SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1313-16T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

C.M.B.,

Defendant-Appellant,

and

A.D.B., Jr.,

Defendant.

IN THE MATTER OF THE GUARDIANSHIP OF W.T.B. and A.M.B., minors.

Argued February 13, 2018 – Decided March 26, 2018

Before Judges Fisher, Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FG-04-0164-16.

Bruce P. Lee, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Bruce P. Lee, on the brief).

Salima E. Burke, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Jason W. Rockwell, Assistant Attorney General, of counsel; Salima E. Burke, on the brief).

Cory H. Cassar, Designated Counsel, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Cory H. Cassar, on the brief).

PER CURIAM

Defendant C.M.B. (Colleen)[1] appeals from a judgment of guardianship terminating her parental rights as to her children, W.T.B. (Will), a boy born on July 25, 2003, and A.M.B. (Ann), a girl born on October 12, 2004. Defendant argues:

[POINT I]
THE COURT'S RULING THAT THE LENAPE TRIBE ARE NOT FEDERALLY RECOGNIZED IS ERRONEOUS, AND THEREFORE REMAND IS REQUIRED FOR PROPER NOTICE UNDER THE INDIAN CHILD WELFARE ACT.

[POINT II]
DR. JEFFREY'S CONCLUSIONS AS TO HARM ARISING FROM A CONTINUED RELATIONSHIP WITH THE MOTHER REPRESENTS NET OPINION, AND THEREFORE ANY RULING EMANATING FROM THIS RELIANCE SHOULD BE REVERSED.

[POINT III]
THERE IS NOT SUFFICIENT, CREDIBLE EVIDENCE TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT

[1] We use fictitious names for defendant and the children to protect their privacy.

THE DIVISION HAS CARRIED ITS BURDEN OF PROOF AS TO PRONGS THREE AND FOUR OF [N.J.S.A.] 30:4C-15.1(a).

A. DCPP DID NOT UNDERTAKE REASONABLE EFFORTS TO EXPLORE AVAILABLE RELATIVE PLACEMENTS IN VIOLATION OF [N.J.S.A.] 30:4C-12.1, THEREFORE THE COURT ERRED IN FINDING CLEAR AND CONVINCING EVIDENCE THE THIRD PRONG [WAS] SATISFIED AND THUS ERRED BY NOT CONSIDERING ALL ALTERNATIVES TO TERMINATION.

B. DCPP DID NOT UNDERTAKE REASONABLE EFFORTS TO PROVIDE SERVICES TO DEFENDANT IN VIOLATION OF [N.J.S.A.] 30:4C-12.1, THEREFORE THE COURT ERRED IN FINDING CLEAR AND CONVINCING EVIDENCE THE THIRD PRONG [WAS] SATISFIED.

C. BECAUSE THE COURT DID NOT APPROPRIATELY CONSIDER KINSHIP LEGAL GUARDIANSHIP AS AN ALTERNATIVE TO TERMINATION, THE COURT ERRED [IN] FINDING PRONG THREE OF [N.J.S.A.] 30:4C-15.1(a) [WAS] SATISFIED.

D. DCPP DID NOT DEMONSTRATE BY CLEAR AND CONVINCING EVIDENCE THAT TERMINATION OF THE MOTHER'S PATERNAL RIGHTS WOULD NOT CAUSE MORE HARM, THEREFORE THE COURT ERRED [IN] FINDING DCPP SATISFIED PRONG FOUR OF [N.J.S.A.] 30:4C-15.1(a).

We disagree and affirm substantially for the reasons set forth by Judge Francine I. Axelrad in her comprehensive oral decision rendered after a four-day trial at which she heard testimony from defendant and four witnesses called by the New Jersey Division of Child Protection and Permanency.

The remand sought by defendant is not required because the

Division sent proper notices under the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. The ICWA was enacted to preserve Native American families; it limits a court's ability to remove Native American children from their families. N.J. Div. of Child Prot. & Permanency v. K.T.D., 439 N.J. Super. 363, 368-69 (App. Div. 2015). The ICWA applies only to children who are members of or eligible for membership in a federally recognized Indian tribe. 25 U.S.C. § 1903; Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 26,826, 26,832 (May 4, 2016). In any termination of parental rights proceeding, if the court knows or has reason to know that a child may be Native American, then the child's tribe must be notified. K.T.D., 439 N.J. Super. at 369; 25 C.F.R. 23.111(d)(3)(2017) (listing the information to be included in the notice). If the child's tribe cannot be identified, then notice must be provided to the Bureau of Indian Affairs (BIA) that a guardianship proceeding is pending. K.T.D., 439 N.J. Super. at 369; 25 U.S.C. § 1912(a); 25 C.F.R. 23.11(b) (2017). The tribe has a right to intervene in a termination proceeding if any child involved is a member of the tribe. K.T.D., 439 N.J. Super. at 369-70. The purpose of the notice requirement is to provide the tribe with the opportunity to determine if the child in question is an "Indian child" as defined by ICWA. Ibid.

An "Indian child" is any unmarried person under age eighteen who is either: a member of a Native American tribe; or is eligible for membership in a Native American tribe and is the biological child of a tribe member. Id. at 370. Tribes have the exclusive authority to determine membership. Id. at 369. The BIA has issued non-binding guidelines regarding the interpretation of the ICWA to assist the courts. Id. at 371; In re Adoption of a Child of Indian Heritage, 111 N.J. 155, 187 n.12 (1988). A judgment that terminates parental rights can be set aside if notice was not given to the tribe or to the BIA. K.T.D., 439 N.J. Super. at 373-74.

Judge Axelrad noted defendant's claim that she is — through her mother and grandmother — "part Lenape Indian."[2] We need not address defendant's claim that the judge erred by finding the Lenape tribe is not federally recognized — and that the Lenape tribe, also known as the Delaware Nation tribe, is recognized — because after defendant raised this issue on appeal, the Division sent notices pertaining to defendant and the children to: the Southern Plains Regional Director of the BIA; the Assistant

[2] The children's father also claimed that he is "part native Blackfoot . . . and he provided some general information about [his] paternal grandmother . . . and his brother." Any issue regarding the children's paternal Native American heritage was not raised on appeal.

Secretary of the BIA; and the Delaware Nation tribe in Anadarko, Oklahoma. The notices contained information pertaining to both children, defendant and her family. The Delaware Nation responded that the children were not enrolled Tribe members, or eligible for enrollment.

The Division sent similar additional notices to: the Eastern Oklahoma Regional Director of the BIA; the Assistant Secretary of the BIA; and the Delaware Tribe of Indians in Caney, Kansas. The Delaware Tribe of Indians also responded that the children were not enrolled tribe members, or eligible for enrollment.

The Division met the notice requirements of the ICWA. Thus a remand will have no practical effect, rendering the issue moot. N.J. Div. of Youth & Family Servs. v. J.C., 423 N.J. Super. 259, 263 (App. Div. 2011). Moreover, responses from those noticed evidence that the ICWA does not apply to the children.

Defendant challenges the court's determination that the Division satisfied its burden of proof regarding the third and fourth prongs of the best interests test.[3] Our review is limited.

[3] The Division must prove four prongs by clear and convincing evidence before parental rights may be terminated; the prongs pertinent to this appeal are:

> (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's

In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002). "Appellate courts must defer to a trial judge's findings of fact if supported by adequate, substantial, and credible evidence in the record." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007). The trial court's interpretation of the law and legal findings are reviewed de novo. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552-53 (2014). Thus, we can only change the trial court's determination if there was a manifest denial of justice. N.J. Div. of Youth & Family Servs. v. V.K., 236 N.J. Super. 243, 255 (App. Div. 1989).

As to the third prong, defendant contends the Division failed to investigate all potential relative placements; failed to provide reasonable services despite defendant's lack of employment and chronic homelessness; and that the judge "did not appropriately

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> placement outside the home and the court has considered alternatives to termination of parental rights; and
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> (4) Termination of parental rights will not do more harm than good.
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> [N.J.S.A. 30:4C-15.1(a); see also N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 604-11 (1986).]

consider kinship legal guardianship as an alternative to termination. We disagree.

First addressing the Division's efforts vis-à-vis defendant, Judge Axelrad delineated those extensive efforts subsequent to each of the three removals. She accepted Dr. Linda R. Jeffrey's expert opinion, which the judge described as "insightful and supported by the record," and found the "repetitive" services offered defendant were "appropriate . . . for [defendant's] constellation of problems within the standard of practice[;] that she was given multiple access to intervention, but she was noncompliant."

Defendant's present arguments that the Division did not undertake reasonable efforts to provide her with vocational services and housing assistance are without merit. R. 2:11-3(e)(1)(E). A vocational assessment revealed defendant did not require such services in that she possessed the skills and ability to obtain work in various fields based on her experience. Defendant testified she did not seek work — as a result she was under a welfare sanction; she had no ability to pay rent — or even save for a security deposit and, as the judge found, she "was noncompliant with services, so there was no reason for the Division to advance the security deposit and first month's rent."

Judge Axelrad found that the Division's efforts revealed no

relatives presented as viable options. Defendant's parents — despite numerous requests from the Division — and other maternal relatives declined; a seventy-four-year-old[4] maternal aunt who lived in a one-bedroom apartment was not a practical alternative. No one was willing to care for the children, and defendant did not identify any other potential placements. The record supports the judge's findings and conclusion therefrom that the Division satisfied its burden of exploring available and identified relative placements.

The judge credited testimony from the Division's trainer for Ann's resource family that those parents — after the trainer explained and discussed with them the difference between kinship legal guardianship (KLG) and adoption — chose adoption. Thus the judge properly determined that KLG is only a viable option when adoption is either not feasible or not likely. N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 509 (2004); see also N.J. Div. of Youth & Family Servs. v. D.H., 398 N.J. Super. 333, 339-41 (App. Div. 2008) (stating that KLG is not obtainable when adoption is feasible or likely); see also N.J. Div. of Youth & Family Servs. v. S.F., 392 N.J. Super. 201, 213 (App. Div. 2007) (holding that KLG is only available when no one is willing to

[4] The record also indicates her age as seventy-three.

adopt child). Likewise, KLG was not an option for Will because no relatives were willing to care for him. See N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 105 (2008) (explaining that KLG was not an option because there was no person available to serve as a kinship legal guardian). The judge heard testimony from a Division adoption worker who explained that Will's best hope for a permanent placement was through termination of parental rights, especially in light of his many challenges,[5] and correctly recognized that Will's placement plan should be designed to sustain his best interests, and that the services provided to him should also advance his mental and physical health. N.J.S.A. 9:6B-4(k).

We determine that defendant's remaining arguments about the third prong — including that the judge erred when she held that the third prong was satisfied because the children were not informed of the distinctions between KLG and adoption, and her reliance on the inapposite decision in N.J. Div. of Youth & Family Servs. v. H.R., 431 N.J. Super. 212, 228 (App. Div. 2013) — are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Defendant argues "[t]he court terminated [her] parental

[5] Dr. Jeffrey, the psychologist who conducted bonding and psychological evaluations of Colleen and the children, opined Will had special needs, an adjustment disorder, autism, and attention deficit hyperactivity disorder.

rights, even though [the Division] did not demonstrate a 'compensating benefit' for [Will]," and "by failing to fully account for the collateral harm resulting from terminating parental rights." We reject both arguments in light of the thoughtful treatment Judge Axelrad gave to the fourth prong. Recognizing that a bonding evaluation between Ann and her resource parents was not completed,[6] the judge credited Dr. Jeffrey's "insightful expert testimony,"[7] considered that the children's father was "out of the picture," and that defendant's continued — since 2008 — and "longstanding mental health[,] homelessness, drug, domestic violence problems, [and] lack of stable housing" resulted in her inability "to even provide a minimal level of safe parenting." The judge determined "it's clear that [the children] can't be returned to [defendant] safely, now or in the near future, and that it would be harmful to them to . . . keep them in

[6] Ann was placed with the resource parents less than two weeks before the guardianship trial.

[7] We determine defendant's contention that Dr. Jeffrey's was a net opinion to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). The doctor's conclusions were based on her evaluations and psychological analysis of defendant and both children, as well as family records and the materials cited in her report, which set forth the necessary "why and wherefore" supporting her opinion. Townsend v. Pierre, 221 N.J. 36, 53-54 (2015).

purgatory[8] in the hope that [defendant] would somehow . . . miraculously change." Judge Axelrad also acknowledged that there was no guarantee that Will would be able to have contact with his sister if parental rights were terminated, but astutely recognized, crediting the adoption supervisor's testimony, that the chances of placing Will in a home that would focus on his special needs would increase if parental rights were terminated. And, as already noted, Ann's resource parents indicated their adoptive intentions. Judge Axelrad's thorough consideration and weighing of all evidence related to the fourth prong manifested her understanding of the import of a trial judge's decision to terminate defendant's fundamental and highly protected parental

[8] In weighing the possible harm to the child if it terminates parental rights against the possible injury to the child if removed from a resource placement, In re Guardianship of K.H.O., 161 N.J. 337, 355 (1999), a court can consider the child's need for permanency, which is the court's primary focus, N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 281 (2007). A child need not "languish indefinitely" in an out-of-home placement while a parent tries to correct her parenting deficiencies. S.F., 392 N.J. Super. at 209-10. Importantly, the Division does not need to show that no harm will befall a child if parental rights are terminated. K.H.O., 161 N.J. at 355. The court can consider the likelihood that the parent will be capable of caring for his or her child in the near future. Id. at 357; see also N.J. Div. of Youth & Family Servs. v. C.S., 367 N.J. Super. 76, 119 (App. Div. 2004) (holding that a court must take into account child's need for loving relationship with caregiver). The purpose of this analysis is to determine the least harmful option for the child. A.W., 103 N.J. at 616.

rights. Santosky v. Kramer, 455 U.S. 745, 753-54 (1982). Her fact-sensitive analysis of each of this and the third prong followed the Court's guidance that "[t]he balance between parental rights and the State's interest in the welfare of children is achieved through the best interests of the child standard." K.H.O., 161 N.J. at 347.

The thoughtful findings Judge Axelrad made as to each of the prongs, as they related to Ann and Will, were supported by credible, clear and convincing evidence, and are entitled to our deference. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012); Cesare v. Cesare, 154 N.J. 394, 413 (1998).

Affirmed.