Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-203

AUGUST TERM, 2002

In re D.M., Juvenile	}	APPEALED FROM:
	}	Bennington Family Court
	}	DOCKET NO. 3-1-02 Bnjv
	}	Trial Judge: Karen R. Carroll

In the above-entitled cause, the Clerk will enter:

Mother appeals from a family court decision that D.M. is a child in need of supervision. She contends the court erred in: (1) finding that D.M. was without proper care; (2) admitting and relying on hearsay evidence; and (3) finding that mother had attempted to commit suicide. We affirm.

The record evidence may be summarized as follows. D.M., who was eleven years old at the time of these proceedings, was initially placed in SRS custody in 1996. Custody was returned to father in 1997, and in 1999 was transferred to mother. Under a special Medicaid waiver, extensive services were provided to the family that allowed D.M. to remain in mother's custody even while spending considerable time in foster homes when mother deemed it necessary to seek overnight or hourly respite care. The family's caseworker testified that mother regularly utilized temporary foster care placements when D.M. exhibited out-of-control behavior, as well as on several occasions when mother was hospitalized for depression and suicidal ideation. The caseworker further testified about the January 2, 2002 incident that resulted in the CHINS petition and temporary SRS custody of D.M., explaining that mother had called her to say that she had attempted suicide with knife.

Officer Larry Cole of the Bennington Police Department also testified about the incident of January 2. He recalled receiving a telephone call that day from a worker for United Counseling Services stating that mother was suicidal. When Officer Cole entered mother's apartment, he observed that she was sitting in a chair with a knife in her hand and had a cut on her wrist. The officer sat down near her, engaged her in conversation, and eventually attempted to remove the knife. Mother, in response, tightened her grip and turned the knife blade toward her stomach. Two additional officers intervened and were able to remove the knife from mother's possession. Shortly thereafter, however, mother entered another room and obtained another knife which the officers were able to remove after a short struggle. The officer accompanied mother to the hospital, where she required restraints. He recalled that mother said she had additional knives in the house, but that next time she would use a rifle.

Mother also testified at the hearing, explaining that she had back and neck injuries which resulted in chronic pain and depression, that she took a number of antidepressant and pain medications, and that she was not attempting suicide on January 2, but rather was attempting to mask her other pains and obtain assistance. She acknowledged that the first time she considered suicide was in 1995, when her mother died and she overdosed on alcohol and drugs, resulting in a hospitalization of several weeks. She also acknowledged other incidents in which she had thought about suicide, had cut

herself, and had been hospitalized, although she explained that she believed these were calls for help rather than suicide attempts.

At the conclusion of the hearing, the court ruled that the State had carried its burden of proving by a preponderance of the evidence that D.M. was a child in need of care and supervision. The court found that the circumstances surrounding the January 2 incident represented a real and serious suicidal episode, demonstrating that D.M. could not have obtained proper parental care during and immediately after the incident. While acknowledging that D.M. was spared from any immediate trauma because he was in foster care at the time, and that mother could continue to utilize such respite care in the future, this was not adequate in the court's view to ensure proper parental care. The court noted that the respite care was strictly voluntary on mother's part and could not be enforced by SRS or the court, and that the court could not depend on mother's ongoing rational decisionmaking when this form of suicidal ideation was present. Viewed in light of mother's history of depression, the very significant amount of care and attention that D.M. required and the strain that it placed on mother's mental and physical health, the court concluded that the State had established by not just a preponderance, but clear and convincing evidence, that D.M. was without proper parental care and therefore was a child in need of care and supervision during the period in question. See 33 V.S.A. 5502(a)(12)(B) (child in need of care and supervision includes one who is "without proper parental care . . . necessary for his well-being"). This appeal followed.

Mother first contends the court erred in finding that D.M. was without proper parental care. She relies on In re G.C., 170 Vt. 329, 333 (2000), where this Court observed that the requirement of proper parental care "does not compel a CHINS adjudication whenever incapacitated parents leave their children with relatives or others to provide 'parental' care during the period of incapacitation." Rather, the question is whether "given all of the circumstances, the child is without proper 'parental' care, such that the child's well-being is threatened." Id. at 334. While the court here acknowledged that mother had effectively utilized foster care for periods when she was unable to care for D.M., it found that such voluntary services were insufficient assurance of D.M.'s well-being in light of the serious mental instability demonstrated by the January 2 incident and D.M.'s significant need for supervision and control. The court's findings and conclusion in this regard were supported by the evidence, and reasonably based, and therefore may not be disturbed on appeal. See In re D.T., 170 Vt. 148, 156 (1999) (court's findings in CHINS proceeding will stand unless clearly erroneous, and its conclusions will be upheld if supported by the findings).

Mother next contends the court erred in admitting certain hearsay portions of a 1996 disposition report that documented mother's prior mental health history. Although generally admissible in a disposition hearing, hearsay provisions of a disposition report are inadmissible hearsay at the merits proceedings. In re Y.B., 143 Vt. 344, 347-48 (1983). Any error in this regard was harmless, however, as the court's findings concerning mother's troubled mental health history were supported by the other record evidence, including mother's own testimony that she had overdosed and otherwise attempted to harm herself, resulting in her hospitalization, on several occasions dating from 1995. See In re C.M., 157 Vt. 100, 103 (1991) (CHINS determination upheld despite admission of hearsay disposition report where other evidence supported findings).

Finally, mother contends the court erred in finding that the January 2 incident represented a suicide attempt. Although mother testified that the episode was merely a cry for help, the court was entitled to credit the officer's detailed testimony, which amply supported a finding to the contrary. See D.T., 170 Vt. at 157 (credibility of witnesses is matter for trier of fact to judge). Mother cites no authority to support the additional claim that expert testimony was required to support the court's finding. Cf. State v. DePiano, 926 P.2d 508, 514 (Ariz. Ct. App. 1995) (holding that court acted within its discretion in admitting lay opinion testimony on meaning of alleged suicide note), vacated in part on other grounds, 926 P.2d 494 (Ariz. 1996); Skaggs v. Aetna Life Ins. Co., 884 S.W.2d 45, 47 (Mo. Ct. App. 1994) (lay witness is permitted to give opinion on person's mental status).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice