

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4197-15T4

NEW JERSEY DIVISION
OF CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

M.F.,

Defendant-Appellant,

and

M.M.,

Defendant.

IN THE MATTER OF THE GUARDIANSHIP
OF N.F., a Minor.

Submitted March 16, 2017 – Decided April 10, 2017

Before Judges Lihotz and O'Connor.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Cape May
County, Docket No. FG-05-01-16.

Joseph E. Krakora, Public Defender, attorney
for appellant (Marc D. Pereira, Designated
Counsel, on the brief).

Christopher S. Porrino, Attorney General,
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General, on the brief).

Joseph E. Krakora, Public Defender, Law
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counsel and on the brief).

PER CURIAM

Defendant M.F. (mother) appeals from the May 18, 2016
Family Part judgment terminating her parental rights to her son,
N.F. (Nick), currently three years of age.¹ Nick's father, M.M.
(father), died during the guardianship litigation.

The mother does not challenge the trial court's finding the
New Jersey Division of Child Protection and Permanency (the
Division) proved by clear and convincing evidence the first,
second, and fourth prongs of the four-prong standard codified by
the Legislature in N.J.S.A. 30:4C-15.1(a).² The mother also does

¹ We use a pseudonym for "Nick" to protect the child's privacy.

² The four prongs of this statute are:

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

not argue the Division failed to make reasonable efforts to provide services to help the mother correct the circumstances which led to Nick's removal from her care, one of the elements of the third prong of this statute. See N.J.S.A. 30:4C-15.1(a)(3). The mother's sole contention is the trial court erred by finding the child could remain with his resource parent, instead of being placed with his paternal great aunt (aunt). After reviewing the record and the applicable legal principles, we affirm.

(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.

[N.J.S.A. 30:4C-15.1(a).]

In April 2014, four months after the then seventeen-year old mother gave birth to Nick, the Division executed an emergent removal of Nick from the mother's care, primarily because of her use of illicit substances. Nick was placed with his current resource parent, with whom he has lived since. His resource parent wishes to adopt him.

After the removal, the court awarded the Division custody, care, and supervision of the baby. Thereafter, the mother was ordered to submit to substance abuse and psychological evaluations, and comply with any treatment recommendations. Her psychological evaluation revealed she was not an appropriate caretaker for the child, was in need of a number of services, and would likely require a lengthy period of time to make any significant changes, delaying permanency for the child.

The mother did not faithfully avail herself of the services made available to her and did not succeed in making any of the changes necessary for reunification. As previously stated, it is not disputed the Division proved by clear and convincing evidence the first, second, and fourth prongs of N.J.S.A. 30:4C-15.1(a) and, under the third prong, the Division made reasonable efforts to try and rehabilitate the mother.

In July 2015, the Division filed a complaint for guardianship. The Division investigated various relatives and friends of Nick's family to determine if Nick could be placed with any of them. A total of eight were considered, but all were rejected.

In November 2015, Nick, then just one month shy of his second birthday, and his resource parent submitted to a bonding evaluation, conducted by James L. Loving, Psy.D. In his report, Dr. Loving noted Nick exhibited a strong, positive, and healthy attachment to his resource parent. Dr. Loving found Nick viewed the resource parent as not only a stable, responsive, and nurturing caregiver, but also his "most central and important parent figure." Dr. Loving opined if Nick were removed from the resource parent's care, he would be placed at "high risk for serious and enduring emotional harm."

In December 2015, the father died. The mother's Division caseworker from the Division attended the father's wake, held on January 2, 2016. At that time, the aunt approached the caseworker and advised she was interested in adopting Nick. The Division had not been aware of the aunt or of her interest in Nick. The Division reached out to Dr. Loving to learn what the impact to Nick would be if transferred to his aunt's custody. Dr. Loving, who had not yet issued his written report about his

evaluation of the bond between Nick and his resource parent, stated he wanted time to think about any transition, but proffered if one were done, it would have to be done slowly and the aunt would have to be "extremely consistent."

According to a contact sheet issued in February 2016, a Division caseworker told the resource mother Dr. Loving had said Nick could be moved to the aunt's home "without harm." In her testimony, the caseworker clarified Dr. Loving did not recommend Nick be moved, but if he were, any transition would have to be done slowly. The caseworker also testified that, later that month, the Division decided not to pursue placing Nick with his aunt, because of the length of time Nick had been living with the resource parent and the bond that had formed between them.

During a case management hearing held on February 24, 2016, the Law Guardian requested and the court granted, without objection from the mother, an order reserving the law guardian's right to a "best interest hearing" before Nick could be removed from the resource parent's home. By letter dated April 19, 2016, the Division notified the aunt it would not be placing Nick in her home.

In March 2016, Dr. Loving issued his report on his bonding evaluation, the highlights of which were previously noted. He also addressed placing Nick with his aunt, stating the child

could potentially overcome the risk he would be harmed, as long as he were placed in the care of an adult who could provide him with a sense of stability, safety, and nurturance. Dr. Loving explained he provided this advice merely because the Division inquired if the child could be successfully transferred to the aunt's home. However, Dr. Loving maintained he was recommending Nick remain with the resource mother, and supported her plan to adopt him. Dr. Loving stated:

[E]ven with that possible plan [of placing Nick with his aunt] in mind, I noted that [Nick] shared a positive and strong attachment with [the resource parent] and that I would support adoption with her I support the Division's primary goal for [Nick], which is adoption by [the resource parent]. In my opinion, that outcome would give [Nick] a very good chance to enjoy a physically safe and emotionally healthy home as he grows older. All children need a sense of permanency as early as possible, or else will find themselves at gradually increasing risk for emotional problems. In my opinion, adoption by [the resource parent] would give [Nick] the best chance of experiencing a true and lasting sense of permanency, and in this way, adoption would be a healthy outcome for him.

Dr. Loving's trial testimony was consistent with his report. Among other things, he stressed the strong attachment Nick has to the resource parent, and that removing him from her care would be a "fairly high-risk situation." He testified Nick needed a "truly permanent . . . for lack of a better term - a

forever home, as soon as possible. And the longer he finds himself in a situation that is impermanent, the higher the risk is for him . . . to feel unsettled, to not feel a deep sense of permanency." Dr. Loving explained the ramifications of not attaining permanency sooner rather than later:

[Nick] is at a point right now in his development where he's showing signs of stranger anxiety, separation anxiety. These are normal at this age but strong for him, based on this caregiver's descriptions and based on my observations. He's at, you could say, a critical point or turning point in his development.

If he is in a situation that feels uncertain, that is uncertain, this can be a situation that could magnify those sorts of difficulties, so that he doesn't grow out of those in the way that most kids do, so that these pronounced problems continue on and get more and more pronounced. The sooner he could feel a sense of permanency, and be in a home that – that literally is permanent for him the better chance he would have of feeling secure, feeling clear in who he is, and where he belongs, and where he'll be looking forward. And that'll be a healthier situation for him. . . .

[H]e has a healthy outcome available to him, which is adoption by his current caregiver, and that . . . would give him the chance to experience permanency relatively soon.

Dr. Loving testified Nick could transition to the aunt's home but, consistent with his report, stated the move would have to be carried out gradually and the child's response would have

to be monitored after each visit with the aunt, "to get a sense of what . . . the timing might be in terms of moving forward."

The trial court found the Division considered placement with Nick's relatives, including the aunt, as evidenced by the Division reaching out to Dr. Loving to learn what the impact to Nick would be if removed from the resource parent's home. However, on the basis of Dr. Loving's recommendation, the court determined it was in Nick's best interests to remain with his current caretaker.

II

As previously stated, the mother's principal contention on appeal is the court erred when it determined the third prong of N.J.S.A. 30:4C-15.1(a) was fulfilled. The mother argues the Division did not meet this prong because Nick was not placed with a relative and, specifically, with his aunt.

Appellate review of a determination terminating a parent's rights is limited. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278-79 (2007). The factual findings which undergird such a judgment "should not be disturbed unless 'they are so wholly insupportable as to result in a denial of justice,' and should be upheld whenever they are 'supported by adequate, substantial and credible evidence.'" In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)

(quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974)); see also Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988).

Of course, "[w]here the issue to be decided is an 'alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom,' we expand the scope of our review." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188-89 (App. Div. 1993)). "Despite such circumstances, deference will still be accorded to the trial judge's findings unless it is determined that they went so wide of the mark that the judge was clearly mistaken." Ibid. However, this court accords no special deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts," Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), which this court reviews de novo. Dep't of Env'tl. Prot. v. Kafil, 395 N.J. Super. 597, 601 (App. Div. 2007).

When the Division accepts a child into its care or custody, it must "initiate a search for relatives who may be willing and able to provide the care and support required by the child." N.J.S.A. 30:4C-12.1(a). We have long recognized "the Division's policy to place children with relatives whenever possible."

N.J. Div. of Youth & Family Servs. v. M.F., 357 N.J. Super. 515, 527 (App. Div. 2003). However, "there is no presumption in favor of placement with relatives." N.J. Div. of Youth & Family Servs. v. K.L.W., 419 N.J. Super. 568, 580 (App. Div. 2011). "The reality is that, no matter how fit or willing a proposed relative may be, a child will, in some instances, be better off remaining in a successful foster placement." N.J. Div. of Youth & Family Servs. v. J.S., 433 N.J. Super. 69, 85 (App. Div. 2013), certif. denied, 217 N.J. 587 (2014).

Further, the Division is not obligated to explore relatives who are identified by a parent late in the litigation. See K.L.W., supra, 419 N.J. Super. at 582. Parents cannot "expect the Division to locate a relative with no information" and "wait until the eve of the guardianship trial to identify a relative who is willing to adopt." Ibid. When determining where to place a child, the Division may take into account "the passage of time and the child's critical need for finality and permanency." J.S., supra, 433 N.J. Super. at 87.

Here, the uncontroverted expert evidence is Nick has a strong and healthy attachment to his resource parent, who Dr. Loving found to be a stable, responsive, and nurturing caregiver. If removed from her care, Nick would be placed at high risk for serious and enduring emotional harm. Nick has no

attachment to his aunt, with whom he does not have any relationship, let alone any bond.

Furthermore, Nick's aunt did not advise the Division she wanted to be considered as a placement for Nick until January 2, 2016, six months after the guardianship complaint was filed and just three and a half months before the trial started. Before then, the Division was unaware of the aunt's existence; the mother does not fault the Division for not discovering the aunt's interest in Nick sooner.

Although the Division is not obligated to explore relatives who are identified by a parent late in the litigation, see K.L.W., supra, 419 N.J. Super. at 582, nevertheless, in this matter the Division did so. However, the Division ultimately determined after consulting with Dr. Loving that placement with the aunt was not in Nick's best interests, and the mother fails to show it would have been. The Division may decline to place a child with a relative if it determines it is not in the child's best interests. J.S., supra, 433 N.J. Super. at 85; N.J.S.A. 30:4C-12.1. Even if the Division could be deemed remiss for not pursuing placement with the aunt, "[d]elay of permanency or reversal of termination based on the Division's noncompliance with its statutory obligations is warranted only when it is in the best interests of the child." K.L.W., supra, 419 N.J.

Super. at 581. Here, for the reasons provided by the expert, delay of permanency was not in Nick's best interests.

The mother focuses upon Dr. Loving's comment the child could be placed with the aunt without suffering any harm. In context, we do not read Dr. Loving's comment to mean no harm would occur if Nick is transitioned to the aunt's home. The expert qualified his statement, noting such a transition would be a "fairly high-risk" venture, which would have to be conducted slowly and the child's reaction to the aunt closely monitored.

We reiterate there is no presumption in favor of placement with a relative. Id. at 580. Placement with a relative does not necessarily trump a successful foster placement, see J.S., supra, 433 N.J. Super. at 85, especially if a child's need for finality and permanency has reached, as it has in this matter, a critical point. Id. at 87. Nick is not an experiment, and it is of vital importance he attain permanency at this time. He will achieve that if he remains with his resource parent.

We are satisfied the Division fulfilled the third prong by clear and convincing evidence. To the extent we did not explicitly address an argument advanced by a party, it is because the argument was without sufficient merit to require discussion in a written opinion. See R. 2:11-3(E)(2).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION