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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NOS. A-1625-16T4  
A-1683-16T4

NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

V.V. (deceased),

Defendant,

and

V.V.,

Defendant-Appellant.

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IN THE MATTER OF THE GUARDIANSHIP  
OF P.V. AND A.V., Minors.

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NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

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V.V. (deceased),

Defendant,

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V.V.,

Defendant-Respondent.

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IN THE MATTER OF THE GUARDIANSHIP  
OF P.V.,

Minor-Appellant,

and

A.V.,

a Minor.

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Argued March 13, 2018 – Decided April 5, 2018

Before Judges Carroll, Mawla, and DeAlmeida.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Bergen County,  
Docket No. FG-02-0032-16.

Meghan K. Gulczynski argued the cause for  
appellant in A-1625-16 and respondent V.V. in  
A-1683-16 (Joseph E. Krakora, Public Defender,  
attorney; Meghan K. Gulczynski, Designated  
Counsel, on the briefs).

Olivia Belfatto Crisp argued the cause for  
minor P.V. in A-1625-16 and minor-appellant  
in A-1683-16 (Joseph E. Krakora, Public  
Defender, Law Guardian, attorney; Olivia  
Belfatto Crisp, Assistant Deputy Public  
Defender, on the briefs).

Natasha C. Fitzsimmons argued the cause for  
respondent New Jersey Division of Child  
Protection and Permanency (Gurbir S. Grewal,  
Attorney General, attorney; Jason W. Rockwell,  
Assistant Attorney General, of counsel;

Natasha C. Fitzsimmons, Deputy Attorney  
General, on the brief).

PER CURIAM

Victor (V.V.) and Veronica (V.V.) are the parents of Peter (P.V.) and Ashley (A.V.).<sup>1</sup> Victor and Peter's law guardian appeal from a December 12, 2016 judgment, which terminated Victor's parental rights to Peter and Ashley. Victor challenges the judgment as to Peter only, and asserts the Division of Child Protection and Permanency (Division) failed to prove all four prongs of the best interests test pursuant to N.J.S.A. 30:4C-15.1(a). Peter's law guardian argues the Division failed to prove the fourth prong. We affirm.

I.

The following facts are taken from the record. Victor and Veronica were married in 2002, and divorced in February 2014. They had two children: Peter, born in July 2003; and Ashley, born in May 2006, who were, respectively, thirteen and ten years of age at the time of trial.

The Division became involved with the family in July 2013, pursuant to a referral from the New York Administration for Children's Services (ACS) because Veronica and the children had recently moved from New York to New Jersey. ACS initiated the

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<sup>1</sup> We utilize fictitious names to protect the parties' privacy.

referral because it had an open investigation into allegations against Veronica of alcohol abuse and inadequate supervision of the children.

When a Division caseworker met with Veronica, she learned neither Veronica nor the children had any contact with Victor because he had physically abused her. Veronica informed the case worker that Victor was aware she and the children moved, but he did not know where. Peter told the caseworker the move to New Jersey was in order to move away from Victor. The Division closed its case after interviewing Veronica, her mother, and the children, noting no concerns.

In March 2014, the Division received a second referral, from Ashley's school, reporting Ashley said she wanted to "take a knife and stick it in her heart." The caseworker interviewed Peter, Ashley, and Veronica to investigate the referral. Ashley stated: "I don't have a dad, because he was mean." When asked if she felt safe with her dad, Ashley reiterated "I don't have a dad." Peter stated he had not seen Victor in five months, and repeated Victor had "beat[] up [Veronica] when he was mad" in the past. Veronica said the children had not seen Victor in eighteen months. She later told the Division that she did not know where Victor lived, and that he might have returned to his home country of Ukraine.

The Division concluded abuse and neglect by Veronica against Peter and Ashley was not established.

One month later, the Division received records from ACS, which revealed Victor was substantiated for inadequate guardianship by ACS. The ACS records revealed Victor had physically assaulted Veronica in front of the children in November 2008, requiring her to seek medical attention. As a result, ACS filed a neglect petition against Victor, who was arrested and barred from the home. Victor was arrested again in December 2010, for choking Veronica and attempting to drown her in the bathtub. According to ACS records, Veronica screamed for Peter to call 9-1-1 during the incident. The children told ACS it was not the first time they had seen Victor assault Veronica and they were afraid of him. ACS records also revealed Veronica had an order of protection against Victor through September 6, 2012, and Victor was incarcerated in immigration detention.

According to ACS records, in March 2013, Veronica was intoxicated in the presence of the children and belligerent to a degree police were called and she was hospitalized. Because of Veronica's condition, Victor picked up the children from the police station and delivered them to Veronica's mother, who lived with Veronica and the children. ACS records disclosed Veronica had been consuming a bottle of vodka per day during this time period,

and her intoxication caused her to engage the children in inappropriate conversations regarding her desire for a male companion. ACS substantiated Veronica for maltreatment of the children due to alcohol abuse.

Veronica continued to struggle with alcoholism. ACS records disclosed she arrived intoxicated at the children's school, passed out in the street, and was again hospitalized in May 2013. She was substantiated for inadequate guardianship, and ACS filed a neglect petition against her. The Division also obtained police records from two different municipalities, which disclosed Veronica had been transported to the hospital intoxicated on three occasions in the fall of 2013, after she and the children moved to New Jersey.

In September 2014, the Division received a referral from a New Jersey Police Department that Veronica was intoxicated outside her home and yelling she wanted to kill herself. Veronica was hospitalized and the children remained with their landlord, who resided in the same home, until Veronica's mother returned from work. The Division executed a "Dodd removal,"<sup>2</sup> formally placed the children with Veronica's mother, and restrained Veronica from

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<sup>2</sup> A "Dodd removal" refers to the emergency removal of a child from the home without a court order pursuant to N.J.S.A. 9:6-8.21 to - 8.82, known as the Dodd Act. N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 26 n.11 (2011).

the home. However, the following day the Division learned Veronica's mother's immigration visa had expired. They then removed the children from her care and placed them together in a non-relative resource home.

The Division interviewed Peter, Ashley, Veronica, and her mother. Veronica stated Victor did not pay child support and did not see the children. She indicated he was verbally abusive to her, choked her, and attempted to kill her. She acknowledged that he lived in Brooklyn, but denied having his contact information. When Veronica was informed the Division would need to contact Victor, she refused to provide any additional information about him. Veronica's mother confirmed Victor lived in Brooklyn, but she did not have his address or phone number. She acknowledged speaking with him about visiting the children, but said he had not seen them in more than a year.

Peter also said Victor lived in Brooklyn, but did not know his address or phone number. He told one Division worker he had not seen Victor in a "couple of months," and told another it had been over a year. Peter said he did not like his father and suggested Victor had hit him in the past. He said Victor was mean to Veronica, and he was present when his father choked his mother and assaulted her in the bathroom when they lived together in New York. Peter stated he ceased residing with Victor three years

prior because he hit Veronica hard on the head. Peter said Victor occasionally brought them money. Peter and Ashley also confirmed Veronica drank alcohol and repeatedly threatened to kill herself.

The trial court granted the Division care, supervision, and custody of the children on September 25, 2014, because Veronica had been substantiated by ACS for inadequate guardianship and alcohol abuse. The order also noted it granted the Division's application because the New York court had granted ACS supervision of the family on June 10, 2013, but Veronica and the children had moved to New Jersey on June 21, 2013. The order further stated the Division learned Veronica had been hospitalized for alcohol intoxication at least four times in the preceding year, and the children had been witnesses on at least two occasions.

The order also noted Victor was substantiated for inadequate guardianship by ACS on two occasions for "serious incidents of domestic violence" against Veronica, "which his children witnessed." It further noted Victor had not seen the children in over a year and the Division was making efforts to locate him. The order granted Veronica and Victor weekly supervised visitation with the children.

On the same date the court entered its order, the Division made contact with Victor because Veronica provided his phone number. At the time, Victor was living with a friend in a one-



bedroom apartment in Brooklyn, but offered to move to another apartment to have his children placed with him. A month prior, however, he had been hit by a car while riding his bicycle, and suffered vertebral fractures in his neck, a possible cranial fracture, a concussion, and a hematoma. Victor lost his construction job as a result of the accident and had no income.

Victor asked to visit with Peter and Ashley. He also offered a niece and a nephew as two possible relative placements for the children. However, the Division ruled them out because they were unable to care for the children.

Victor was interviewed in person at a Division office in October 2014. He wanted to see the children. The last time he saw them was in June 2014, when he took them to the beach for a few hours. According to Victor, he tried to see the children more often, including making trips to New Jersey to drop off clothes and groceries, but Veronica would not allow him to see them. He accused Veronica of alienating the children from him.

Victor denied the domestic violence allegations. He claimed Veronica lied when she claimed he hit and choked her. He asserted Veronica was an alcoholic who suffered from depression and that he had concerns about her mental health and alcohol abuse. Victor claimed Veronica's mother concealed and enabled Veronica's

behavior. He requested the children be placed with his family until he could find appropriate housing.

When asked by the Division caseworker whether they wanted to see Victor, Peter and Ashley declined. The children informed the caseworker they were opposed to reunification with Victor, and only wanted to be placed with their mother.

On October 17, 2014, the trial court entered an order maintaining custody of the children with the Division. Victor was ordered to comply with psychiatric, psychological, and substance abuse evaluations. Veronica was granted supervised visitation with Peter and Ashley for a minimum of four hours per week. Victor's visitation was conditioned on the children's wishes, and pending the outcome of Victor's psychological evaluation.

In November 2014, Victor underwent a substance abuse evaluation, and no treatment was recommended. The same day, he also had a psychological evaluation with Dr. Ada Liberant, Psy.D. Victor reiterated to Dr. Liberant that Veronica did not let him see the children and would not let them live with him. He acknowledged that due to the bicycle accident he was unemployed and could not provide for the children, but he wanted to have visitation. Victor hoped Veronica would recuperate "so the kids go back to her."

Victor admitted to Dr. Liberant he committed domestic violence. He stated "it's a problem if you hit a woman, but a person like [Veronica] . . . no . . . ." Victor blamed Veronica because she was "uncontrollable," "not obedient," "[felt she] was always right," and because she would leave the home for days at a time without warning. He stated he "beat her, and she knows why." He denied he attempted to drown her, but stated "it would have been better if she drowned herself."

Peter told Dr. Liberant Victor used to hit him and Ashley. Ashley stated Victor was mean and she did not miss him. According to Dr. Liberant's report, neither Peter nor Ashley wished to visit with Victor.

Dr. Liberant concluded Victor rationalized the past instances of domestic violence, felt no remorse, and had little insight into how it had impacted his children. Dr. Liberant noted "[d]espite having nothing positive to state regarding his ex-wife and describing a long-standing history of emotional instability on her part, [Victor] still spoke about the children remaining with her." She recommended Victor attend anger management classes and that the children not be placed with him given "his lack of desire to take care of them, his issues with anger management, lack of insight into his children's functioning, and limited bond between him and the children." Dr. Liberant added "[c]onsideration must

also be given to the children's wishes to not reside with their father, given the significant exposure to violence and lack of bonding they have with him."

In January 2015, Michael Gentile, M.D., conducted a psychiatric evaluation of Victor. Dr. Gentile found Victor was not an addict, was not affected by mood or thought disorders, and was not a danger to himself or others. He recommended Victor complete an extensive parenting course, alternatives to domestic violence group therapy, and an anger management program. Dr. Gentile also recommended Victor begin reunification therapy with the children and visitation be gradually increased at the therapist's discretion.

In February 2015, the trial court entered an order that required Victor to attend anger management therapy and directed the Division to explore reunification therapy between Victor and the children. The court also ordered family therapy at the Audrey Hepburn Children's House (AHCH). Visitation remained at the children's discretion.

In April 2015, the Division became concerned Veronica was drinking again after she called to complain about the children's foster parent with noticeably slurred speech. The children's pediatrician also refused to treat them because of Veronica's behavior.

In April 2015, Peter was hospitalized for suicidal ideations. He was discharged later that month, and at his request placed in a new non-relative resource home.

In May 2015, the trial court entered an order requiring Victor to attend individual psychotherapy, family therapy, and reunification therapy with the children. Victor was also required to attend anger management counseling. The children's visitation with Victor remained at their discretion, but the court directed AHCH to explore therapeutic visitation.

The Division advised Victor he had been referred to anger management counseling and reunification therapy at AHCH. The Division also offered Victor services closer to his home.

Because Veronica appeared to be making progress with the services offered by the Division, her mother was approved to supervise visits with the children beginning in July 2015. The Division brought the children to Veronica's apartment for visitation on Peter's birthday, but Veronica's mother told the caseworker that Veronica was not home and would not let the worker into the apartment. Therefore, the case worker waited outside for Veronica to return home.

When Veronica did not appear the caseworker went into the apartment to take the children back to their foster homes, and Peter informed the caseworker Veronica was inside the apartment

intoxicated. The children informed the caseworker they had discovered Veronica on the floor of a closet wearing only a short skirt with no underwear or bra. They gave Veronica clothes to wear, but she was unable to dress herself. The children told the caseworker Veronica and her mother told them to lie about the incident.

AHCH recommended Veronica have only supervised visitation with the children until she achieved sobriety and took responsibility for her actions. AHCH recommended no visitation with Victor until he began therapy.

On August 4, 2015, the trial court ordered Victor to attend anger management counseling and domestic violence services with a Russian-speaking provider. Victor remained subject to the prior order, which required he attend individual psychotherapy and reunification therapy, and AHCH was ordered to continue exploring therapeutic visitation. The Division sent Victor formal notice of these obligations and again offered to locate services for him near his home. The court also ordered Veronica and Victor to attend family therapy at AHCH.

The Elmwood Park police were called to Veronica's home on three occasions in August 2015. Each time she was found intoxicated and hospitalized for suicidal ideations. In the first incident, Veronica was discovered unresponsive on the sidewalk,

and when officers were able to revive her, she reached for an officer's weapon and shouted "give me the gun." During the second incident, officers had to break down her apartment door and discovered her nude, holding a knife, and shouting she wanted to kill herself. In the third incident, Veronica's landlord called the police because water had leaked into the landlord's kitchen from Veronica's apartment. When police entered Veronica's apartment they discovered her passed out naked on the couch covered in rice and noodles. When asked about the water leaking into the downstairs apartment, she replied "I know[,] so what." Veronica stated that she had nothing to live for anymore and wanted to kill herself.

The trial court entered an order dated September 23, 2015, which directed Victor to attend individual therapy, anger management counseling, and domestic violence services with Russian speaking providers "in his area." The order also required Victor to attend reunification therapy with the children. The order continued to require family therapy at AHCH and directed AHCH to explore therapeutic visitation with Victor.

The trial court also entered a permanency order on September 23, 2015, which approved the Division's plan of termination of parental rights followed by adoption. The order noted Victor "has a history of domestic violence [and] has not attended therapy."

The order also noted the "children do not wish to see their father." The order recited the Division had made reasonable efforts by providing "psychological evaluations for the family, psychiatric evaluations, substance abuse evaluations and referrals for treatment, random urine screens, hair tests, individual therapy at AHCH, psychiatric treatment [and] medication monitoring, domestic violence counseling, and supervised visitation."

Veronica continued to struggle. In October 2015, she called the police and stated she was going to kill herself. Officers discovered her intoxicated and she asked for an officer's gun so she could "just do it."

In November 2015, Victor canceled a family team meeting. Victor could not explain his reasons or reschedule the meeting because of a language barrier. Victor was personally served with the guardianship complaint on December 2, 2015. The caseworker who served Victor with the pleadings utilized language line to communicate with Victor.<sup>3</sup> Victor advised the caseworker he was willing to engage in services, and she informed him AHCH would contact him. The caseworker also informed Victor she was locating services for him in Brooklyn. Victor offered his mother as a

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<sup>3</sup> Language line is a service in which a third-party interpreter provides remote telephonic interpreting services.



possible caretaker for the children. However, the Division had ruled out his mother because she resided with four other women in a one-bedroom apartment.

Victor scheduled an appointment at AHCH for December 8, 2015, but canceled an hour before the appointment. During a meeting with the caseworker the following week, Victor reiterated that he was willing to attend therapy at AHCH despite his prior cancelation. The caseworker informed Victor the Division would contact AHCH again, and that she would also continue looking for services in Brooklyn. AHCH attempted to reach Victor to reschedule an appointment, but was unsuccessful. On February 10, 2016, AHCH closed Victor's case.

On December 16, 2015, the trial court entered an order requiring Victor and Veronica to comply with psychological evaluations and attend therapy. The court also ordered Veronica to attend partial hospitalization substance abuse treatment. Visitation remained at the children's discretion, and for the first time, Peter expressed an interest in visiting with Victor.

Veronica continued to struggle. In January 2016, she was hospitalized again for suicidal ideations. After Veronica was released from the hospital, Dr. Elizabeth Smith, a licensed psychologist, attempted to conduct a bonding evaluation between Veronica and the children. However, Veronica arrived for the

evaluation intoxicated and was cursing and screaming. Dr. Smith contacted police to remove her. The children told Dr. Smith Veronica's behavior was not unusual and that they were embarrassed by it. Peter said his mother loved them, but he could not handle the stress of taking care of her any longer. Dr. Smith later attempted to meet with Veronica for a psychological evaluation, but she was intoxicated again, and refused to sign a consent form for the evaluation.

In February 2016, Peter had a supervised visit with Victor and Victor's mother. Afterwards, Peter informed the caseworker he wanted to visit with his father again.

Later that month, the Division sent Victor a letter, in Russian, listing possible Russian-language therapy providers closer to his home.<sup>4</sup> The letter advised Victor to make an appointment and then contact the Division "so that payment can be explored." In court on February 24, 2016, Victor confirmed he received the letter, but when he called there were no spots available for him and he could not afford the \$100 per visit cost. On March 23, 2016, the Division sent Victor another letter, which listed two therapists in Middlesex County who provided Russian-language therapy. The Division also offered to pay for therapy.

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<sup>4</sup> All letters sent after this date were in Russian.

In April 2016, the caseworker reported Peter's therapist had approved visitation with Victor. Peter visited with Victor and Victor's mother a second time later that month. Visits were initially held weekly, but changed to twice per month at Peter's request because he was bored and he and Victor were running out of things to discuss. In May 2016, Ashley indicated that she also wanted to attend visits with her father.

The Division provided an interpreter to facilitate communication between Victor and the children during the visits. The Division's records noted Victor was quiet and reserved during the visits. During other visits he was more engaged, and encouraged Peter to participate in extracurricular activities and counseled him against spending too much time on the computer. Victor also conversed and played games with Peter and Ashley. However, Victor also missed several scheduled visits. In total, by the time of trial, Victor had approximately ten supervised visits with Peter, and three with Ashley.

The court held a case management and permanency hearing on May 18, 2016, because Peter had been hospitalized with suicidal ideations and then placed in a treatment home. Because of his condition, Peter's permanency plan was modified to termination of parental rights followed by select home adoption. The law guardian objected to the new permanency plan on behalf of Peter because he

wanted to be placed with his father. The trial court approved the revised permanency plan.

The Division located and paid for a Russian speaking therapist for Victor. The therapist indicated he would be able to incorporate anger management and domestic violence counseling into the therapy sessions. Victor's first therapy appointment was on August 23, 2016, and he had four sessions by the time of trial.

The guardianship trial occurred over the course of three days in September and November 2016. Veronica died in a house fire one week prior to the start of trial. The Division presented testimony from the caseworker, Maria DeVargas, Dr. Smith, and Karen Backiel, a Division field support supervisor in the adoption operations unit. The law guardian adduced testimony from the children's court appointed special advocate (CASA) worker, Gail Wisneski. Victor did not testify or call any witnesses, but adduced a report from his therapist.

Through DeVargas, the Division offered factual background testimony regarding the history of the litigation, the Division's interaction with the family, and the services offered to reunify the children with their parents. DeVargas's testimony also laid the foundation for admission of the Division's records into evidence. Victor objected to the introduction of the ACS records through DeVargas on the basis they were not certified as business

records. The trial judge reserved decision on the admissibility of the ACS records. All other documents offered by the Division were admitted into evidence without objection.

DeVargas explained the Division had never provided transportation assistance for Victor to get from Brooklyn to New Jersey because he never sought it. She stated if he had asked for travel assistance, the Division would have provided it.

DeVargas also testified about Peter's placements. Specifically, she stated from September 2014, to April 2015, Peter was placed in the same non-relative resource home as Ashley, until he was hospitalized with suicidal ideations. After his release from the hospital in April 2015, Peter was placed in a new non-relative resource home. At the request of that resource family, Peter was removed from their home in June 2016, and placed in another non-relative resource home. He was hospitalized for suicidal ideations after one week in that home. Peter was then placed in a treatment home, where he remained at the time of trial.

DeVargas estimated Peter would remain in the treatment home for six months to a year, and if a permanent placement was located he would need to reside in the permanent placement home before he could be adopted. DeVargas acknowledged Peter's behavioral issues made finding a permanent adoptive placement for him difficult, but

expressed confidence an adoptive home would be located.<sup>5</sup> DeVargas testified Ashley remained in her initial resource home, and wanted to be adopted by her resource family, which was the Division's plan.

The parties stipulated to Dr. Smith's qualifications as an expert in psychology. Dr. Smith testified she performed a psychological evaluation of Victor with the aid of a translator in March 2016. Dr. Smith also reviewed records provided by the Division. Additionally, she performed standardized psychological tests on Victor, but acknowledged the results must be interpreted cautiously because Victor was not born in the United States and was not fluent in English. Thus, she did not base her opinion on the test results alone. Notwithstanding, Dr. Smith testified the test results supported her conclusions Victor "would not be able to provide even a marginally safe and nurturing home for his children and should not be considered a custodial parent."

Dr. Smith found Victor lacked empathy, which she described as one of the most important attributes for a parent because understanding how a child felt and how to help the child was essential to recovery. She noted empathy was especially important

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<sup>5</sup> On May 3, 2017, the Division filed a letter pursuant to Rule 2:6-11(f), which advised Peter was moved from the treatment home to a pre-adoptive resource home.

for Peter and Ashley because of the trauma they had experienced with their mother. Dr. Smith concluded a lack of empathy by a parent would cause a child to feel "emotionally abandoned and alone." She opined empathy was difficult to learn.

Dr. Smith testified Peter had control issues and difficulty with accepting instruction from others because of his fractured relationship with his parents. Dr. Smith opined Peter needed a parent who was patient and sensitive to his needs because of the many traumas he had experienced, namely, witnessing domestic violence between his parents, abandonment by his father, and witnessing his mother's alcohol abuse and mental health episodes.

Dr. Smith concluded Victor lacked these necessary traits. She observed Victor "presented as insensitive to his children's feelings and highly narcissistic and exploitive of others." She concluded Victor's issues "represent long term, pervasive habits" and short-term therapy and other temporary interventions were unlikely to change his behavior, especially because he did not believe he did anything wrong. Thus, Dr. Smith concluded Victor's engagement in therapy late in the litigation did not change her opinion because there was no "quick fix," and even a year's worth of therapy was not enough time to address his deficits.

Dr. Smith also questioned whether Victor would comply with services because he had a history of non-compliance. Specifically,

he failed to engage in anger management. He agreed to attend parenting classes and therapeutic visitation as long as he did not have to pay, but said he had no choice in the matter and did not understand why such services were necessary. Dr. Smith testified these services "cannot be successful unless you actually understand that there's something that needs to change."

Dr. Smith found Victor's excuses for not seeing the children in several years "superficial and unconvincing." Victor largely blamed Veronica and the Division for the lack of visitation. Dr. Smith testified Victor's placement of blame on others corroborated her findings Victor was a guarded, evasive, and unreliable reporter who avoided personal responsibility.

Indeed, Dr. Smith noted Victor had at first acknowledged domestic violence in his relationship with Veronica to Dr. Liberant, but then denied any history of domestic violence, and claimed Veronica had falsely accused him. Victor acknowledged he had been arrested three times for domestic violence against Veronica, but claimed he pled guilty on the advice of his attorney because "of course" the judge would believe Veronica.

Victor claimed he was required to complete a six-month domestic violence class as a result of an order of protection obtained by Veronica, yet could not produce a certificate of



completion. Dr. Smith opined even if Victor had completed a domestic violence course, he had not internalized its lessons.

Dr. Smith testified the children's exposure to domestic violence placed them at greater risk of developing depression and anxiety. She noted Peter already suffered from depression. Dr. Smith characterized the domestic violence between Victor and Veronica as "very severe" and as a result the "children did not ever get the sense that the world was a safe place." Dr. Smith noted this was especially true for Peter, because he became his mother's caregiver and protector as a result of the domestic violence. Dr. Smith concluded the reversal of the parent-child relationship was "very damaging" to Peter.

Dr. Smith testified Victor had made no realistic plans for the children to live with him. At first, Victor told her he would take them to Ukraine even if they objected. Victor asserted it was unimportant for the children to remain in the United States because they did not know much other than fast food and school. Then he suggested the children could visit Ukraine with his mother, and stay there if they wanted, but that he would remain in the United States. When Victor recognized the court was unlikely to approve such a plan, he told Dr. Smith the family could live together in the United States. Dr. Smith opined these plans were not reasonable. Moreover, she concluded Victor was "oblivious"

to the fact that the children might harbor negative feelings about reuniting with him or moving to Ukraine.

During his evaluations with Dr. Smith, Victor acknowledged his work visa had expired, and he could not work legally in the United States. He had previously received a deportation order, and was detained for six months due to his immigration status. Victor had no plan to care for the children in the event of his deportation, and instead asserted the children could apply for family reunification in nine years, and he could then become a legal resident.

Dr. Smith did not perform a bonding evaluation between Victor and the children. However, she noted that the children had not spent a "significant period" of time with their father "before he disappeared from their lives." Victor had only one visitation with Peter at the time of Dr. Smith's evaluation. Dr. Smith noted it was "difficult . . . to envision [Peter] having attachment to someone that was not in his life for so long."

The fact Peter had been in numerous placements and had not secured a permanent placement, but was situated in a select home adoption did not alter Dr. Smith's opinion reunification with Victor was not appropriate. Dr. Smith opined if Peter was placed with Victor the placement would fail and Peter would suffer a worse harm than if the Division continued to search for an adoptive

home. Dr. Smith explained Peter would take responsibility for the failed reunification and blame himself for not measuring up to Victor's expectations. Dr. Smith opined Victor's rejection of Peter would be deleterious to the child.<sup>6</sup>

As noted, the Division offered testimony about the select home adoption plans for Peter. Backiel explained permanency was important for a child because "children . . . who grow up in foster care do not do well as adults." Backiel explained the Division determined a select home adoption was the best permanency plan for Peter because "[h]e needs to be able to grow up in this final period, [of] his adolescence, with a family who can protect him, keep him safe, and give him the services on a continuous basis he is going to need." Backiel also explained the termination of parental rights would legally free Peter and increase the pool of potential adoptive homes in New Jersey and other states.

As noted, Victor introduced a report from his therapist into evidence. The report stated Victor blamed Veronica for the family's problems. It also noted Victor claimed the accusations of domestic violence were false. The report claimed Victor had

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<sup>6</sup> We omit a detailed discussion of the bonding evaluation between Ashley and her resource parent as neither Victor nor Ashley have challenged the judgment terminating parental rights to Ashley.

"made progress in regard to softening his attitude and accepting new ideas and concepts, especially concerning his children."

The law guardian offered testimony from Wisneski, the children's CASA worker. Wisneski had been involved with the children for eighteen months, visiting with them every other week, or more often if there was a crisis situation. She testified that since Peter had been placed in the treatment home, he had "opened up" and was performing better in school. She also revealed Peter stated he wanted to live with Victor. However, she did not feel Peter should be placed with Victor.

The trial judge issued a comprehensive written opinion. He found the Division met its burden of proving by clear and convincing evidence the four prongs of the statutory best-interests-of-the-child test, and terminated Victor's parental rights to Peter and Ashley. The judge found the testimony of all three of the Division's witnesses, and the CASA worker credible.

The trial judge found Victor had "endangered the safety, health, and development of the [c]hildren" under the first prong. Specifically, the judge found Victor harmed the children by causing them to witness domestic violence, and withdrawing as a parent and failing to maintain a relationship with the children, essentially abandoning them to Veronica's care, despite his knowledge of her alcohol abuse and mental health issues. The judge also found

Victor would continue to endanger the children because of his own severe parenting deficits.

As to the second prong, the trial judge found the Division also proved Victor would be unable to eliminate the harm facing the children or provide them with a safe and stable home. The judge concluded further delay in securing permanency would add to the harm facing the children, and Peter's best chance for achieving permanency was through termination of Victor's parental rights, because the Division would have additional tools available to find Peter a permanent home.

Under the third prong, the trial judge found the Division had made reasonable efforts to provide services to Victor to help him correct his parenting deficiencies. The judge noted the Division provided substance abuse, psychiatric, and psychological evaluations, and referrals for additional services. In addition, the Division provided a translator for Victor and facilitated visitation once the children expressed a willingness to visit with him. The judge also found the Division considered alternatives to terminating Victor's parental rights.

With respect to the fourth prong, the trial judge found the termination of Victor's parental rights would not do more harm than good because of his severe parenting deficits and inability to provide a safe and nurturing home to his children. The judge

acknowledged the law guardian's argument Peter had expressed a desire to live with Victor, but concluded Victor would not be able to care for Peter in the foreseeable future. The judge also found select home adoption was an acceptable permanency plan for Peter, as it was the best chance Peter had to be matched with a resource family and make a nurturing emotional attachment.

The trial judge granted the Division guardianship of the children. This appeal followed.

## II.

Our scope of review on appeal from an order terminating parental rights is limited. N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (citing In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). We will uphold a trial judge's factfindings if 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) (citing N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). No deference is given to the court's "interpretation of the law" which is reviewed de novo. D.W. v. R.W., 212 N.J. 232, 245-46 (2012) (citing N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 183 (2010); Balsamides v. Protameen Chems., 160 N.J. 352, 372 (1999)).

"We accord deference to factfindings of the family court because it has the superior ability to gauge the credibility of

the witnesses who testify before it and because it possesses special expertise in matters related to the family." N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448 (2014) (citing 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 G.L., 191 N.J. at 605). We also accord deference to the judge's credibility determinations "based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006) (citing Cesare, 154 N.J. at 411-13).

When terminating parental rights, the court focuses on the "best interests of the child standard" and may grant a petition when the four prongs set forth in N.J.S.A. 30:4C-15.1(a) are established by clear and convincing evidence. In re Guardianship of K.H.O., 161 N.J. 337, 347-48 (1999). "The four criteria enumerated in the best interests standard are not discrete and separate; they relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." Id. at 348.

As codified, N.J.S.A. 30:4C-15.1(a) requires the Division prove:

- (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 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.

Victor contends there was insufficient evidence to support the judge's findings on each of the four prongs of the best interests standard. Peter's law guardian attacks the sufficiency of the trial court's findings regarding the fourth prong. After reviewing these arguments in light of the record and applicable legal principles, we are convinced there is substantial credible evidence supporting the trial judge's findings of fact and determination the Division established by clear and convincing evidence under N.J.S.A. 30:4C-15.1(a), it was in Peter's best interest to terminate Victor's parental rights.



A.

The first prong of the best interests of the child standard requires the Division to establish that "[t]he child's safety, health, or development has been or will continue to be endangered by the parental relationship[.]" N.J.S.A. 30:4C-15.1(a)(1). "[T]he Division must prove harm that 'threatens the child's health and will likely have continuing deleterious effects on the child.'" N.J. Div. of Youth & Family Servs. v. A.L., 213 N.J. 1, 25 (2013) (quoting K.H.O., 161 N.J. at 352).

The harm need not be physical, as "[s]erious and lasting emotional or psychological harm to children as the result of the action or inaction of their biological parents can constitute injury sufficient to authorize a termination of parental rights." In re Guardianship of K.L.F., 129 N.J. 32, 44 (1992) (citing In re Guardianship of J.C., 129 N.J. 1, 18 (1992)). The focus of the harm is not on any isolated incident, but rather "the focus is on the effect of harms arising from the parent-child relationship over time on the child's health and development." K.H.O., 161 N.J. at 348. "Moreover, '[c]ourts need not wait to act until a child is actually irreparably harmed by parental inattention or neglect.'" Div. of Child Prot. & Perm. v. E.D.-O., 223 N.J. 166, 178 (2015) (alteration in original) (quoting In re Guardianship of DMH, 161 N.J. 365, 383 (1999)).

The harm may be established by "a delay in establishing a stable and permanent home . . . ." DMH, 161 N.J. at 383. "A parent's withdrawal of . . . 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 (citing K.H.O., 161 N.J. at 352-54). Additionally, a parent's "persistent failure to perform any parenting functions and to provide . . . support for [the child] . . . 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.

Victor argues the trial judge erred in his analysis of prong one of N.J.S.A. 30:4C-15.1(a). He argues his lack of work and unfortunate circumstances created by his bicycle accident, did not provide a valid statutory basis to conclude he posed a harm to the children. Victor argues the Division reached him at a late stage in the litigation, and he was not afforded an opportunity to demonstrate his ability to care for the children. He also argues the trial judge erred by admitting unauthenticated ACS records, as proof he committed domestic violence against Veronica witnessed by the children.

We first address Victor's argument the trial judge's admission of the ACS records constituted inadmissible hearsay because domestic violence pervaded the parties' relationship and

impacted upon the children's condition to a great extent. At trial, the Division produced the cover sheet sent by ACS, to authenticate the records. Victor objected to the attempt to introduce the ACS records into evidence because they were not "certified." The trial judge noted there was no certification to establish the documents were business records, and reserved his ruling on their admissibility.

At the next trial date, the judge again reserved decision on the admissibility of the records, but indicated if "I rule that you need some additional certification, I obviously would give the Division an opportunity to do so." The judge did not issue a ruling at a later date.

Our review of an evidentiary determination is de novo if the trial court "fails to apply the proper test in analyzing the admissibility of proffered evidence." Villanueva v. Zimmer, 431 N.J. Super. 301, 310 (App. Div. 2013) (quoting Konop v. Rosen, 425 N.J. Super. 391, 401 (App. Div. 2012)). Review is also de novo if the trial court "never performed" the required analysis. State v. Garrison, 228 N.J. 182, 194 (2017).

Hearsay may be adduced by the Division in certain circumstances. See In re Guardianship of Cope, 106 N.J. Super. 336, 343 (App. Div. 1969), holding the Division

should be permitted to submit into evidence, pursuant to Evidence Rules 63(13) and 62(5),<sup>7</sup> reports by [Division] staff personnel (or affiliated medical, psychiatric, or psychological consultants), prepared from their own first-hand knowledge of the case, at a time reasonably contemporaneous with the facts they relate, and in the usual course of their duties with the [Division].

In Cope, we articulated that to require Division personnel to give live testimony regarding all matters within their personal knowledge would cause an "intolerable disruption" in the Division's operation. Ibid. In addition, we reasoned the recognition that such reports, having been "prepared by the qualified personnel of a state agency charged with the responsibility for overseeing the welfare of children in the State," by their nature "supply a reasonably high degree of reliability as to the accuracy of the facts contained therein." Id. at 344.

Rule 5:12-4(d) codifies the holding in Cope and states the Division "shall be permitted to introduce into evidence, pursuant to N.J.R.E. 803(c)(6) and 801(d), reports by staff personnel or professional consultants." Pursuant to N.J.R.E. 803(c)(6), a hearsay document may be admitted as a business record if it was:

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<sup>7</sup> Evidence rules 63(13) and 62(5) were the predecessors to the current N.J.R.E. 803(c)(6) and 801(d). See Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 803(c)(6) and 801(d) (2017).

(1) "made at or near the time of observation"; (2) "by a person with actual knowledge or from information supplied by such a person"; (3) so long as the "record was made in the regular course of business and it was the regular practice of that business to make it"; and (4) "the sources of information or the method, purpose or circumstances of preparation indicate that it is . . . trustworthy."

Although the record contains no formal ruling regarding the admission of the ACS records, the trial judge's opinion cited to exhibit P-3, which were the ACS records. Furthermore, the trial judge's opinion refers to an "attached evidence list." That list notes the ACS records were marked for identification only, and bears no date for admission of the records into evidence.

In N.J. Div. of Youth & Family Servs. v. J.T., 354 N.J. Super. 407, 413 (App. Div. 2002), the defendant argued records from the Hawaii Department of Human Services (DHS), which indicated he had abused the child's mother, "were insufficiently authenticated under N.J.R.E. 901 and should not have been considered." Id. at 413. We found "circumstantial evidence is acceptable for authentication of written material" and held that the cover sheet, which was signed by a DHS caseworker, was sufficient to authenticate the records. Id. at 413-14.

Victor does not argue the records are inauthentic. Instead, he claims the records were improperly admitted as business records under N.J.R.E. 803(c)(6) because there was no certification from ACS that they were made near the time of observation by a person with actual knowledge, or from information supplied by that person and made in the regular course of business. Thus, J.T. is inapposite because it did not address whether the evidence constituted business records under N.J.R.E. 803(c)(6).

The Division and law guardian contend the prerequisites for admissibility of the ACS records under N.J.R.E. 803(c)(6) were met because DeVargas testified it was the Division's regular practice to request such records from out-of-state agencies and then incorporate them into the Division's case file. However, we have stated only firsthand observations by Division staff or consultants are admissible under the business records exception to the hearsay rule. See N.J. Div. of Child Prot. & Perm. v. N.T., 445 N.J. Super. 478, 496 (App. Div. 2016). A hearsay statement contained in Division records "from persons other than Division personnel and affiliated professional consultants 'may not be admitted unless it satisfies an exception to the hearsay rule.'" Id. at 497 (quoting N.J. Div. of Child Prot. & Perm. v. B.O., 438 N.J. Super. 373, 385 (App. Div. 2014)). Accordingly, statements in Division records by those other than Division

employees and consultants "are inadmissible hearsay unless they qualify under another hearsay exception as required by N.J.R.E. 805." Id. at 497.

Here, the ACS records were hearsay because (1) they contained statements, in the form of written assertions, by ACS employees who did not testify at trial, and (2) they were offered to prove Victor physically abused Veronica in the presence of the children. DeVargas's testimony explained how the Division came into possession of the ACS records, but there was no testimony whether the records were made near the time of observation by a person with actual knowledge or from information supplied by that person, or whether they were made in the regular course of business and that it was the regular practice to do so. Absent such a representation from ACS, the records should not have been admitted into evidence.

Relying on State v. T.J.M., 220 N.J. 220, 231 (2015), the law guardian also contends Victor failed to object after the Division produced the cover letter from ACS, and therefore acquiesced to admission of the ACS records into evidence. We disagree. In T.J.M. the victim of child sexual abuse was brought into the courtroom during defense counsel's summation. Id. at 225. Defense counsel raised the issue to the court after summations, arguing it was a purposeful act by the prosecutor, but "did not request

or receive a ruling on the issue . . . ." Id. at 226. The Supreme Court stated defense counsel's objection was "tepid" and found "no objection was clearly raised on the record at the time the trial court could have explored the issue with trial counsel." Id. at 231. Here, Victor clearly objected to admission of the ACS records, and the court explicitly reserved its decision twice. Thus, there was no need for Victor to reiterate his objection.

The Division and law guardian further contend the ACS records were trustworthy because the information in them was corroborated by other testimonial and documentary evidence. Although trustworthiness is a necessary prerequisite for admission, it is not an independent grounds for the admission of hearsay.

Notwithstanding, there was ample non-hearsay evidence of the past incidents of domestic violence between the parties that the admission of the ACS records was harmless error. Rule 2:10-2 states: "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ."

Here, there were numerous documents admitted into evidence without objection, which referenced the incidents of domestic violence between the parties. Much of this evidence were Peter's statements about the domestic violence incidents he witnessed, which were admissible pursuant to N.J.R.E. 803(c)(4).



Furthermore, in evidence were court orders, which described the domestic violence as well as the New York order of protection Veronica had obtained against Victor. In addition, DeVargas testified without any objection regarding Victor's history of domestic violence. Also in evidence was Dr. Smith's report and her testimony recounting Victor's own admission to committing domestic violence, which were admissible pursuant to N.J.R.E. 803(b). Therefore, although the admission of the ACS records was erroneous, it had no prejudicial effect on the outcome given the other substantial evidence of domestic violence.

Furthermore, the domestic violence the children witnessed was but one facet of the trial judge's findings under prong one of the best interests test. The judge also found Victor was aware of Veronica's alcohol abuse and the risk it posed to Peter, but made no effort to prevent or mitigate the harm. The judge accepted Dr. Smith's unrebutted testimony Peter's depression and suicidal ideations were linked to Victor's abuse of Veronica and his abandonment of Peter to his mother's care. The trial judge further accepted Dr. Smith's unrebutted testimony the confluence of Victor's domestic violence and Veronica's alcohol abuse resulted in a "role reversal." As a result Peter wanted to care for and protect his mother, which was "very damaging" to him.

Thus, the judge concluded Peter was harmed by Victor's "history of domestic violence" and "his withdrawal of a nurturing parental relationship." Moreover, the judge found Victor had "severe parenting deficits that cannot be ameliorated in the foreseeable future." We agree.

The record demonstrates Victor knew Veronica was an alcoholic. He told Dr. Smith that when they lived together Veronica would become intoxicated and leave for days at a time. Nonetheless, the record is devoid of any efforts by Victor to intercede to protect or parent his children after Veronica moved with them to New Jersey. Furthermore, Victor's own admissions demonstrate that Veronica's residence with her mother was not safe. Indeed, when the Division interviewed Victor he claimed Veronica's mother covered up Veronica's drinking and allowed it to continue.

Victor also contends the court failed to consider that at the time the Division first made contact with him he had recently been injured in an accident. However, the record demonstrates Victor's absence from the children's lives was during the course of several years before his accident.

We also reject Victor's argument Veronica kept him from seeing the children. As the trial judge found, notwithstanding the order of protection, Victor "made no effort to regain custody of the

[c]hildren or even have regular parenting time with them while they were living with [Veronica] in New Jersey."

Accordingly, there was substantial credible evidence in the record to support the trial judge's finding Victor endangered, and would continue to endanger, Peter's safety, health, or development. Thus, the Division proved the first prong of the best interests test.

B.

"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; DMH, 161 N.J. at 378-79. In considering this prong, the court should determine whether it is reasonably foreseeable that the parent can cease to inflict harm upon the child. N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 607 (1986). 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 (alteration in original) (quoting K.H.O., 161 N.J. at 363).

Victor argues the trial judge based his decision on Victor's economic and immigration status. Victor also asserts Dr. Smith's evaluation was flawed because the testing she performed was in English, which rendered the results inaccurate since he is a native Russian speaker. Victor claims the trial judge failed to consider the harm caused to Peter by terminating parental rights. We are not persuaded by these arguments.

The trial judge found Victor had "a total lack of insight into . . . his parental deficits." The judge found Victor failed to acknowledge and take responsibility for his past actions, and presented "formidable obstacles in any prognosis for successful therapeutic intervention." The judge credited Dr. Smith's testimony that Victor "cannot be successful in therapy unless he understands that he needs to change," and that his engagement in therapy "on the eve of trial does not demonstrate a sincere commitment."

The judge found the report from Victor's therapist was consistent with Dr. Smith's report: both proved Victor did not

"recognize his deficits" or "appreciate the need to modify his parental behavior." Indeed, the report from Victor's therapist noted Victor blamed Veronica for the problems the family endured. Victor even blamed Veronica for the past incidents of domestic violence. He then denied the incidents had occurred at all.

While Victor claimed to have completed a six-month domestic violence course, the trial judge found he had not learned any of the course lessons. Even though Victor had made some progress in therapy, the judge found there was no indication how long he would need to be in therapy to be able to safely parent the children.

The judge concluded the children remained at risk of harm because Victor failed to cure the deficiencies that existed when the Division took custody of them. The judge found Victor was unable to provide a safe and stable home for his children, or parent them without placing them at risk of harm. Thus, there was substantial evidence to prove the second prong of the best interests test beyond the trial judge's recitation of Victor's employment and immigration status. Even so, we hasten to add the un rebutted evidence Victor lacked verifiable income and that he was subject to deportation were not trivial matters for the judge's consideration.

Victor also argues the trial judge erred in relying on Dr. Smith's testimony because the language barrier rendered her report

and its conclusions inaccurate. We find little merit to this argument.

Dr. Smith acknowledged the language barrier in her report and testimony. However, Dr. Smith utilized an interpreter, and she did not rely exclusively on the psychological testing results to reach her conclusions. Rather, Dr. Smith's report focused on the information obtained from her clinical interview of Victor, the documented history of the case and numerous collaterals offered into evidence. Thus, we reject Victor's assertion Dr. Smith placed undue weight or relied exclusively on the psychological testing.

Victor asserts the second prong was not proved because Peter will suffer harm if his parental rights are terminated. This issue was also explored in Dr. Smith's testimony. She recognized terminating Victor's parental rights would be more difficult for Peter than for Ashley. Dr. Smith noted Peter needed to form a trusting attachment with an adult, but found Victor could not form that type of relationship with his son. She opined reunification with Victor would fail, leaving Peter worse off. Dr. Smith recognized it would be difficult to find a permanent placement for Peter. However, she opined Peter would be able to form a new attachment, and that select home adoption was a better plan than reunification with Victor.

The trial judge addressed the Division's adoption plan and finding that a permanent placement for Peter would be challenging because of his "age and psychiatric hospitalizations." The judge acknowledged the risks posed by select home adoption, but determined placing Peter with Victor carried greater risk because Victor was not equipped "to meet [Peter's] emotional needs or to provide a stable and nurturing home." The judge credited Backiel's testimony that additional resources would be available to the Division to find a placement for Peter through the select home adoption process. The judge also noted Backiel's testimony Peter had "numerous strengths . . . such as his intelligence, health, interest in soccer and gaming, [and] general good behavior—that bolster his chances of finding a permanent home." Therefore, the judge's conclusion terminating Victor's parental rights was Peter's best chance for achieving permanency, and a delay in securing permanency would add to Peter's harm was based on the credible evidence in the record.

The trial judge considered the unrebutted testimony of Dr. Smith and Backiel and concluded "[f]urther delaying termination of parental rights would deny the Division access to all of the available tools to achieve the best chance at permanency for [Peter]. The [c]ourt does not find such a denial to be in [Peter's] best interests." Other than to disagree with the weight accorded

to testimony, Victor again offers no evidence to contradict this finding.

For these reasons, prong two of the best interests test was met. There was sufficient credible evidence in the record to support the trial court's conclusions Victor could not eliminate the harm facing Peter or provide a safe and stable home for his son, and that further delay would add to the harm.

C.

Under prong three, the trial court must consider whether "the [D]ivision . . . made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home . . . ." N.J.S.A. 30:4C-15.1(a)(3). The Division's efforts must be analyzed "with reference to the circumstances of the individual case[,]" including the parent's degree of participation. DMH, 161 N.J. at 390.

N.J.S.A. 30:4C-15.1(c) defines reasonable efforts as those reasonable "attempts by an agency authorized by the [D]ivision to assist the parents in remedying the circumstances and conditions that led to the placement of the child and in reinforcing the family structure[.]" The statute sets forth examples of "reasonable attempts," including but not limited to:

- (1) consultation and cooperation with the parent in developing a plan for appropriate services;



- (2) providing services that have been agreed upon, to the family, in order to further the goal of family reunification;
- (3) informing the parent at appropriate intervals of the child's progress, development, and health; and
- (4) facilitating appropriate visitation.

[Ibid.]

Victor argues the Division failed to prove its reasonable efforts to reunify him with the children because it delivered services to him late in the litigation in a language he did not understand. Victor also argues the Division required him to pay for services and the services it provided were inadequate. We disagree.

After the Division took custody of the children in September 2014, Victor underwent a substance abuse evaluation, psychological evaluation, and a psychiatric evaluation. The psychological and psychiatric evaluations resulted in recommendations Victor attend anger management classes, parenting classes, domestic violence counseling, and individual and family therapy.

To effectuate the recommendations, the Division corresponded with Victor frequently, informing him of the referral to anger management counseling and family therapy at AHCH, and the status of the referral. Although the Division's correspondence was in

English at the outset, as the Division notes, Victor attended court hearings and had the aid of an interpreter. Thus, Victor was informed of the contents of the court's orders and of his obligation to comply with services. Moreover, when the Division communicated with Victor telephonically, the case worker utilized a language line interpreter.

The Division provided a litany of services to Veronica aimed at reuniting her with the children. This also met the Division's reasonable efforts obligation. Indeed,

where one parent has been the custodial parent and takes the primary or dominant role in caring for the children, it is reasonable for [the Division] to continue to focus its efforts of family reunification on that custodial parent, so long as [the Division] does not ignore or exclude the non-custodial parent.

[DMH, 161 N.J. at 393.]

Although Victor and Veronica were hostile to each other, Victor supported the Division's efforts to reunite the children with Veronica as he hoped the children would return to their mother. Therefore, it was reasonable for the Division to center its efforts on Veronica at that time.

After September 2015, when the trial judge approved the Division's permanency plan of termination of parental rights and DeVargas became the caseworker, the Division made additional

efforts to provide services to Victor. DeVargas scheduled a family team meeting with Victor on November 11, 2015, but Victor canceled it. DeVargas made sure Victor obtained an appointment at AHCH, but Victor canceled it as well. AHCH attempted to reschedule the appointment with Victor, but was unsuccessful. DeVargas also drove to Brooklyn to meet with Victor on more than one occasion.

Victor's claim the services provided were inadequate is unsupported by the record. DeVargas sent Victor letters in Russian identifying Russian-speaking therapists near his home. Victor maintained he could not afford to pay for therapy despite the fact DeVargas told him the Division would help fund it. Victor did not begin therapy until less than one month before trial, and only after DeVargas had called numerous therapists on his behalf. After Victor confirmed his appointment, the Division hand-delivered the payment to Brooklyn so there would be no delay in the start of therapy. The Division also considered relative placements for the children suggested by Victor.

Victor argues the Division failed to provide adequate visitation with Peter. He argues the circumstances here are similar to N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 177-178 (2010). We disagree.

In I.S., the Supreme Court held the Division's provision of one hour of supervised visitation per week to a married father who

had a child out of wedlock with another woman and had no relationship with the newborn child was "paltry." Id. at 178. The court found "[the Division] provided no reason to restrict [the father's] visits with his son to supervised ones, and the record reveals none." Id. at 179. The court concluded the frequency and duration of the visits were inadequate, holding infant and pre-school age children require frequent visits due to their different perception of time. Ibid.

The facts here are different. Victor's history of domestic violence and absence as a parent provided a reasonable basis to require supervised visitation. Peter was eleven at the time the Division took custody of him, and was a teenager at the time of trial. Therefore, Peter's need for frequent visitation did not apply on account of his age, and the record does not demonstrate otherwise.

Victor argues the conditioning of visitation on the children's desire also prejudiced him. We are not persuaded by this argument. The condition was imposed because of the psychological effects the history of domestic violence had on them and how the domestic violence shaped their attitudes towards their father. Additionally, given Peter's age, it was reasonable to give him a say regarding visitation with his father. Indeed, the Supreme Court has held the court should consider "the wishes of a

child over the age of ten, who has reached a level of maturity that allows the child to form and express an intelligent opinion." E.P., 196 N.J. at 113.

Here, after only a few weeks of visitation, Peter stated he was bored, had run out of topics to discuss with Victor, and requested a reduction in visitation. Victor has not presented any facts to demonstrate an increase in visitation would have benefitted his relationship with Peter.

The record demonstrates the Division met its burden to provide reasonable efforts at reunification. The trial judge's determination the Division met prong three was not erroneous.

D.

Both Victor and Peter's law guardian challenge the trial judge's findings regarding prong four of the best interests standard. This prong requires the Division to show "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). Termination of parental rights poses a risk to children due to the severing of the relationship with their natural parents, but it is based "on the paramount need the children have for permanent and defined parent-child relationships." K.H.O., 161 N.J. at 355 (quoting J.C., 129 N.J. at 26).

Thus, "the fourth prong of the best interests standard [does not] require a showing that no harm will befall the child as a

result of the severing of biological ties." Ibid. Prong four "serves as a fail-safe against termination even where the remaining standards have been met." G.L., 191 N.J. at 609. "[T]he question to be addressed under [prong four] is whether, after considering and balancing the two relationships, the child[ren] will suffer a greater harm from the termination of ties with [their] natural parents than from permanent disruption of [their] relationship with [their] foster parents." I.S., 202 N.J. at 181 (quoting J.N.H., 172 N.J. at 478).

The trial judge found termination of Victor's parental rights would not do more harm than good. The judge agreed with Dr. Smith's uncontroverted testimony Victor would not be able to provide a safe and nurturing home for Peter. The judge found Victor's parenting deficits were "significant" and reunification between Peter and Victor would be "destructive" to Peter because of Victor's inability to parent. The judge found it was not possible for Victor to cure his parenting deficiencies in "the foreseeable future" in order to provide Peter with permanency. The judge found the lack of permanency would damage Peter if he were "placed 'on the shelf' to wait to see if [Victor] makes the requisite progress in therapy."

The judge found the prospect of a select home adoption was the better permanency plan for Peter. Even though Peter would

remain in the treatment home for up to one year, and then be placed in a resource home for six months before he could be adopted, it was a better alternative than reunification with Victor. The judge concluded a "select home adoption gives [Peter] the only chance to be matched with a family with whom he can make the necessary emotional attachment," whereas a reunification with Victor would place Peter at "a greater risk" for lack of permanency. The judge reasoned "[Victor] has not advanced a viable plan for [Peter]. [Victor] has no verifiable income. Instead, Victor awaits an accident settlement to support [Peter]. [Victor] remains subject to deportation[.]"

Both Victor and Peter argue the fourth prong was not proved because there was no bonding evaluation conducted between them. Generally, to prove the fourth prong the Division "should offer testimony of a well qualified expert who has had full opportunity to make a comprehensive, objective, and informed evaluation of the child's relationship with both the natural parents and the foster parents." F.M., 211 N.J. at 453 (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 281 (2007)); See R.G., 217 N.J. at 564 (finding the Division's position lacked support because "no bonding evaluation was conducted"); N.J. Div. of Youth & Family Servs. v. A.R., 405 N.J. Super. 418, 432 (App. Div. 2009) (affirming an order denying the termination of parental rights in

cases where no bonding evaluation was conducted). However, the lack of a bonding evaluation is not fatal where termination "was not predicated upon bonding, but rather reflected [the child's] need for permanency and [the parent's] inability to care for him in the foreseeable future." N.J. Div. of Youth & Family Servs. v. B.G.S., 291 N.J. Super. 582, 593 (App. Div. 1996).

The record supports the trial judge's findings regarding the fourth prong. The judge credited Dr. Smith's testimony Victor would not be able to provide a safe and nurturing home for Peter. The judge stated:

Prior to September 2014, [Victor] had not seen the [c]hildren in a number of years; first reporting to Dr. Smith he had not seen them in four years . . . , later saying it had been seven years since [he had seen Ashley] . . . . Moreover, although [Victor] has engaged in recent visitation there [is] little evidence that Victor forged a real emotional bond with Peter.

The judge found Victor "did not advance any expert opinion that would challenge Smith's conclusion that he cannot provide even a marginally safe and nurturing home for his children in the foreseeable future." A bonding evaluation would not have changed the outcome.

Notwithstanding, Victor and Peter's law guardian liken the facts here to those in E.P., 196 N.J. 88 (2008). In that case, the Supreme Court reversed a judgment terminating the parental




rights of a mother to her thirteen-year-old daughter. Id. at 92-93. The child was in her seventh foster home, and her prospects of adoption were "slim," "bleak," and "elusive." Id. at 109. The child's mother in E.P. was the "one sustaining force in [her] life . . . ." Ibid. The child had an extreme and violent reaction to the prospect of adoption and attempted to take her own life upon learning she would not be unified with her mother. Ibid. Thus, the court in E.P. found terminating the mother's parental rights would be "extremely painful" and "devastating" for her daughter. Id. at 110. The court concluded the "unlikely possibility of permanency" did not outweigh the "strong and supportive" parent-child relationship, and that the "sad reality" was the child had been "hopelessly adrift within the foster care system, and the termination of her mother's parental rights removed her one mooring—the one enduring and sustaining relationship that she has in this world." Id. at 110-11.

The facts here are very different. Although Peter's age and threats of self-harm bear a resemblance to the child's in E.P., his conduct was borne of Victor's conduct not caused by the prospect of a severance in the parental relationship. Victor did not maintain a strong and supportive relationship with Peter. Instead, the evidence showed Victor had essentially abandoned Peter for the past several years.

Also, even though Peter's age and conduct have proven, and would continue to prove, to be a hindrance to finding him a permanent adoptive placement, there was no suggestion here, as there was in E.P., that Peter's hopes for adoption were "slim" or "bleak." To the contrary, the trial testimony confirmed finding a permanent placement for Peter would prove difficult, but not impossible. Therefore, the Division proved the fourth prong of the best interests standard.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION