SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2623-16T4
A-2624-16T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

N.N.M. and L.D.,

Defendants-Appellants.

IN THE MATTER OF THE GUARDIANSHIP OF A.L.M.,

Minor.

Submitted May 1, 2018 – Decided May 7, 2018

Before Judges Fisher and Natali.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FG-09-0111-16.

Joseph E. Krakora, Public Defender, attorney for appellant N.N.M. (Jennifer M. Kurtz, Designated Counsel, on the brief).

Joseph E. Krakora, Public Defender, attorney for appellant L.D. (Britt J. Salmon-Dhawan, Designated Counsel, on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Jason W. Rockwell, Assistant Attorney General, of counsel; Chanel Van Dyke, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Tracye Wilson Elliot, Designated Counsel, on the brief).

PER CURIAM

In these consolidated appeals, N.N.M. ("Nancy") and L.D ("Leonard") contest the Family Part's February 10, 2017 final judgment of guardianship terminating their parental rights to A.L.M ("Amy")[1], who is currently five years old. Defendants collectively argue that the Division of Child Protection and Permanency ("Division") did not prove all four prongs of the statutory "best interests of the child" test under N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence. The Law Guardian supports termination and urges us to affirm the trial judge's determination. Because we conclude that the trial court did not make necessary findings concerning all elements of prong three, N.J.S.A. 30:4C-15.1(a)(3), and specifically whether kinship legal guardianship ("KLG") is a viable permanency alternative, we reverse and remand for the trial court to address this prong.

[1] We use fictitious names for N.N.M., L.D., A.L.M., and the paternal grandmother, for ease of reading and to protect their privacy.

As the court's remand is limited to prong three, our discussion of the relevant procedural history and factual background is brief and narrowly tailored to that statutory factor.

Prior to the birth of Amy on October 18, 2013, the Division was involved in pending litigation against Nancy that involved her two other children. On June 26, 2014, after Nancy's incarceration on an outstanding warrant, the Division instituted a Dodd[2] removal with respect to Amy. At the time of the removal, Leonard was also incarcerated. Less than a week later, the court granted the Division custody of Amy after concluding "it would be contrary to . . . [her] welfare . . . to return home at this time because [Nancy] remains incarcerated and she is non[-]compliant with Division services." Amy began living with her paternal grandmother, Lu.D ("Lucy") shortly after her removal and remains in her care.

During the trial court proceedings, the court held a series of compliance hearings where the court ordered the Division to provide various services to the family. Thereafter, the court held two permanency hearings approving the Division's plan for

[2] A "Dodd removal" refers to the emergency removal of a child from a home without a court order, as authorized by N.J.S.A. 9:6—8.29 of the Dodd Act, N.J.S.A. 9:6—8.21 to —8.82. The Dodd action here also involved the removal of Nancy's other two children who were in her custody at the time. Those children are not the subject of this appeal.

adoption of Amy by Lucy. At the first permanency hearing, the court found Nancy had consistently failed to comply with Division services and had ongoing substance abuse issues. The court found Leonard failed to present himself as a viable placement option for Amy and failed to comply with services.

The Division subsequently filed a guardianship complaint in which it sought to terminate Nancy and Leonard's parental rights followed by adoption. During the course of the guardianship proceedings, the Division continued to provide services to Leonard and Nancy. Those services included inpatient and outpatient substance abuse treatment and parenting skills classes. The Division also arranged supervised visitation between the parents and Amy. At a second permanency hearing, the court reaffirmed the Division's plan of termination of parental rights followed by adoption as it determined that Nancy and Leonard continued to "have issues with substance abuse and [had] not fully complied with services."

The guardianship trial proceeded over the course of three days. The Division introduced documentary evidence and called three witnesses: adoption caseworker Jason Swartwood and two psychologists, Robert Kanen, Psy. D. and Dr. Robert Miller, Ph.D. Leonard also testified at the trial. Neither Lucy nor Nancy testified.

The Division's evidence on the issue of alternatives to termination of parental rights was elicited primarily through the testimony of Swartwood and Dr. Miller. Swartwood testified that he discussed the difference between KLG and adoption with Lucy several times. He also testified that Lucy agreed to adopt Amy but "would accept" KLG.

When Swartwood was asked if he had Lucy sign an information sheet explaining the difference between KLG and adoption, he stated, "Yes. Well, actually, I did not. The previous caseworker would have." The Division did not introduce the referenced information sheet that Lucy purportedly reviewed and signed and that explained the difference between KLG and adoption.[3]

Dr. Miller, in his report that was introduced into evidence at trial, stated that it was Lucy's plan to take care of Amy "if

[3] On appeal, the Division and the Law Guardian also rely upon statements by Lucy to Division caseworkers that are contained in the voluminous contact sheets that were admitted at the guardianship trial. For example, the Division relies upon the contact sheets for the proposition that Lucy told the Division caseworker that she wanted to adopt Amy and was in favor of the Division's plan of adoption. As the trial court correctly noted, those statements, despite being contained in the business records of the Division, are clearly inadmissible hearsay. Indeed, reports admitted pursuant to Rule 5:12-4(d) are still subject to hearsay limitations, including those imposed by N.J.R.E. 805 concerning embedded hearsay statements. See, e.g., N.J. Div. of Youth & Family Servs. v. M.G., 427 N.J. Super. 154, 172-74 (App. Div. 2012).

they don't give my son [Leonard] another chance, I don't know about the mother, if the judge orders, it's between KLG and adoption, I have to see what the judge say, I have to watch." According to Dr. Miller, the "paternal grandmother indicated her intention to adopt her granddaughter if the judge ordered termination of parental rights however she appeared ambivalent and expressed hope her son would receive custody" (emphasis supplied). Lucy stated to Miller: "I have to see, that mother's not going to give them up, but I hope my son get himself together, but every time he seem to do it he get in trouble."

In its February 10, 2017 oral opinion, the court concluded that the Division satisfied all four prongs of N.J.S.A. 30:4C-15.1(a) clearly and convincingly. As to prong three, the court found:

> With regard to the third prong, this gets a little more interesting. This involves a determination of whether the Division made reasonable efforts to assist the parents to reunite with the child and whether the Division has considered alternatives to terminating parental rights. . . .
>
> . . . .
>
> Here I find, for the record, that . . . [Nancy's] attorney argues in his closing that the Division did not offer reasonable services because, and this is his only argument, despite all the services that they offered to her they did not offer proper services, a Mommy and Me residential program, even though

it was recommended at one point by, I guess, it was New Pathways.

She did complete the inpatient program. But when she was asked to address her drug issues as an outpatient program, in a non-supervised setting, where she had to get up and go someplace and deal with it, you know, like the real world, which would be on for the next, this child's three years old, for at least the next 15 years of the child's life. She couldn't do that.

I mean she did it in the inpatient program when she couldn't go anywhere, and they were there. But it's clear that she could never complete that program as an outpatient program even though the outpatient program was recommended by Turning Points after she had completed that program . . . .

She had a lot of excuses. There was a waiting list. I mean there's another CADC evaluation. But it's pretty clear from the record, I don't think she ever testified, that she wanted to be with the baby again. And that's the only reason why she would go to a residential program was to get the baby back in a Mommy and Me program. That's why she wanted the Mommy and Me program. To go there to really deal with the substance abuse program I don't think that was ever as important to her as just holding the baby in her arms, [be]cause if it was she would have gone to the outpatient program. She knew the risk involved. Especially after the history she had with DYFS and the other two children.

She just couldn't do it. The substance abuse issues were, and I'm finding for the record, are way too strong for her to make them less of a priority than properly parenting and caring for her child.

> So, therefore, that is the evidence and a basis for me to find by clear and convincing evidence that she would never be able to eliminate the harm in the future if she were granted custody of the child again.
>
> The Division referred her multiple times for substance abuse evaluation and substance abuse treatment . . . .
>
> She was referred to parenting skill classes and Visiting Homemaker Services. But was discharged for being absent. She was referred again in January 28th, 2015 [sic] . . . . I think she completed that with the homemakers.
>
> With regard to [Leonard] I summarized the various services that he was unable to complete and why he's in the outpatient program. I believe [it] is because he was ordered to do so to comply with his probation so [that] he doesn't go back to jail. It wasn't really to fix his habit and deal with being a parent.
>
> Thus, the Division has satisfied the third prong of the best interest standard, I believe, by clear and convincing evidence despite failing to have her in the Mommy and Me program.

Nancy and Leonard contend that the trial court failed to comprehensively address all elements of prong three. We agree. The trial court's oral decision on prong three focused exclusively on whether the Division "made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home." The trial judge did

not address the equally important requirement that the court "consider alternatives to termination of parental rights."

The scope of an appellate court's review of a trial court's decision to terminate parental rights is limited. N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007). "Appellate courts must defer to a trial judge's findings of fact if supported by adequate, substantial, and credible evidence in the record." Ibid. Reviewing courts "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 (2012).

As a threshold matter, New Jersey courts "are guided by the principle that 'clearly favors keeping children with their natural parents and resolving care and custody problems within the family.'" N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 165 (2010) (quoting In re Guardianship of J.C., 129 N.J. 1, 7-8 (1992)). Parents have a fundamental constitutional right to raise their children. F.M., 211 N.J. at 447. That right is not, however, absolute and is "tempered by the State's parens patriae responsibility to protect children whose vulnerable lives or

psychological well-being may have been harmed or may be seriously endangered by a neglectful or abusive parent." Ibid.

"The focus of a termination-of-parental-rights hearing is the best interests of the child." Ibid. The statutory best-interests-of-the-child standard, set forth in N.J.S.A. 30:4C-15.1(a), "aims to achieve the appropriate balance between parental rights and the State's parens patriae responsibility." N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 280 (2007). Under that standard, to justify termination of parental rights, the State must prove by clear and convincing evidence that termination is in the child's best interests. Ibid.

Specifically, the State must establish:

> (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;

> (4) Termination of parental rights will not do more harm than good.
>
> [N.J.S.A. 30:4C-15.1(a).]

The third prong of the best-interests-of-the-child standard, in addition to evaluating the efforts of the Division in providing services to the parents, requires that the court consider alternatives to the termination of parental rights. See N.J.S.A. 30:4C-15.1(a)(3). Under prong three, an alternative to termination is kinship legal guardianship, which allows a relative to become the legal guardian, committed to care for the child until adulthood, without stripping parental rights. N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 508 (2004). KLG resulted from the Legislature's realization "that an increasing number of children who cannot safely reside with their parents are in the care of a relative or family friend who does not wish to adopt the child or children." N.J. Div. of Youth & Family Servs. v. L.L., 201 N.J. 210, 222-23 (2010). See N.J.S.A. 3B:12A-1(a)-(b).

In P.P., the New Jersey Supreme Court, while acknowledging the benefits of KLG, emphasized "New Jersey's strong public policy in favor of permanency." P.P., 180 N.J. at 510 (quoting In re Guardianship of K.H.O., 161 N.J. 337, 357 (1999)). The Court explained that KLG is available "as a more permanent option than

foster care when adoption 'is neither feasible nor likely' and '[KLG] is in the child's best interests.'" Id. at 512 (quoting N.J.S.A. 3B:12A-6(d)(3)-(4)). But, when the permanency provided by adoption is available, KLG cannot be used as a defense to termination of parental rights. N.J. Div. of Youth and Family Servs. v. D.H., 398 N.J. Super. 333, 341 (App. Div. 2008) (holding that KLG is not available when adoption is feasible or likely); N.J. Div. of Youth & Family Servs. v. S.F., 392 N.J. Super. 201, 213 (App. Div. 2007) (reaffirming that KLG is only available when no one is willing to adopt the child); N.J.S.A. 3B:12A-6(d). Indeed, we have recognized that when a caretaker "unequivocally" asserts a desire to adopt, the standard to impose a KLG arrangement that adoption is neither feasible nor likely, cannot be satisfied. N.J. Div. of Youth & Family Servs. v. T.I., 423 N.J. Super. 127, 130 (App. Div. 2011).

Based on our review of the record and the trial court's oral decision, we are unable to conclude that the trial judge determined that the Division clearly and convincingly considered alternatives to terminating Nancy and Leonard's parental rights. We offer no comment as to the sufficiency of the proofs submitted at the guardianship trial on that issue. The purpose of our remand is to permit the trial court in the first instance to assess the evidence already presented, conduct additional proceedings as he

deems appropriate, and issue supplemental factual findings and legal conclusions on the limited issue of whether the Division appropriately considered alternatives to termination.

Reversed and remanded for forty-five days to allow the trial court to conduct supplemental proceedings as necessary and issue an amplified decision. We retain jurisdiction.