, 224 n.1 (1981) (Schreiber, J., concurring) (citing Smith v. Del. & Atl. Tel. & Tel. Co., 63 N.J. Eq. 93, 95 (Ch. 1902), aff'd, 64 N.J. Eq. 770 (1902); In re Petagno, 24 N.J. Misc. 279, 283-84 (Ch. 1946); McCormick on Evidence § 245 at 584 (2d ed. 1972); Annotation, "Consideration, in determining facts,

of inadmissible hearsay evidence introduced without objection," 79 A.L.R.2d 890 (1961)).

In this case, defendant first argues the trial court should have waited for the Division to complete its investigation before it ordered her to undergo a substance abuse evaluation. Defendant correctly quotes N.J.S.A. 30:4C-12, which states:

> If, after such investigation has been completed, it appears that the child requires care and supervision by the division or other action to ensure the health and safety of the child, the division may apply to the Family Part of the Chancery Division of the Superior Court in the county where the child resides for an order making the child a ward of the court and placing the child under the care and supervision or custody of the division.

Defendant, however, misconstrues "investigation" to preclude further investigation, which N.J.S.A. 30:4C-12 clearly anticipates:

> If the parent, parents, guardian, or person having custody and control of the child refuses to permit or in any way impedes an investigation, and the department determines that further investigation is necessary in the best interests of the child, the division may thereupon apply to the Family Part of the Chancery Division of the Superior Court in the county where the child resides, for an order directing the parent, parents, guardian, or person having custody and control of the child to permit immediate investigation. The court, upon such application, may proceed to hear the matter in a summary manner and if satisfied that the best interests of the child so require may issue an order as requested.

[(emphasis added).]

We therefore reject defendant's argument.

Defendant next contends the trial court should not have considered her first doctor's statements that he had discharged her because someone had alleged she was abusing oxycodone. First, defendant testified to this fact, even after the Division objected to her counsel's question that explicitly elicited the testimony. Second, the trial court did not rely on this testimony to conclude Aurora's and Alice's best interests required defendant to undergo a substance abuse evaluation. As the court said, defendant "testified to explain why there were so many doctors that prescribed her the medicine," and "her answers . . . were not sufficient for the [c]ourt to believe the medicine was prescribed in the [proper] manner[,] and it was being taken as required." The court therefore ordered her to undergo a substance abuse evaluation. We affirm the trial court's reasoning.

Defendant also argues defendant's pharmacy record "alone cannot support the Division's conclusion that [defendant] was misusing prescribed medication." Although defendant correctly notes the pharmacy record contains inadmissible hearsay, defense counsel objected to the investigator's identification of the record, not his testimony concerning its contents. The trial court properly overruled defense counsel's objection because the

source of the pharmacy record was not an out of court statement. See N.J.R.E. 801. Defense counsel did not object to the investigator's or defendant's other testimony concerning the pharmacy record, so the trial court properly considered their testimony as evidential. State v. Ingenito, 87 N.J. 204, 224 n.1 (1981) (Schreiber, J., concurring) (citing Smith v. Del. & Atl. Tel. & Tel. Co., 63 N.J. Eq. 93, 95 (Ch. 1902), aff'd, 64 N.J. Eq. 770 (1902); In re Petagno, 24 N.J. Misc. 279, 283-84 (Ch. 1946); McCormick on Evidence § 245 at 584 (2d ed. 1972); Annotation, "Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection," 79 A.L.R.2d 890 (1961)).

Defendant also argues Aurora's and Alice's "statements . . . constituted hearsay not within an exception and were not sufficient evidence to support the trial court's decision to order a substance abuse evaluation for [defendant] and restrict [her] contact with her children." The trial court explicitly said it did not consider Aurora's or Alice's statements "for the truth," so they were not admitted as hearsay. See N.J.R.E. 801. Instead, the trial court considered them insofar as they prompted the investigator's subsequent actions. We consequently affirm the trial court's consideration of Aurora's and Alice's statements.

Last, defendant contends the Division "provided no reason why the visits should be supervised other than the fact that

[defendant] refused to undergo a substance abuse evaluation, but had no other credible evidence to suggest she was unfit to be alone with her children." Given the previously established evidence and the trial court's finding that defendant could not adequately explain her extensive use of oxycodone, the trial court reasonably concluded Aurora's and Alice's best interests required a third party to supervise defendant's contact with them. See T.S., supra, 426 N.J. Super. at 65.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION