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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2314-15T1
A-2709-15T1[1]

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

P.S.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF T.W., a Minor.

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.L., Sr.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF I.L. and J.L., Jr., Minors.

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[1] These matters are calendared back-to-back and are consolidated for purposes of opinion only.

Argued (A-2314-15) and Submitted (A-2709-15) February 8, 2017 – Decided April 21, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FG-15-0001-15.

Adrienne Kalosieh, Designated Counsel, argued the cause for appellant P.S. in A-2314-15 (Joseph E. Krakora, Public Defender, attorney; John A. Salois, Designated Counsel, on the briefs).

Amy B. Klauber, Deputy Attorney General, argued the cause for respondent in A-2314-15 (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Angela Melchionna, Deputy Attorney General, on the brief).

Melissa R. Vance, Assistant Deputy Public Defender, argued the cause for minor T.W. in A-2314-15 (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Vance, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant J.L. in A-2709-15 (Daniel DiLella, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent in A-2709-15 (Melissa H. Raksa, Assistant Attorney General, of counsel; Melissa Bayly, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors I.L. and J.L., Jr. in A-2709-15 (Melissa R. Vance, Assistant Deputy Public Defender, on the brief).

Appellant J.L. filed a pro se supplemental brief in A-2709-15.

PER CURIAM

In these back-to-back appeals, which we decide by a single opinion, defendant J.L.,[2] the biological father of fraternal twins, I.L. and J.L., Jr., born in March 2010, appeals from the February 17, 2016 judgment of guardianship which terminated his parental rights to the twins. Defendant P.S., the biological father of T.W., born in March 2008, appeals from the January 25, 2016 Family Part order denying his motion to vacate the April 16, 2015 judgment of guardianship which terminated his parental rights to T.W. B.L., J.L.'s wife, is the biological mother of all three children. She voluntarily surrendered her parental rights on December 4, 2014, and has not appealed her termination or participated in these appeals.[3] Having considered the parties' arguments in light of the record and applicable legal principles, we affirm as to both defendants.

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[2] Pursuant to Rule 1:38-3(d)(12), we use initials to protect the confidentiality of the participants in these proceedings.

[3] Both J.L. and B.L. voluntarily surrendered their parental rights to a third child, Br.L., born in September 2012; J.L by virtue of a December 17, 2014 identified surrender and B.L. by virtue of the December 4, 2014 general surrender. Br.L. is not involved in this appeal.

I.

It is well-settled that a court should terminate parental rights when the Division proves by clear and convincing evidence that:

> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
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> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
>
> (3) The [D]ivision has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
>
> (4) Termination of parental rights will not do more harm than good.
>
> [N.J.S.A. 30:4C-15.1(a).]

Our scope of review on appeals from orders terminating parental rights is limited. In such cases, the trial court's factual findings generally should be upheld so long as they are supported by "adequate, substantial, and credible evidence." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014) (citation omitted). A decision in this context should only be

reversed or altered on appeal if the trial court's findings were "so wholly unsupportable as to result in a denial of justice." N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 511 (2004) (citations omitted). We must give substantial deference to the trial judge's opportunity to observe the witnesses first hand and to evaluate their credibility, particularly the Family Part which possesses special expertise "by virtue of its specific jurisdiction[.]" R.G., supra, 217 N.J. at 553. While the traditional scope of review is ordinarily expanded "where the focus of the dispute is . . . alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom," deference must still be afforded unless the court "went so wide of the mark that a mistake must have been made." N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (citations omitted).

II.

The termination of J.L.'s parental rights followed a guardianship trial conducted over four non-consecutive days, during which the New Jersey Division of Child Protection and Permanency (Division) presented testimony of three Division workers and two psychologists qualified as experts in the field of clinical and forensic psychology. Numerous documentary exhibits were also admitted into evidence. J.L. did not call any

witnesses or testify on his own behalf. However, he was permitted to make an unsworn statement. We will not recite in detail the history of the Division's involvement with J.L. Instead, we incorporate by reference the factual findings and legal conclusions contained in Judge Melanie Donohue Appleby's oral opinion delivered on February 17, 2016.

Summarizing the evidence most pertinent to the appeal, J.L. has an extensive juvenile and adult criminal history, having been incarcerated at various times throughout his involvement with the Division. A prior incarceration stemmed from him physically abusing his former paramour's child, resulting in him serving 364 days in the county jail as a condition of probation following his guilty plea to fourth-degree child endangerment. At the time of the guardianship trial, J.L. was incarcerated at the New Jersey State Prison (NJSP) on a robbery charge, with a projected parole eligibility date of 2018. While in prison, J.L. received court ordered visitation, communicated with the twins through letters, and was updated about the status of the twins and his case. He told the Division caseworker that he participated in a "therapeutic program," but refused to sign the necessary release for the caseworker to confirm his participation or assess the efficacy of the program.

When the twins were born in 2010, J.L. was not incarcerated. However, the Division obtained care and supervision to address allegations of medical and environmental neglect. The twins were born premature and I.L. tested positive for opiates. The twins required follow-up medical care but the parents were uncooperative and their housing was unstable and unsuitable. In an effort to stabilize the family, the Division provided housing assistance; substance abuse evaluations; and in–home counseling for parenting skills, anger management and relationship building. Based on their compliance, the litigation was later terminated.

In 2012, the case was reopened amidst allegations of drug use, and a safety protection plan requiring supervision by an approved caregiver was implemented after allegations of inadequate supervision were substantiated. In November 2012, an emergency removal was conducted based on safety concerns, but the twins were subsequently returned to their parents' custody by order of the court. Although the court found no abuse or neglect after conducting a fact-finding hearing, the court continued the twins in the care and supervision of the Division. The Division continued providing J.L. with services, including substance abuse assessments and treatment, random drug screens, and in-home counseling. However, J.L. was non-compliant with substance abuse

treatment, and minimally compliant with drug screens and in-home counseling.

In July 2013, another emergency removal was conducted following J.L.'s arrest on drug related charges and admitted heroin use. The following month, J.L. was arrested again on robbery related charges. The twins were subsequently placed in the same non-relative resource home where they remained throughout these proceedings. On October 9, 2013, following a fact-finding hearing, the court determined that J.L. did not abuse or neglect the twins but continued the Division's custody of the children for services pursuant to N.J.S.A. 30:4C-12.

Prior to J.L.'s release from jail in November 2013, he underwent a psychological evaluation at the behest of the Division. Following his release, the Division provided J.L. with substance abuse evaluations, substance abuse treatment, random drug screens, visitation, individual and couples counseling, and transportation assistance. For seven months following J.L.'s release from jail and prior to his subsequent imprisonment at the NJSP for robbery, J.L. failed to complete substance abuse evaluations and treatment; tested positive for illicit substances; maintained contact with the Division sporadically; was inconsistent with visitation; and refused transportation assistance. In June 2014, the court approved the Division's plan for termination of parental rights

followed by adoption, and a complaint for guardianship of the twins was filed.

The Division assessed several family members for placement, including the paternal grandmother, a paternal uncle, a paternal aunt, and a maternal aunt. All were ruled out as inappropriate placements. The paternal grandmother, L.L., was ruled out on October 8, 2013, based on her extensive history with the Division consisting of fourteen referrals dating back to 1984. Although none of the referrals were substantiated, the Division determined that it would be in the best interest of the twins to remain in their current placement. Her subsequent appeal was denied pursuant to N.J.A.C. 10:120A-3.1(b).[4] Although L.L. was allowed visitation with the twins, her application to the court for custody was denied on June 5, 2014 based in part upon an unfavorable psychological evaluation.

At the time of trial, the twins had been in the same resource home for over two years. Division caseworker, Christen Clayton, testified that the resource parents are committed to the twins and "couldn't bear the thought of them leaving the family." Clayton described the twins' relationship with their resource parents and the other members of the household as "great" and the environment

[4] Recodified as N.J.A.C. 3A:5-3.1(b), effective June 6, 2016.

in the home as "[v]ery loving" and "[c]omfortable." According to Clayton, the resource mother has ensured that the twins have ongoing contact with their siblings and paternal grandmother, and is "well versed" in addressing the twins' special needs.

Both children have asthma and are under the care of a pulmonologist. I.L. underwent a neuropsychological evaluation and was diagnosed with Disinhibited Social Engagement Disorder (DSED), Attention-Deficit Hyperactivity Disorder (ADHD), and Oppositional Defiant Disorder (ODD). The Division's expert, Elise Landry, Ph.D., opined that multiple caregiver transitions "would be detrimental to her emotional and behavioral well-being" and "could further exacerbate the attachment deficits and result in a much longer road to . . . recovery." According to Dr. Landry, given I.L.'s prolonged period of stability with one caregiver, "interrupting that at this stage could be very harmful" and lack of permanency and certainty prevents I.L. from "fully form[ing] those healthy attachment relationships[.]"

The Division's expert, David Brandwein, Psy.D., conducted multiple psychological evaluations of J.L., multiple bonding evaluations between J.L. and the twins, and a bonding evaluation between the twins and their resource parents. Dr. Brandwein diagnosed J.L. with a "personality disorder with antisocial, narcissistic, histrionic and compulsive personality [patterns]"

as well as an opiate use disorder. According to Dr. Brandwein, J.L. "lacked insight[,] . . . was more comfortable blaming others than taking responsibility for himself[,]" and demonstrated "a level of denial that really strained the boundaries of reality."

Dr. Brandwein acknowledged J.L.'s plan to live with his mother and resume parenting the twins after his release from prison. However, Dr. Brandwein opined that J.L. has no ability to parent the twins now or in the foreseeable future, and concluded that it was in the twins' best interest to be placed in the guardianship of the Division for adoption by the resource parents. Dr. Brandwein testified that without termination of parental rights, the twins would have been in placement "for well over five years" once J.L. is released from prison. According to Dr. Brandwein, at that point, "[J.L.] will need a period of two to three years to show that he's not going to re-offend, to show that he's not going to get arrested and sent to jail or prison again. And then at that point, his kids will be [eleven]." Dr. Brandwein opined that depriving the twins of stability and permanency "to wait around for another six years for [J.L.] to potentially . . . be able to parent them" would have a "devastating" impact on their "educational development, psychological development, psychosocial development, development of relationships. . . . And [J.L] knows that. . . . He went through it himself. His dad left him."

Dr. Brandwein found that the twins have a bond with J.L. but "wouldn't characterize it as a strong, secure bond." According to Dr. Brandwein, although the twins would experience grief at separation, "short term therapy and the continuation of their relationship with their resource parents" would mitigate the grief. In contrast, Dr. Brandwein observed "a strong, positive, secure bond between the children and the resource parents." According to Dr. Brandwein, the resource parents are the twins' "psychological parents,"[5] they "are able to meet the children's special needs," and are "a role model for the children." Dr. Brandwein opined that if the relationship with the resource parents was terminated, the twins would experience a "[m]oderate to severe" grief reaction that J.L. is incapable of mitigating. According to Dr. Brandwein, "[t]he children would likely experience regressions in their skills. They would get a message, again, that their life is unstable, that adults are not trustworthy, and that would be devastating to these kids[.]"

Judge Appleby credited the testimony of the Division's witnesses, made factual findings consistent with her credibility

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[5] Dr. Brandwein defined psychological parent as "the caregiver the child looks to when in distress" and "when they have a need." "It's the caregiver that is able to provide an environment for the child that fosters their psychological, cognitive, and academic development."

assessments, and concluded that the Division satisfied all four prongs of the best interests test, N.J.S.A. 30:4C-15.1(a). Judge Appleby found that J.L.'s "continued incarcerations" and "continued issues as to substance abuse that have not been addressed" endangered the twins' safety, health and development. Further, despite the Division's efforts to provide services to J.L., his "continued noncompliance" prevents him from "eliminating the harm . . . and providing a safe and stable home" for the twins.

Judge Appleby determined that the Division satisfied its responsibility to provide services and consider relatives. She found that any further delay of permanency or break in the bond with the resource parents would cause the twins "devastating harm[.]" While "the resource parents could mitigate any harm" caused by terminating J.L.'s parental rights, "if [the twins] were taken away from the resource parents," there is "[n]o indication that [J.L.] could mitigate it." According to Judge Appleby, the twins "need real parenting. They need a fit parent. And not just someone who is saying some words and not putting the actions behind them." She concluded that termination of J.L.'s parental rights was in the twins' best interest.

On appeal, J.L. argues that the trial court erred in finding that the Division proved by clear and convincing evidence the four statutory prongs contained in N.J.S.A. 30:4C-15.1(a). According

to J.L., the court failed to analyze the case "based upon the relevant case law regarding an incarcerated parent." J.L.'s arguments are without merit.[6] Judge Appleby thoroughly reviewed the evidence presented at the trial, made detailed findings as to each prong of N.J.S.A. 30:4C-15.1(a), and concluded the Division had met by clear and convincing evidence all of the legal requirements for an order of guardianship. The judge's opinion tracks the statutory requirements of N.J.S.A. 30:4C-15.1(a), accords with applicable case law, including In re Guardianship of K.H.O., 161 N.J. 337 (1999), In re Guardianship of D.M.H., 161 N.J. 365 (1999), and N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591 (1986), and is more than amply supported by substantial and credible evidence in the record. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448 (2012).

Contrary to J.L.'s reasoning, "the standard for termination of parental rights is not any different when the parent is incarcerated." R.G., supra, 217 N.J. at 559. While incarceration alone is insufficient to prove parental unfitness, termination of parental rights of an incarcerated parent will be upheld if supported by "particularized evidence of how a parent's

[6] In a pro se submission, J.L. makes various arguments that are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

incarceration affects each prong of the best-interests-of-the-child standard[.]" Id. at 556. Here, the judge's determination that J.L.'s incarceration affected each prong of the best-interests standard is supported by particularized and substantial evidence in the record.

III.

The judgment of guardianship terminating P.S.'s parental rights to T.W. was entered on April 16, 2015 based on an affidavit denying paternity executed by P.S. on December 31, 2014. P.S.'s subsequent motion to vacate the judgment of guardianship pursuant to Rule 4:50-1(f) was denied on January 25, 2016, and P.S. appeals the denial.

On July 25, 2013, the Division obtained custody of T.W. following an emergency removal necessitated by B.L.'s arrest with J.L. on drug related charges. B.L.'s former paramour, S.W., appeared on T.W.'s birth certificate and was believed to be T.W.'s biological father until August 26, 2013, when paternity testing ruled him out as the father. After the court approved the Division's plan for termination of parental rights, B.L. provided P.S.'s name as a potential father on June 25, 2014. The Division filed a guardianship complaint and named P.S. as a defendant but was unsuccessful in contacting him until December 4, 2014, after receiving contact information from B.L.

In a certification submitted to the court by the Division, Caseworker Clayton certified that, on December 4, 2014, during a telephone conversation, she informed P.S. that he was identified as the putative father and advised him of his options. According to Clayton, she advised P.S. that he could undergo paternity testing as arranged by the Division; participate in Division services or voluntarily surrender his parental rights if paternity was confirmed or acknowledged; or sign an affidavit denying paternity. P.S. indicated that he was unsure if T.W. was his child and "was concerned about his wife learning of his infidelity." Upon learning that T.W. was in a non-relative resource home and that the Division's plan was termination of parental rights followed by adoption, P.S. indicated that he needed time to consider his options and agreed to contact Clayton in one week with his decision.

One week later, when P.S. failed to contact Clayton, she left him a voicemail message. On December 15, 2014, P.S. returned her call and advised her that he wanted to sign an affidavit denying paternity but warned that he was a truck driver and his schedule made it difficult to commit to a time to execute the document. On December 31, 2014, P.S. came to the Division office and signed under oath a notarized affidavit denying paternity. P.S. read and signed the affidavit in the presence of a notary public. In the

affidavit, P.S. affirmed that he understood that he was "waiving all rights to a court hearing and any further involvement in this matter" and that he had no objection to the Division's plan for adoption of T.W. After signing the affidavit, P.S. contacted the Division on January 5 and 7, 2015, to confirm that he was not responsible for anything further.

On June 9, 2015, over five months after denying paternity and almost two months after the judgment of guardianship was entered, P.S. contacted Clayton and requested a paternity test, indicating that he had a "change of heart." Through his attorney, P.S. expressed regret for signing the affidavit and, after "soul searching," wanted to do a paternity test "so that both [P.S.] and [T.W.] can have some closure and move on with their lives with no regrets." On July 13, 2015, defendant filed a pro se motion seeking to void the signed affidavit denying paternity, obtain a paternity test, and halt adoption proceedings pending the outcome of the test.

In the accompanying certification, P.S. certified that he was contacted by B.L. and informed that he was the father of T.W. but was unaware of B.L.'s pregnancy and had no contact with her other than the one-time sexual encounter. According to P.S., the Division gave him the option of taking the paternity test or signing the paper denying paternity and advised him that if he did

not sign, he would be subpoenaed into court. P.S. certified that he panicked, fearing he would lose his wife of twenty-two years and their two teenage sons, and was assured that T.W. was in a good home that was committed to adopting her. According to P.S., he "couldn't let the thought go" and, a few months later, after discussing it with his wife, he reached out to the Division to ascertain T.W.'s status and provide family medical history. Upon learning that T.W. had not been adopted and had been moved multiple times, he and his wife contacted an attorney for advice on obtaining a paternity test and custody of T.W. P.S. certified that he regretted signing the paper and, although he did not know everything T.W. "had been through," he wanted to give her "stability, love and a good life."

On August 14, 2015, the court conducted a hearing on P.S.'s motion and P.S. appeared with assigned counsel. The Division and the Law Guardian agreed to the paternity test but objected vehemently to any delay in the adoption proceedings. At that juncture, T.W. had been in placement for almost two years. She was in her third resource home and the resource parents were committed to adoption. The prior month, T.W. underwent a neuropsychological evaluation conducted by Dr. Landry because her prior resource mother expressed concerns about T.W.'s behavior. T.W. presented with "an extensive history of trauma exposure,

including neglect and physical abuse, while in her biological mother's care." T.W. was diagnosed with Attention-Deficit Hyperactivity Disorder (ADHD) and Post-Traumatic Stress Disorder (PTSD). However, her current placement had resulted in reduced symptoms and decreased reliance on medications. Because additional upheavals, uncertainty, and instability would exacerbate her symptoms and result in more significant deficits, Dr. Landry opined that prompt adoption by her current resource family was in T.W.'s best interests.

Following the hearing, Judge Appleby ordered paternity testing but continued the adoption process. On September 15, 2015, the test results confirmed P.S.'s paternity. On October 28, 2015, Judge Appleby conducted an in-camera interview of T.W. pursuant to Rule 5:12-4(b), during which T.W. expressed her desire to be adopted by her resource parents and her frustration that P.S.'s belated involvement in the proceedings was delaying her adoption. T.W. told Judge Appleby that she did not know P.S., she had no desire to meet him, and she did not view him as her real father.

On December 8, 2015, P.S. filed a motion to vacate the judgment of guardianship under Rule 4:50-1(f). P.S. argued that he was never advised that he should seek counsel before signing the affidavit denying paternity and that his constitutional right

to parent his child demanded that the waiver be taken before a judge. On January 25, 2016, Judge Appleby denied P.S.'s motion. Relying on the uncontroverted evidence presented, Judge Appleby made factual findings consistent with Clayton's certification, Dr. Landry's neuropsychological evaluation, and T.W.'s in-camera interview.

Judge Appleby noted that under N.J.S.A. 9:3-41(e), P.S.'s denial of paternity constituted a surrender, allowing T.W. to be adopted. Judge Appleby reasoned that under N.J.S.A. 9:3-41(a), P.S.'s surrender could only be set aside upon proof of fraud, duress or misrepresentation by the Division. Judge Appleby concluded that P.S. made no such showing but rather indicated that "he changed his mind." According to the judge, P.S. never "alleged that he didn't do this voluntarily or that he didn't recognize that there was a possibility that he could have been the father[.]" Further, there was no assertion "that he was placed under duress by the Division" or "that he didn't know what he was doing." In rejecting P.S.'s argument that the affidavit was signed while he was undergoing stress in his personal life, Judge Appleby noted that "stress is not duress."

Judge Appleby distinguished In re Guardianship of J.N.H., 172 N.J. 440 (2002) and concluded that P.S. failed to present

sufficient evidence to overcome the judgment of guardianship. The judge explained that

> here . . . we have [T.W.], who is doing well in resource care, who has indicated to this [c]ourt herself that she is interested in being adopted, that she . . . has no relationship with [P.S.], doesn't know who he is, basically, and that the only thing that has changed here is that there has been a test, and there's a genetic relationship.

Focusing on the best interests of T.W. and the impact that granting the motion will have on her, Judge Appleby concluded that nothing was presented to satisfy the court "that it would be inequitable to enforce this judgment of guardianship." On the contrary, the court determined that nothing "could be more disturbing to this child [than] to have an additional upheaval and create more insecurity or instability in her life by entertaining what is really a whim on behalf of [P.S.]"[7]

On appeal, P.S. raises the following points for our consideration:

> POINT I
>
> THE JUDGEMENT OF GUARDIANSHIP AGAINST [P.S.], [T.W]'S BIOLOGICAL FATHER, SHOULD BE VACATED BECAUSE HE NEVER PERFORMED AN IDENTIFIED SURRENDER AS IS REQUIRED UNDER THE STATUTE AND

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[7] Judge Appleby also denied P.S.'s application for a stay of the adoption proceedings. On March 28, 2016, the Law Guardian made a motion to enforce the plan of adoption to the current resource parents and on May 3, 2016, we granted a stay of the adoption proceedings pending the outcome of the appeal.

THEREFORE, THE TRIAL COURT VIOLATED HIS DUE PROCESS RIGHTS BY FAILING TO ADHERE TO APPROPRIATE PROCEDURAL AND STATUTORY SAFEGUARDS THEREBY VIOLATING APPELLANT'S DUE PROCESS RIGHTS.

POINT II

THE TRIAL COURT ERRED IN DENYING [P.S.]'S REQUEST TO VACATE THE IDENTIFIED SURRENDER PURSUANT TO RULE 4:50-1(f).

POINT II(A)

THE TRIAL COURT ERRED IN FINDING THAT THE BIOLOGICAL FATHER, [P.S.] FAILED TO MEET PRONG ONE OF THE TWO PART TEST.

POINT II(B)

THE TRIAL COURT DID NOT HAVE ENOUGH EVIDENCE TO DECIDE WHAT WAS IN THE BESTS [SIC] INTERESTS OF [T.W.].

POINT III

FATHER'S APPOINTED COUNSEL WAS INEFFECTIVE AND HIS PERFORMANCE WAS SO DEFICIENT AS TO DEPRIVE FATHER OF HIS FOURTEENTH AMENDMENT RIGHT TO COUNSEL, AND PREJUDICED THE FATHER'S CASE IN SUCH A WAY THAT DEPRIVED HIM OF A RIGHT TO A FAIR HEARING ON THE R. 4:50-1 MOTION.

N.J.S.A. 9:3-41(e) provides, in pertinent part, that "[t]he denial of paternity by an alleged father, at any time including prior to the birth of the child, shall be deemed a surrender for purposes of allowing the child to be adopted." Pursuant to N.J.S.A. 9:3-41(a),

> [s]urrender of a child to an approved agency for the purpose of adoption . . . shall be by a signed instrument acknowledged by the person executing the instrument before an officer authorized to take acknowledgments or proofs in the State in which the instrument is executed. Prior to the execution of the surrender, the approved agency shall, directly or through its agent, inform the person executing the surrender that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and child. The approved agency shall advise the parent that the surrender shall constitute relinquishment of the person's parental rights in or guardianship or custody of the child named therein and consent by the person to adoption of the child. The approved agency shall offer counseling to the parent, prior to the execution of the surrender. The surrender shall be valid and binding without regard to the age of the person executing the surrender and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency.

The Division, as part of the Department of Children and Families, is an approved agency. N.J.S.A. 9:3-38(a).

Under Rule 4:50-1,

> the court may relieve a party . . . from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) fraud . . . , misrepresentation, or other misconduct

> of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Generally, a motion for relief from a judgment based upon the grounds specified in Rule 4:50-1 should be "granted sparingly." N.J. Div. of Youth and Family Servs. v. T.G., 414 N.J. Super. 423, 434 (App. Div.) (citations omitted), certif. denied, 205 N.J. 14 (2010), cert. denied, 563 U.S. 1013, 131 S. Ct. 2925, 179 L. Ed. 2d 1255 (2011).

> An applicant's right to relief examines the totality of the circumstances and the decision whether to vacate a judgment on one of the six specified grounds is a determination left to the sound discretion of the trial court, guided by principles of equity. A judgment will be left undisturbed unless it represents a clear abuse of discretion.
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> [Ibid. (quotations and citations omitted).]

When the judgment under attack is a judgment terminating parental rights, a moving parent must satisfy a two-part test in order to succeed.

