RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2651-14T4
A-5513-14T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

K.D.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF S.D.,

Minor.

Argued April 25, 2017 – Decided June 1, 2017

Before Judges Fisher, Vernoia and Moynihan.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FG-09-135-11 and Middlesex County, Docket No. FA-12-67-12.

Jennifer M. Kurtz, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Kurtz, on the brief).

Julie B. Colonna, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Colonna, on the brief).

Danielle Ruiz, Designated Counsel, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Ruiz, on the brief).

PER CURIAM

The procedural circumstances in these consolidated appeals appear to present unusual legal issues. Notwithstanding, our focus remains on the best interests of a ten-year old child whose future this case impacts.

I

S.D., the child in question, was born on the fourth of July in 2006.[1] He was removed from the care and custody of his mother — defendant K.D. — in 2009, because of lapses in defendant's parenting caused by her alcoholism.[2] The child was placed in the care of his maternal grandmother, A.D. (Anna, a fictitious name).

[1] The child was diagnosed with "Autism Spectrum Disorder with combined repetitive and expressive language disorder, developmental fine motor coordination disorder and attention deficit hyperactivity disorder."

[2] In September 2009, police reported finding the child, then three years of age unaccompanied at a busy intersection. Following its investigation, the Division of Protection and Permanency provided a "24 hour homemaker" and, after reviewing the homemaker's

The Division commenced a guardianship action in Hudson County in October 2010, asserting there was no viable alternative to the termination of parental rights. The child's father — T.D. — entered into a voluntary surrender of his parental rights in favor of Anna. And, in 2011, defendant also executed a voluntary surrender of her parental rights in favor of Anna, as well as defendant's twenty-two year old daughter, C.D. (Carolyn, a fictitious name).[3] At the April 27, 2011 hearing, there was some initial confusion about defendant's undertaking.[4] But, defendant eventually

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subsequent reports, determined the child was "unsafe," conducted a Dodd removal, and placed the child with his maternal grandmother.

[3] The record suggests that at some point after defendant executed it, Carolyn's name was crossed out of the voluntary surrender form. There is no indication — other than what might be suggested by the hearing concerning this surrender — that defendant consented to that alteration of the document she had signed.

[4] After defendant's attorney advised the judge that defendant was "prepared to enter an identified surrender to her mother and adult daughter," the following took place:

> [DEPUTY ATTORNEY GENERAL]: No, it's just the mother [i.e., Anna].
>
> [LAW GUARDIAN]: It's just the mother [Anna] with the daughter [Carolyn] being the back up.
>
> [DEFENSE COUNSEL]: It's just the mother?
>
> THE COURT: Just her mother then, right?
>
> [DEPUTY ATTORNEY GENERAL]: Yes.

testified her surrender was only in favor of Anna, and, at the conclusion of the hearing, the judge stated he was "fully confident and convinced" that the surrender was "freely, voluntarily and knowingly" made. That same day, a judgment was entered terminating defendant's parental rights. That judgment, which went unappealed, permitted Anna to adopt the child, and a judgment of adoption was entered in Middlesex County on March 29, 2012.

On May 12, 2012, six weeks after adopting the child, Anna died.

Carolyn, who lived in Anna's home, thereafter cared for the child. A few months later, Carolyn advised the Division she was unable to provide permanent care for the child and requested that the Division find him a home, although Carolyn also expressed a willingness to care for the child until that occurred.

In October 2012, the Division filed a complaint in Middlesex County seeking guardianship of the child. Defendant was not named as a party even though she was the child's natural parent, even though the termination of her parental rights was based on a surrender to Anna, and even though she had become, by way of the

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> THE COURT: That's who the father surrendered to, the maternal grandmother, right?
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> [DEFENSE COUNSEL]: [Carolyn is] still going to be the back up.

judgment of adoption, the child's sibling. In defendant's absence, and in the absence of any other person or entity that might have had an interest in the circumstances, other than the law guardian,[5] on October 1, 2012, the trial court entered a judgment terminating Anna's parental rights.[6] The judge referenced no authority that would allow for the termination of the parental rights of a deceased person; we doubt any exists. Other than perhaps easing the way for the Division to control the situation, we see no purpose in those proceedings or the October 1, 2012 order.[7]

The Division thereafter removed the child from Anna's home, where defendant apparently also resided. He was placed in two treatment homes, but only temporarily, and was finally placed in his current treatment home in May 2013.

During this time, defendant sought to eliminate her problems with alcohol. Evidence heard at later proceedings demonstrated she took her last drink in September 2013. Defendant successfully completed inpatient treatment in March 2014 and continued with an

[5] No personal representative of Anna's estate was named or noticed in these proceedings.

[6] If a hearing was conducted on that occasion, the parties have not provided this court with a transcript.

[7] Indeed, the only possible impact of this order was its potential to deprive the child of any right to inherit from Anna.

intensive outpatient program, consistently testing negative for all substances.

In light of these considerable efforts, defendant moved to restore her relationship with the child in June 2014. Her pro se motion, filed in Hudson County where the original guardianship action was commenced, sought to vacate her identified surrender of the child and to set aside the Middlesex County judgment that memorialized Anna's adoption of the child.

In January 2015, the Hudson County judge conducted a hearing to consider the factual basis for defendant's motion. Defendant testified she believed her surrender was not only to her mother, Anna, but also to her daughter, Carolyn. She also testified she did not "totally understand" what she was doing when she surrendered her parental rights. She claimed that she drank heavily the night before the hearing and that she was "not fully clear headed" and was "very confused" at the April 27, 2011 hearing. Defendant also asserted that she was misled when she was convinced by the Division to change her plan from kinship legal guardianship to an identified surrender. And she testified on cross-examination that she did not remember attending pre-surrender counseling or even testifying at the April 27, 2011 hearing that she did attend counseling.

The motion judge did not find defendant's testimony to be credible and denied her motion to vacate by order entered on January 9, 2015. The judge also directed that the Division's request to vacate Anna's adoption of the child be heard in Middlesex County.

Defendant filed a notice of appeal, seeking our review of the January 9, 2015 order. On February 27, 2015, while that appeal was pending, a Middlesex County judge denied defendant's application to vacate the judgment of adoption, and on April 13, 2015, the judge also denied defendant's motion for reconsideration.[8]

Before the motion for reconsideration in the adoption matter was denied, defendant moved in this court for supplementation of the record on her first appeal with information concerning her successful completion of inpatient treatment and her regular attendance in outpatient treatment. We denied the motion to supplement without prejudice and, instead, remanded the matter to the trial court, while retaining jurisdiction, to provide defendant with the opportunity to seek relief from the judgment which memorialized her surrender based on her claim of changed circumstances.

[8] Defendant filed a separate notice of appeal, seeking our review of these February 27 and April 13, 2015 orders.

In conformity with our order, defendant moved in Hudson County for relief pursuant to Rule 4:50. At an evidentiary hearing, defendant presented her own testimony as well as that of a clinical psychologist, and a drug treatment counselor; these witnesses testified to defendant's sobriety and her ability to care for the child. Defendant also called a Division caseworker, who testified the Division's plan for the child was select home adoption — a plan that had not borne fruit. The Division responded with the testimony of a psychologist and the executive director of a drug treatment center. The Division also called its adoption supervisor, who testified the child's current caretaker was unwilling to adopt but willing to continue caring for him until an adoptive home could be located.

The motion judge — employing the two-prong test from In re Guardianship of J.N.H., 172 N.J. 440, 474-75 (2002) — found defendant's circumstances had indeed changed but that she had not shown it was in the child's best interests to change his placement or return him to defendant's care and custody.

Defendant filed an amended notice of appeal, seeking review of the August 18, 2015 order, which denied her Rule 4:50 motion. The pending appeals, as amended — regarding the Hudson County guardianship action and the Middlesex County adoption action — were consolidated.

In the meantime, yet another action was commenced in Middlesex County and remains pending. In this so-called "FC" matter,[9] the trial court has continued to monitor the situation, and has allowed defendant to intervene for purposes of seeking visitation without foreclosing intervention in other areas. An October 12, 2016 order, which was included in the record on appeal, states that the Division issued an October 11, 2016 letter that ruled defendant out as a resource placement for the child.

The Division advised a few days prior to oral argument in this court, pursuant to Rule 2:6-11(f), that the resource parent has now committed to adopting the child.

II

In appealing the January 9, 2015, and August 18, 2015 orders in the guardianship matter, and the February 27, 2015, and April 13, 2015 orders in the adoption matter, defendant presents the following arguments for our consideration:

> I. THE MOTHER'S MOTION TO VACATE THE IDENTIFIED SURRENDER AND ADOPTION SHOULD BE GRANTED BECAUSE SHE HAS DEMONSTRATED CHANGED CIRCUMSTANCES, AND VACATING THE JUDGMENTS IS IN THE CHILD'S "BEST INTEREST."

[9] Docket numbers in family court matters contain a two-letter prefix all of which start with the letter "F." For example, the prefixes to the docket numbers of the guardianship and adoption actions were "FG" and "FA," respectively. "FC" is used to designate a matter that concerns a child's placement.

> II. DUE TO A NUMBER OF PROCEDURAL FLAWS, INCLUDING CHANGING THE TERMS OF THE SURRENDER AFTER THE MOTHER EXECUTED IT, THE SURRENDER WAS NOT MADE KNOWINGLY AND VOLUNTARILY AND, THUS, THE MOTHER'S MOTION TO VACATE THE SURRENDER SHOULD BE GRANTED.
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> III. THE ADOPTION SHOULD BE VACATED AND THE MOTHER'S PARENTAL RIGHTS SHOULD BE REINSTATED.

Having closely examined the record in light of these issues, we reject defendant's challenges to the orders denying her post-judgment attempts to set aside the voluntary surrender of her parental rights in favor of Anna. In both instances, the judge conducted an evidentiary hearing, made factual findings that require our deference, and utilized sound discretion in determining that the April 27, 2011 judgment should not be altered, modified or vacated. We, thus, affirm the orders entered in the Hudson County guardianship action that are under review.[10]

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[10] None of the parties requested oral argument in this court. We notified the parties, however, that the court required oral argument and asked counsel to be prepared to argue whether any part of defendant's appeals would be moot, particularly whether — if we were to leave undisturbed the judgment of adoption — defendant's appeal of the orders denying relief from the guardianship action would be rendered moot. It is arguable that an adoption moots any subsequent attack on a judgment terminating the natural parent's rights to the adopted child — i.e., how can the parental rights of a birth parent be restored if the child has been adopted and the judgment of adoption is inviolate? See N.J. Div. of Youth & Family Servs. v. J.C., 411 N.J. Super. 508, 512 (App. Div. 2010) (recognizing that, "if not moot," an appellate court's "ability to render effective relief" in an out-of-time appeal following a judgment of adoption "is dubious at best"). In

In the first instance — the pre-appeal motion to vacate — the judge determined that defendant failed to demonstrate she did not knowingly or voluntarily surrender her rights. The judge heard and considered the testimony and made findings that militated against granting relief; those findings require our deference. See N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008); N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007).

In the second instance — the post-appeal motion to vacate — the judge heard a considerable amount of testimony from defendant, other lay witnesses, and competing expert witnesses, from which the judge determined that, although defendant had demonstrated changed circumstances, she had not proved it was in the child's best interests to set aside the judgment. These findings are also entitled to deference on appeal, and we are satisfied the judge's assessment of the evidence comported with the legal standard set forth in J.N.H., supra, 172 N.J. at 474-75.

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a similar setting, however, the Supreme Court chose not to find moot a post-adoption appeal of an order denying Rule 4:50 relief from the termination of parental rights, noting only that such a circumstance "would constitute an additional heavy weight against Rule 4:50 relief." J.N.H., supra, 172 N.J. at 475. In any event, because we find no merit in defendant's arguments on appeal regarding the denial of her motions to vacate, we need not determine whether her appeal was rendered moot by the entry of a judgment of adoption that could not be set aside in these circumstances.

We also conclude that the Middlesex judge properly denied the motion to set aside the judgment of adoption. For the reasons just expressed, we reject the premise upon which that motion was based: that defendant's voluntary surrender was ineffectual to terminate her parental rights or that it is inequitable to further enforce the April 27, 2011 guardianship judgment. Moreover, the adopting mother — Anna — had passed away by the time defendant applied for relief, thereby rendering academic any challenge to the adoption judgment.[11]

This brings us to the October 1, 2012 order, which posthumously terminated Anna's parental rights. Although defendant's appeals in the guardianship and adoptions matters do not implicate this order, which was entered in a separate matter not before us for review, we cannot ignore the fact that this order suffers from the same disabilities found in defendant's motion to vacate the judgment of adoption. There is no evidence that notice was given to Anna's personal representative or to defendant, who, upon Anna's adoption of the child, had become in the eyes of the law the child's sibling. And the Division's application sought relief the court was not empowered to give: the

[11] Even if that were not so, the motion was procedurally deficient because notice was not given to the personal representative of Anna's estate.

termination of parental rights of a deceased parent. The issue resolved by that court had been rendered purely academic; any debate about Anna's parental rights ended with her death.

III

This leaves us with the question the Law Guardian rightfully emphasized at oral argument: moving forward, what is best for this child? Our response is that this presents a highly-sensitive fact question that must be further considered in the trial court.

As noted earlier, an "FC" action is pending in Middlesex County. That court, we are told, permitted defendant's intervention, albeit to a limited degree, but with the acknowledgement that her involvement in the action could be expanded as the matter progresses. As noted above, the record on appeal reveals that the Division issued a letter that "ruled out" defendant's consideration as a resource; an order entered in the FC matter, however, also recognized that defendant had not, at that time, been served with the letter. Whether, when, or to what extent defendant may challenge that determination is not presently clear.

The Division, as we observed above, also advised this court days before oral argument that the resource parent was now committed to adopting the child. And, at oral argument, counsel

represented to this court that the judge presiding over the FC matter is, in essence, awaiting our disposition of these appeals before proceeding further in that matter.

Having found no merit in defendant's challenge to the orders under review, and having thereby fixed defendant's status vis-à-vis the child subject to what future proceedings may generate, we believe the best approach to this unusual and troubling matter is to simply allow the FC matter to proceed. In other words, the FC matter should proceed on the basis that defendant's parental rights remain terminated, but also with the understanding that Anna's parental rights were not terminated by order but, instead, by her death,[12] leaving defendant — in the law's eyes — as a family member of the child. We trust, in this regard, that the FC judge will now examine what is in the best interests of the child, including consideration of defendant's availability as a resource as a member of the child's family or otherwise. And we offer no view of the propriety of the so-called "rule out" letter, which is neither contained in the record on appeal nor before us for a review of its merits.

[12] The adoption judge properly denied the motion to vacate the judgment permitting Anna's adoption of the child. And, although not directly before us, we conclude that the judge who entered the October 1, 2012 order mistakenly posthumously terminated Anna's parental rights.

IV

We, thus, affirm: the January 9, 2015, and August 18, 2015 orders, which denied defendant's motions to vacate the April 27, 2011 judgment; the February 27, 2015 order, which denied defendant's motion to vacate the judgment of adoption; and the April 13, 2015 order, which denied defendant's motion for reconsideration of the February 27, 2015 order.

Affirmed.