

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3964-16T2

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.S.,

Defendant-Appellant,

and

J.A.S., III,

Defendant.

IN THE MATTER OF THE GUARDIANSHIP
OF J.J.S., J.J.A.S., III and
J.A.S., IV,

Minors.

Submitted January 17, 2018 - Decided February 1, 2018

Before Judges Hoffman, Gilson and Mayer.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Ocean County,
Docket No. FG-15-0010-17.

Joseph E. Krakora, Public Defender, attorney for appellant (Carol A. Weil, Designated Counsel, on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Constance Russell Tous, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Melissa R. Vance, Assistant Deputy Public Defender, on the brief).

PER CURIAM

Defendant J.S. (Jena) appeals from a May 3, 2017 Family Part order terminating her parental rights to her three youngest children: Jeff, born in February 2012, Jack, born in March 2013, and Jimmy, born in September 2016.¹ The Division of Child Protection and Permanency (Division) and the children's Law Guardian argue in support of the judgment.

Defendant's brief raises the following points of argument:

POINT I

THE MOTHER WAS DENIED HER CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN THE PERMANENCY HEARING FOR A THREE[-]MONTH[-]OLD BABY WAS CONDUCTED BEFORE THE MOTHER WAS REPRESENTED BY COUNSEL AND WITHOUT THE OPPORTUNITY FOR HER TO CHALLENGE [THE DIVISION'S] FAILURE TO COMPLY WITH FEDERAL AND STATE REQUIREMENTS.

¹ We use pseudonyms to protect the children's privacy interests. R. 1:38-3(d)(12).

POINT II

THE TRIAL COURT ERRED BY TERMINATING THE MOTHER'S PARENTAL RIGHTS BECAUSE ALTERNATIVES TO TERMINATION, INCLUDING EVALUATION OF FAMILY MEMBERS AND FAMILY FRIENDS AS POTENTIAL CAREGIVERS, WERE NOT FULLY OR PROPERLY CONSIDERED.

POINT III

TERMINATION OF THE MOTHER'S PARENTAL RIGHTS MUST BE REVERSED BECAUSE THE COURT WRONGLY FOUND THAT THE DIVISION HAD MET ITS BURDEN OF PROOF AS TO THE FOURTH PRONG OF THE BEST INTERESTS TEST.

Following our review of the record, we affirm substantially for the reasons expressed by Judge Madelin F. Einbinder in her oral opinion issued on May 3, 2017.

I

Jena and J.A.S., III (Joe)² are the biological parents of J.J.S (Jeff), J.J.A.S., III (Jack), and J.A.S., IV (Jimmy). Jena also has two older children, Felix and George, by different fathers. The case under review does not involve these older children.

Jena's involvement with the Division dates back to October 2009 and pertained to Felix and George. However, following Jeff's birth, the Division received numerous referrals regarding Jena.

² Joe did not appeal from the order terminating his parental rights.

The Division was providing Jena services in 2012 when she gave birth to Jeff. In July 2012, Jena's drug treatment program discovered she had opiate prescriptions at multiple pharmacies. Subsequently, the treatment program discharged Jena after she refused to sign a release that would allow it to contact her prescribing physician.

In December 2012, the Division received a referral that Jena was pregnant (with Jack) and using heroin or morphine. The reporter also told the Division there was domestic violence in the home, and Jeff appeared developmentally delayed. At the time, Jena was attending a methadone clinic. In January 2013, the Division learned Jena was receiving methadone from two sources, and she left her drug treatment program after it confronted her about this allegation.

On January 11, 2013, the Division filed a complaint for care and custody of Felix, George, and Jeff. The Family Part granted care and supervision, and ordered Jena and Joe to attend substance abuse treatment and attend psychological evaluations.

On March 12, 2013, Dr. David R. Brandwein, Psy.D., completed a psychological evaluation of Jena. He endorsed Jena as "an independent caretaker"; however, he also opined that "should [Jena] test positive for any substance not prescribed to her and/or should she permit [Joe] to have access to her children while he

is suspected or using drugs and/or under the influence, the Division should immediately re-petition the Court for custody of the minor children."

In November 11, 2013, a referral alleged Jena was using and selling drugs, had a "disgusting" home, and was not properly caring for her children. The Division determined the allegations were unfounded, but noted Jena refused to allow her caseworker to count how many pills she had in her pain medication bottle; Jena claimed she had given some pills away.

In June 2014, the police contacted the Division and reported that Jeff and Jack were found "wandering unattended" on Route 9. Jena stated that at the time of the incident, George – eight at the time – was tasked with watching the children and "making sure the doors [stayed] locked" because she was "ripping up carpet." Jena refused to complete a substance abuse evaluation, but the caseworker noted she did not appear to be under the influence of drugs.

In July 2014, the State Police found Jeff and Jack again unattended outside the home. Jena tested positive for alcohol on the date of the incident, but denied drinking.

In December 2014, Jena's substance abuse program reported she only sporadically attended the program, and she tested positive

for alcohol. Jena also stated she no longer took medication to treat her bipolar disorder.

In March 2015, a Division caseworker referred Jeff and Jack to Early Intervention. However, no services were put into place due to the family's noncompliance.

On June 20, 2015, the Division received a referral from the Ocean County Board of Social Services, which alerted the Division that Jena claimed she was homeless and sought housing due to domestic violence. Jena also reported Joe threatened to kill her.

On June 25, 2015, the Family Part granted the Division custody of the children. Felix and George went to live with a maternal aunt, and the Division placed Jeff and Jack in resource care. On July 2, 2015, the Division relocated Jeff and Jack to a different resource home.

On August 18, 2015, Dr. Brandwein again evaluated Jena. He did not endorse her as an independent caretaker, and recommended "[a]ll of her contact with [her children] should occur under supervision." He "made recommendations designed to move [Jena] toward levels of personal and psychological stability that could, potentially, allow her to care for her children." However, the doctor remained "extremely pessimistic" that Jena would comply with his recommendations.

Between September and December 2015, Jeff and Jack underwent developmental evaluations, which showed numerous delays. Shortly thereafter, they began receiving special services and therapies.

In October 2015, Jena commenced inpatient drug treatment, and started parenting classes. She successfully completed the inpatient program in November 2015, and subsequently began an outpatient program, where she consistently provided negative urine screens. In February 2016, Jena successfully completed the parenting program.

Shortly thereafter, however, Jena began missing her outpatient treatment sessions, and provided a diluted urine screen. In March 2016, her urine screen tested positive for morphine.

Dr. Brandwein re-evaluated Jena on March 24, 2016. He found Jena had "appeared to make significant strides towards her personal and case goals"; however, he was concerned that Jena maintained contact with Joe, who was noncompliant and refused to attend substance abuse evaluations or provide urine screens. Dr. Brandwein also noted concerns regarding Jena's recent arrest, diluted urine screens, and positive morphine screen. Accordingly, he did not endorse her as an independent caregiver.

In April 2016, Jena disclosed to the Division she was twenty-weeks pregnant with Jimmy. During this time, she was charged with

shoplifting, and was later arrested for possession of controlled dangerous substances (CDS), to which she pled guilty to "wandering/prowling to obtain/sell CDS." In May 2016, she was again arrested for possession of CDS and a hypothermic syringe, and plead guilty to possession of the syringe.

On July 20, 2016, the Division served Jena and Joe with a guardianship complaint. The Family Part held a hearing on August 3, 2016, which Jena and Joe failed to attend.

On September 5, 2016, Jena gave birth to Jimmy; her urinalysis tested positive for cocaine, opiates, and alcohol. The hospital discharged Jimmy directly to the Division, pursuant to the Division's order to show cause and complaint for custody alleging abuse and neglect under Title 9.

On December 6, 2016, the Family Part held two consecutive hearings – first addressing the Division's Title 9 charges regarding Jimmy and second addressing the guardianship case regarding Jeff and Jack. Jena completed an application for appointed counsel – a 5A form – for the guardianship action, but apparently did not realize she needed to fill out a separate form for the Title 9 action.

During the guardianship hearing, Jena's appointed attorney for the guardianship litigation indicated she was present for the Title 9 hearing. She asked "the Division not at this point

encourage [Jena] to fill out a 5A form" The judge and the Division agreed with this request.

On January 10, 2017, the Division filed an amended complaint for guardianship to include Jimmy. At the next hearing on February 24, 2017, both Jena and Joe were present and represented by counsel. The Family Part terminated Jimmy's Title 9 action "due to the fact that a [c]omplaint for termination of parental rights ha[d] been filed."

Trial commenced on May 2, 2017. The Division presented testimony from Dr. Brandwein and two caseworkers. Dr. Brandwein testified as to his findings from his three psychological evaluations. He further recommended the termination of parental rights, and found the children – aside from Jimmy who was too young – bonded with their resource mother. He opined that terminating parental rights would not cause more harm than good.

In her oral opinion, Judge Einbinder concluded that the Division had satisfied the four prongs of the best interests test by clear and convincing evidence. We briefly summarize her findings, which are supported by sufficient credible evidence. R. 2:11-3(e)(1)(A).

Regarding prong one, Judge Einbinder found that the "safety, health, [and] development" of all three children have been and will continue to be endangered by Jena and Joe, citing their long

history of substance abuse, domestic violence, criminal behavior, and incarceration. The judge noted that both parents often missed substance abuse evaluations and substance abuse treatment.

As to prong two, the judge found that the Division proved that both parents are unwilling or unable to eliminate harm facing their children and delaying permanent placement would add to the harm. The judge credited the testimony of Dr. Brandwein, and the psychological evaluations he completed in 2013, 2015, and 2016. The judge found both parents failed to benefit from the many services the Division offered, and both lacked the ability to provide safety, nurture and guidance to their children due to the instability in their own lives. On the other hand, the judge found the resource parent developed a strong bond with the children that, if terminated, would cause the children "serious and enduring emotional or psychological harm."

Regarding prong three, the judge found the Division "made more than reasonable efforts to provide services to help both [parents] correct the circumstances which led to the three children's placement outside the home." The Division properly considered alternatives to termination of parental rights and reasonably ruled out several alternative placement options suggested by the parents.

As to prong four, the judge relied upon the findings and conclusions of Dr. Brandwein, who could not endorse either parent as an independent caretaker now, or in the foreseeable future. The judge also cited Dr. Brandwein's unopposed testimony that termination of parental rights would not do more harm than good.

II

The scope of this court's review of a determination terminating parental rights is limited. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 278 (2007). The factual findings that support such a judgment "should not be disturbed unless 'they are so wholly insupportable as to result in a denial of justice,' and should be upheld whenever they are 'supported by adequate, substantial and credible evidence.'" In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am. 65 N.J. 474, 483-84 (1974)); Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 475 (1988)). This court accords no special deference to the family judge's interpretation of the law and the legal consequences that flow from established facts. See Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 183 (2010).

Parents have a constitutionally protected right to enjoy a relationship with and to raise their children. In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999). However, "the right of

parents to be free from governmental intrusion is not absolute." Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 599 (1986). "When [a] child's biological parents resist the termination of their parental rights, the court's function" is to decide whether the parents can raise the child without causing him or her further harm. In re Guardianship of J.C., 129 N.J. 1, 10 (1992).

III

Jena first argues the Family Part deprived her of her right to due process when it did not provide her with the opportunity to be represented by counsel at the Title 9 permanency hearing for Jimmy. See, e.g., Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 634 (App. Div. 2010) ("When faced with the temporary loss of parental rights, a parent's right to have legal representation is assured by the due process guarantee of Article I, paragraph 1 of the New Jersey Constitution and by N.J.S.A. 9:6-8.30(a)."). Jena's argument lacks merit.

Jena's guardianship attorney – who was present at both the Title 9 and guardianship hearings – explicitly requested the Division abstain from urging Jena to complete another 5A form. Specifically, she stated:

[S]o that this does not become too utterly confused, I would just ask that the Division not at this point encourage [Jena] to fill out a 5A [form] for the [Title 9 case] because that would obviously be dismissed at the next

case, and I'm already here on the [guardianship action].

Furthermore, at the next hearing, when the judge asked whether "anybody wish[ed] to be heard in regards to the Division's application to terminate the [Title 9] litigation because a [guardianship litigation] has been filed," all counsel responded in the negative. Thus, the attorney who represented Jena at the following hearing declined an opportunity to object to the Division's amended guardianship complaint and the dismissal of the Title 9 action. Moreover, we note that no finding of abuse or neglect was made in the Title 9 proceeding before the court dismissed it. The record only reflects that Jena admitted to being part of a "family in need of services" pursuant to Title 30; such an admission clearly had no adverse impact in the guardianship case. Jenna was provided with the opportunity to contest all of the Division's allegations during the guardianship trial.

Additionally, we note the Division is not required to file a Title 9 complaint before filing a guardianship complaint, nor is it obligated to conclude or commence a Title 9 action before bringing an action under N.J.S.A. 30:4C-15.1 to terminate parental rights. N.J. Div. of Youth & Family Servs. v. A.P., 408 N.J. Super. 252, 260-61 (App. Div. 2009). This is because "[i]f [the Division] cannot bring a termination proceeding until an abuse or

neglect action finally winds its way through the courts, the Legislature's goal of achieving permanency in the placement of children will be frustrated and the child will suffer." Ibid. (first alteration in original) (citation and internal quotation marks omitted). Accordingly, Jena's due process argument clearly lacks merit.

IV

Jena next argues the Division failed to satisfy its burden regarding prongs three and four of the best interests standard. Our examination of the record discloses the Division met these prongs by clear and convincing evidence.

Regarding the third prong, Jena argues the Division neglected to adequately pursue kinship legal guardianship (KLG). This argument lacks support in the record.

"N.J.S.A. 30:4C-12 simply does not permit the Division to embark on a course set for termination of parental rights and adoption by a foster parent without at least first exploring available relative placements." Div. of Youth & Family Servs. v. K.L.W., 419 N.J. Super. 568, 580 (App. Div. 2011). However, "[i]f adoption is readily available, KLG cannot be used to defend against termination of parental rights." Div. of Youth & Family Servs. v. D.H., 398 N.J. Super. 333, 341 (App. Div. 2008).

Here, the Division pursued, and ruled out, Jena's relatives. In May 2016, a maternal aunt stated she was unable to care for the children. In both May 2016 and September 2016, Jena's mother declined to care for the children. Therefore, at the time of the hearings, KLG was not a viable option. See Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 105 (2008) (holding the court may proceed with terminating parental rights when, "at the end of the family court hearings, there [is] no person available to serve as kinship legal guardian.").

Moreover, the children's resource mother indicated she wished to adopt all three boys. See In re Guardianship of J.E.D., 217 N.J. Super. 1, 17 (App. Div. 1987) (holding when a resource parent wishes to adopt, an "influential factor is introduced into the best interests" standard). Accordingly, the record supports the judge's finding that the Division satisfied the third prong.

Finally, Jena argues the Division failed to satisfy the fourth prong regarding Jimmy because he "never had a valid bonding evaluation with the [resource parent] or [Jena]." This argument also lacks merit.

The fourth prong considers whether terminating parental rights will not do more harm than good. N.J.S.A. 30:4C-15.1(a)(4). "The crux of [this prong] is the child's need for a permanent and stable home, along with a defined parent-child relationship." Div.

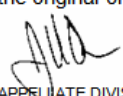
of Youth & Family Servs. v. H.R., 431 N.J. Super. 212, 226 (App. Div. 2013). There exists a "paramount need [for] children [to] have . . . permanent and defined parent-child relationships." J.C., 129 N.J. at 26.

Here, Dr. Brandwein was unable to perform a bonding evaluation on Jimmy because he was too young. However, the doctor testified that over the course of Jena's ten-year involvement with the Division, she "struggled to achieve the stability [she] need[ed] to achieve to parent any child." He did not believe Jena currently or "in the foreseeable future" would be able to provide permanency for the children, and did not recommend reunification. In contrast, he testified that the resource mother was a stable provider, who had developed "a secure psychological bond" with the two older children and had demonstrated the ability to meet Jimmy's needs.

Dr. Brandwein cautioned that reunification of the children with their parents, at this point, would "result in a grave psychological risk to these children." He concluded that "termination of parental rights . . . will not do more harm than good." We find no reason to alter the Family Part's judgment of guardianship terminating parental rights.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION