

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3205-15T4
A-3206-15T4

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

V.

W.S.B., III, and Y.M.B.,

Defendants-Appellants.

IN THE MATTER OF THE GUARDIANSHIP
OF C.N.B.B.,

Minor.

Submitted February 16, 2017 – Decided March 22, 2017

Before Judges Hoffman, O'Connor and Whipple.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FG-07-156-15.

Joseph E. Krakora, Public Defender, attorney
for appellant W.S.B., III (Meghan K.
Gulczynski, Designated Counsel, on the
briefs).

Joseph E. Krakora, Public Defender, attorney
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Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Eleanor M. Armstrong, Deputy Attorney General, on the brief).

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

PER CURIAM

Defendants W.S.B., III, (Wade) and Y.M.B. (Yvonne) appeal from a March 22, 2016 judgment of guardianship terminating their parental rights to their daughter C.N.B.B. (Colleen), born in December 2012.¹ Defendants seek reversal, principally arguing the Division of Child Protection and Permanency (Division) failed to satisfy the four prongs of the best interests test required to terminate parental rights. N.J.S.A. 30:4C-15.1(a). Following our review of the trial record, we find no support for defendants' claims of trial court error. Instead, the trial record contains substantial credible evidence supporting the trial judge's findings and conclusions. We therefore affirm.

I.

We discern the following facts from the record. Yvonne had a long history with the Division, including the May 2012 termination of her parental rights to her then four-year-old

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

daughter, A.I.B. (Alice). Yvonne had also engaged in criminal activity since her youth, with at least eleven felony convictions for assault, theft, and drug offenses. By her own account, the police arrested her between fifty and seventy times during her life. She long struggled with drug abuse and admitted to alcohol, heroin, and cocaine abuse. She also suffered from bipolar disorder and failed to comply with the services provided to her from the Division. According to Yvonne, Wade left her upon learning of her pregnancy.

In early December 2012, prior to Colleen's birth, the Division received a referral regarding Yvonne's late-term pregnancy, her history of substance abuse, and her failure to attend her last four pre-natal appointments. During the Division's investigation, Yvonne stated she only missed the appointments due to Hurricane Sandy. While Yvonne acknowledged the termination of her parental rights to another child six months before, she claimed she had not used drugs since April 2007. Diagnosed with a bipolar disorder, she refused to take her prescribed medication.

Approximately one week later, the hospital notified the Division that Yvonne delivered Colleen the day before, and both mother and baby tested positive for cocaine. During the Division's investigation, Yvonne again denied using cocaine, but claimed her positive drug test came from bagging cocaine before selling it.

Subsequently, the Division substantiated Yvonne for abuse and neglect based upon both Yvonne and Colleen testing positive for cocaine.

On December 14, 2012, the Division completed an emergency removal of Colleen from Yvonne's care and placed her into foster care with Yvonne's distant cousin. On January 7, 2013, the court granted an order continuing Colleen in the custody of the Division. The court noted the recent termination of Yvonne's rights to another child, and that she had previously exposed two other children to drugs.

Regarding Wade, the Division served him with its complaint seeking the care, custody, and supervision of Colleen, and provided him with contact information for the Division. Although Wade failed to attend the January 7 court hearing, he appeared at the Division's office four days later, stating he filed an application for counsel. On March 18, 2013, the court ordered Wade to complete DNA testing; he requested visitation if the DNA test confirmed paternity.

In June 2013, after DNA testing confirmed Wade's paternity of Colleen, the Division referred him for a drug and alcohol assessment and a psychological evaluation, and arranged for visitation. However, Wade failed to comply with services, attend visitation, or maintain contact with the Division. Wade failed

to attend any of the nine court hearings between July 2013 and December 2014.

At the January 7, 2013 court hearing, Yvonne admitted to a drug relapse and agreed to participate in services. The Division provided her with a family team meeting and arranged for visitation, drug treatment, parenting skills classes, and a psychological evaluation. However, she failed to attend visitation consistently. She enrolled in drug treatment on February 14, 2013; within four weeks, she tested positive for cocaine.

On March 18, 2013, Yvonne stipulated to a finding of abuse and neglect for her conduct leading up to Colleen's birth. She admitted she had a long history of substance abuse problems. The court ordered Yvonne to complete drug treatment and parenting skills classes. Ten days later, Yvonne's drug treatment program discharged her for non-compliance. In April 2013, the Division referred Yvonne to parenting skills classes, but she failed to attend.²

For the next seventeen months, the Division attempted to provide Yvonne with services, but her participation was either absent or inconsistent. During this time, numerous warrants

² By October 2013, defendant finally completed her parenting skills program.

remained outstanding for her arrest. In June 2013, Yvonne refused to provide a urine sample, and in December 2013, she refused to attend a scheduled psychological evaluation.

On September 29, 2014, after Yvonne failed to appear for a permanency hearing the second time in three weeks, the court approved the Division's revised permanency plan of termination of parental rights, followed by adoption. At that time, Yvonne had not resolved the warrants against her, signed releases for the Division to clarify her medical condition, or visited with Colleen in over two months. In a separate order, the court exempted the Division from making reasonable efforts to reunify Yvonne with Colleen based upon the prior termination of Yvonne's parental rights to Alice.

On November 13, 2014, the Division filed its complaint for guardianship and served it upon Wade, along with an order to show cause directing him to appear in court on the December 18, 2014 return date. The order to show further advised him the court would consider the merits of the case in his absence. The process server also informed him his failure to appear in court could result in the termination of his parental rights. Wade also received contact information for his Division caseworker and the Deputy Attorney General.

On December 2, 2014, Yvonne attended a family team meeting,

where the Division personally served her with the order to show cause, complaint for guardianship, and application for counsel. Both defendants failed to appear at the December 18 return date of the order to show cause.

At the next hearing, on February 4, 2015, the court confirmed the Division sent Wade a letter advising him of the court date and the need for him to attend. When Wade again failed to appear, the court entered default against him based on his failure to appear, his lack of contact with the Division, and his failure to visit with his child. From February through July 2015, Wade failed to contact the Division, and correspondence sent to him came back as "not deliverable."

Meanwhile, Yvonne maintained only sporadic contact with the Division after the transfer of the case to the adoption unit. While Yvonne failed to attend visitation, she accepted checks sent by the Division to assist her with transportation to the visits. On May 6, 2015, Yvonne appeared with an attorney, and the court ordered her to comply with evaluations and execute medical releases to allow the Division to obtain information regarding her claim of a heart condition. The Division reported Yvonne's failure to visit Colleen. The court ordered the Division to assist Yvonne with transportation to visitation, but clarified this did not require the Division to personally transport her.

On June 1, 2015, Yvonne admitted to her caseworker she had not resolved the outstanding warrants against her; in addition, she and her paramour lacked housing. Yvonne agreed to contact the caseworker regarding visitation and to notify the Division if she needed assistance with transportation; however, from May through November 2015, Yvonne only visited Colleen twice.

On August 14, 2015, Dr. Samiris Sostre completed a psychiatric evaluation of Yvonne, after she failed to keep her first appointment. Yvonne acknowledged her lack of compliance with Division services, and admitted to a history of depression, but denied any bipolar disorder. She claimed she last abused cocaine in December 2012. Dr. Sostre diagnosed Yvonne with depression and post-traumatic stress disorder, and recommended counseling.

On September 16, 2015, during a permanency hearing, Yvonne's counsel informed the court and the Division that his client recently underwent heart surgery. The court also learned of Yvonne's continued failure to visit with Colleen and her continued failure to address her outstanding arrest warrants.

On September 24, 2015, Yvonne attended a psychological evaluation with Dr. Eric Kirschner; however, she left early, before the completion of the evaluation. She failed to attend her re-scheduled appointment on October 13, but ultimately completed the evaluation on November 17, 2015. While initially claiming she

never missed visitation, she later acknowledged missing recent visits, citing health issues. Yvonne admitted she had memory issues and experienced episodes of lost time; nevertheless, she believed her health had no impact on her ability to raise Colleen. She admitted receiving a bipolar diagnosis. She reported she had been arrested at least seventy times and incarcerated for periods as long as eighteen months.

Dr. Kirschner described Yvonne as narcissistic with antisocial personality traits, and self-centered, with problems responding to the needs of others. She tends to place her needs above those of her children. He concluded Colleen would face a risk of harm in Yvonne's care.

Dr. Kirschner also performed a bonding evaluation between Yvonne and Colleen. While he described Colleen as "generally comfortable" with Yvonne, she did not respond to Yvonne's displays of affection, nor did she initiate showing affection toward Yvonne.

Meanwhile, on October 6, 2015, the Division removed Colleen from her relative placement after an investigation by the Office of Licensing caused Yvonne's cousin to lose her foster boarding home license. On November 2, 2015, the Division placed Colleen in a new foster home.

On December 11, 2015, Dr. Kirschner observed Colleen with her new foster mother. Colleen referred to her foster mother as

"mommy," and she did not want her foster mother to leave the room without her. For her part, the foster mother appeared committed to Colleen and stated she wanted to adopt her. Despite Colleen's short time in this new home, Dr. Kirschner believed a parent-child bond existed, presenting the foundation for the development of a secure attachment between Colleen and her new foster mother.

On January 11, 2016, four days before the scheduled start of the guardianship trial, Wade appeared at the Division's office, claiming he had been incarcerated since his last contact with the Division. He received an application for counsel and the name of his prior attorney. The following day, the Division filed an emergent application with the court to seek expedited processing of Wade's application for counsel and an adjournment of the trial date. The court granted the Division's motion, postponed the trial for four days, and agreed to hear any applications to vacate the default against Wade on that date.

On January 19, 2016, the court heard Wade's motion to vacate default. His attorney submitted Wade's unsigned certification, stating he had been unable to participate in the guardianship litigation due to "unforeseen circumstances." Wade finally appeared in the closing minutes of the hearing. He informed the court he had never seen Colleen. He was homeless, and his incarceration resulted from his failure to pay child support.

On cross-examination, he admitted receiving the guardianship complaint; although he had access to a telephone, he admitted he failed to contact the Division. The court determined Wade failed to show excusable neglect and presented no viable defense. Nevertheless, the court permitted Wade to undergo a psychological evaluation, and then submit a new application to vacate default. The court ordered Wade to comply with a urine screening. Wade stated he may test positive for marijuana; ultimately, he tested positive for cocaine and antidepressants.

On February 4, 2016, Wade appeared for his evaluation with Dr. Kirschner. Wade arrived late for the meeting, disheveled and irritable. He related obtaining a high school degree, but only a limited employment history. He admitted to anger management issues, but never completed an anger management course. Contrary to his testimony before the court, he indicated twice visiting with Colleen. He currently resided in a boarding home; he admitted to abusing drugs and alcohol and last used cocaine on January 18, 2016. Dr. Kirschner determined that Wade lacked empathy and an understanding of child development, rendering him incapable of caring for a child in the foreseeable future. He recommended against allowing Wade any visitation. That same day, Wade informed the Division he used cocaine and declined to provide his address to his caseworker. On February 17, 2016, the court granted Wade's

motion to vacate default, but denied his requests for visitation and a bonding evaluation between himself and Colleen.

The trial started on March 16, 2016, and lasted two days. The Division presented the testimony of two caseworkers and a supervisor, along with expert testimony from Dr. Kirschner and Dr. Sostre. Yvonne testified on her own behalf and submitted photographs of an unfurnished apartment. Although Yvonne participated in defense evaluations, she did not present any expert testimony. Wade did not testify nor did he present any other witnesses. After hearing closing arguments, the trial judge placed an oral opinion on the record setting forth his reasons for terminating defendants' parental rights.

Specifically, the judge made credibility findings regarding the expert and lay testimony presented. He addressed the factual basis for finding that Wade failed to involve himself in Colleen's life, explaining he thwarted the Division's efforts to provide him with services, and determined that the termination of Wade's rights would not harm Colleen.

As for Yvonne, the court noted her twenty-year history with the Division, her drug abuse problems spanning two decades, her extensive criminal history, and her significant mental health problems. He found Yvonne's testimony not credible, noting she failed to take responsibility for her lifestyle, and had her rights

to another child terminated shortly before the birth of Colleen. Despite her prior contacts with the Division, Yvonne failed to forego using drugs and present herself honestly to the Division after Colleen's birth. The judge determined Yvonne's failure to stabilize her life, inability to develop a relationship with Colleen, continued drug use, and failure to comply with services all combined to cause harm to Colleen.

The judge further noted Yvonne's lack of stability, joblessness, drug use, failure to consistently visit Colleen, lack of pre-natal care, and overall abandonment of Colleen as harmful events. Other examples of Yvonne's unstable life included her inability to resolve the outstanding arrest warrants against her even after the passage of two years. The judge found Yvonne incapable of parenting for the foreseeable future.

The judge found the Division provided Yvonne with services and funds for transportation to visitation, but Yvonne failed to make an effort to complete the services or to become reunified with Colleen. The Division also assessed relatives and initially placed Colleen with a relative, pursuant to Yvonne's request. Overall, the Division provided reasonable efforts aimed at reunification, notwithstanding N.J.S.A. 30:4C-11.3(c), relieving the Division of its obligation to provide reasonable efforts to reunify the child with a parent if the parent's right to another

child has been involuntarily terminated.

The judge specifically found the opinions of Dr. Kirschner credible. The judge determined Yvonne incapable of caring for a child for the foreseeable future, because she never rectified the instability in her life and never addressed her substance abuse problem. Finally, the judge noted Dr. Kirschner's "glowing" bonding report regarding the evaluation he performed between Colleen and her new foster mother. In contrast, the judge stated, "The mother's a stranger[,] who "has not shown a willingness to give up what she has to [give up], to do what she has to [do], to develop a relationship, to get the stability in her own life that she needs before she can take care of this child."

The judge adopted the conclusion of Dr. Kirschner "that both of these parents are incapable of parenting now or in the foreseeable future," and "that termination of parental rights would not do more harm than good." The judge therefore concluded the Division had satisfied the four prongs of the best interests test by clear and convincing evidence, warranting the termination of defendants' parental rights.

II

In striking a balance between a parent's constitutional rights and the children's fundamental needs, courts engage in the four-part guardianship test articulated in N.J. Div. of Youth &

Family Servs. v. A.W., 103 N.J. 591, 604-11 (1986), and codified as N.J.S.A. 30:4C-15.1(a):

The division shall initiate a petition to terminate parental rights on the grounds of the "best interests of the child" pursuant to subsection (c) of section 15 of P.L.1951, c. 138 (C.30:4C-15) if the following standards are met:

(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 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.

In their application, the four factors above "are not discrete and separate, but relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 167 (2010) (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 606-07 (2007)).

On this appeal, we must defer to the trial judge's factual determinations unless those findings "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) (citation omitted). We will not disturb the judge's factual findings so long as "they are 'supported by adequate, substantial and credible evidence.'" In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993) (citation omitted). And we owe special deference to the judge's credibility determinations. Cesare v. Cesare, 154 N.J. 394, 411-13 (1998).

Gauged by those standards, we find no basis to disturb the trial judge's factual findings, his decision to credit the expert opinions of Dr. Kirschner, or his decision to terminate defendants' parental rights. On this appeal, defendants each raise a series of arguments that we find are insubstantial and not supported by the record. Except as addressed herein, their appellate arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Wade contends the court and the Division denied him of procedural due process, before and during the guardianship trial. He alleges that the Division failed to provide him with notice of the guardianship trial, and the trial court failed to give him enough time to prepare for trial. Wade failed to raise these

claims in the trial court. We therefore apply a plain error standard of review. Pursuant to Rule 2:10-2, we will affirm the challenged actions of the trial court unless they were clearly capable of producing an unjust result.

Here, the record contains no support for Wade's argument that his due process rights were violated at any point during the litigation. At the outset, the Division timely served Wade with the complaint in the abuse and neglect case; he had assigned counsel; and he received contact information for the Division. After completing his DNA testing, he failed to maintain contact with the Division for an extended period.

The Division also timely served Wade with the guardianship complaint in December 2014. He received oral and written notice that failure to participate in the litigation could result in his default. Nevertheless, Wade failed to attend the psychological and substance abuse evaluations scheduled by the Division.

When Wade appeared at the Division's offices in 2016, he received an application for counsel. The Division requested and received an adjournment of the upcoming guardianship trial to allow Wade time to prepare his case. The judge also eventually vacated the default entered against Wade after he underwent a psychological evaluation. Also, he continued to use cocaine after service of the guardianship complaint, even on the eve of trial.

At the guardianship trial, assigned counsel represented him, and he had the opportunity to be heard. He declined to present any witness testimony or documentary evidence. Thus, Wade received full due process. We therefore discern no trial court error regarding the issue of due process, and certainly no plain error considering the overwhelming evidence supporting the judge's decision to terminate Wade's parental rights to Colleen.


The record also fully supports the trial judge's conclusion Yvonne presented no basis for removing Colleen from her new foster mother, who wants to adopt her. We are not persuaded by Yvonne's efforts to downplay her substance abuse problems, mental health issues, extensive criminal history, and failure to cooperate with the Division. Nor can we agree that the Division offered insufficient services; instead, the record clearly shows a blatant failure on the part of Yvonne to avail herself of available services.

In this case, Yvonne's failure to complete services denied her the opportunity to regain custody of Colleen. Because she failed to visit her regularly, she never developed a meaningful bond with Colleen. By the conclusion of the trial, Colleen had remained in foster care for almost forty months. During that time, Yvonne made no meaningful progress in addressing her serious problems that rendered her incapable of becoming a stable parent.

Young children need parents who are consistently available to care for them. They do not have a "pause" button that can be pressed when a parent continually fails to address serious issues that present potential harm to caring for children. "Ultimately, a child has a right to live in a stable, nurturing environment and to have the psychological security that his [or her] most deeply formed attachments will not be shattered." N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 453 (2012).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION