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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2870-15T2
A-2871-15T2¹

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

D.M.K. and T.A.C.,

Defendants-Appellants,

IN THE MATTER OF THE GUARDIANSHIP
OF E.L.C. and A.S.C., Minors.

Submitted March 7, 2017 – Decided April 10, 2017

Before Judges Messano and Suter.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex
County, Docket No. FG-12-72-15.

Joseph E. Krakora, Public Defender, attorney
for appellant D.M.K. in A-2870-15 (Catherine
Reid, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney
for appellant T.A.C. in A-2871-15 (Anthony J.
Vecchio, Designated Counsel, on the briefs).

¹ The cases were consolidated on appeal in order to share transcripts and to permit a single responding brief.

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Lisa D. Cerasia, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Danielle Ruiz, Designated Counsel, on the brief).

PER CURIAM

D.M.K. and T.A.C., the biological parents of Emily and Anna,² appeal the March 1, 2016 final judgment of guardianship, which terminated their parental rights to these children.³ We affirm substantially for the reasons set forth in the comprehensive written opinion of Judge Arnold L. Natali, Jr.

I.

In August 2011, the Division of Child Protection and Permanency (DCPP) was contacted by the hospital after D.M.K. tested positive for cocaine upon the birth of her daughter Emily. Emily, whose meconium also tested positive for cocaine, experienced withdrawal symptoms, which required an extended stay in the hospital. D.M.K. denied she used cocaine. However, DCPP received information from the New Brunswick Counseling Center (NBCC), where

² We have used fictitious names for the parties throughout the opinion to maintain their confidentiality.

³ The parents have two younger children, born in 2015 and 2016, who are not part of this litigation. D.M.K. has two children who are older than Emily and Anna, who also are not part of this case.

D.M.K. had been in treatment, showing that she tested positive for cocaine twenty-one times during her pregnancy with Emily. She also tested positive on August 9, 2011, "only hours before [Emily]'s birth." D.M.K. was under treatment with methadone for addiction to heroin.

DCPP requested and was granted care and custody of Emily following an emergency Dodd removal.⁴ Because D.M.K. had no family resources except for her parents, who already were caring for an older child of D.M.K.'s, Emily was placed with a foster family.

D.M.K. would not attend inpatient drug treatment after Emily's birth, opting instead for intensive outpatient treatment. She did not begin treatment until months after Emily's birth and was discharged shortly thereafter for non-attendance. She consistently tested positive for the presence of non-prescription drugs. She lost her welfare benefits and funding for methadone treatment at NBCC for failure to participate in the program.

In September 2012, D.M.K and T.A.C. had a second child, Anna, who was born drug free. D.M.K. made progress in her drug treatment program, where she also exercised weekly visitation with Emily. Just shortly before Anna's birth in September 2012 and based on D.M.K.'s positive progress in the program, she and Emily were

⁴ The Dodd Act is found at N.J.S.A. 9:6-8.21 to -8.82 (as amended).

reunited. D.M.K. transferred to a transitional treatment program where she tested negative for drugs through June 2013. She obtained housing in a motel through social services, was referred to a multi-cultural parent support program, and was provided with a parent mentor to assist with parenting skills.

D.M.K. received rental assistance and was able to move into a three-bedroom apartment in July 2013. Shortly thereafter, her drug screens began to be positive for cocaine and opiates. Despite DCPD's implementation of a safety protection plan and the assistance of a parent mentor seven days per week, in October 2013, D.M.K. was treated at the emergency room because she was under the influence of an unknown substance. Although she explained she had mistakenly taken some of her brother's medication, eventually D.M.K. acknowledged she had relapsed.

DCPD executed an emergency Dodd removal of Emily and Anna, and obtained an order for their custody. Since then, both children have lived together with one foster family, which is the same family who previously cared for Emily and now has expressed a desire to adopt both children.

D.M.K. enrolled in, but then was discharged for non-attendance from, several drug treatment programs in 2013, 2014 and 2015. D.M.K. was terminated from two therapeutic visitation programs because of missed visits. During supervised visitation

with the children, at times she was argumentative and dismissive toward DCPD staff. During one visit when her father was supervising her, D.M.K. was arrested for shoplifting while Emily and Anna were present. D.M.K. did not complete a required psychological evaluation and her drug screens continued to test positive for cocaine.

By October 2014, DCPD's goal for Emily and Anna was changed from reunification with D.M.K. and T.A.C. to termination of parental rights. DCPD filed a complaint for guardianship in November 2014.⁵

By December 2014, D.M.K. was regularly attending supervised visitation with the children, but the foster parents were reporting to DCPD that Anna "was uncontrollable" after visitation, and Emily "would urinate and defecate on herself."

In January 2015, D.M.K. and T.A.C. had a third child, Toby, who tested positive for cocaine at birth. Although D.M.K. denied using cocaine and could not understand how the child could test positive, she also tested positive for cocaine just one day prior to Toby's birth. Toby is not part of this litigation. D.M.K. tested positive for cocaine again in March 2015.

⁵ This was the second complaint for guardianship. The first was dismissed in 2012 after Anna was born and D.M.K. was making progress in her then current intensive treatment program.

In May 2015, D.M.K. enrolled in a halfway house program where she had supervised visitation weekly. She was successfully discharged from that program in November 2015 and enrolled in a program of intensive outpatient treatment. However, she was not attending therapeutic counseling within that program. At that time, D.M.K. resided in a motel with T.A.C. By the time the guardianship trial commenced in the fall of 2015, D.M.K. had missed a number of treatment sessions, and there was only one week where she attended all recommended treatment. D.M.K. was employed as a waitress.

T.A.C. and D.M.K. met when she purchased drugs from him. In 1998, T.A.C. was convicted of the aggravated sexual assault of a twelve-year-old, was sentenced to nine years in jail, and under Megan's Law,⁶ to community supervision for life. T.A.C. is prohibited from having unsupervised contact with minors. Over the life of Emily and Anna, T.A.C. has spent lengthy periods of time in jail for violations of his conditions of parole and community supervision for life.

T.A.C. was discharged from outpatient drug treatment shortly after Emily's birth. He denied using drugs or the need for drug treatment. He claimed he was unaware of D.M.K.'s drug use although

⁶ N.J.S.A. 2C:7-1 to -23.

they resided together when Emily was born. He sporadically attended parenting classes in the months after Emily was born.

Beginning in March 2012, T.A.C. was incarcerated for the next two years for assaulting a police officer. He took a course in anger management and parenting while in jail, and exercised bi-weekly or monthly visits with the children. T.A.C. was not released on parole until March 2014. He resumed supervised visitation with Emily and Anna after he completed a psychological evaluation, which recommended that he could have supervised visitation with the children. By September 2014, he was attending a substance abuse treatment program. However, he was re-incarcerated in October 2014 for violation of parole and was not released until August 2015.

On March 1, 2016, following a multiday trial, Judge Natali issued a comprehensive written decision and order terminating the parental rights of D.M.K. and T.A.C. to Emily and Anna. The trial court found the parents' continuing relationship with the children endangered their "safety, health or development."

T.A.C. had been incarcerated the majority of Emily and Anna's lives and did not successfully complete services for his substance abuse or anger management issues. The court found credible the State's expert, Dr. Kinya Swanson, who observed that T.A.C. never consistently parented either child, having been absent due to

frequent incarceration, which included parole violations. Dr. Swanson expressed concerns about T.A.C.'s "ability to avoid re-incarceration, make prudent decisions, and to provide a stable and safe environment for [the children]," which "outweigh[ed] the benefits of reuniting the children with him at this time." Additionally, "he ha[d] not demonstrated, with sufficient consistency, decisions and behaviors indicative of putting [Emily]'s and [Anna]'s needs first."

The court found DCPD had established that D.M.K. "has significant substance abuse and mental health issues," and that those issues are "extensive and have directly affected the parental relationship." The court found that D.M.K. "failed to complete successfully approximately ten substance abuse treatment programs." At the time of the guardianship trial, the court found that although D.M.K. was enrolled in a treatment program, she was "not compliant with her recommended therapeutic counseling." The judge found this to be "extremely concerning" and a "critical development" in light of D.M.K.'s drug use and relapse history. Her drug use affected her ability to adequately parent the children. The court found that D.M.K. was in the "nascent stage [of] her treatment and recovery."

Defendant's expert Dr. James Reynolds stated in his report that D.M.K. was then "in partial remission." He recommended

intensive outpatient treatment, confirming that relapse was part of her history and that she was at risk to do so again, having relapsed a half dozen times already. The court also found that D.M.K.'s psychological issues remained "of significant concern." The court summarized that based on the parents' drug abuse and lack of compliance with services, the children's "mental and emotional well-being[] would be extremely endangered in the care and supervision of [D.M.K. or T.A.C.]."

Judge Natali found that DCPD had met its burden of showing that D.M.K. and T.A.C. could not "cease to inflict harm upon" Emily or Amy. D.M.K. had a substantial history of drug abuse and had not addressed her mental health issues. She was not participating in required therapeutic counseling. Although the court "acknowledge[ed] and commend[ed]" D.M.K. for her sobriety, it did not find believable that the trial evidence supported the extent of her sobriety. The judge found her sobriety to be "fragile and her risk of relapse is significant." Moreover, the court found D.M.K. "exhibited poor insight into her addiction and is still addressing the underlying causes . . . and the reasons why she relapsed in the past."

T.A.C. was not compliant with treatment for anger management or substance abuse. The court stated that his repeated incarcerations "disrupt[ed] any hope for permanency and an

enduring bond." The court found that T.A.C. "has not identified any plan for the children, nor has he addressed the poor decisions he made, many of which led to his incarceration, which directly affected the time with the children and the lack of bond between them." Judge Natali concluded that although the parents "expressed a willingness to address their problems, they have not displayed the capability of doing so." In fact, neither expert recommended reunification of the children with their parents at the time of the guardianship trial.

Judge Natali found that DCPD made "reasonable efforts to provide services to help the parent[s] correct the circumstances that initially caused the removal" of Emily and Anna. These services included substance abuse treatments, services and psychological evaluations, visitation with the children, including during T.A.C.'s incarceration, parenting training, mentoring, housing assistance, and monitoring of a safety protection plan. Moreover, DCPD tried to, but could not, identify relatives who were "able or willing to care for the children."

Judge Natali also found that DCPD had proven "clearly and convincingly" that termination of D.M.K.'s and T.A.C.'s parental rights would "not do more harm than good." The court found Dr. Swanson's testimony to be credible. She stated the children did not "evidence[] clear signs of a developing and healthy bond with

[T.A.C.]." With respect to D.M.K., Dr. Swanson testified she was "not in a position to adequately parent either child" now or "in the foreseeable future." Although she has "some strengths that highlight her potential to parent[,] " [h]er substance abuse issues, failure to take personal responsibility for the children's care, and markedly poor judgment, including . . . [her decision] to repeatedly remain involved with drug involved persons/activities[,] have jeopardized her ability to parent and form a healthy, stable and secure attachment with [the children]." Anna did not show "signs of a developing and healthy bond" with D.M.K. While Emily showed "more signs of security and relatedness," there also were "no clear signs of a developing and healthy bond." Dr. Swanson testified the children did not view her as the primary parental figure.

In contrast, Dr. Swanson opined that Emily and Anna were "thriving and connected" to their foster family. Dr. Swanson concluded those parents were the "primary attachment figures" for the children and the "best long-term placement." The children resided with them "throughout most of their critical bonding period." She testified that permanency for the children was important for their future best interests. In the end, D.M.K.'s "[in]ability to maintain sobriety, make prudent decisions, and to

provide a stable and safe environment for [the children], outweigh the benefits of reuniting the children with her at this time."

Judge Natali found defendant's expert, Dr. Reynolds, to be "somewhat evasive during cross-examination" and more importantly his "substantive opinions were not as believable" because he lacked factual information about D.M.K.'s "drug use, relapses and mental health issues."

While Dr. Reynolds testified that D.M.K. appeared to be a candidate for reunification, this was conditioned on her "remaining abstinent" and "continu[ing] to actively participate in treatment." Dr. Reynolds concluded that the children were attached both to the foster family and to D.M.K., but if contact with the foster family were terminated, he thought the "strength of the attachment bonds the girls have developed with their mother and foster parents will likely be sufficient to mitigate that harm in the long run." Nevertheless, he did not recommend that the children be reunited with D.M.K. at this time.

The trial court concluded that reunification of the children with D.M.K. and T.A.C. would place their "health and welfare in danger." Severance of the parental relationship would not cause more harm than good. The court took into consideration "all of the visitation reports," finding based upon the testimony of Dr. Swanson that any harm the children might suffer as a result of the

termination of the parent's rights "can be adequately and appropriately addressed by the resource parents."

D.M.K and T.A.C. appeal the March 1, 2016 order of Judge Natali. D.M.K. contends the court erred in finding DCPD satisfied the second prong of the required statutory factors set forth in N.J.S.A. 30:4C-15.1(a). She contends she has addressed the issues which led to the children's removal, and that it "was reasonably foreseeable that she could safely raise them going forward." D.M.K. also contends the fourth prong of the statute was not satisfied, arguing that the trial court abdicated its role by relying upon the opinion of Dr. Swanson, who "emphasized continuity in care over the existing parental relationships."

T.A.C. contends on appeal that there was inadequate proof to establish the children's "safety, health or development" was endangered by his relationship with them (prong one), or that termination was required in the children's best interest (prong two). T.A.C. contends that court erred in concluding that termination of his parental rights would not do more harm than good (prong four).

We agree with Judge Natali that there was sufficient credible evidence in the record to prove by clear and convincing evidence that all four prongs under N.J.S.A. 30:4C-15.1(a) were met.

II.

We start by recognizing the established principle that a parent has a fundamental right to enjoy a relationship with his or her child. In re Guardianship of K.H.O., 161 N.J. 337, 346-47 (1999). These rights are not absolute but are "tempered by the State's parens patriae responsibility to protect the welfare of children." Id. at 347. The standard by which the rights of the parents and the interests of the State in the welfare of the child are balanced is "through the best interests of the child standard." Ibid. Under that standard, an individual's parental rights to a child may be terminated if the DCPD establishes all of the following criteria:

- (1) The child's safety, health or development has been or will continue to be endangered by the parental relationship;
- (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 [DCPD] 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)(1)-(4).]

These factors relate to each other and overlap; they are not "discrete and separate." K.H.O., supra, 161 N.J. at 348. Each prong must be proven by DCPD with clear and convincing evidence. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 447 (2012).

"Our review of a trial judge's decision to terminate parental rights is limited." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (citing In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)); see also N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278-79 (2007). Factual findings that are supported by adequate, substantial and credible evidence "should not be disturbed unless 'they are so wholly insupportable as to result in a denial of justice.'" Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974) (quoting Greenfield v. Dusseault, 60 N.J. Super. 436, 444 (App. Div.), aff'd o.b., 33 N.J. 78 (1960)); see also In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993) (internal citations omitted).

Additionally, we must accord substantial deference to the findings of the Family Part due to that court's "special jurisdiction and expertise in family matters." Cesare v. Cesare,

154 N.J. 394, 413 (1998). Our review is expanded, however, where the error alleged is "in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014).

A.

In considering the first prong of the statutory test, the concern is "whether the parent has harmed the child or may harm the child in the foreseeable future." N.J. Div. of Youth & Family Servs. v. C.S., 367 N.J. Super. 76, 113 (App. Div.) (citing N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 607 (1986)), certif. denied, 180 N.J. 456 (2004). In assessing whether the child has been harmed by the parental relationship, "a parent or guardian's past conduct can be relevant and admissible in determining risk of harm to the child." N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 573 (App. Div. 2010). DCPD must demonstrate "that the harm is likely to continue because the parent is unable or unwilling to overcome or remove the harm." K.H.O., supra, 161 N.J. at 348.

We discern no error by Judge Natali in finding that D.M.K. and T.A.C. posed a danger to the children's "safety, health or

development" as set forth in prong one of the statutory test.⁷ T.A.C.'s drug and alcohol use was long standing. He was non-compliant with services to address drug use, anger management and parenting. He exhibited poor decision-making because of his many periods of incarceration that contributed to his absence from the family. He did not provide the children with stable housing, shelter or support. Moreover, T.A.C.'s plan for the children was for D.M.K. to parent them, despite her extensive drug use. She was only in the early stage of recovery and neither of the testifying experts supported reunification with D.M.K. at the time of the trial. This was not a viable plan as neither parent provided a stable home or relationship for the children.

B.

Under the second prong, the trial court was required to "determine whether it is reasonably foreseeable that the parents can cease to inflict harm upon the [child]." A.W., supra, 103 N.J. at 607. "While the second prong more directly focuses on conduct that equates with parental unfitness," prongs one and two of the best interests standard "are related to one another, and evidence that supports one informs and may the support the other."

⁷ We do not discuss the application of this prong to D.M.K. because she did not challenge the judge's finding that prong one was satisfied.

In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999) (citing K.H.O., supra, 161 N.J. at 348-49, 351-52). The court considers "whether the parent is fit, but also whether he or she can become fit within time to assume the parental role necessary to meet the child's needs." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 87 (App. Div. 2006) (citing In re Guardianship of J.C., 129 N.J. 1, 10 (1992)), certif. denied, 190 N.J. 257 (2007).

D.M.K. contends the trial court erred in terminating her parental rights to Emily and Anna because she was maintaining sobriety in her drug treatment program and caring for her son, Toby, born in 2015. We find no error in the trial court's determination that mother's "sobriety [was] fragile and her risk of relapse [was] significant," remaining a "serious obstacle[] to returning the children to her custody and care." Dr. Swanson testified that D.M.K.'s sobriety in a structured environment did not mean D.M.K. could parent the children once she was exposed to the stress of everyday life, given her eleven-year history of drug abuse. Moreover, once released from that structured inpatient setting, she was not attending therapeutic counseling, meaning she was not compliant with therapy and treatment.

We likewise agree with the trial judge that D.M.K.'s situation with Toby is not determinative of the parental rights termination decision regarding Emily and Anna. Emily and Anna were at a

different stage in their lives than Toby. Dr. Swanson testified Toby was in the beginning of the "critical bonding period," while Emily and Anna were at the end of that period. Emily and Anna developed a healthier bond with their foster family because of the length of time they have resided with them.

With respect to T.A.C., the trial court's decision to terminate parental rights was not solely based on the fact of T.A.C.'s incarceration. See R.G., supra, 217 N.J. at 556 (citing In re Adoption of Children by L.A.S., 134 N.J. 127, 137-38 (1993) ("[I]ncarceration alone . . . is an insufficient basis for terminating parental rights."). Rather, T.A.C. had no realistic plan for the children, opting for them to be placed with D.M.K. despite her drug issues. T.A.C. was non-compliant with drug treatment and anger management treatment. His repeated incarceration showed he was not addressing the issues that were contributing to the conduct that was preventing him from being available for the children. The judge found correctly that prong two was satisfied because, given T.A.C.'s drug use and incarceration, it was not foreseeable he could cease to inflict harm upon the children. We are satisfied that the record amply supported Judge Natali's findings under prong two.

C.

The third prong under the statute requires DCPD to show that it "has made reasonable efforts to provide services to help the parent[s] correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights." N.J.S.A. 30:4C-15.1(a)(3). Neither parent challenged the trial court's finding that DCPD provided ample services to them to address the harms that they posed to Emily and Anna. In finding that the third prong of the statutory test was met, the trial court stated that both parents "failed to complete substance abuse treatments, services and psychological evaluations completely or in an untimely fashion," affecting negatively their potential for reunification. The court detailed the services provided. Furthermore, there were no relatives who were available to care for the children, leaving no reasonable alternative to termination of parental rights.⁸

D.

We find no error in the trial court's determination that the fourth prong of the statute was satisfied by clear and convincing

⁸ Of D.M.K.'s older children, the oldest was residing with the maternal grandparents. The other older child was residing with his father.

evidence. This prong requires the trial court to balance the harms suffered from terminating parental rights against the good that will result from terminating these rights. K.H.O., supra, 161 N.J. at 363; A.W., supra, 103 N.J. at 610-11. It does not require a showing that "no harm" will result from the termination of parental rights, but involves a comparison of the child's relationship with the biological parent and the foster parent. K.H.O., supra, 161 N.J. at 355. Thus, "[t]he question to be addressed under [the fourth] prong is whether, after considering and balancing the two relationships, the child will suffer a greater harm from the termination of ties with her natural parents than from the permanent disruption of her relationship with her foster parents." Ibid.

D.M.K. and T.A.C. contend the judge erred by not giving proper weight to Dr. Reynold's testimony, by not considering there was the risk the foster parents might not proceed with adoption, and by not comparing D.M.K.'s relationship with the children to their relationship with the foster parents.

Here, Dr. Swanson testified that the children did not show a developing or healthy bond with D.M.K. or T.A.C. Because of the length of time the children resided with the foster family, and because they were with the foster family at the critical time in their development when bonding occurred, Emily and Anna developed

a healthy bond with the foster parents and identified them as their mother and father. Dr. Swanson testified that removing the children from the foster family would cause "severe and enduring harm." She testified D.M.K. and T.A.C. would not be able to mitigate that harm.

Defendants' expert Dr. Reynolds acknowledged the bond with the foster parents, testifying that the harm to the children if that bond were terminated would be the same as terminating the bond with D.M.K. He did not address the negative physical reactions the children were having after visiting with D.M.K. and T.A.C. Moreover, he testified at trial that he did not favor reunification at that time. His opinions were premised on D.M.K.'s continued sobriety and active participation in treatment. The trial court did not find the evidence in equipoise on prong four as is suggested because it credited Dr. Swanson's testimony.

We have no cause to dispute that Emily and Anna's best interests lie with the termination of their parents' rights. The children have a bond with the foster parents. They will suffer harm if that bond is broken. We agree with Judge Natali based on this record that D.M.K. and T.A.C. will not be able to adequately address that harm. The foster family has consistently expressed an interest in adoption. The children have the opportunity for a permanent, stable living arrangement, which D.M.K. and T.A.C. have

not been able to give them despite a host of services provided over years of time. The result of those services has yielded only short periods of sobriety. We agree that termination of parental rights to Emily and Anna will not do more harm than good.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION