

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1005-15T4

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

M.Z.,

Defendant-Appellant.

IN THE KINSHIP MATTER OF J.W.,
a minor.

Submitted March 14, 2017 – Decided April 24, 2017

Before Judges Leone and Vernoia.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Cape May County, Docket No. FL-05-04-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Jennifer M. Kurtz, Designated Counsel, on the briefs).

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Noel C. Devlin, Assistant Deputy Public Defender, on the brief).

PER CURIAM

Defendant M.Z.¹ appeals a family court order granting kinship legal guardianship (KLG) of her daughter J.W. (Jessie) to Jessie's paternal grandparents. We affirm.

I.

Defendant is the mother of four children. Jessie is the oldest and was born in 2001. In September 2009, the Division of Child Protection and Permanency (Division) received a referral that Jessie and two of her siblings were home without adult supervision. Allegations of neglect were substantiated against defendant, the children were removed from the home,² and Jessie was placed with her father, defendant R.W. (Ronald). In April 2011, the Division removed Jessie from Ronald's care after allegations of abuse. Jessie was placed with her paternal grandparents, and she has resided with them since that time.

On September 9, 2009, the Division filed a complaint alleging defendants abused or neglected their children. The complaint was

¹ We employ initials and pseudonyms to protect the identity of the parties and for ease of reference.

² The record does not disclose where defendant's other child resided at the time of the 2009 removal.

amended on April 13, 2011, and on March 27, 2013, the Division filed a guardianship complaint seeking the termination of defendants' parental rights. On March 19, 2015, the court entered an order amending the guardianship complaint to request that Jessie's paternal grandparents be granted KLG. The court conducted a KLG trial on September 21, 2015.

During the trial, the Division presented the testimony of a Division caseworker, Jennifer Alliano, and Dr. Janet Cahill, Ph.D., an expert in the areas of psychology in child protective cases, psychological bonding, and parenting capacity. Defendant testified on her own behalf. Ronald did not appear at trial and did not oppose the appointment of his parents as kinship legal guardians.

Alliano testified that Jessie is comfortable residing with her grandparents and interacts well with them. Jessie does not want to be adopted and prefers KLG. Alliano explained that the grandparents wished to adopt Jessie, but KLG was acceptable to them based on Jessie's preference.

Cahill testified that she conducted psychological evaluations of defendant in 2013 and 2014, and bonding evaluations of Jessie and defendant, and of Jessie and her grandparents. Cahill diagnosed defendant with "bipolar I disorder with anxious distress." She recommended treatment for defendant, including medication and

therapy, and found defendant's bipolar disorder was likely to continue for the foreseeable future because it is a "chronic and persistent mental illness," and defendant refuses to take medication or acknowledge her need of services.

Cahill opined that Jessie would suffer serious harm if removed from her grandparents' care because she resided with them for over four years, removal would require separation from her school and friends, and her grandparents provided positive parenting. Cahill found removal would cause Jessie adverse "psychological consequences" after four years of stability in her grandparents' home. Cahill also expressed concerns about Jessie spending long periods of time with defendant because of defendant's untreated mental illness. She concluded that KLG gave Jessie "the best of both worlds" because it allowed Jessie to maintain her attachment to defendant while receiving the benefits of the stable caregiving of her grandparents in a home where she felt safe and preferred to live. Cahill did not recommend joint custody because there was a history of conflict between the grandparents and defendant, some of which occurred in front of Jessie.

Defendant testified she had no objection to Jessie living with the grandparents and with the grandparents having primary custody of Jessie. Defendant, however, sought joint custody with the grandparents. Defendant acknowledged a history of conflict

with the grandparents, testified she is not comfortable talking to the grandfather, and admitted there are "issues" between her and the grandparents. Defendant also testified that she had received recommendations to attend therapy and take medications to address her bipolar disorder. She disagreed with the recommendations, and refused to take the medications and attend therapy.

In an oral opinion following the conclusion of the trial, the court awarded KLG to Jessie's grandparents. The judge found defendant had a mental health disorder that impacted her ability to safely parent Jessie, and that there was a strong bond between Jessie and the grandparents. He also found Jessie desired to continue residing with her grandparents but that adoption was not feasible because Jessie does not want to be adopted. The court entered an order granting the grandparents KLG. This appeal followed.

II.

"Although the right of a parent to enjoy a relationship with his or her child is of constitutional dimension, parental rights are not absolute." N.J. Div. of Youth & Family Servs. v. S.F., 392 N.J. Super. 201, 209 (App. Div.) (citation omitted), certif. denied, 192 N.J. 293 (2007). In New Jersey, "[t]he emphasis has shifted from protracted efforts for reunification with a birth parent to an expeditious, permanent placement to promote the

child's well-being." N.J. Div. of Youth & Family Servs. v. C.S., 367 N.J. Super. 76, 111 (App. Div.), certif. denied, 180 N.J. 456 (2004). "A child cannot be held prisoner of the rights of others, even those of his or her parents. Children have their own rights, including the right to a permanent, safe and stable placement." Ibid.

The Kinship Act, N.J.S.A. 3B:12A-1 to -7, was enacted because "the Legislature recognized that an increasing number of children who cannot safely reside with their parents are in the care of a relative or a family friend who does not wish to adopt the child or children." N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 222-23 (2010). KLG is "an alternative to termination of parental rights and subsequent adoption." N.J. Div. of Youth & Family Servs. v. D.H., 398 N.J. Super. 333, 339 (App. Div. 2008). It "is intended to be permanent and self-sustaining, as evidenced by the transfer to the caregiver of certain parental rights, but retains the birth parents' rights to consent to adoption, the obligation to pay child support, and the parents' right to have some ongoing contact with the child." N.J.S.A. 3B:12A-1(b). KLG "permits a caretaker to become the legal guardian of a child until the age of majority without the biological parent permanently losing his or her parental rights." N.J. Div. of Youth & Family Servs. v. H.R., 431 N.J. Super. 212, 229 (App. Div. 2013).

A kinship legal guardian will typically be a caregiver with a "biological, legal, extended or committed emotional or psychological relationship with a child and who [is] willing to assume care of the child due to parental incapacity or inability, with the intent to raise the child to adulthood." N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 508 (2004). The purpose of KLG "is to address the needs of children who cannot reside with their parents due to their parents' incapacity or inability to raise them and when adoption is neither feasible nor likely." S.F., supra, 392 N.J. Super. at 209 (citing N.J.S.A. 3B:12A-1; P.P., supra, 180 N.J. at 508).

In order to appoint a kinship legal guardian, the court must find by clear and convincing evidence that:

- (1) each parent's incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child;
- (2) the parents' inability to perform those functions is unlikely to change in the foreseeable future;
- (3) in cases in which the [D]ivision is involved with the child . . . (a) the [D]ivision exercised reasonable efforts to reunify the child with the birth parents and these reunification efforts have proven unsuccessful or unnecessary; and (b) adoption of the child is neither feasible nor likely; and

(4) awarding kinship legal guardianship is in the child's best interests.

[N.J.S.A. 3B:12A-6(d).]

An appellate court's "[r]eview of a trial court's grant of guardianship is limited." S.F., supra, 392 N.J. Super. at 210 (citing N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278 (2007)). "We accord deference 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 Services v. F.M., 211 N.J. 420, 448 (2012) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "We recognize that the cold record, which we review, can never adequately convey the actual happenings in a courtroom." Ibid. (citing N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). "We will not overturn a family court's factfindings unless they are so 'wide of the mark' that our intervention is necessary to correct an injustice." Ibid.

Defendant argues the court erred by finding the Division satisfied its burden under prongs one, two, and four of N.J.S.A. 3B:12A-6(d). Defendant contends the evidence was insufficient to support the court's conclusion that the Division clearly and convincingly established those prongs under the statutory

standard. We disagree and are satisfied the record amply supports the court's findings.

A. The First Prong

Prong one requires a showing that "each parent's incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child." N.J.S.A. 3B:12A-6(d)(1); see also D.H., supra, 398 N.J. Super. at 341-42 (finding prong one was satisfied where the mother was "clinically diagnosed with psychiatric problems," "[had] not received appropriate treatment for her condition," was unemployed, living with a friend, and failed to comply with the Division's recommendations).

Here, the court found that defendant was unable to perform the regular and expected functions of caring and supporting Jessie because defendant suffered from bipolar disorder, which the evidence showed was a chronic and persistent condition that could be treated but not cured. Defendant did not comply with recommendations for treatment of the disorder, refusing to take medications and to meaningfully participate in therapy. Defendant testified she was unwilling to take the recommended medication and that she went "through the motions" during the limited therapy in which she participated.

Cahill's uncontradicted testimony was that untreated bipolar disorder causes a "pattern of engagement in behaviors that are likely to either be self-destructive or cause unpleasant or problematic consequences," including an inability to self-regulate moods over time, leading to mood swings. Cahill testified that and defendant's disorder caused "aggressive behaviors" and instances over the prior "four to six years, where she engaged in irrational and aggressive behavior." Cahill found that defendant's untreated disorder caused defendant to be irritable and aggressive when angry, and resulted in her involvement in domestic violence incidents in front of her children, physical altercations with others, and inappropriate parenting behaviors.

Cahill opined defendant's condition was "likely to continue for the foreseeable future." The court found that defendant's lack of insight into her condition and her refusal to participate in mental health treatment had persisted for the six years following the 2009 removal of Jessie from her care.

Defendant argues the court's findings were erroneous because since April 2015, she has had full custody of one of her sons, and during the months preceding the KLG trial she had unsupervised overnight parenting time with Jessie and two of her other children. The record, however, shows the judge considered the evidence but did not find it persuasive or dispositive. He instead accepted

Cahill's testimony that the lack of any incidents during defendant's care of the child currently residing with her, and during Jessie's visits, did not establish that defendant's bipolar disorder was cured or that it no longer "significantly impact[ed] her ability to safely parent" Jessie. Thus, the court's finding is supported by credible evidence and we defer to the finding because the judge had the opportunity to assess the credibility of the witnesses and because of his expertise in matters related to the family. F.M., supra, 211 N.J. at 448.

Defendant also argues the court's finding that she needed treatment was incorrect because Cahill testified that bipolar disorder resolves itself in approximately 5% of cases, and thus it is "possible" her condition has resolved. The record, however, is bereft of any evidence defendant's bipolar disorder has resolved, and Cahill's unrefuted testimony was that defendant suffers from the condition and it "was likely to continue for the foreseeable future." The court rejected defendant's argument, and correctly stated that defendant was asking it "in the absence of a psychological evaluation . . . proffered on behalf of [defendant], [] to simply assume that this is one of those rare instances where bipolar I resolves itself." See D.H., supra, 398 N.J. Super. at 341-42 (finding prong one had been met where, among other issues, the mother was "clinically diagnosed with

psychiatric problems and [had] not received appropriate treatment for her condition," and failed to comply with the Division's recommendations).

Defendant also argues the court erred by relying on Cahill's 2013 and 2014 psychological evaluations because they took place more than a year before the September 2015 KLG trial. Defendant contends there were developments following the evaluations, including her obtaining custody of one of her children and having unsupervised visitation with Jessie and her other children, that undermine the validity of Cahill's evaluation.

We reject defendant's contentions because Cahill testified concerning events occurring after the evaluations, and opined that it was defendant's ongoing failure to obtain the recommended treatment for her bipolar disorder that rendered her unable to safely parent Jessie. Cahill explained that the disorder's adverse effect on defendant's ability to properly parent was again revealed following the evaluations when defendant allowed Jessie to travel home alone on a bus during the months prior to the commencement of the KLG trial. The court considered the developments that followed Cahill's evaluations, but accepted Cahill's testimony that defendant's failure to obtain treatment for the bipolar disorder during the six years following Jessie's removal continued to render defendant unable to perform the regular and expected

functions of care and support for Jessie. See F.M., supra, 211 N.J. at 450-51 (finding in a termination of parental rights case³ that "[m]ental illness, alone, does not disqualify a parent from raising a child. But it is a different matter if a parent refuses to treat [their] mental illness, [and] the mental illness poses a real threat to the child"); M.M., supra, 189 N.J. at 268 (finding sufficient evidence of the first prong in a termination of parental rights case where the father "[did] not pose a direct threat," but did not mitigate the effects of a harmful environment, and because he had "ample opportunity to improve the circumstances," his efforts were "untimely and inadequate"). Thus, the judge's finding the Division clearly and convincingly established the first prong under N.J.S.A. 3B:12A-6(d)(1) was supported by substantial, credible evidence in the record.

B. The Second Prong

Under the second prong, the court considers whether "the parents' inability to perform [the regular and expected child care functions] is unlikely to change in the foreseeable future." N.J.S.A. 3B:12A-6(d)(2). Defendant argues the court failed to

³ See S.F., supra, 392 N.J. Super. at 212 n.5 (noting that the elements required for KLG under N.J.S.A. 3C:12A-6 "mirror the best interests standard for termination of parental rights" under N.J.S.A. 30:4C-15.1 and thus finding "it is reasonable to apply the decisional law applicable to N.J.S.A. 30:4C-15.1 to KLG cases as well").

analyze the second prong separate from the first, because it addressed the first and second prong together. The argument lacks merit because a court's "evaluation of the evidence supporting the second prong, or element, recognizes that the conduct satisfying the first prong, 'informs and may support' the second element." S.F., supra, 392 N.J. Super. at 212 (citing In re Guardianship of DMH, 161 N.J. 365, 378-79 (1999)).

Defendant further argues the second prong lacks support in the evidence because defendant had unsupervised visits with Jessie and had custody of another child at the time of trial. The judge rejected defendant's claim because the evidence showed defendant took no action to address her mental health issue in the six years following the removal of the children, and defendant testified she would not engage in any services. The judge's conclusion is supported by the evidence, particularly because defendant testified that she disagreed with the recommendations to take medication and receive therapy, and Cahill opined that defendant's untreated condition continued to present child safety issues and rendered defendant unable to perform the regular and expected functions of care and support of Jessie. We are therefore satisfied the judge's conclusion that defendant's inability to parent Jessie was not likely to change in the foreseeable future is supported by substantial credible evidence in the record.

C. The Fourth Prong

Under the fourth prong, the court must find "awarding kinship legal guardianship is in the child's best interests." N.J.S.A. 3B:12A-6(d)(4); see also S.F., supra, 392 N.J. Super. at 213-14 (finding KLG was in children's best interests where the court found they were in a "good, nurturing" home that provided them with stability and was able to meet their needs). Defendant argues that KLG is not in Jessie's best interests because she is willing to allow Jessie to continue to reside primarily with her grandparents, there was no evidence she would change that arrangement if KLG was denied, and she wants to share joint custody with the grandparents.

The judge found KLG was in Jessie's best interests because defendant's ongoing refusal to treat her bipolar disorder rendered her unable to parent Jessie, Jessie had lived with her grandparents for four years and had a very close bond with them, Jessie would suffer severe and enduring harm if she was removed from the grandparents' home, and the grandparents had been effectively parenting Jessie. The evidence also showed that Jessie wanted to continue to live with her grandparents. See N.J.S.A. 9:3-49 (stating that in adoption cases, if a child is ten years or older, the child's wishes shall be considered); E.P., supra, 196 N.J. at 113 (stating that if a child is over the age of ten, the child's

wishes are often considered in other contexts other than adoption, and that "the family court would benefit from hearing the wishes of a child over the age of ten, who has reached a level of maturity that allows the child to form and express an intelligent opinion").

The court rejected joint custody, finding it "simply is unworkable" because defendant testified that she did not "get along with the grandparents" and "she shouldn't have to coparent with them." The record supports the court's finding. Defendant testified that she "[tried her] best to stay as cordial as possible with [Jessie's] grandparents," which was "not always the easiest thing," that she was "not comfortable" talking to the grandfather, which causes "issues" between them, and expressed frustration with "being told to co-parent with people that [she] didn't procreate with." She also agreed that if she had joint custody with the grandparents, making joint decisions concerning Jessie would be a "problem." Thus, the court's determination, that joint legal custody between defendant and the grandparents was not a feasible alternative to KLG, was supported by the evidentiary record.

We are therefore convinced that the court's finding under prong four of N.J.S.A. 3B:12A-6(d) was supported by substantial credible evidence in the record. There was no evidence submitted that would support a conclusion to the contrary.

In sum, we are convinced that the court's findings under prongs one, two and four of N.J.S.A. 3B:12A-6(d) are supported by substantial evidence the court found credible. We therefore find no basis to reverse the court's order awarding KLG to Jessie's grandparents.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION