SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3876-16T4
A-3877-16T4

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

K.G.M. and T.R.J.M.,

Defendants-Appellants.

IN THE MATTER OF THE
GUARDIANSHIP OF M.M.J.M., a minor.

Submitted April 9, 2018 – Decided May 8, 2018

Before Judges Accurso, O'Connor and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FG-12-0056-17.

Joseph E. Krakora, Public Defender, attorney for appellant K.G.M. (Thomas W. MacLeod, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant T.R.J.M. (James D. O'Kelly, Designated Counsel, on the briefs).

Gurbir S. Grewal, Attorney General, attorney for respondents (Melissa H. Raksa, Assistant Attorney General, of counsel; Christina Duclos, Deputy Attorney General, on the brief).

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

PER CURIAM

In these two appeals, calendared back-to-back and consolidated for the purpose of this opinion, we address challenges to a Family Part judgment terminating the parental rights of defendant K.G.M (the father) and defendant T.R.J.M. (the mother) to their now three-year-old daughter, M.M.J.M. (Molly).[1] The father seeks reversal, arguing the Division of Child Protection and Permanency (the Division) failed to prove by clear and convincing evidence the four-prong standard codified by our Legislature in N.J.S.A. 30:4C-15.1(a).[2]

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[1] We use initials and pseudonyms to protect the family's and other individuals' privacy.

[2] These four prongs are:

> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
>
> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm.

The mother does not challenge the Family Part's findings on the first, second, and fourth prongs of the statute, or as to that part of the third prong that requires the Division to make reasonable efforts to assist a parent overcome those deficiencies that led to his or her child's removal from the home. The mother contends the Division improperly rejected her suggestion Molly be placed with the child's paternal aunt or with a close family friend, and also failed to consider alternatives to the termination of her parental rights. After reviewing the record and the applicable legal principles, we affirm.

I

> Such harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child;
>
> (3) The division has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
>
> (4) Termination of parental rights will not do more harm than good.
>
> [N.J.S.A. 30:4C-15.1(a).]

In lieu of reciting at length the evidence presented during the guardianship trial, we incorporate by reference the judge's factual findings because they are supported by competent evidence. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012). However, we highlight the principal evidence.

The mother is well-known to the Division. Before Molly was born, the mother had eight children, all of whom were removed from the mother's custody because of her long-standing addiction to drugs. Despite being provided with a plethora of services to help her overcome her addiction, the mother continued to abuse illicit substances. In fact, the underlying event that led to Molly's removal from defendants' custody was that cocaine and marijuana were found in Molly's meconium[3] at birth, which prompted the hospital staff to notify the Division the baby may have been abused or neglected.

The Division took physical custody of the baby when she was discharged from the hospital and placed her with a resource parent. Molly has lived with such parent (resource mother) since; the resource mother wants to adopt her. The Division did

[3] "The first intestinal discharges of the newborn infant, greenish in color and consisting of epithelial cells, mucus, and bile." Stedman's Medical Dictionary 842 (5th ed. 1982).

not place the baby in the father's custody because of his criminal history and other concerns.

Specifically, in 2003 and 2005, the father was "charged" with possession of marijuana.[4] In 2012, he was convicted of possession of marijuana, for which he was placed on probation for five years. In addition, although defendants had been living together for a number of years, and in fact married in 2014, the father, presumably aware of the extent of the mother's dependence on drugs, advised the Division he had no concerns about her drug use.

While Molly was still in the hospital, the Division explored but declined the mother's suggestion Molly be placed with her paternal aunt, H.M. (Helen), with whom defendants lived. The Division sent Helen a rule-out letter, which stated Helen was rejected as a placement option because of her "inability to take time from work to support and care for [Molly]." During trial, a Division employee clarified Helen was ruled out because she was unable to take off six weeks of work at the time of Molly's discharge from the hospital.

The rule-out letter advised that if Helen wished to challenge the Division's decision, she had twenty days to

[4] It is unclear whether he was convicted of these alleged charges.

appeal. The letter also stated that if Helen's circumstances changed and she wanted to be reconsidered as a potential caregiver to Molly, she could contact the Division. Helen neither sought a review nor reconsideration of the Division's decision. Defendants suggested four other relatives be considered as placement options, but all were ruled out and none sought a review of the Division's decision. Defendants do not challenge the Division's rejection of these other family members.

In June 2015, just two months after Molly was born, the father was arrested for violating probation because he moved to a new county without first securing permission from his probation officer. He was housed in a county correctional facility and then transferred to a halfway house in July 2015 for drug treatment, where he remained until March 2016. He worked during the day, participated in substance abuse treatment during the evening, and submitted to drug testing twice per month.

In August 2015, the father was evaluated by psychologist Alan S. Gordon, Psy.D. The father advised Gordon his drug of choice was marijuana, but claimed he had last used such drug in 2012; however, the father also reported he had in-patient drug treatment in 2013. Gordon administered various tests to the

father, which revealed psychological dysfunction of mild to moderate severity. Gordon observed that, when in a program, the father does well, but "the real question remains how he will function after he is in the community."

The father successfully completed the program at the halfway house and was discharged in March 2016. By all accounts, he did well while in the program. However, one month after his release, he violated probation by driving with a suspended license. The court revoked his probation and, in June 2016, the father was sentenced to a term of imprisonment that does not expire until June 2019.

At the time of trial, the father was participating in a drug treatment program in the prison and was doing well in treatment. Since Molly's removal, he has taken advantage of all opportunities to visit with her and has been found to be appropriate and affectionate with the child during all visits. He also completed a parenting course.

Despite the father's progress, the Division harbored doubts about his ability to parent Molly effectively because, for example, in March 2016 the father told the Division he was unwilling to separate from the mother so that he could gain custody of Molly. He also minimized the mother's drug use.

In December 2016, the father submitted to a psychological evaluation by the Division's expert, Lateisha Callender, Ph.D. At that time, the father told Callender he would separate from the mother so he could obtain custody of Molly. After examining the father and reviewing various documents, Callender concluded as follows. First, she acknowledged the father had done well in substance abuse treatment programs and completed a parenting course. In addition, before he was incarcerated he was gainfully employed. However, she found he exhibited poor judgment by engaging in conduct that led to his imprisonment, which in turn made him unavailable to care for and meet Molly's needs. His conduct revealed his difficulty with making decisions that allowed him to remain in the community.

Callender also noted that, despite the mother's prolonged inability to refrain from the use of drugs, the father minimized her use and failed to ascertain whether she was taking illicit substances when pregnant with Molly. Callender opined that if he had custody of Molly, his obliviousness to the mother's drug use would place the child at risk of harm. Specifically, there is the risk he would expose Molly to and fail to protect her from the mother if the mother were under the influence in the child's presence.

Callender also conducted a bonding evaluation of the father and Molly, as well as of the resource mother and the child. Callender concluded the resource mother is Molly's psychological parent. Callender also determined the resource mother is providing "high quality" care to Molly and that she is "thriving." Although it would not be "traumatic" for Molly if she were removed from the resource mother's home and placed with the father, nevertheless the harm caused by such change would be "severe and enduring."

Callender explained permanency is central to a child's sense of safety, and removal from the resource mother's home could have lifelong implications for Molly's social and cognitive development. If sufficiently skilled, a new caretaker could mitigate the harm to Molly. However, Callender opined the father lacks such skills. Finally, Callender stated that if Molly remained in the resource mother's home, the termination of defendants' parental rights will not do more harm than good.

Just weeks before the guardianship trial commenced in April 2017, the mother requested the Division investigate a close family friend, S.M. (Susan), as a placement option. Because of Callender's opinion Molly would suffer harm if removed from her resource mother's care, the Division ruled out Susan,

determining it was in Molly's best interests to remain in her current placement home.

In an extensive oral opinion, the Family Part judge reviewed the evidence and made factual findings and conclusions of law, determining the Division met all four prongs of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence. For substantially the reasons expressed in that opinion, we agree with and affirm the judge's findings.

II

On appeal, the father contends his parental rights were terminated on insufficient grounds. In his view those grounds were: (1) he will not be able to protect Molly from the mother's use of drugs if Molly were placed in his custody; (2) he violated probation, notwithstanding the nature of the violations were minor; and (3) he was incarcerated.

The father also argues the fact he successfully participated in drug treatment and meaningfully engaged in visitation was not accorded sufficient weight. Finally, both he and the mother claim the Division failed to appropriately consider Helen and Susan as placement options and did not consider alternatives to termination.

In reviewing a case in which termination of parental rights has been ordered, we are mindful of the gravity and importance

of our review. See N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 151 (2010) ("[T]he process for terminating parental rights is a difficult and intentionally rigorous one that must be satisfied by a heightened burden of proof. . . ."). Parents have a constitutionally protected right to enjoy a relationship with their children and to raise them without undue State interference. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 102 (2008).

However, this right is not absolute, as it is limited 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." F.M., 211 N.J. at 447. The State has a strong public policy that favors placing children in a permanent, safe, and stable home. See generally In re Guardianship of K.H.O., 161 N.J. 337, 357-58 (1999).

In addition, a reviewing court should not disturb the factual findings of the trial court if they are supported by "adequate, substantial and credible evidence. . . ." N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)). We defer to the trial court's credibility findings and, in particular, its fact findings because of its

expertise in family matters, see N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010), unless the trial court's findings are "so wide of the mark that the judge was clearly mistaken." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (citing J.T., 269 N.J. Super. at 188-89).

Here, the judge's factual findings are supported by "adequate, substantial and credible evidence. . . ." M.M., 189 N.J. at 279 (quoting J.T., 269 N.J. Super. at 188). The judge found Dr. Callender credible and relied upon her expert, unrebutted opinions, summarized above, to reach his conclusions on the first, second, and fourth prongs. We discern no reason to disturb those findings.

As for the father's specific contentions, there is no evidence the father's parental rights were terminated because he violated probation or was incarcerated. We agree the father's probation violations were minor, comparatively speaking. We also agree incarceration, standing alone, is insufficient to prove parental unfitness. See N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 555 (2014). However, the father's parental rights were not terminated because he moved to a different county without permission, drove while on the suspended list, or was incarcerated.

What occurred here is the father knowingly engaged in conduct that put him at risk for and did result in his confinement. Since Molly was two months old, but for a brief period between his discharge from the halfway house in March 2016 and his arrest for violating probation in April 2016, the father has been in jail, a half-way house, or prison. His current term of imprisonment does not terminate until June 2019. The probation violations were relatively minor, but their consequences significant.

Molly has been with her resource mother since she was approximately two weeks old. The pivotal and critical fact is that, by the time of trial, Molly had become so bonded to the resource mother that the severance of such bond will cause her severe and enduring harm. It was the father's unavailability that drives the outcome here. Although Molly could be placed with another, she will be seriously injured unless such person possesses the skills necessary to mitigate the harm she will experience if separated from her resource mother. It is unfortunate, but the father does not possess those vital skills.

As for the third prong, the Division must show it "has considered alternatives to termination of parental rights." N.J.S.A. 30:4C-15.1(a)(3). The Division may not "embark on a course set for termination of parental rights and adoption by a

foster parent without at least first exploring available relative placements." N.J. Div. of Youth & Family Servs. v. K.L.W., 419 N.J. Super. 568, 580 (App. Div. 2011).

Here, as part of its consideration of alternatives to termination of parental rights, the Division investigated five relatives and one family friend as placement options, but all were ruled out. Defendants did not request that the Division investigate any other individuals. On appeal, defendants claim Helen and Susan should not have been rejected.

As for Helen, we need not reach the merits of the Division's decision to reject her as a placement option. Helen declined to appeal from the rule-out determination. She also spurned the invitation to be reconsidered as a caregiver after the initial six-week period expired and the Division's perceived obstacle to her becoming a caregiver no longer existed. Under the circumstances, it is reasonable to assume Helen's failure to seek review or reconsideration of the Division's decision signified she was no longer able or willing to be a caregiver. Thus, placing Molly with Helen was not an alternative to terminating defendants' parental rights.

With respect to Susan, significantly, during her testimony she equivocated over whether she would be willing to adopt Molly. Susan stated it was not her plan to adopt Molly unless

it became necessary. When asked to clarify what would make adoption necessary, she merely replied, "Meaning if it's eight years, nine years, and I'm, you know, still a foster parent with her." In light of Susan's reluctance to adopt Molly at this time and the unrefuted testimony Molly needs permanency, which is best achieved through adoption, placing Molly with Susan also was not an alternative to terminating defendants' parental rights. Therefore, we affirm the judge's finding the Division met prong three of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence.

To the extent we have not addressed a defendant's argument, it is because we determined it was without sufficient merit to warrant discussion in a written opinion. See Rule 2:11-3(e)(1)(E).

Affirmed.