> First, a parent's motion "must be supported by evidence of changed circumstances" as the "moving party bears the burden of proving that events have occurred subsequent to the entry of a judgment to justify vacating the judgment." A showing of those reasons

> articulated under Rule 4:50-1(a) to (f) satisfies this provision. However, this alone will not be sufficient to succeed as review must encompass a second condition: in a "termination case[,] the best interests of the child must be considered." . . . This prong requires a weighing of the effects setting aside the judgment may have on the child's stability and permanency. Consequently, "the primary issue is . . . what effect the grant of the motion would have on the child."
>
> [Id. at 434-35 (quoting J.N.H., supra, 172 N.J. at 473-75) (internal citations omitted).]

Here, P.S.'s execution of a notarized affidavit denying paternity constituted a valid and binding surrender. The Division complied with the safeguards contained in N.J.S.A. 9:3-41(a) and we find no procedural flaws that would render the surrender invalid or undermine the court's reliance on the surrender in entering the judgment of guardianship. Judge Appleby correctly determined that P.S. neither established proof of fraud, duress or misrepresentation by the Division to justify setting aside the surrender nor supplied the necessary changed circumstances mandated by the first part of the J.N.H. test. J.N.H., supra, 172 N.J. at 473. Contrary to P.S.'s assertion, the removal of T.W. from her second resource home and placement in a third resource home with resource parents committed to adoption, and where T.W. was reportedly thriving, does not constitute changed circumstances supportive of P.S.'s position.

P.S. also argues that he was not afforded an opportunity to surrender his rights before a judge, and access to an attorney. P.S. argues further that the procedure utilized by the Division demonstrates that the waiver was neither knowingly nor willingly executed, and that the process was coercive. We disagree with both arguments. As to the former, N.J.S.A. 9:3-41(a) and (e) do not require involvement by court or counsel and, as to the latter, defendant's assertions are belied by the record.

Next, we turn to the second part of the J.N.H. test, requiring a weighing of the effect setting aside the judgment may have on the child's stability and permanency. J.N.H., supra, 172 N.J. at 473. Judge Appleby's determination that uncertainty, instability and lack of permanency would exacerbate T.W.'s symptoms and cause harm to T.W. was informed by expert evidence and an in-camera interview of T.W. We are unpersuaded by P.S.'s assertion that Dr. Landry's evaluation was unreliable because, at the time she rendered her opinion, Dr. Landry was only aware that P.S. had executed a denial of paternity and was unaware that P.S. had been identified as the biological father. Judge's Appleby's decision to deny P.S.'s motion to facilitate stability and permanency for T.W. was clearly in the best interests of T.W. and amply supported by the record. Consequently, we discern no abuse of discretion in denying P.S.'s motion to vacate the judgment of guardianship.

Finally, P.S. argues that his attorney was deficient because he filed a letter without citation to case law rather than a legal brief, waived oral argument at the hearing on the Rule 4:50-1 motion, and did not support his filing with a certification from P.S. P.S. argues that these shortcomings prejudiced his case and that his side of the story was never adequately presented to the court. In a certification submitted in support of his ineffective assistance of counsel claim, P.S. certified that although his appointed attorney filed the requisite motion to vacate the judgment of guardianship, his attorney "barely communicated" with him and "never asked [him] any questions about [his] case" but told him that he had "no chance of success" and that his case "was doomed from the beginning." Although P.S. believed that his parental rights should not have been terminated because he "never caused any neglect or abuse to [T.W.,]" his account of what transpired procedurally in the case as contained in his certification was generally consistent with Clayton's.

When examining a claim challenging trial counsel's effective performance in these matters, we consider the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 309 (2007). Under Strickland's two-pronged test, the parent must

prove counsel's performance was objectively deficient, and but for counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. In our review, we accept the "strong presumption" that counsel has rendered appropriate and sufficient professional assistance. State v. Fritz, 105 N.J. 42, 52 (1987) (quoting Strickland, supra, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694). Judicial scrutiny requires great deference because the standard does not demand "the best of attorneys," but rather requires attorneys not "so ineffective as to make the idea of a fair [hearing] meaningless." State v. Davis, 116 N.J. 341, 351 (1989).

P.S.'s assertions are insufficient to support a finding of ineffective assistance of counsel because counsel's performance, while less than stellar, was not deficient. Moreover, the outcome would not have been different without counsel's omissions because "in determining a Rule 4:50 motion in a parental termination case, the primary issue is not whether the movant was vigilant in attempting to vindicate his or her rights or even whether the claim is meritorious, but what effect the grant of the motion would have on the child." J.N.H., supra, 172 N.J. at 475.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION