RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2537-16T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

D.C.,

Defendant,

and

I.M.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF E.C.M.,

Minor.

Submitted January 22, 2018 – Decided February 21, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FG-09-0151-16.

Joseph E. Krakora, Public Defender, attorney for appellant (Christine B. Mowry, Designated Counsel, on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Katherine A. Gregory, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Margo E.K. Hirsch, Designated Counsel, on the brief).

PER CURIAM

Defendant I.M. appeals from the Family Part's February 3, 2017 order terminating his parental rights to his son, E.C.M. (Eddie).[1] Defendant contends the Division of Child Protection and Permanency (the Division) failed to prove the four prongs of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence and failed to place Eddie with a relative, in violation of the Child Placement Bill of Rights Act (the Act), N.J.S.A. 9:6B-1 to -6, and N.J.S.A. 30:4C-12.1(a). Defendant also asserts that trial counsel provided ineffective assistance. The Division urges us to affirm, as does Eddie's Law Guardian.

Having considered the arguments in light of the record and applicable legal standards, we affirm.

[1] The order also terminated the parental rights of Eddie's mother, D.C. (Diane). She has not appealed. We use initials and pseudonyms to maintain the confidentiality of those involved.

I.

When Diane gave birth to Eddie in New York City in February 2015, she was homeless and tested positive for opiates and marijuana. At birth, Eddie suffered from withdrawal symptoms, a pneumothorax, pneumonia, respiratory distress and required hospitalization. New York authorities notified the Division, which was familiar with Diane, having taken custody of her two older children in December 2013. The Division tried unsuccessfully to contact defendant after Diane identified him as Eddie's father. The New York authorities were able to locate defendant, and, in March, he and Diane signed a handwritten note stating they relinquished their parental rights in favor of defendant's mother, L.C. (Lucy). When he was released from the hospital, the Division placed Eddie with the same resource parents that were caring for Diane's two older children.[2]

The Division contacted Lucy, a native of Puerto Rico, who was living with her daughter, A.M. (Alice), and her two children in a two-bedroom apartment in Hoboken. The caseworker told Lucy she would need her own apartment and sufficient income to care for Eddie before the Division could consider her as a placement alternative. The Division also agreed to evaluate Alice as a

[2] In June 2016, after Diane's parental rights were terminated, the resource parents adopted the two children.

placement resource, but ruled her out in July because of a "lack of appropriate sleeping arrangements in [her] home." Lucy, Diane, and sometimes Alice, continued to visit with Eddie.

In August 2015, Diane stopped visiting, and the Division did not locate her again throughout the balance of the litigation.[3] Lucy moved from her daughter's home and stayed with friends and relatives in Jersey City, but the Division advised Lucy that it would not consider placing Eddie with her unless she had her own apartment and sufficient income.

Defendant did not appear in court until October 2015. The Division arranged a twice-weekly visitation schedule, but defendant only visited Eddie four times in November. He told caseworkers that he was homeless, staying with friends and family on a night-to-night basis, and working off the books. Defendant would not provide an address and failed to attend a substance abuse evaluation the Division arranged.

Although DNA testing of Lucy and Alice virtually assured that Eddie was defendant's offspring, he insisted on another DNA test, which revealed that defendant was indeed Eddie's father. Defendant underwent a psychological evaluation, appeared at, but refused to

[3] At trial, the Division's adoption caseworker indicated that Diane had made contact and was living in North Carolina. She had given birth to another child. Diane did not appear at trial.

cooperate with, a substance abuse evaluation, and failed to visit Eddie during February and March 2016. The Division terminated his visitation. In the interim, the Division ruled out Lucy as a placement resource because she "lack[ed] housing and verifiable income," and the resource parents expressed a willingness to adopt Eddie.

The Division filed its guardianship complaint in March 2016. Although the Division agreed in April to defendant's request to recommence visits with Eddie, he did not visit his son again until November. Defendant failed to keep appointments for an updated psychological evaluation and a bonding evaluation; he tested positive for cocaine and TCH in October and refused to participate in substance abuse treatment because he disputed the results of the test.

At the guardianship trial, which began in January 2017, the Division's caseworker testified that defendant was attending parenting classes since November 2016. The caseworker delineated the other services the Division offered defendant, which he either failed to participate in or did so sporadically, like visiting with Eddie. The caseworker reviewed the reasons why the Division ruled out Lucy and Alice as placement resources.

Dr. Robert Kanen, who had performed a psychological evaluation of defendant in December 2015, testified as the

Division's expert. At the time of the evaluation, Dr. Kanen concluded defendant suffered from an untreatable antisocial personality disorder, which would make it unlikely that defendant could honor personal obligations, like parental duties. Dr. Kanen explained that individuals with this disorder are unreliable, lack insight and do not learn from experience. Dr. Kanen concluded that defendant could not provide Eddie with a permanent, safe and secure home, and that placing Eddie in defendant's care would expose the child to an unnecessary risk of harm.

Dr. Kanen also testified regarding his September 2016 bonding evaluation of Eddie and his resource parents. The doctor opined that Eddie was securely attached to them and would suffer very serious emotional harm if he were removed from their care.

Defendant testified that he stopped visiting Eddie when Alice refused to let him stay with her any longer, and he became homeless. He denied having a drug problem and insisted there was an error with the October 2016 positive drug test. Defendant was presently living with friends, hoping to get a steady job and wanted Eddie to live in Puerto Rico in an apartment Lucy shared with defendant's stepfather. Defendant admitted that he did not initially visit Eddie for eight months in 2015 because there was an outstanding warrant for his arrest that he needed to resolve.

He did not see Eddie for ten months in 2016 because he left New Jersey to work in Buffalo, New York.

Defendant produced no other witnesses at trial.

II.

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

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

interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552-53 (2014) (quoting Manalapan Realty, LP v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995)).

A.

"The focus of a termination-of-parental-rights hearing is the best interests of the child." N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 447 (2012). The four prongs contained in N.J.S.A. 30:4C-15.1(a)[4] "are neither discrete nor separate. They

[4] Under the statutory best-interests-of-the-child test, the Division must prove by clear and convincing evidence:

> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
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> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
>
> (3) The [D]ivision has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's

(footnote continued next page)

overlap to provide a composite picture of what may be necessary to advance the best interests of the children." M.M., 189 N.J. at 280 (emphasis in original) (quoting N.J. Div. of Youth & Family Servs. v. F.M., 375 N.J. Super. 235, 258 (App. Div. 2005)).

We reject defendant's argument that the Division failed to prove his conduct endangered Eddie. The judge noted defendant's frequent extended absences effectively withdrew parental "solicitude, nurtur[ing] and care" from his son. In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999).

Defendant also contends the proofs as to prong two were insufficient because he took action to eliminate any future harm to Eddie. The judge, however, noted defendant lacked stable housing, was unlikely to be able to parent Eddie in the foreseeable future and separating Eddie from his resource parents would cause serious harm. See F.M., 211 N.J. at 451 ("Prong two may also be satisfied if 'the child will suffer substantially from a lack of

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(footnote continued)

> 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.
>
> [N.J.S.A. 30:4C-15.1(a); see also In re Guardianship of K.H.O., 161 N.J. 337, 347-48 (1999).]

. . . a permanent placement and from the disruption of [the] bond with foster parents.'" (quoting In re Guardianship of K.H.O., 161 N.J. 337, 363 (1999)).

Defendant argues he identified Lucy as a potential placement resourced and the Division failed to make reasonable efforts to place Eddie with Lucy or consider kinship legal guardianship (KLG) as an alternative to termination. It is the Division's policy to "place children with relatives whenever possible." N.J. Div. of Youth & Family Servs. v. M.F., 357 N.J. Super. 515, 527 (App. Div. 2003). However, "there is no presumption in favor of placement with relatives." N.J. Div. of Youth & Family Servs. v. K.L.W., 419 N.J. Super. 568, 580 (App. Div. 2011). The record is clear. The Division was not averse to placing Eddie with Lucy, but she failed to acquire stable housing or a source of income sufficient to care for the child.

KLG is an alternative to termination of parental rights when adoption is neither likely nor feasible. N.J.S.A. 3B:12A-1(c); N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 508-09 (2004). Here, adoption was likely and feasible.

Lastly, defendant's argument regarding the insufficient proof as to prong four lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

B.

The Act provides that every child is entitled to "the best efforts of the applicable department, including the provision or arrangement of financial or other assistance and services as necessary, to place the child with a relative." N.J.S.A. 9:6B-4(b) (emphasis added). However, the child's rights are "separate from and independent of the child's parents or legal guardian." N.J.S.A. 9:6B-2(a). The Act gives a child a private cause of action in damages against the applicable department. K.J. v. Div. of Youth & Family Servs., 363 F. Supp. 2d 728, 743-45 (D.N.J. 2005). We therefore agree with the Division that defendant has no standing to assert a claim under the Act.

The "plain meaning and purpose" of N.J.S.A. 30:4C-12.1[5] "is [the] prompt identification of relatives and notice to them of the results of the investigation and the potential for termination if the child remains in foster care." K.L.W., 419 N.J. Super. at 580. When "the Division fails to comply with its obligation, the judicial determinations that follow are made without information relevant to the best interests of the child." Id. at 581. For

[5] N.J.S.A. 30:4C-12.1(a) provides: "In any case in which the Department of Children and Families accepts a child in its care or custody, including placement, the department shall initiate a search for relatives who may be willing and able to provide the care and support required by the child."

reasons already stated, the Division fully complied with its obligations under Title Thirty.

C.

In termination cases, a parent is entitled to the effective assistance of counsel. N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. 301, 306 (2007). To establish ineffective assistance, a defendant must establish the two-prong standard adopted in Strickland v. Washington, 466 U.S. 668, 687 (1984), i.e., counsel's perform must be objectively deficient and must have prejudiced the defense. B.R., 192 N.J. at 307 (citing Strickland, 466 U.S. at 694).

Here, defendant contends trial counsel failed to question the witnesses thoroughly, sufficiently argue his position or submit a written summation like the other attorneys did. None of these alleged deficiencies demonstrate that counsel's performance was inadequate or prejudiced defendant.

Affirm.