RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4702-15T4

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

Z.J.C. and D.E.A.,

Defendants,

and

K.S.,

Defendant-Appellant.

IN THE MATTER OF THE
GUARDIANSHIP OF K.A.S.
and A.S., minors.

Submitted March 28, 2017 – Decided April 24, 2017

Before Judges Reisner and Rothstadt.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FG-12-73-16.

Joseph E. Krakora, Public Defender, attorney for appellant (Sarah L. Monaghan, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Patrick Jhoo, Deputy Attorney General, on the brief).

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

PER CURIAM

Defendant K.S., who did not appear at the guardianship trial in this matter, appeals from the Family Part's May 25, 2016 guardianship judgment and order terminating his parental rights to his son, K.A.S., and daughter, A.S.,[1] and from a June 16, 2016 order denying his motion to vacate the judgment and order so that he could testify. The Division of Child Protection and Permanency (Division) and the Law Guardian contend that the orders should be affirmed. After reviewing the record in light of the applicable legal standards, we affirm substantially for the reasons stated by Judge Lorraine Pullen in her May 25, 2016 written decision that she filed and read into the record on that date, as well as in her

[1] The order also terminated the parental rights of the children's mother, defendant Z.J.C., as to both children and to her other two children (J.M.A. and G.E.A.) from another relationship. Z.J.C. did not file an appeal from the guardianship judgment and order terminating her rights.

June 16, 2016 written decision regarding defendant's motion to vacate.

The pertinent evidence was set forth in Judge Pullen's opinions and need not be repeated here in detail. Defendant's son was born on May 28, 2007, and his daughter on April 20, 2011. The Division became involved with the family in June 2013 after it received two referrals regarding the parents' substance abuse, lack of supervision for the children, and inadequate food and electricity in the home. After several positive drug screens and defendant's repeated failure to engage in recommended services, the Division commenced litigation in April 2014 for care and supervision of the children. The Family Part granted the Division's application and during the litigation ordered defendant to attend substance abuse treatment, comply with the program's recommendations, submit to a psychological evaluation, and to have only supervised contact with the children.

Both children were eventually placed with their maternal aunt and have lived with her since June 2014, due to their parents' longstanding substance abuse problems and psychological and psychiatric issues. The aunt wishes to adopt the children. According to the Division's expert psychologist, whose testimony was unrefuted at trial, the children have bonded with their aunt,

see her as a "psychological parent," and would experience severe emotional harm if removed from her care.

Defendant's therapeutic supervised visits were arranged through Catholic Charities, but were discontinued in February 2016 due to his repeated failure to attend scheduled visits. Although the court held a series of status hearings thereafter, defendant never asked the court or the Division to reinstate visitation, and he never completed the many services aimed at reunification that the Division offered to him prior to the guardianship trial.

At the conclusion of the trial, Judge Pullen tentatively scheduled the issuing of her decision for May 18, 2016. The date was later changed to May 25, 2016. A day prior to the decision being placed on the record, defendant signed a certification in support of a motion for an order re-opening the trial and permitting him to testify. In the certification, defendant claimed that his failure to appear for trial was due to "emotional problems and medical issues" and his "homeless[ness]" that prevented him from receiving mail "despite [his] listing at the . . . call center." As a result, defendant stated he "did not know the trial was listed for April 2016." Defendant acknowledged that the children were with the maternal aunt who wished to adopt them, and relied on that fact when he stated that "allow[ing him] to testify will not affect the children." There were no documents attached

to the certification. Despite signing that certification on May 24, 2016, defendant did not file the motion until June 14, 2016, and no explanation was provided for the delay.

In deciding the matter on May 25, 2016, Judge Pullen applied the best interests of the child test, N.J.S.A. 30:4C-15.1(a), and concluded that the Division had satisfied all four prongs. She found that the evidence was clear and convincing and "reveal[ed] that the children [were] not a priority for their biological parents," and that "[t]hese children need permanency and any further delay in establishing permanency is not in their best interest." With regard to the first prong of the test, Judge Pullen found defendant had unaddressed substance abuse and mental health issues, did "not have the ability to provide a safe and stable home," and was "unable to become fit to assume a parental role for the children now or in the foreseeable future." As to the second prong, she found defendant failed to accept and complete Division services, including substance abuse treatment, recommendations to interact consistently with the children, and to appear for psychological and bonding evaluations. Under the third prong, Judge Pullen found that the "[t]estimony [was] overwhelming that the Division has been 'reasonable' in its efforts to assist [defendant] in re-unifying with [his] children, however, [his] own self-defeating behaviors continue to derail all plans

toward that end." Relying on the Division's psychologist, Judge Pullen found the fourth prong satisfied and rejected defense counsel's argument that a kinship legal guardianship (KLG) would be an alternative to termination because no other relatives were proffered by either parent as a potential caregiver, and the aunt was willing to adopt the children.[2]

Defendant filed his motion to vacate. In Judge Pullen's written decision denying defendant's motion, she found his reliance on N.J. Div. of Child Protection & Permanency v. K.S.,[3] 445 N.J. Super. 384 (App. Div. 2016), a case in which a mother was permitted to re-open and give testimony after failing to appear for trial, to be misguided. The judge stated the court's inquiry is "fact specific, and the facts in the matter at bar do not rise to a level close to the circumstances of that case." Given defendant's "very long history of inconsistent participation with matters pertaining to his children," the judge concluded "granting such a motion would disturb the stability and permanency that the

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[2] Pursuant to N.J.S.A. 3B:12A-6(d)(3), a KLG is only proper when, among other things, "adoption of the child is neither feasible nor likely." See N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 513 (2004) ("[W]hen the permanency provided by adoption is available, kinship legal guardianship cannot be used as a defense to termination of parental rights . . . .").

[3] Although defendant in this matter has the initials K.S. as well, the proceedings are unrelated.

children were afforded by way of the termination order." This appeal followed.

On appeal, defendant argues:

> POINT I
>
> THE COURT ERRED IN DENYING [K.S.] THE OPPORTUNITY TO TESTIFY AFTER THE TRIAL HAD CONCLUDED
>
> POINT II
>
> THE COURT ERRED IN FINDING THAT DCPP ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT IT IS NECESSARY TO TERIMINATE [K.S.'S] PARENTAL RIGHTS IN ORDER TO PROTECT [HIS CHILDREN'S] BEST INTEREST
>
> A. Without [K.S.'s] Testimony, the Court Lacked Sufficient Evidence to Determine Whether [K.S.] had Remedied the Harm that Caused his Children to Be Removed
>
> B. The Trial Court Erred in Finding that DCPP Provided Prong Three by Clear and Convincing Evidence Because the Court did not Properly Consider Alternatives to Termination of Parental Rights
>
> C. Without [K.S.'s] testimony, the Trial court Lacked Sufficient Evidence to Determine Whether Terminating [K.S.'s] Parental Rights Would Do More Harm than Good

We are not persuaded by defendant's arguments. Based on our review of the record, we conclude that Judge Pullen's decision was supported by substantial credible evidence, see N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012), and that defendant's arguments challenging the termination of his parental

rights are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We address only defendant's argument that he should have been permitted to testify after the trial concluded. Although defendant concedes that Judge Pullen had placed her opinion on the record three weeks earlier when he moved to re-open the matter, he nevertheless argues that the judge denied him his constitutional due process rights because the adoption hearings had not yet commenced. Therefore "[t]he court could have easily heard his testimony" without any "adverse impact on the children." Relying on K.S., supra, 445 N.J. Super. at 390, defendant argues he should now be permitted to testify because he is entitled to notice and a fair opportunity to be heard, especially given a parent's overriding interest in participating in a guardianship proceeding.

"We review a trial judge's decision not to reopen the record to take testimony under the abuse of discretion standard." Ibid. (citing Quick Chek Food Stores v. Springfield, 83 N.J. 438, 445-46 (1980)). Applying that standard, we discern no abuse of discretion and, like Judge Pullen, we find defendant's reliance upon K.S. to be inapposite.

In K.S., we reversed the Family Part's denial of a mother's application to re-open a trial so that she could testify even though she failed to appear for trial. Id. at 388-90. The mother,

who suffered from various mental health conditions that caused confusion about the trial date, appeared in court on what was supposed to be the second day of the scheduled two-day trial and was told by court staff that the trial was over. Id. at 388-89. She then returned ten days later, the day the trial judge was prepared to render his decision, seeking to testify. Id. at 389. The trial judge denied the motion based upon the mother's history of having failed to appear for court proceedings. Id. at 389.

In reversing, we observed that the trial judge failed to "recognize other reasons in the record which may have contributed to [the mother's] failure to appear on the first scheduled trial date." Id. at 394. We held that "[a] parent facing termination of parental rights is entitled to every reasonable opportunity to produce evidence," and "[i]f a parent seeks to reopen the record to testify after the close of evidence, the trial court is constitutionally obligated to grant that request as long as it does not interfere with the children's 'essential and overriding interest in stability and permanency.'" Ibid. (quoting In re Guardianship of J.C., 129 N.J. 1, 26 (1992)).

The facts in the present case do not compel the same result. In this case, defendant's motion papers were devoid of an explanation as to how his alleged "emotional problems and medical issues" prevented him from timely appearing to testify or taking

any action at any time to determine when the trial was to take place, if he was not aware of the date.[4] Notably, by the trial date, defendant had ceased any contact with his children and did not seek any additional visitation. He simply disappeared and had no contact with the Division or his attorney. Moreover, unlike the mother in K.S., defendant never appeared on a scheduled trial date and filed his motion more than three weeks after the court's opinion was placed on the record, without any explanation for the delay between the time he signed his certification and the date of the motion being filed. At the time defendant signed the certification, he already knew the trial ended on April 27, 2016, and the parties were awaiting the court's decision. Yet, defendant took no further action for weeks. Finally, unlike the judge in K.S., Judge Pullen found that granting defendant's application would interfere with the stability and permanency needed by his children. Under these circumstances, we find no abuse of discretion in the judge's refusal to vacate the judgment to allow defendant to testify.

Affirmed.

[4] Prior to the trial, the Division made diligent efforts to contact defendant regarding the termination proceedings, including personally serving him with the guardianship complaint, having a caseworker visit the address on file, which confirmed he had been there recently, and sending notices to the resource center and to the home that the family originally resided in.