

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3444-20

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

N.N.,

Defendant-Appellant/
Cross-Respondent,

and

D.M. and R.Z.,

Defendants.

IN THE MATTER OF H.M.
and M.Z-N., minors,

Cross-Appellants.

Submitted November 15, 2022 – Decided January 24, 2023

Before Judges Sumners and Susswein.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Passaic County,
Docket No. FN-16-0143-19.

Joseph E. Krakora, Public Defender, attorney for
appellant/cross-respondent (Caitlin A. McLaughlin,
Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for
respondent (Melissa H. Raksa, Assistant Attorney
General, of counsel; Leah A. Schmidt, Deputy
Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian,
attorney for minors/cross-appellants (Meredith A.
Pollock, Deputy Public Defender, of counsel; Nancy
P. Fratz, Assistant Deputy Public Defender, of counsel
and on the brief).

PER CURIAM

The Division of Child Protection and Permanency (Division) filed this Title 9 action charging defendant N.N.¹ with abuse or neglect of her daughters, seven-year-old H.M. (Hillary) and three-year-old M.Z-N. (Millie). The Division alleges that defendant placed the children at risk of harm by not addressing her mental health issues. After a one-day factfinding hearing, the

¹ We use initials and a pseudonym to protect the privacy of defendant and her children. R. 2:1-38-3(d)(12).

trial court entered an order finding defendant abused or neglected her children as alleged and placed her on the Child Abuse Registry.²

In their appeal, defendant and the Law Guardian contend the trial court's finding was not supported by substantial credible evidence. They maintain the court improperly admitted expert reports and allowed a non-expert caseworker to testify regarding defendant's mental illness based on those outdated expert reports. Defendant contends the present diagnosis of schizophrenia was previously unknown to her; thus, the trial court erred in finding that she had foregone treatment. In addition, defendant contends the court erred in crediting the caseworker's testimony regarding his home visit investigation.

We conclude the trial court misapplied its discretion in admitting reports of non-testifying experts and allowing a non-expert to testify regarding defendant's mental health. Because this improperly admitted testimony formed

² A child abuse registry serves as "the repository of all information regarding child abuse or neglect that is accessible to the public pursuant to State and federal law." N.J.S.A. 9:6-8.11. "Although those records are kept confidential, see N.J.S.A. 9:6-8.10a(a), they may be disclosed, on written request, to doctors, courts, child welfare agencies, employers who are required by law 'to consider child abuse or neglect information when conducting a background check or employment-related screening,' and others, see N.J.S.A. 9:6-8.10a(b)(1)-(23)." N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 26 (2013).

the basis of the court's order, we reverse and direct removal of defendant's name from the Central Registry.

We need not recite the multitudes of referrals involving the Division's past contact with defendant which were detailed at the hearing. Instead, we limit our discussion to the Division's testimony concerning the home visit that triggered the present allegations and defendant's mental illness that she allegedly failed to treat.

On February 21, 2019, it was reported to the Division that defendant's children had not been to school for a week; defendant was seen in the street "with no shoes on" and "acting crazy"; the "children are always crying"; and defendant claimed that a famous Latin singer was always watching over her children. That evening, Division family specialist Xavier Rosa and co-worker Eliana Hilario investigated the allegations by making a visit to defendant's apartment. Rosa—the Division's only witness—testified he initially found defendant to be coherent. However, after she accurately named Hillary's father, she then indicated a famous Latin singer was actually the father of her daughters. Defendant, according to Rosa, then started to speak to her television, saying "[the singer] watches her from the TV." Defendant also told

Rosa there was a man living in her apartment, but he did not see anyone there other than defendant and the children.

While the children were eating, Rosa noticed that Hillary's drink appeared clouded with a powdery substance. When Rosa inquired, defendant replied that she crushed sleeping medication (she could not recall its name) and mixed it in juice because Hillary did not like taking the medicine. After her other daughter, Millie, fell asleep, Rosa testified she could not be woken up, so he decided to call for the emergency medical assistance. When the emergency medical technicians arrived, defendant woke up her daughter. No medical care was needed.

The Division removed the children from the home with defendant's consent. Hillary was diagnosed with a sty, which caused her eye to swell and corroborated defendant's reasoning for keeping her children out of school. There were no findings of physical abuse. The children were placed with their maternal grandmother.

Prior to his home visit, Rosa had not read the Division's records regarding defendant's mental illness because he "only [had] a certain amount of time to respond" after receiving referrals. Defendant was taken to the hospital where she tested negative for illegal substances, and a psychological

evaluation was conducted. For the first time, defendant was diagnosed with schizophrenia, which was much more serious than her previous mental health diagnoses of major depressive disorder, an intellectual disability, and an unspecified personality disorder generated from the Division's referrals.

In its abuse or neglect complaint against defendant, the Division relied upon medical evaluations of defendant's mental health prior to Rosa's home visit. Rosa testified the Division considered defendant's prior mental health history, her unusual behavior during his home visit, and her failure to participate in treatment offered by the Division.

At the hearing, over defendant's objection, the Division admitted into evidence psychological reports by Louis Arroyo, M.D. from his May 3, 2011 evaluation and Carolina Mendez, Ph.D., from her July 12, 2013 evaluation, as well as a psychiatric report by Richard F. Coco, Ph.D., from his November 6, 2017 evaluation.

We first consider defendant's and the Law Guardian's contentions that the trial court found defendant's failure to follow a mental health treatment plan constituted neglect of her children by placing them in an undue risk of harm without the benefit of hearing expert testimony concerning defendant's mental health status when the risk occurred. They maintain it was error for the

court to rely on Rosa's lay testimony, given his lack of knowledge and expertise regarding mental health, and to deny defendant's objection to the admission of the three expert reports without the testimony of any of the experts. It is argued the court's acceptance of the Division's reliance on outdated medical records made its order lacking in substantial and accurate credible evidence. Citing N.J. Div. of Youth & Family Servs. v. M.G., it is also argued that N.J.R.E. 808 requires exclusion of the expert's opinion "even if [the opinion is] contained in a business record, unless the trial judge makes specific findings regarding trustworthiness" when the expert does not testify at trial. 427 N.J. Super. 154, 174 (App. Div. 2012) (citation omitted). We agree.

Title 9 defines an "[a]bused or neglected child" as one under the age of eighteen 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 . . . 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

[N.J.S.A. 9:6-8.21(c)(4)(b) (emphasis added).]

In establishing abuse or neglect, the Division must show by a preponderance of the "competent, material and relevant evidence" that the child is "abused or neglected." N.J.S.A. 9:6-8.46(b). "Such evidence may include 'any writing [or] record . . . made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding of any hospital or any other public or private institution or agency,'" as long as it meets the requirements for admissibility "akin to the business records exception." N.J. Div. of Youth & Fam. Servs. v. P.W.R., 205 N.J. 17, 32 (2011) (quoting N.J.S.A. 9:6-8.46(a)(3)).

In reviewing the admission or exclusion of evidence, "we afford '[c]onsiderable latitude . . . [to a] trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion.'" N.J. Div. of Child Prot. & Permanency v. N.B., 452 N.J. Super. 513, 521 (App. Div. 2017) (quoting N.J. Div. of Child Prot. & Permanency v. N.T., 445 N.J. Super. 478, 492 (App. Div. 2016)). We reverse discretionary determinations, as with all rulings on the admissibility of evidence, only "when the trial judge's ruling was 'so wide of the mark that a manifest denial of justice resulted.'" M.G., 427 N.J. Super. at 172 (quoting State v. Carter, 91 N.J. 86, 106 (1982)). When a family judge's ruling involves

the application of legal principles rather than credibility determinations, we owe no special deference to the ruling. N.B., 452 N.J. Super. at 521.

The admissibility of reports on behalf of the Division must meet the prerequisites for admission of a business record under N.J.R.E. 803(c)(6), namely that the report is prepared by a professional consultant for the Division, and the report is maintained in the regular conduct of the Division's business. N.B., 452 N.J. Super. at 524. Even if the report satisfies these requirements, when the Division does not offer the expert as a witness, the expert's conclusions and diagnoses must satisfy N.J.R.E. 808. See N.J. Div. of Child Prot. & Permanency v. A.D., 455 N.J. Super. 144, 158 (App. Div. 2018). "Expert diagnoses and opinions in a Division report are inadmissible hearsay, unless the trial court specifically finds they are trustworthy under the criteria in N.J.R.E. 808, including that they are not too complex for admission without the expert testifying subject to cross-examination." N.T., 445 N.J. Super. at 487.

In the case of psychological reports without the testimony of the expert who authored the report, the report is susceptible to exclusion under N.J.R.E. 808. A psychological diagnosis should be excluded as evidence when the

expert who prepared the report is absent. See A.D., 455 N.J. Super. at 160; N.B., 452 N.J. Super. at 524-26.

Because neither Drs. Arroyo, Mendez, or Coco testified, the trial court should have conducted a N.J.R.E. 808 hearing on the trustworthiness of their reports. Given the inherently subjective nature of the doctors' psychological and psychiatric reports, a N.J.R.E. 808 hearing was required prior to admitting the report as evidence. Additionally, at such a hearing, the court should have addressed whether the doctors' diagnoses and opinions contained in their reports were sufficiently complex, requiring them to testify and be subject to cross-examination. Absent an evidentiary hearing, the diagnoses and opinions contained in their reports—exacerbated by the fact they were based on evaluations that occurred approximately nineteen months to eight years prior to trial—were inadmissible and thus could not serve to corroborate defendant's mental health and treatment needs when Rosa made his home visit.

Instead of conducting a N.J.R.E. 808 evidentiary hearing regarding the reports, the court found they were admissible to support the Division's contention that defendant's conduct during Rosa's home visit was the result of her untreated mental health condition, which constituted abuse or neglect of

her daughters. In allowing the reports over defendant's objections, the court merely stated:

I'm going to overrule the objection. [Rosa] testified that those were taken into consideration. The fact that they are two years, eight years, six years – this is not a guardianship trial. This is a fact finding. There are differences with regards to the issues in a guardianship trial which certainly would have to be at a higher level of clear and convincing evidence, whereas here it's a preponderance of the evidence. And age of various evaluations would be more pertinent in that regard than they would be here.

Nonetheless, the testimony was that [Division] took these into consideration with regards to the history.

The court did not cite any evidence rule or case law to support its reasoning.

The court's reasoning suggests defendant is not afforded the same rights to challenge the evidence presented against her in an abuse or neglect trial as she would in a guardianship trial. Even though the proceeding was not to terminate defendant's parental rights, her employability is negatively impacted by being placed on the Child Abuse Registry. This can be devastating for defendant and her daughters. This court has further recognized:

Perhaps more concerning beyond inclusion in the Child Abuse Registry is the often direct and dire impact substantiation has on the relationship between the parent and the affected child or other children as well. The administrative finding, as the Supreme Court has already recognized, may "provide a basis for an action to terminate a parent's custodial rights to a

child." N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 179 (2014); N.J. Div. of Child Prot. & Permanency v. V.E., 448 N.J. Super. 374, 393-94 (App. Div. 1998). Substantiation alone — regardless of inclusion in the Child Abuse Registry — has the potential to directly impact parents' "constitutionally protected right to maintain a relationship with their children." N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382, 397; see also N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 619 (App. Div. 2010).

[N.J. Dep't of Children & Families v. L.O., 460 N.J. Super. 1, 13-14 (App. Div. 2019).]

The court was obligated to analyze the admission of the doctors' reports in accordance with N.J.R.E. 808. The court's decision to admit them should not have been based on that fact defendant was defending herself in an abuse or neglect proceeding, as opposed to a guardianship trial, in which the Division has a higher burden of proof. We reject the implication that the rules of evidence can be relaxed, much less disregarded, because the consequences of a child abuse or neglect hearing are less severe than termination of parental rights.

Defendant and the Law Guardian argue the court erred in finding defendant abused or neglected her children in not following a mental health treatment plan based on Rosa's lay and hearsay medical opinion testimony and the outdated medical reports. The Law Guardian stresses there was no proof

that defendant's prior untreated condition of major depression was the cause of defendant's behavior during Rosa's home visit. We agree.

There was no testimony by a qualified medical expert that defendant's unusual behavior during Rosa's visit was attributable to a medical condition — major depressive disorder, intellectual disability, and an unspecified personality disorder — with which she had been previously diagnosed but failed to follow the prescribed treatment plan. Evaluations and diagnoses of defendant's mental health condition some nineteen months to eight years ago could not provide a credible basis for the trial court's finding that defendant abused or neglected her daughters in February 2019 due that condition. Contrary to the Division's contention before us, Rosa's testimony could not provide substantial, credible evidence that defendant's behavior was due to a medical condition that she knowingly failed to treat. He was not qualified to relate defendant's behavior to complex medical diagnoses.

The Division admitted into evidence the report of defendant's mental health evaluation conducted following Rosa's home visit, stating she had schizophrenia. Defendant had never been diagnosed with this condition before. Therefore, even assuming schizophrenia caused her unusual behavior,

she cannot be held responsible for a condition that had not been previously diagnosed and for which she was not prescribed a treatment plan.

We reverse the trial court's order finding of abuse and neglect and direct the Division to remove defendant's name from the Child Abuse Registry within ten days of the date of this opinion.

Reversed.

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



CLERK OF THE APPELLATE DIVISION