RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1275-16T2

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.S.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF S.A.S., a minor.

Submitted March 19, 2018 – Decided April 13, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FG-07-0232-16.

Joseph E. Krakora, Public Defender, attorney for appellant (Charles S. Rosenberg, Designated Counsel, on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Jason W. Rockwell, Assistant Attorney General, of counsel; Paul H. Juzdan, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (James J. Gross, Designated Counsel, on the brief).

PER CURIAM

Defendant S.S. (Susan or defendant) appeals from the Family Part's November 9, 2016 order terminating her parental rights to S.S. (Sarah), her daughter who was born in January 2014.[1] The testimony at the guardianship trial revealed that the Division of Child Protection and Permanency (the Division) first encountered defendant and Sarah in October 2014, when Susan brought her daughter to the hospital and began acting unruly and cursing at the child while in the emergency room. A similar scene was repeated in January 2015, when Susan brought Sarah to the hospital for treatment of a burn on the child's leg. Defendant began acting aggressively and was transported to the hospital's psychiatric unit for further evaluation.

Susan acknowledged having smoked marijuana prior to going to the hospital, and that it might have been laced with "something." The Division substantiated defendant for neglect and, two days later, filed its verified complaint seeking care, custody and supervision of Sarah. The Family Part's January 9, 2015 order

[1] We use initials and pseudonyms to protect the identity of those involved. Despite administering several paternity tests, the Division could never identify Sarah's father.

granted the Division custody of Sarah and directed it to undertake efforts to ascertain whether the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963 (1978), applied based upon information supplied by Susan's aunt.

The Division began to provide services to defendant, including treatment at several programs designed to address both her substance abuse and mental health problems. The Division's caseworkers testified defendant was not compliant with any of the programs. Susan's drug screen in August 2016 was positive, and she refused to submit to another in September.

Susan regularly attended supervised visitations, including those held in her aunt's home, where the Division had placed Sarah. But, Susan frequently was unable to control her daughter's behavior during the sessions and on occasion was belligerent herself. By April 2015, defendant's aunt was no longer willing to host future visits. One year later, the Division changed its goal from family reunification to adoption because of Susan's failure to comply with substance abuse and mental health services. Defendant's aunt and her husband told the Division they wished to adopt Sarah.

Dr. Eric Kirschner, a psychologist, testified at trial as an expert for the Division. In evaluating Susan, Dr. Kirschner perceived a "role reversal," where defendant's focus was on how her relationship with Sarah provided defendant, not Sarah, with

needed love and attention. Dr. Kirschner described Susan as immature and childlike and did not consider her fit to parent Sarah. He did not expect defendant's "limitations" to improve over time, even with services, and he believed Sarah would be at risk if left in Susan's care.

Dr. Kirschner also testified regarding the bonding evaluations he conducted with Sarah and Susan, and Sarah and her foster parents. Although Sarah reacted "positively" when she saw Susan, she became frustrated and twice tried to leave the room. Dr. Kirschner found it notable that Susan admitted she could not control Sarah. He concluded there was no particularly strong bond between the two, nor did he believe that Sarah would suffer harm should the court terminate Susan's parental rights.

To the contrary, Dr. Kirschner found that Sarah's resource parents were able to manage her behavior. He concluded there was a strong bond between them, and that the child perceived them as her "psychological parents." He believed Sarah would suffer harm if she were removed from them, and Susan would be unable to mitigate that harm. Dr. Kirschner opined that adoption by her resource parents was in Sarah's best interests.

Dr. Jonathan Mack, a neuropsychologist, testified as an expert for the Division regarding the two-day evaluation he conducted of defendant. Based on his testing, Dr. Mack determined

that Susan had an IQ of 56, "in the moderate range of intellectual disability." Defendant had a history of strokes and was the victim of a sexual assault several years earlier. Dr. Mack diagnosed Susan with a "major vascular neurocognitive disorder with behavioral disturbances," "mixed personality disorder due to organic brain damages with labile disinhibited," and post-traumatic stress disorder. As a result, Dr. Mack concluded Susan was unable to care for Sarah, and the child would be at risk for abuse and neglect if left in Susan's care. Dr. Mack opined "there is no foreseeable way that [defendant is] going to be a fit parent . . . in the foreseeable future."

In a comprehensive written opinion which we discuss below, Judge James R. Paganelli concluded the Division proved by clear and convincing evidence the four prongs of the best-interests-of-the-child test under N.J.S.A. 30:4C-15.1(a).[2] He entered the order terminating Susan's parental rights, and this appeal followed.

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[2] Those four standards are:

> (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.

Defendant raises the following points for our consideration:

> I.
>
> SUSAN'S PARENTAL RIGHTS SHOULD NOT BE TERMINATED BECAUSE THE FINDINGS OF THE TRIAL JUDGE AND THE EVIDENCE ADMITTED AT TRIAL DID NOT SUPPORT A LEGAL CONCLUSION THAT ALL FOUR PRONGS OF N.J.S.A. 30:4C-15.1(a) HAD BEEN PROVEN BY CLEAR AND CONVINCING EVIDENCE.
>
> > A. DCPP DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT SUSAN WAS UNABLE OR UNWILLING TO ELIMINATE THE HARM FACING SALLY AS REQUIRED BY PRONG TWO OF N.J.S.A. 30:4C-15.1(a).
> >
> > B. DCPP FAILED TO SATISFY THE REASONABLE EFFORTS STANDARD UNDER PRONG THREE OF N.J.S.A. 30:4C-15.1(a) BECAUSE DCPP FAILED TO PROVIDE SERVICES THAT WERE REASONABLE UNDER ALL THE CIRCUMSTANCES AND THE COURT DID NOT EXPLORE ALTERNATIVES TO

(footnote continued)

> 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).]

TERMINATION. (PARTIALLY RAISED BELOW)

1. DCPP FAILED TO MAKE REASONABLE EFFORTS TO PROVIDE SERVICES THAT WERE TAILORED TO HELP SUSAN CORRECT THE CIRCUMSTANCES WHICH LED TO THE CHILD'S PLACEMENT OUTSIDE THE HOME.

2. DCPP FAILED TO SATISFY THE THIRD PRONG OF THE BEST INTEREST TEST BECAUSE IT PROVIDED SERVICES THAT WERE NOT APPROPRIATE UNDER THE CIRCUMSTANCES AND THAT VIOLATED THE PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT (42 U.S.C. § 12101 ET SEQ.) (NOT RAISED BELOW)

3. THE COURT ERRED BY FINDING THAT DCPP CONSIDERED ALTERNATIVES TO TERMINATION BECAUSE DCPP PRESENTED INCORRECT INFORMATION ABOUT KINSHIP LEGAL GUARDIANSHIP. (NOT RAISED BELOW)

II.

THE JUDGMENT TERMINATING SUSAN'S PARENTAL RIGHTS SHOULD BE REVERSED BECAUSE THE TRIAL COURT'S CONDUCT DEPRIVED SUSAN OF THE LEVEL OF DUE PROCESS AND "FUNDAMENTAL FAIRNESS" THAT NEW JERSEY LAW REQUIRES IN DCPP MATTERS AND IN DOING SO, UNDERMINED ITS FINDINGS UNDER N.J.S.A. 30:4C-15.1(a). (NOT RAISED BELOW)

A. THE TRIAL COURT'S FAILURE TO REMEDIATE SUSAN'S (AN INDIGENT DEFENDANT'S) LACK OF ACCESS TO AN EXPERT EVALUATION, RESULTED IN A VIOLATION OF DUE PROCESS AND FUNDAMENTAL FAIRNESS THAT NEW JERSEY LAW REQUIRES IN DCPP MATTERS. (NOT RAISED BELOW)

B. ALL FOUR PRONGS WERE FATALLY UNDERMINED BY THE COURT'S FAILURE TO REMEDY THE ERROR WHICH RESULTED IN SUSAN'S (AN INDIGENT DEFENDANT) LACK OF ACCESS TO AN EXPERT EVALUATION. (NOT RAISED BELOW)

C. THE DOCTRINE OF INVITED ERROR DOES NOT PRECLUDE SUSAN FROM RAISING THE POINTS ABOVE AS GROUNDS FOR REVERSAL, AS THE ERRORS CAUSED A FUNDAMENTAL MISCARRIAGE OF JUSTICE IN A MATTER IMPLICATING SUSAN'S CONSTITUTIONAL RIGHTS. (NOT RAISED BELOW)

III.

THE JUDGMENT BELOW MUST BE REVERSED BECAUSE OF THE FAILURE OF DCPP AND THE COURT TO COMPLY WITH THE INDIAN CHILD WELFARE ACT. (NOT RAISED BELOW)

The Division and Sarah's Law Guardian both urge us to reject these contentions.

After considering these arguments in light of the record and applicable legal standards, we affirm.

I.

The standards guiding our review of the arguments raised in Point I are well-established. "We will not disturb the family court's decision to terminate parental rights when there is substantial credible evidence in the record to support the court's findings." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (citing In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). We defer to the factual findings of the trial judge, who had "the opportunity to make first-hand credibility judgments about the witnesses . . . [and] has a 'feel of the case' that can never be realized by a review of the cold record." Ibid. (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007)). We accord even greater deference because of "the family courts' special jurisdiction and expertise in family matters." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)).

"Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark' should an appellate court intervene and make its own findings to ensure that there is not a denial of justice." E.P., 196 N.J. at 104 (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."

N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552-53 (2014) (quoting Manalapan Realty, LP v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995)).

"The focus of a termination-of-parental-rights hearing is the best interests of the child." N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 447 (2012). The four prongs contained in N.J.S.A. 30:4C-15.1(a) "are neither discrete nor separate. They overlap to provide a composite picture of what may be necessary to advance the best interests of the children." M.M., 189 N.J. at 280 (emphasis in original) (quoting N.J. Div. of Youth & Family Servs. v. F.M., 375 N.J. Super. 235, 258 (App. Div. 2005)).

Susan's challenge focuses on prongs two and three. With respect to the second prong, Judge Paganelli found the Division had established by clear and convincing evidence that Susan was unable or unwilling to eliminate the harm facing Sarah because Susan repeatedly did not comply with the services offered by the Division. The court accepted Dr. Mack's opinion and concluded that even if she had complied, Susan was "unable and can never eliminate the harm facing" Sarah. The judge concluded that Susan was unable to provide a safe and stable home for her daughter. Judge Paganelli also found the Division had satisfied the third prong:

> The Division provided [Susan] with: Family Team Meetings, referrals for . . . counseling, individual therapy, psychological evaluation, psychiatric evaluation, neuro-cognitive evaluation, transportation and visitation. Further, the Division provided [Susan] with multiple opportunities for mental health and substance abuse treatment.

Susan's argument as to prong two is an amalgam of other points raised in her brief — the Division failed to prove she was unable and unwilling to eliminate harm to Sarah because it provided inadequate services, the judge relied upon expert opinion and Susan was denied the opportunity to rebut with her own expert, and the Division did not comply with ICWA. We address these arguments more particularly below.

The second prong "inquiry centers on whether the parent is able to remove the danger facing the child." F.M., 211 N.J. at 451 (citing In re Guardianship of K.H.O., 161 N.J. 337, 352 (1999)). It suffices to say defendant fails to point to any evidence in the record indicating that after partaking in numerous services provided by the Division, she no longer posed a threat to Sarah at the time of the court's decision.

Susan presents a multi-faceted challenge to the prong three proofs. She argues the Division provided generic services, not tailored to her specific needs, and, in doing so, violated the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 to —

12213 (2008). Susan also contends the judge improperly rejected kinship legal guardianship (KLG) as an alternative to termination because the Division provided incorrect information to her aunt.

N.J.S.A. 30:4C-15.1(a)(3) requires the Division to make "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 to "consider[] alternatives to termination of parental rights." Services under the third prong "contemplate[] efforts that focus on reunification," K.H.O., 161 N.J. at 354, but those efforts are not measured by their success, F.M., 211 N.J. at 452, nor whether they were a "perfect model." M.M., 189 N.J. at 286. Moreover, "[e]ven if the Division ha[s] been deficient in the services offered to" a parent, reversal is not necessarily "warranted, because the best interests of the child controls" the ultimate determination regarding termination of parental rights. N.J. Div. of Youth & Family Servs. v. F.H., 389 N.J. Super. 576, 621 (App. Div. 2007).

As Judge Paganelli found, the Division provided myriad services to Susan, and, despite her arguments to the contrary, those services were specifically designed to meet her dual

diagnoses of substance abuse and mental health problems. The point warrants no further discussion. R. 2:11-3(e)(1)(E).[3]

Defendant acknowledges that KLG is an alternative to termination of parental rights only when adoption is neither likely nor feasible. N.J.S.A. 3B:12A-1(c); N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 508-09 (2004). She argues, however, that the Division provided incorrect information to her aunt regarding KLG, specifically, that if the aunt opted for KLG, Susan would not be permitted to live in her aunt's home.[4]

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[3] Susan never raised her claim that the Division's lack of "tailored" services violated the ADA before Judge Paganelli. We usually decline consideration of an issue not properly raised before the trial judge, unless the jurisdiction of the court is implicated or the matter concerns an issue of great public importance. Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Neither of those situations exists here, therefore, we need not consider defendant's contention. Nevertheless, we have reviewed the argument and conclude it lacks merit. See N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 442 (App. Div. 2001) (rejecting the defendant's discrimination claim and holding that permitting the ADA to constitute a defense to a termination of parental rights proceeding "would improperly elevate the rights of the parent above those of the child").

[4] Susan asserts the Division's "Fact Sheet" explaining KLG, which was not in evidence, states the parent is prohibited from living in the same home as the KLG caregiver, absent certain circumstances that do not apply here. She argues the KLG statute imposes no such limitation, therefore, the information was incorrect. For the reasons that follow, we need not decide whether this information was "incorrect."

In N.J. Div. of Youth & Family Servs. v. H.R., 431 N.J. Super. 212, 232-33 (App. Div. 2013), we held it was reversible error for the Division to provide incorrect information when the KLG caretaker-aunt testified she would have considered the option because she did not want the child to lose the relationship with her father.

Here, however, Susan's aunt never testified, and the record demonstrated that the aunt rejected KLG as an option. There was no evidence that Susan's aunt would have opted for KLG if she believed Susan could live with her and Sarah. In fact, she twice asked Susan to leave her home during visits, asked not to host any future visits in her home and reported to the Division that defendant threatened to stab her and left threatening messages on her phone.

In short, Judge Paganelli properly determined the Division had met its burden of proof as to all four of the statutory prongs.

II.

In Point II, Susan contends for the first time that she was denied her due process rights to a fundamentally fair trial because she is as an indigent defendant and the court failed to provide her access to an expert witness. She contends the lack of expert testimony on her behalf fatally undermines Judge Paganelli's

findings and conclusions as to all four prongs of the statutory test.

Prior to trial, Susan's counsel[5] told the court:

> [U]nbelievably and for the first time in my experience our office would not approve [an] expert . . . evaluation in this case, so I can't schedule any. I put my client on notice of that, told her what it means. I told her the only option she has is to independently [retain an expert] which, of course, is going to be impossible.

At the next hearing, Susan's counsel told the court, "we will not be having an expert, and we're ready for trial." He never requested any relief from the judge.

N.J.S.A. 30:4C-15.4(a) requires OPD to represent indigent defendants in Title 30 termination proceedings. See also N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 306-07 (2007). However, simply put, Susan never requested that the judge intervene, and she cites no authority for the proposition that the judge should sua sponte overrule the decision of her attorney and order ancillary services.

As already noted, we will not address an issue raised for the first time on appeal unless it implicates the court's jurisdiction or substantially implicates the public interest. Zaman, 219 N.J.

[5] Susan was represented by the Office of Parental Representation in the Office of the Public Defender (OPD).

at 226-27. This is true even with respect to constitutional issues. State v. Galicia, 210 N.J. 364, 383 (2012). In this instance, the failure to make a specific request was more than procedural. It was a substantive failure that deprived the trial court of the ability to consider and address the issue.

III.

ICWA requires that in any termination of parental rights proceeding where a state court knows or has reason to know that the child involved is an "Indian child," the child's tribe or, if the tribe cannot be identified, the Bureau of Indian Affairs (BIA), must be notified of the proceeding and given the opportunity to intervene. 25 U.S.C. § 1912(a); N.J. Div. of Child Prot. & Permanency v. K.T.D., 439 N.J. Super. 363, 369 (App. Div. 2015). The Division's failure compels a remand to the Family Part to ensure compliance, even if the court has already entered a judgment terminating parental rights. Id. at 373.

In her initial brief, Susan argues the Division and the court made no efforts to determine if Sarah was an "Indian child" despite having received information from defendant's aunt in May 2015 that Susan might be of Cherokee lineage. However, the complete record provided by the Division reveals it sent inquiries to three Cherokee tribes by regular and certified mail. It also sent an inquiry to the Department of the Interior, of which the BIA is a

part. The letter provided Susan's personal information, a statement that her maternal grandmother might have had Cherokee lineage and the grandmother's name, date of birth, address and date of death. The three tribes responded and indicated there were no tribal records indicating possible Indian lineage.

While the litigation was pending under Title 9 and before the Division filed its guardianship complaint, the judge entered an order finding that Sarah was not an Indian child. When the guardianship trial began, the Division asked Judge Paganelli to take judicial notice of this order, which he did without objection from defendant.

In her reply brief, Susan contends the inquiry was insufficient because it was sent during the Title 9 proceedings, and the court should have ordered the Division to renew its inquiry prior to the start of the guardianship trial. She also claims that the inquiry was insufficient because the Division did not provide enough information, did not serve her or her aunt with a copy and did not serve BIA's regional director.

Susan never lodged these objections with Judge Paganelli, nor did she object to the judge taking judicial notice of the orders entered in the Title 9 proceeding. She does not claim she was unaware of the Division's efforts, nor does she identify what additional information, if any, was known in mid-2016, immediately

before the guardianship trial, that was not known in mid-2015. Lastly, although there is no proof the inquiry was forwarded from the Department of the Interior to BIA, we have recognized that the "Secretary of the Interior uniformly refers such notices to the [BIA] for its investigation." In re Guardianship of J.O., 327 N.J. Super. 304, 307 n.1 (App. Div. 2000). To the extent we have not otherwise addressed the arguments in defendant's reply brief, they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.