SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4151-15T2
A-4196-15T2

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

A.B. and P.U.B.,

Defendants-Appellants.

IN THE MATTER OF THE GUARDIANSHIP OF A.K.B.,

Minor.

Submitted May 17, 2017 – Decided June 21, 2017

Before Judges Fuentes and Farrington.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FG-09-0221-15.

Joseph E. Krakora, Public Defender, attorney for appellant A.B. (Anthony J. Vecchio, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant P.U.B. (Ruth Ann Harrigan, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Stephanie Asous, Deputy Attorney General, on the briefs).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Nancy P. Fratz, Assistant Deputy Public Defender, on the briefs).

PER CURIAM

Defendants P.U.B. (Petra) and A.B. (Anton) appeal from a judgment terminating their parental rights to their son A.K.B.[1] The trial court concluded that termination was appropriate in light of Petra's cognitive delays and substance abuse disorder, which inhibited her from safely caring for A.K.B. as it had for a second child, in the care of his putative father. The court found Anton's relationship with A.K.B to be virtually non-existent on account of his three incarcerations since A.K.B.'s placement and failure to have served as A.K.B.'s caretaker at any time. Both defendants challenge the court's conclusions and contend that the New Jersey Division of Child Protection and Permanency (Division) failed to establish, by clear and convincing evidence, the four

[1] We use pseudonyms for ease of reference and to protect the privacy of the children. R. 1:38-3(d)(12).

criteria of the best interests of the child standard embodied in N.J.S.A. 30:4C-15.1(a). The Division and the Law Guardian disagree and argue that the trial court's judgment should be affirmed. On June 19, 2016, we consolidated the appeals. Having considered the parties' arguments in light of the record and applicable legal standards, we affirm.

We will not recite at length the history of the Division's involvement with the family, which began on October 14, 2011, when the Division was granted legal and physical custody of A.K.B. due to inadequate housing issues and failure to submit to substance abuse evaluation after testing positive for marijuana. This case was subsequently closed on November 13, 2012. The case was re-opened on allegations of phencyclidine use by Petra's mother, T.B., with whom she shared a residence. The Division received reports of Petra leaving A.K.B. for long periods of time and her lack of compliance with the requirements of public assistance, placing her at risk of losing monetary benefits and temporary rental assistance. This resulted in Petra signing a safety protection plan which permitted homemakers into her home and barred her from leaving A.K.B. with T.B.

Much of the factual and procedural history that followed is set forth in the trial court's written opinion following the guardianship trial from which the present appeal is taken. It

suffices to say that the Division was granted custody of A.K.B. for the second time on October 31, 2013, after Petra failed to comply with recommendations for substance abuse services. After an initial placement in a non-relative resource home, A.K.B. was placed in the home of Petra's godmother, L.N., where he remains. After A.K.B.'s second removal, Petra was offered services including counseling by a Certified Alcohol and Drug Counselor (CADC), assessments, substance abuse treatment, psychological evaluations, individual counseling, and parenting skills classes.

In 2014, Petra was referred three times to Visiting Homemaker Service for parenting skills training and failed to complete all three referrals. In 2015, the Division provided Petra with parenting skills training at the Family Success Center, but Petra failed to complete the program. On December 3, 2013, Dr. Robert Kanen conducted a psychological evaluation of Petra. In his report, he found the testing showed evidence of cognitive limitations with low end functioning levels. He stated further that she showed significant deficits in attention, concentration, and short-term working memory. He further opined that marijuana abuse contributed significantly to those deficits. He concluded Petra was extremely self-centered, undependable, and emotionally unstable, and found the return of A.K.B. to her would expose the child to unnecessary risk of harm. Dr. Kanen recommended Petra

complete an intensive outpatient drug treatment program, parenting classes, individual psychotherapy, maintain housing, and acquire employment.

Petra was referred to Progressive Solutions for substance abuse and counseling services in early 2014. She was discharged after she failed to participate after April 2014. The Division had brief contact with Petra in September and October 2014 after receiving a referral after Petra was arrested and charged with child endangerment and possession of a firearm. At that time, Petra submitted to a CADC. After producing multiple negative screens, it was determined no further treatment was recommended. Following those contacts, the Division did not have contact with Petra until January 2015, when it referred her to Progressive Solutions as well as parenting skills classes and individual therapy at Family Success Center and C-Line Outreach Center. Thereafter, she had one contact in March and one contact in June, and then her whereabouts were unknown until November 2015. In November 2015, the Division scheduled visits with A.K.B. every Monday at Division offices. Between November 2015 and January 2016, Petra visited twice.

The Division continued to offer Anton services throughout the litigation. At the time of trial, Anton was incarcerated and had been since April 2015. He was also incarcerated when the Division

was granted custody of A.K.B. in October 2013 and remained so until approximately November 2014. The paternity of Anton was confirmed in June 2014. The Division thereafter did arrange for him to have visits with A.K.B. while incarcerated. Three attempts were made while he was at Hudson County Correctional Facility in 2014. One visit took place, another was interrupted because of A.K.B.'s misbehavior, and A.K.B. slept through the third visit. The Division met with Anton about once per month to update him on A.K.B.'s school and health issues. When Anton was released from jail in November 2014, the Division attempted to meet with him in person on December 21, 2014, but he failed to appear. On December 22, 2014, the Division learned Anton had been re-incarcerated. He was released on January 8, 2015. The Division made contact with Anton on January 16, 2014 to meet on January 20, 2015, which meeting he did attend. A second meeting took place on February 23, 2015. In April 2015, the Division became aware that Anton had been re-incarcerated. Anton advised he did not want A.K.B. to visit him in jail.

The Division assessed and ruled out three alternate placements for A.K.B. A permanency hearing was held on October 7, 2014 and again on October 6, 2015. At both hearings the court found the Division's plan of termination of parental rights, followed by adoption was appropriate due to Petra's non-compliance

with services and lack of stable housing. Anton's incarceration rendered him unable to parent the child at the time. On March 31, 2015, the permanency litigation was terminated and superseded by the filing of the guardianship complaint. The trial began in January 2016 and concluded in March 2016. Although Petra was notified of the trial date, she failed to appear. Anton was produced from the Hudson County Correctional Center and was represented by counsel. T.J., defendant's paternal aunt, and E.J., defendant's paternal grandmother, testified on his behalf. His mother, S.B., was expected to testify but failed to appear on two court dates. The Division presented the testimony of Jason Swartwood, the adoption caseworker, and expert psychologist, Dr. Robert Kanen.

Judge Lourdes I. Santiago carefully reviewed the evidence presented and concluded the Division proved by clear and convincing evidence the four prongs of the best interests test, codified in N.J.S.A. 30:4C-15.1a(1) to (4), that:

> (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 . . . ;

> (3) The [D]ivision has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
>
> (4) Termination of parental rights will not do more harm than good.
>
> [N.J.S.A. 30:4C-15.1a(1) to (4). See also N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 604-11 (1986).]

On appeal, both defendants challenge the trial court's findings with respect to the statutory best interests test, which balances a parent's right to enjoy a relationship with his or her child and the State's interest in protecting the welfare of children. In re Guardianship of K.H.O., 161 N.J. 337, 346-47 (1999). "The four criteria enumerated in the best interests standard are not discrete and separate; they relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." Id. at 348.

The scope of our review of the trial court's findings of fact is well established. The trial court's factual findings will be sustained on appeal as long as "they are supported by 'adequate, substantial and credible evidence' on the record." N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)).

Furthermore, our deference to the trial court's findings of fact is "especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). We also give considerable deference to the factual findings of the Family Part, due to the court's "special jurisdiction and expertise in family matters." Id. at 413.

A. First Prong

As noted, prong one of the best interests standard requires the Division to establish that "[t]he child's safety, health or development has been or will continue to be endangered by the parental relationship". N.J.S.A. 30:4C-15.1(a)(1). To satisfy this prong, the Division must show that the parental relationship harmed the child's health, safety, or development, and the parental relationship will likely have a continuing deleterious effect on the child. K.H.O., supra, 161 N.J. at 347. The harm may, but need not, be physical. In re Guardianship of K.L.F., 129 N.J. 32, 43-44 (1992). Termination may be warranted on a showing of "[s]erious and lasting emotional or psychological harm", resulting from a parent's action or even inaction. Id. at 44. Indeed, a "parent's withdrawal of . . . solicitude, nurture, and care for an extended period of time is in itself a harm that endangers the

health and development of [a] child." In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999).

Although a single instance may suffice, the standard may be satisfied by evidence of an accumulation of harm over time. N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 506 (2004). That is the case irrespective of whether the parent is morally culpable for that harm, so long as the parent is "unable or unwilling to prevent [it] irrespective of [its] source". M.M., supra, 189 N.J. at 289. Moreover, the court need not wait "until a child is actually irreparably impaired by parental inattention or neglect." D.M.H., supra, 161 N.J. at 383. A risk of harm may be shown "'not only from [a parent's] past treatment of the child in question but also from the quality of care given to other children in [his or her] custody.'" N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 573-74 (App. Div. 2010) (quoting J. v. M., 157 N.J. Super. 478, 493 (App. Div.), certif. denied, 77 N.J. 490 (1978)).

In her thorough written opinion, Judge Santiago wrote as to both Petra and Anton that A.K.B. has been in the physical and legal custody of the Division for more than two years.

> This is A.K.B.'s second placement in the Division's custody. A.K.B. was placed in the Division's custody in October 2013, after Petra and T.B. failed to comply with substance abuse services for marijuana and PCP,

> respectively, with homemaker services and Petra's failure to acquire stable housing. At the time of the removal, [Anton] . . . was incarcerated, and thus, unable to care for A.K.B.
>
> It took [Petra] a full year from A.K.B.'s removal to comply with a substance abuse treatment recommendations. [F]rom his removal through the date of trial, [Petra] has been inconsistent with visiting A.K.B., often disappearing for months at a time and has been inconsistent with maintaining contact with the Division. [Petra] knows the resource parent, however, she has failed to avail herself of the opportunity to visit A.K.B. in the resource home . . . .
>
> Additionally, [Petra] has failed to complete court ordered services, including parenting skills classes and individual counseling despite multiple referrals . . . Dr. Kanen opined at trial that the child would be at risk of continued harm if returned to [Petra]'s care as she has not been meeting his day to day needs for more than two years. A.K.B.'s needs would likely go unrecognized and any gains he has been made while in placement would likely be lost.

As to Anton, specifically, the court found:

> [T]he relationship between A.K.B. and [Anton] has been virtually non-existent . . . . [Anton] was incarcerated from October 2013 until about November 2014; December 2015 to January 2015; and then again from April 2015 to present.
> [Anton] admits that he was sentenced in April 2015 to his alternative sentence of four to five years for violating his probation term in Drug Court . . . .
>
> Dr. Kanen opined that A.K.B. presented avoidant and insecure attachment with regard

> to [Anton]. It does not appear that prior to [Anton]'s incarceration that A.K.B. had a strong relationship with him, and [sic] no evidence in the record that he ever served as a caretaker.

Anton argues that he had never caused any harm to A.K.B. and termination was not in A.K.B.'s best interest. Although it is true that there is no evidence Anton physically caused harm to A.K.B., there is no basis in the record for his assertion that termination is not in the child's best interests. As Judge Santiago eloquently explained, Anton's unabated criminal behavior caused him to become estranged from his own child. Although not as visible as the scars of physical abuse, the emotional and psychological trauma caused by the absence of a parent can also leave a child permanently injured.

Petra argued the Division failed to make any accommodations in light of her disability, referring to her low level of cognitive function. Specifically, Petra claims the Division failed to make an individualized assessment of the tailored services necessary for her. However, the record is clear that Petra failed to avail herself of the services offered to her, including parenting skills classes and individual counselling. Dr. Kanen's testimony and opinion is that "the child's safety, health and development has been or will continue to be endangered by the parental relationship." We are satisfied that the Division has shown the

parental relationship harmed the child's health, safety, or development, and the parental relationship will likely have a continuing deleterious effect on the child. Consequently, we conclude that sufficient credible evidence in the record supports the court's finding that the Division satisfied the first prong of the best interests test.

B. Prong Two

Under the second prong, the court must consider not only whether the parent can remove the danger to the child, but whether he or she can do so "before any delay in permanent placement becomes a harm in and of itself." N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 434 (App. Div. 2001), certif. denied, 171 N.J. 44 (2002). Indeed, courts must be "cognizant of New Jersey's strong public policy in favor of permanency." K.H.O., supra, 161 N.J. at 357. Termination may be appropriate, for example, where a parent's ongoing history of substance abuse has caused or contributed to the parent's inability to provide a safe and stable home for the child. Id. at 352-54. Furthermore, this prong can be satisfied "if there is clear and convincing evidence that the child will suffer substantially from a lack of stability and a permanent placement and from the disruption of [his or] her bond with foster parents." Id. at 363.

Here, Judge Santiago found the Division presented unrebutted

and credible evidence that Petra and Anton were unable or unwilling to eliminate the harm facing their child. The judge noted Dr. Kanen's credible and uncontroverted testimony that Petra, "continues to present as an unreliable and unstable figure, and as a result, is unable to safely parent her child." Dr. Kanen, who saw Petra three times over 2012, 2013, and 2015 opined that she has "longstanding personality and cognitive issues which impair her ability to safely care for A.K.B." Judge Santiago found that Anton has been unable to provide A.K.B. with a safe and stable home due to his lengthy incarceration. The judge found, "both parents have contributed to a delay in permanency for A.K.B. and that would add to the harm he has already suffered." She noted "Dr. Kanen opined that permanency is necessary to a child's development as a child needs safety, security and consistency in their lives." There is sufficient credible evidence in the record to support the judge's factual findings.

The record supports the judge's conclusion that the Division established the second prong of N.J.S.A. 30:4C-15.1(a) with clear and convincing evidence. Petra and Anton's contentions to the contrary are without sufficient merit to warrant further comment. R. 2:11-3(e)(1)(E).

C. Prong Three

The third prong of the test for termination of parental rights

requires the Division to establish that it "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". N.J.S.A. 30:4C-15.1(a)(3). "[A]n evaluation of the efforts undertaken by [the Division] to reunite a particular family must be done on an individualized basis." D.M.H, supra, 161 N.J. at 390. The reasonableness of the Division's efforts is "not measured by their success." Id. at 393.

In her written opinion, Judge Santiago notes that the failure of a parent to become a caretaker for his or her child is not determinative of the sufficiency of the Division's efforts at family reunification. She concluded: "Here, the Division has clearly and convincingly established through the testimony of the Division worker and its evidence that it made reasonable attempts to help Petra and Anton achieve reunification with their child." The judge notes referrals on multiple occasions for CADC evaluations, individual counseling, parenting skills classes and parent/child visitation. She found:

> [Petra] was inconsistent in engaging in services. One year after the child's placement, [Petra] did complete a substance abuse assessment and an extended assessment in October 2014, resulting in no treatment recommendations. However, [Petra] failed to complete recommended parenting skills classes

> and individual counseling despite numerous referrals.

The court also noted Petra's visits with A.K.B. were sporadic through the case "as she often disappeared for months at a time. This is the same conduct which led to the child's removal." The judge considered and rejected Petra's contentions that the Division failed to provide reasonable services to help Petra correct the circumstances that led to her child's out of home placement. The court pointed to Dr. Kanen's evaluation in 2012 where he found Petra to have a low level of cognitive functioning and that daily life and full-time sustained employment is likely to be an uphill struggle. The judge wrote,

> In his evaluation in 2013, he found she had no history of mental illness, or history of suicide attempts. He placed her at the low end of the borderline range of intelligence. He repeated that her cognitive functioning had declined since her evaluation in 2012. However, he attributed such to substance abuse, which at the time was marijuana.

Judge Santiago quoted Dr. Kanen as describing Petra as a "self-defeating" individual, "someone who can function on a satisfactory basis as long as she is supported by others", that "where she has to interact with the world around her and support herself and her children, she is likely to be irritable, confused, disorganized and oppositional." The judge noted that in his final psychological evaluation of Petra, Dr. Kanen found, "she is likely

to have difficulty adequately recognizing physical and psychological dangers in the environment that could pose as risk of harm to her child." Although her marijuana use appeared to be in full remission, he concluded that her prognosis to become a competent parent was poor. Dr. Kanen recommended that Petra continue with individual therapy to resolve her anxiety and develop competent social living skills stating that her cognitive delays might improve with such therapy but it was unclear from her history of non-compliance with services that she would commit to the long-term treatment needed for her to address her cognitive delays.

As we noted earlier, Judge Santiago addressed the factors relevant to Anton when considering whether a parent's incarceration supports or cautions against termination of parental rights. Those factors included Anton's lack of relationship with the child prior to incarceration, the risk posed by the parent's criminal disposition, the efforts made by the parent to remain in contact with the child since incarceration, rehabilitation accomplished since incarceration, the effect of the continuation of the parent-child relationship on the psychological and emotional well-being of the child, the need for the child to have permanency and stability, and whether the parent child relationship will undermine that need. The court noted Anton's efforts to obtain secondary education while in jail and the fact

that he was not permitted to receive substance abuse services until he completed those educational classes. The judge concluded that the Division's efforts as to both defendants, while unsuccessful in ensuring reunification, were nonetheless reasonable.

Judge Santiago also considered alternatives to termination of parental rights, specifically Kinship Legal Guardianship (KLG). KLG is appropriate only when adoption is neither feasible nor likely. N.J. Div. of Youth and Family Serv. V. P.P., 180 N.J. 494, 509 (2004). The Division caseworker testified that the resource parent had expressed a preference for adoption. The resource parent was Petra's godmother and A.K.B. had been placed with her at Petra's request. The trial court noted the Division explored four relatives in this matter and found that all were ruled out and the rule-outs were proper. The judge's conclusion that the Division satisfied the third prong of the best-interest standard finds the support of sufficient credible evidence in the record. Defendants' arguments to the contrary warrant no additional discussion. R. 2:11-3(e)(1)(E).

D. Prong Four

To satisfy the final prong, the Division need not demonstrate that no harm will result from termination, but that any such harm will be outweighed by the harm resulting from non-termination.

K.H.O., supra, 161 N.J. at 355. This analysis is meant to act as a fail-safe and prevent "an inappropriate or premature termination of parental rights" even if the Division satisfies its burden as to the rest of the standard. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 453 (2012).

"Inherent in the fourth [prong] is that a child has a 'paramount need for a permanent and defined parent-child relationship' . . . as well as a deep need for a nurturing adult, commonly termed the 'psychological parent.'" N.J. Div. of Youth & Family Servs. v. C.S., 367 N.J. Super. 76, 119 (App. Div.) (quoting In re Guardianship of J.C., 129 N.J. 1, 26 (1992)), certif. denied, 180 N.J. 456 (2004). When a parent has harmed a child through abuse or neglect and is unable to remediate the danger to the child, and when the child has bonded with foster parents who have provided a safe and nurturing home, termination of parental rights likely will not do more harm than good. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 108 (2008). "The 'good' done to a child in such cases in which reunification is improbable is permanent placement with a loving family". Ibid.

Here, Judge Santiago carefully recounted the results of Dr. Kanen's bonding evaluations, noting that A.K.B. had an impaired and insecure attachment to Petra, was avoidant and insecure with Anton, and had bonded with and had a secure attachment to the

resource parent. The court relied on the unrebutted testimony of Dr. Kanen that A.K.B. would not suffer severe and enduring harm if permanently separated from either birth parent but that if there was a separation or brief reaction from that separation the resource parent could mitigate. However, if removed from the resource parent, A.K.B. would be seriously harmed because the resource parent has been a stable figure in his life and he would lose the only maternal figure he knows. The judge therefore concluded that termination would not do more harm than good.

In summary, we are bound by the trial judge's factual findings so long as they are supported by sufficient credible evidence in the record. M.M., supra, 189 N.J. at 279. Here, Judge Santiago accepted the Division's evidence as credible, and properly found the Division satisfied all four prongs of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence. To the extent we have not specifically addressed any of defendants' remaining arguments, we deem them without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.