RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3136-15T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

R.M., Sr.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF R.M., Jr., a minor.

Argued February 14, 2017 – Decided March 20, 2017

Before Judges Ostrer, Leone and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FG-16-87-15.

Clara S. Licata, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Licata, on the briefs).

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

Charles Ouslander, Designated Counsel, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Mr. Ouslander, on the brief).

PER CURIAM

Defendant R.M. appeals a family court order terminating his parental rights to his sixteen-year-old son, R.M., Jr. (Robert)[1]. Defendant argues the Division of Child Protection and Permanency (Division) failed to satisfy the second, third, and fourth prongs of the best-interests-of-the-child standard, N.J.S.A. 30:4C-15.1(a), required to terminate parental rights. We disagree and affirm.

I.

Robert's mother died in 2010, but long before her death Robert had been cared for by his maternal grandmother, E.W. (Esther). In January 2014, Robert called 911 threatening to kill himself and was taken to the hospital, but Esther refused to go to the hospital to provide consent for Robert's treatment. Robert has serious mental health issues including a history of depression, anxiety, hallucinations, suicidal ideations and attempts, and pica disorder, a condition involving Robert's ingestion of inedible

[1] We use pseudonyms to refer to the father, child, and grandmother in this matter for purposes of clarity and confidentiality.

objects, and has been hospitalized numerous times for psychiatric treatment.

Based on Esther's refusal to provide consent for Robert's medical treatment, the Division conducted an emergency Dodd removal[2] of Robert from Esther's care and substantiated allegations of neglect and abandonment against her. The court entered an order appointing a law guardian and granting temporary care and custody of Robert to the Division.

Robert was placed in two resource homes during the course of the litigation, but they were unable to meet Robert's special needs. He was also hospitalized several times as the result of his ingestion of batteries, and placed in two residential treatment facilities. He resided at one of the facilities at the time of trial.

After the Division obtained custody of Robert, it located defendant through child support records. At the time, defendant lived in a halfway house following his release from incarceration in 2012. He "had not seen [Robert] since he was a little boy," and had never been a caregiver for Robert. Defendant has a lengthy criminal history, and was incarcerated from 2007 to 2012. Following his release, he had at various times prior to January 2014, been

[2] A "Dodd removal" is an emergency removal of a child from the custody of a parent without a court order. N.J.S.A. 9:6-8.29.

on probation, living in halfway houses, attending substance abuse programs, and working.

After establishing contact with defendant, the Division facilitated supervised visitation between Robert and him. Supervised visits were held between March and August 2014. The Division accommodated defendant's work schedule by arranging visits on weekends through a service provider. The Division also set up parenting classes for defendant, which he attended from June to August 2014.

The Division's reunification efforts were made difficult by defendant's frequent arrests and periods of incarceration. He was arrested in August 2014, and remained incarcerated until September 2014. He was arrested in October 2014, and incarcerated until May 2015. After his release, he was again arrested in May 2015, and was incarcerated until December 2015.[3] Following his release, defendant resided at a rehabilitation program, with a projected discharge date of September 2016.

The Division explored placements for Robert with different family members, including Esther, but none was viable. In April

[3] The trial court's opinion states that defendant was released and rearrested in March 2015. The evidence in the record, however, shows defendant was released and rearrested in May 2015.

2015, the Division filed a guardianship complaint. The trial took place in February 2016.

Dr. Robert Kanen conducted two psychological evaluations of defendant and a bonding evaluation, and testified that defendant was unable to provide Robert with a permanent safe and secure home at the time and in the foreseeable future. Kanen testified that defendant had a history of repeating mistakes, unreliability, undependability, failures to honor personal and parental obligations, and cognitive limitations that constituted severe parenting deficits. Kanen explained that defendant knew Robert had special needs but made no attempt to determine what they were and demonstrated no ability to address them as a parent.

Kanen also found that although there was "somewhat of an attachment" between Robert and defendant, it was "very, very insecure." Kanen concluded Robert would not suffer serious and enduring harm if defendant's parental rights were terminated because Robert never lived with defendant and did not view defendant as a parental figure. Kanen testified Robert would suffer serious harm if returned to defendant, and that if Robert stayed in a specialized placement and defendant's rights remained intact, it would "close the door" on the possibility a permanent home might be found for Robert.

Kevin Belli, an adoption and training supervisor at the Division, testified that the Division's plan was select home adoption because reunification was not an appropriate goal and the Division did not have a resource home or a relative able or willing to provide Robert a permanent home. Thus, if defendant's parental rights were terminated, the Division could explore a prospective permanent home for Robert through select home adoption in the national registry. Belli explained the Division sought to achieve permanency for Robert with a family that could address his special needs even after he turned twenty-one.

On February 29, 2016, following the trial, the court issued a detailed and comprehensive written decision, made findings of fact and conclusions of law addressing each of the prongs of the best-interests standard under N.J.S.A. 30:4C-15.1(a), and entered an order terminating defendant's parental rights and awarding guardianship of Robert to the Division. Defendant appealed.

II.

"Parents have a constitutional right to raise their children" that is "among the most fundamental of all rights." N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 447 (2012). However, that right is not absolute. Ibid. The State has a parens patriae responsibility "to protect children from serious physical and psychological harm, even from their parents." N.J. Div. of Youth

& Family Servs. v. E.P., 196 N.J. 88, 102 (2008). Yet, "[t]erminating parental rights must be used with caution and care, and only in those circumstances in which proof of parental unfitness is clear." F.M., supra, 211 N.J. at 447.

If the State seeks to terminate parental rights, the focus of the court is the "best interests of the child." In re Guardianship of K.H.O., 161 N.J. 337, 347 (1999). The burden is on the State to prove by clear and convincing evidence the four prongs of the best-interests-of-the-child standard enumerated in N.J.S.A. 30:4C-15.1(a). F.M., supra, 211 N.J. at 447. The State must establish:

> (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;
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> (3) The division 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 task as an appellate court is to determine whether the decision of the family court in terminating parental rights is supported by '"substantial and credible evidence" on the record.'" F.M., supra, 211 N.J. at 448 (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (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." Ibid. An appellate court "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. (quoting E.P., supra, 196 N.J. at 104).

Defendant does not challenge the court's determination that Roberts's health, safety, or development has been and will be endangered by the parental relationship under the first prong of the best-interests standard. N.J.S.A. 30:4C-15.1(a)(1). Instead, Defendant argues the court erred by finding the Division satisfied its burden under the second, third, and fourth prongs of the standard. N.J.S.A. 30:4C-15.1(a)(2), (3), and (4). Based on our thorough review of the record and applicable law, we reject defendant's argument and affirm substantially for the reasons set

forth in the family court's well-reasoned written opinion. We add the following comments.

Defendant first contends the court erred by finding the Division established that he was unwilling or unable to eliminate the harm facing Robert or to provide a safe and stable home for Robert, and that the delay in permanency will add to the harm. N.J.S.A. 30:4C-15.1(a)(2). Defendant argues that whether he can provide a safe, stable, and secure home is irrelevant because Robert "is safe and receiving services in his current long-term treatment placement, from which there is no realistic release date and no adoptive home to be released to."

Prong two of the best-interests standard requires the Division to establish that the parent is "unwilling or unable" to eliminate the harm faced by the child, or provide a stable home. N.J.S.A. 30:4C-15.1(a)(2). The essence of this inquiry looks to whether the parent has "cured" the initial harm, and whether it presents a future threat to the child. K.H.O., supra, 161 N.J. at 348. Prong two may be established by, among other things, evidence "that the parent is unable to provide a safe and stable home for the child and that the delay in securing permanency continues or adds to the child's harm." Id. at 348-49.

There is overwhelming evidence supporting the court's determination under the second prong of the best-interests

standard. The evidence showed that defendant, for the multitude of reasons detailed in the trial court's opinion and supported by the evidentiary record,[4] is simply unable to maintain a safe and secure home, and there is little likelihood he could provide a safe, secure and permanent home for Robert, or care for his special needs in the foreseeable future.

We reject defendant's argument that Robert's residence in a long-term placement renders the second prong of the standard irrelevant. The argument ignores that the evidence showed defendant's inability to provide a safe and secure home and care for Robert's special needs causes Robert to suffer substantially from a lack of stability and a permanent placement. See K.H.O., supra, 161 N.J. at 363 (finding second prong of the best-interests standard was satisfied with showing child suffered from lack of stability and permanent placement and from disruption of bond with foster parents).

[4] The judge found defendant's lack of stable employment and housing, mental health and substance abuse issues, borderline intellectual functioning, history of incarcerations, history of "lack of parenting" Robert, and lack of an understanding of Robert's special needs and ability to address them established defendant was not capable of curing the ongoing harm caused to Robert by the lack of permanency. Relying on Kanen's testimony, the judge also found defendant's "pattern of behavior is unlikely to change."

We also reject defendant's contention that the family court erred in finding the Division established that it provided reasonable services to defendant under the third prong. The third prong requires consideration of whether the Division "'made reasonable efforts to provide services to help the parent' remedy the circumstances that led to removal of the children from the home." F.M., supra, 211 N.J. at 452 (quoting N.J.S.A. 30:4C-15.1(a)(3)). The reasonableness of the Division's efforts is not measured by their success. Ibid.

Our Supreme Court has recognized that "the Division is necessarily impeded by the difficulty and possible futility of providing services to an incarcerated person." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 557 (2014). Yet, "[a]bsent an order under N.J.S.A. 30:4C-11.3, the Division may not ignore requests or avoid providing services to an incarcerated parent." Id. at 558.

In R.G., the Court found the Division failed to show it made reasonable efforts to provide services to an incarcerated parent. Id. at 562. The Division visited the parent once in prison, called him once, completed two psychological evaluations but did not complete a bonding evaluation, did not provide him with his daughter's letters, did not facilitate calls, and never compared

the programs he participated in prison to the content of the Division's programs. Id. at 562-63. The Court noted,

> [w]e do not suggest that the Division was required to provide any particular services to appellant. However . . . in circumstances such as these, particularly when an incarcerated parent's release is imminent, the other parent has relinquished her rights to their child, and the incarcerated parent has expressed a willingness to improve his parenting skills and a desire to deepen his parent-child relationship, the Division must do more than merely speak with the parent and provide two psychological evaluations.
>
> [Id. at 563.]

The Division and the courts must be cognizant of the Division's responsibility to "reevaluate what services it [can] provide" to a parent "during his incarceration or after his pending release or suggest enrollment in programs while [the parent] remain[s] incarcerated." Ibid. Here, immediately following defendant's arrest in August 2014, the court's order stated "[defendant] should contact [the service provider] to set up the visitation upon his release from incarceration." Despite the barriers of incarceration, the Division may be able to provide services including arranging visitation where appropriate, facilitating calls, monitoring a parent's progress, and informing parents of their rights. Ibid. Thus, the Division and the court

should have carefully considered whether visitation was possible and appropriate even while defendant was incarcerated.

However, the services provided to defendant were greatly in excess of those the Court found inadequate in R.G. The Division facilitated parenting classes and visits before defendant was incarcerated, and post-incarceration, met with defendant in jail on six occasions, spoke with the jail staff twice about providing defendant with services, facilitated a visit in jail and attempted a second visit, and conducted two psychological evaluations and a bonding evaluation. Further, unlike the father in R.G., defendant's release was not "imminent."

The provision of services was also complicated during the litigation because Robert was hospitalized several times, transferred to several different placements, and dealing with serious mental health issues. On at least one occasion, Robert's therapist advised against visitation because it was causing Robert "severe distress and placing him at risk." Considering all of the circumstances presented, we are convinced there was sufficient credible evidence supporting the court's determination that the Division clearly and convincingly met its burden under the third prong of the best-interests standard. N.J.S.A. 30:4C-15.1(a)(3).

Defendant also claims the court erred by finding the Division satisfied the fourth prong of the best-interests standard. To

satisfy the fourth prong, the Division must prove by clear and convincing evidence that "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). "The question is . . . whether a child's interest will best be served by completely terminating the child's relationship with that parent." R.G., supra, 217 N.J. at 559 (quoting E.P., supra, 196 N.J. at 108). "[A] child's need for permanency is an extremely important consideration pursuant to this prong." Ibid. Accordingly, a court's analysis "must necessarily include a discussion of a child's prospects of permanency as terminating parental rights without any compensating benefit, such as adoption, may do great harm to a child." N.J. Div. of Youth & Family Servs. v. L.M., 430 N.J. Super. 428, 450 (App. Div. 2013).

Defendant argues that termination of his parental rights will do more harm than good because there is no reasonable prospect Robert will be adopted and the Division has shown only that termination will make Robert eligible for select home adoption. Defendant relies on E.P., supra, 196 N.J. at 110, where the Court reversed a termination decision even though there were no options for permanent placement and it was shown the mother did not have the capacity to care for her daughter. The Court determined termination would do more harm than good because the child's singular emotional bond was with her mother, the child expressed

a strong desire to live with her mother, and the mother was living in an apartment, working, had not had a drug relapse in over a year, and enjoyed significant family support. Id. at 111-12. The Court further found the termination of the parental relationship would be "extremely painful" to the child. Id. at 110. Under those circumstances, the Court determined that termination without the immediate prospect of adoption had no "compensating benefit." Id. at 109.

The circumstances presented here are very different than those supporting the Court's decision in E.P. Unlike the parent in E.P., defendant has never cared for his child and has never parented him, and the bonding evaluation revealed Robert does not have any emotional bond with defendant beyond a possible insecure attachment that is "seriously impaired." Defendant does not have the home, employment history, and family support the mother in E.P. demonstrated, and Robert has not expressed a desire to live with defendant. Instead, Robert and the law guardian state that Robert wants defendant to surrender his rights to allow the opportunity for select home adoption. As the trial court stated, Robert "wants and needs a 'family' with all that entails."

Defendant also cites our decision in L.M., supra, 430 N.J. Super. at 450, arguing the Division failed to establish prong four of the best-interests standard because "terminating parental

rights, without any compensating benefit, such as adoption, may do great harm." Again, the facts in L.M. are wholly different than those present here. In L.M., we found the family court erred in terminating a father's parental rights to a child whose prospects for adoption were "bleak" because termination did not appear to have any compensating benefit. Id. at 454. We noted the father was employed, had adequate housing and a stable home life, and did not suffer from substance abuse problems. Ibid. We also rejected as not supported by the evidence the family court's finding that the father "did not have the capacity to parent and had no relationship" with the child. Ibid. Presented with those circumstances and the limited possibility that she would be adopted due to her age and special needs, we concluded termination of parental rights would do more harm than good. Ibid.

Unlike the father in L.M., defendant has never had secure adequate housing, has a long history of criminal convictions and service of state prison sentences, was arrested and incarcerated three times during the litigation, and was unemployed at the time of trial. Defendant has a history of heroin use without treatment, suffers from mental health issues and cognitive limitations, and has a borderline level of intelligence. We found the father in L.M. capable of parenting the child, ibid., but here the uncontradicted evidence showed defendant is incapable of

functioning as a parent; he is not capable of providing a safe and secure home, adhering to Robert's required medical monitoring, and addressing Robert's various medical and psychiatric issues. The evidence also showed that maintaining the parental relationship would result only in denying Robert his best opportunity to obtain permanency with a family that is capable and willing to provide a safe and secure home where his special needs will be addressed before reaching the age of majority and thereafter.

We are mindful the adoption of Robert remains only a possibility and is made difficult by his age and serious special needs. However, the evidence showed the Division has facilitated adoptions of children with special needs through select home adoption, and that the termination of defendant's parental rights increases Robert's opportunities for adoption because he will be eligible for adoption not only in New Jersey, but nationally.

We are convinced the court correctly determined the Division clearly and convincingly established it would not do more harm than good to terminate defendant's parental rights. The evidence supports the court's conclusion that Robert will suffer little, if any harm, from the termination of defendant's parental rights. The evidence also showed that the "good" that will be achieved by termination is the provision to Robert of what may be his last opportunity for permanency with the family he never had but

deserves and desires. Under the fourth prong, an important consideration is the child's need for permanency. *F.M.*, *supra*, 211 *N.J.* at 453. Based on all of the circumstances presented, it was not in Robert's best interests to further delay his best opportunity for a permanent placement. *See* *N.J. Div. of Youth & Family Servs. v. B.G.S.*, 291 *N.J. Super.* 582, 592-93 (App. Div. 1996) (noting it is not in the best interests of a child to indefinitely prolong resolution of a child's status where the parent is unable to provide care); *N.J. Div. of Youth & Family Servs. v. L.J.D.*, 428 *N.J. Super.* 451, 483 (noting children should not "languish indefinitely" in foster care while the parent attempts to correct their parenting deficiencies).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION