

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1160-16T1

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.C.,

Defendant-Appellant,

and

C.R. and S.V-C.,

Defendants.

IN THE MATTER OF THE GUARDIANSHIP
OF S.R. and R.V.,

Minors.

Submitted December 12, 2017 – Decided January 3, 2018

Before Judges Yannotti, Carroll and Leone.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Ocean County,
Docket No. FG-15-0012-16.

Joseph E. Krakora, Public Defender, attorney for appellant (Gilbert G. Miller, Designated Counsel, on the brief).

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

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

PER CURIAM

Defendant S.C., the biological father of S.R., born in May 2009, appeals from the October 31, 2016 Family Part judgment that terminated his parental rights to the child.¹ Defendant contends that plaintiff New Jersey Division of Child Protection and Permanency (Division) failed to prove all four prongs of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence. The Law Guardian supported termination before the trial court and, on appeal, joins the Division in urging us to affirm. Having considered the parties' arguments in light of the record and applicable legal standards, we affirm.

¹ S.R.'s biological mother, C.R., voluntarily surrendered her parental rights to the child on September 26, 2016, and is not involved in this appeal.

I.

We do not recite in detail the history of the Division's involvement with defendant and S.R., which dates back to the child's birth. Instead, we incorporate by reference the factual findings set forth in Judge Joseph L. Foster's detailed October 31, 2016 oral opinion. We summarize the most pertinent facts to lend context to the judge's decision to terminate defendant's parental rights.

Judge Foster conducted the guardianship trial on October 25 and 27, 2016. The Division presented the testimony of expert psychologist John LoConte, Ph.D., permanency caseworkers Monica Aquino and Bryan Lozano, and adoption caseworker Wendy Kenduck. Defendant was briefly present the first morning but left before the trial began and never returned.

Aquino testified that, since May 2009, the Division received six protective referrals involving the family. According to Aquino, after C.R. gave birth to S.R., she "expressed to the hospital that [defendant] was sexually abusing her, there was some domestic violence inside the home, and that [defendant] was also an alcoholic." The Division investigated and learned "there had been some domestic violence inside the home," and defendant admitted to "having some alcohol issues." The Division implemented a safety protection plan, as part of which defendant agreed to

undergo a substance abuse evaluation. Defendant attended the evaluation on June 4, 2009, but failed to comply with the recommendation that he attend an intensive outpatient program.

The Division received a second referral in September 2009. S.R. had a urinary infection and was so dehydrated that he needed to be airlifted to DuPont Hospital in Delaware for treatment.

A third referral in September 2010, which reported S.R. may have ingested defendant's back pain pills, proved unfounded. However, on March 20, 2011, the Division responded to an anonymous report of abuse at the family's residence, and found S.R. had a high fever for a few days and defendant and C.R. had neglected to take him to a doctor. Defendant disclosed to the caseworker he had been drinking, and agreed to submit to another substance abuse evaluation.

In April 2011, the Division filed for and was awarded custody of S.R. due to concerns that defendant and C.R. had not followed through with S.R.'s medical appointments following a procedure performed at DuPont Hospital to treat the child's urinary infection. The Division arranged for defendant and C.R. to have supervised visitation with S.R.

Defendant continued to be non-compliant with substance abuse treatment and visitation. He missed several months of scheduled visitation appointments, was incarcerated for non-payment of child

support, and was taking Percocet while drinking. On August 3, 2012, defendant attended his first supervised visit with S.R. in more than a year. On October 5, 2012, defendant attended a supervised visit with S.R. This was his last contact with the child.

During this time, the Division also scheduled defendant for a psychological evaluation. Defendant missed two appointments, despite the Division's agreement to provide him transportation. Defendant appeared to be under the influence when he ultimately arrived for the evaluation on September 28, 2012.

C.R. was generally compliant with services provided by the Division, and on October 17, 2012, she was reunified with S.R. By then, C.R. had ended her relationship with defendant. In January 2013, C.R. and her new partner S.V.-C. had a child, R.V. However, a few weeks later, S.R.'s school nurse reported to the Division that S.R. had been absent from school for a week, and when he returned he had a black eye that C.R. covered with makeup. C.R. had also indicated to the school that she was feeling overwhelmed. The Division was again granted custody of S.R. In March 2013, S.R. joined R.V. in a resource home where they continue to reside with resource parents who wish to adopt them.

Lozano described the repeated attempts he made to contact defendant after the case was assigned to him in May 2013. In June

2015, Lozano finally met with defendant and explained to him the status of the case and his need to comply with services. Defendant expressed doubt he was S.R.'s father and requested a paternity test. After the meeting, defendant remained non-compliant with services and also failed to respond to communications from Lozano. Significantly, defendant failed to visit with S.R. at any point while the case was assigned to Lozano between May 2013 and August 2015.

The Division filed a complaint for guardianship on August 21, 2015. Defendant missed three court hearings between October 2015 and March 2016. At each hearing, defendant was ordered to submit to a paternity test, which he eventually did on April 13, 2016. After the test revealed he was S.R.'s father, defendant was again ordered to comply with psychological and substance abuse evaluations, as well as a bonding evaluation.

Defendant failed to appear for a court hearing on June 23, 2016. He also missed five scheduled substance abuse evaluations between May 2016 and July 2016. Defendant tested positive for oxycodone and buprenorphine when he was finally evaluated on July 27, 2016. Once again, it was recommended defendant attend an outpatient treatment program, which he failed to comply with. Additionally, defendant did not attend a psychological evaluation scheduled for May 24, 2016, nor a rescheduled appointment on July

29, 2016. He also failed to appear at a court hearing on August 23, 2016, at which the court ordered all prior orders to remain in effect.

Kenduck, the Division adoption caseworker, testified about S.R.'s placement with his resource parents. As noted, since March 2013, S.R. and his half-brother R.V. have resided with their current resource parents, who are committed to adopting them. Kenduck observed that S.R. appears "very connected" to his resource parents, who are proactive in meeting S.R.'s special medical, behavioral, and educational needs.

Dr. LoConte conducted an updated bonding evaluation of S.R., R.V., and the resource parents on October 10, 2016. Dr. LoConte described a sibling bond as the "singular most additional important bond a child can have" next to the child/parent bond. He emphasized the sibling bond takes on added importance when children are placed in foster care. Dr. LoConte characterized the bond between S.R. and R.V. as "very strong and very healthy," based on the quality of their emotional relationship and affectionate contact with each other.

Dr. LoConte also described S.R.'s "very securely-attached relationship" with his resource parents. He opined that if S.R. was separated from his resource parents it would cause an effect that "you see with children who would lose their parents to death

or other kind of permanent loss. . . . You [would] see trauma that would cause undue sadness, anxiety, rage, acting out, [and] aggression. . . ." Dr. LoConte testified that defendant failed to appear for three psychological evaluations, despite phone calls and certified letters reminding him of the appointments. The doctor concluded that because of S.C.'s lack of visitation with S.R., the child would likely have no bond or attachment to defendant, and would thus suffer no harm or trauma were their relationship severed.

After carefully reviewing the testimony and evidence presented at trial, Judge Foster 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-15.1(a), and defendant's parental rights to S.R. should be terminated. This appeal followed.

II.

We begin our analysis by recognizing the fundamental proposition that parents have a constitutionally protected right to the care, custody and control of their children. Santosky v. Kramer, 455 U.S. 745, 753 (1982); In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999). "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights . . .,' 'far more precious . . . than property rights.'" Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted). "The

preservation and strengthening of family life is a matter of public concern as being in the interests of the general welfare." N.J.S.A. 30:4C-1(a); see also K.H.O., 161 N.J. at 347.

The constitutional right to the parental relationship, however, is not absolute. N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 599 (1986). At times, the parent's interest must yield to the State's obligation to protect children from harm. In re Guardianship of J.C., 129 N.J. 1, 10 (1992). To effectuate these concerns, the Legislature created a four-prong test for determining whether a parent's rights must be terminated in the child's best interests. This statutory test requires the Division to prove by clear and convincing evidence 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. 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 [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-15.1(a).]

These "four prongs 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. F.M., 211 N.J. 420, 448 (2012) (citations omitted).

The Division need not demonstrate actual harm in order to satisfy prong one. N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 440 (App. Div. 2001). The test is whether the child's safety, health or development will be endangered in the future and whether the parent is or will be able to eliminate the harm. Ibid. The harm may be established by "a delay in establishing a stable and permanent home." In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999). Likewise, a parent's failure to provide "solicitude, nurture, and care for an extended period of time is in itself a harm that endangers the health and development of the child." Id. at 379. Compounding the harm is the parent's "persistent failure to perform any parenting functions and to provide . . . support for [the child]." Id. at 380. Such inaction "constitutes a parental harm to that child

arising out of the parental relationship [that is] cognizable under N.J.S.A. 30:4C-15.1(a)(1) and (2)." Id. at 380-81.

Prong two requires the Division to prove that the parent is unable or unwilling to eliminate the harm that led to the child's removal, and that a delay in permanent placement will cause further harm. N.J.S.A. 30:4C-15.1(a)(2). "The second prong, in many ways, addresses considerations touched on in prong one." F.M., 211 N.J. at 451. The focus is on parental unfitness. K.H.O., 161 N.J. at 352; D.M.H., 161 N.J. at 379. In considering this prong, the court should determine whether it is reasonably foreseeable that the parent can cease to inflict harm upon the child. A.W., 103 N.J. at 607. The second prong may be satisfied

by indications of parental dereliction and irresponsibility, such as the parent's continued or recurrent drug abuse, the inability to provide a stable and protective home, the withholding of parental attention and care, and the diversion of family resources in order to support a drug habit, with the resultant neglect and lack of nurture for the child.

[K.H.O., 161 N.J. at 353.]

"Prong two may also be satisfied if 'the child will suffer substantially from a lack of . . . a permanent placement and from the disruption of [the] bond with foster parents.'" F.M., 211 N.J. at 451 (quoting K.H.O., 161 N.J. at 363) (alteration in original).

"The third prong requires an evaluation 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." Id. at 452 (quoting N.J.S.A. 30:4C-15.1(a)(3)). The emphasis on the third prong

is on the steps taken by [the Division] toward the goal of reunification. The diligence of [the Division's] efforts on behalf of a parent is not measured by whether those efforts were successful. 'Reasonable efforts' may include consultation with the parent, developing a plan for reunification, providing services essential to the realization of the reunification plan, informing the family of the child's progress, and facilitating visitation. Experience tells us that even [the Division's] best efforts may not be sufficient to salvage a parental relationship.

[Ibid. (citations omitted).]

As part of the inquiry, "the court must consider the alternatives to termination of parental rights and whether the Division acted reasonably." A.G., 344 N.J. Super. at 434-35. "The reasonableness of the Division's efforts depends on the facts in each case." Id. at 435.

The fourth prong seeks to determine whether "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). This prong serves as a "'fail-safe' inquiry guarding against an inappropriate or premature termination of parental rights." F.M., 211 N.J. at 453. "The question ultimately

is not whether a biological mother or father is a worthy parent, but whether a child's interest will best be served by completely terminating the child's relationship with the parent." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 108 (2008). The court must determine "whether . . . the child will suffer a greater harm from the termination of ties with [his or] her natural parents than from the permanent disruption of [his or] her relationship with [his or] her foster parents." K.H.O., 161 N.J. at 355.

Because harm to the child stemming from termination of parental rights is inevitable, "the fourth prong of the best interests standard cannot require a showing that no harm will befall the child as a result of the severing of biological ties." Ibid. "Under this prong, an important consideration is '[a] child's need for permanency.' Ultimately, a child has a right to live in a stable, nurturing environment and to have the psychological security that his most deeply formed attachments will not be shattered." F.M., 211 N.J. at 453 (citations omitted).

III.

In the present case, with regard to the first prong, Judge Foster found that:

[It is] plain to this [c]ourt that [defendant] has endangered his parental relationship, to the extent that [there is] a relationship at all, as it clearly endangers [S.R.'s] safety, health or development and that that harm will

continue. [That is] plain from the clear and convincing evidence. [Defendant has] not had any contact with [S.R.] for the last five years.

The testimony . . . makes it plain that [defendant has] demonstrated nothing but a consistent pattern of total indifference to [S.R.'s] welfare. [Defendant has] not provided any care or nurturing at all. [He has] failed to comply with services. Finally, when a Division case worker was finally able to get hold of him, his only apparent real concern was to see that he had a paternity test.

Judge Foster concluded the Division met its burden of proof with respect to the second prong for "related . . . and similar reasons." The judge explained:

[It is] plain that [defendant] is unwilling or unable to eliminate the harm facing the child or is unwilling or unable to provide . . . a safe and stable home for [S.R.] and that the delay of permanent placement will add to the harm. [Defendant] . . . is clearly unwilling to eliminate the harm facing [S.R.] and [he has] demonstrated that through his complete indifference, his failure to have any contact with [S.R.].

[He has] . . . appeared only two or three times for visitation. He was offered transportation. He failed to cooperate with any services, other than appearing once or twice for a substance abuse evaluation. And then once the recommendation was received, he failed completely to comply with treatment recommendations. He failed to appear even for Doctor LoConte's psychological evaluation.

[Defendant is] just totally indifferent to [S.R.'s] well-being. [He is] clearly unable

to eliminate the harm. And if this were allowed to continue, [it is] plain to this [c]ourt that this harm would just do nothing but continue.

And [it is] also evident, from the testimony of Doctor LoConte, that the clear and convincing evidence indicates that separating [S.R.] from his foster parents will cause serious and enduring emotional and psychological harm to [S.R.]. As the [c]ourt noted, Doctor LoConte testified that based on his evaluation of the parent/child bond between [S.R.] and his foster parents, that if [he is] separated from his foster parents that . . . will result in trauma, sadness, anxiety, rage, acting out and aggression. It would have the same impact as . . . death of a parent would have to a child.

The judge also noted Dr. LoConte's opinion with respect to the consequences that would befall S.R. were he to be separated from R.V., due to the strong sibling bond the boys share.

Turning to the third prong, Judge Foster found the Division proved by clear and convincing evidence that it "made more than reasonable efforts to provide services to help both parents correct the circumstances which led to [S.R.'s] placement outside the home." The judge elaborated:

All three Division case workers describe the variety of services offered to both biological parents in the form [of] psychological, psychiatric evaluation, substance abuse evaluation, supervised visits, . . . [and] in the case of [defendant], paternity tests. They were offered transportation to services . . . [Defendant] was completely non-compliant with any of those services, despite

the Division's repeated offer of availability of those services over the course of the involvement by the Division with his family since 2009 and throughout the tenure of all three caseworkers.

The judge further found both foster parents were completely committed to adopting S.R. and R.V., and there was "no alternative here other than termination of parental rights followed by adoption."

Finally, Judge Foster concluded that termination will not do more harm than good. He reasoned:

Ms. Kenduck described the kind of safe, stable, structured environment that the foster parents have made available consistently to both children. [They are] involved in [S.R.'s] education. They attended to his medical needs, his psychological needs in school, get him to counseling. They [assure he] appears for neurological evaluations. None of those opportunities would be available to either one of these children should they remain in the current state of flux.

The foster parents have offered both children a loving and safe environment in which to grow up. They have each other, which is a real benefit through the sibling bond. [It is] clear that termination of parental rights in this case will do much more good than harm.

Our scope of review on appeals from orders terminating parental rights is limited. In such cases, the trial court's findings generally should be upheld so long as they are supported by "adequate, substantial, and credible evidence." N.J. Div. of

Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014). A decision in this context should only be reversed or altered on appeal if the trial court's findings were "so wholly unsupportable as to result in a denial of justice." N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 511 (2004) (quoting In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). We must give substantial deference to the trial judge's opportunity to have observed the witnesses first hand and to evaluate their credibility. R.G., 217 N.J. at 552. Even where the appellant "allege[s] error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom," deference must be afforded unless the court "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) (citations omitted).

Defendant contends there was insufficient evidence supporting the court's findings on each of the four prongs of the best interests standard. After reviewing defendant's arguments in light of the record and applicable legal principles, we are convinced there is substantial credible evidence supporting the court's findings. Defendant's arguments on appeal do not provide grounds for our intervention. Accordingly, we affirm the termination of defendant's parental rights substantially for the

reasons set forth in Judge Foster's comprehensive and thoughtful opinion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION