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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4572-15T3

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

A.W.,

Defendant-Appellant,

and

T.M.F.,

Defendant.

IN THE MATTER OF THE GUARDIANSHIP
OF A.M.A.F.W.

Minor.¹

Submitted September 27, 2017 – Decided February 14, 2018

Before Judges Fuentes, Manahan and Suter.

¹ As required by Rule 1:38-3(d)(12), we use initials to identify the parties to protect the confidentiality of records related to proceedings initiated by the Division of Child Protection and Permanency held pursuant to Rule 5:12.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FG-07-0164-15.

Joseph E. Krakora, Public Defender, attorney
for appellant (Adrienne Kalosieh, Designated
Counsel, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent (Andrea M. Silkowitz,
Assistant Attorney General, of counsel; Merav
Lichtenstein, Deputy Attorney General, on the
brief).

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

PER CURIAM

The Family Part entered a Judgment of Guardianship against defendant A.W., terminating his parental rights to his minor daughter² A.M.A.F.W. In this appeal, defendant argues the Division of Child Protection and Permanency (the Division) failed to satisfy prongs two, three, and four of N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence. Defendant also argues the Division violated his due process rights by denying his requests for visitation with A.M.A.F.W. throughout the guardianship litigation. We reject these arguments and affirm.

² The Family Part also terminated the parental rights of A.M.A.F.W.'s biological mother, T.M.F., a/k/a T.M.B.F. She did not file an appeal.

I

A

A.M.A.F.W. was born in 2008. She has a significant history of emotional and behavioral problems, including "impulsive behavior, aggressive behavior, defiance, suicidal ideation, problematic sexual behavior, and poor interpersonal boundaries." She was diagnosed in 2014–2015 with Attention Deficit Hyperactivity Disorder (ADHD), Fetal Alcohol Syndrome, and learning disabilities associated with reading and mathematics. The record also shows that she may have been sexually abused.

Defendant has a long history of heroin dependence dating back to the early 1990s. He was born and raised in Newark, where he has resided with his mother "off and on" since 1977. Defendant completed twelfth grade in the Livingston public school system. His most recent job was in 2010 as a "machine operator." His substance abuse problem has also produced drug-related criminal activity for which he has served short periods of incarceration. He has been arrested for "wandering," "loitering," "breaking and entering," drug possession, failure to pay child support, and violation of the terms of a probationary sentence. A psychological evaluation report dated October 31, 2013, shows defendant has been charged with aggravated arson, theft, disturbing the peace, and resisting arrest. The report does not reveal the disposition of

these charges. As of February 24, 2016, defendant did not receive any form of public assistance.

The Division's involvement with this family began approximately two years before A.M.A.F.W. was born. The referrals involved allegations of physical abuse of A.M.A.F.W.'s older siblings by their biological mother. Throughout 2008, the Division substantiated allegations of neglect, abandonment and "substantial risk of physical injury[.]" Shortly after A.M.A.F.W. was born, the Division received a referral from St. Barnabas Medical Center that A.M.A.F.W.'s biological mother: (1) was unable to provide a name that corresponded with a valid social security number; and (2) could not confirm that she received prenatal care during her pregnancy.

When the Division caseworker interviewed A.M.A.F.W.'s mother, T.M.F., she stated that her apartment was "bordered up[.]" She planned to care for her newborn infant at her sister's home. However, the Division was unable to confirm this alleged living arrangement. When asked about the child's biological father, T.M.F. claimed defendant was incarcerated at the time. The Division substantiated T.M.F. for neglect and removed A.M.A.F.W. from her care. The child was reunified with her parents on September 25, 2009, approximately nine months later. From November 17, 2010 to October 5, 2012, the Division received four separate

referrals regarding T.M.F.'s "explosive temper" and suspected alcohol abuse. Defendant denied that T.M.F. had a "drinking problem." On December 12, 2011, defendant also denied being A.M.A.F.W.'s father and refused to provide the Division with his date of birth or social security number.

The first incident that triggered judicial involvement occurred on October 24, 2013. On that date, the Division received a referral that a passerby had contacted the police after discovering then four-year-old A.M.A.F.W. "wandering" by herself at the High Bridge Train Station. Both T.M.F. and defendant refused to accept any responsibility for the incident. Each parent gave conflicting accounts of the event. When she was interviewed by High Bridge Police Officers at police headquarters, T.M.F. claimed that she had placed A.M.A.F.W. on a train with defendant before she returned home.

Defendant told the Division caseworker that he had an argument with T.M.F. and left her house when she "kicked him out." He claimed he was alone when he took a train to New York City to return to the Palladia-Esperanza Transitional Shelter, where he allegedly resided at the time. Defendant told the caseworker that as the train pulled away, he saw T.M.F. and A.M.A.F.W. on the station platform. He then saw T.M.F. "turn around to walk away" and A.M.A.F.W. "running after her and crying." Defendant told the

caseworker that T.M.F. could not have expected him to take A.M.A.F.W. with him to New York City because she knew that children are not allowed in the transitional shelter.

Division records show that later that same day a caseworker telephoned the Palladia-Esperanza Transitional Shelter to verify defendant's statement. The woman who answered the phone refused to identify herself. However, she told the caseworker that defendant "was no longer staying there" and "it [had] been a while since [A.W.] [was] there." When confronted with this information, defendant conceded that he was residing with his mother in the Township of Irvington.

A.M.A.F.W., who was five years old at the time, told the caseworker that her parents had been arguing over who should take care of her that day. She boarded the train with her father, but she stepped off before the train pulled away from the station. Thus, according to A.M.A.F.W., her mother was the one who abandoned her that day. After completing this preliminary investigation, the Division executed an emergency DODD removal of A.M.A.F.W. and placed her in a Division-approved resource home. See N.J.S.A. 9:6-8.29; N.J.S.A. 9:6-8.30. The Division ultimately substantiated both T.M.F. and A.W. for neglect, finding both parents "deprived [A.M.A.F.W.] [of] necessary care[,]" thereby creating a "substantial risk of serious harm[.]"

B

On October 28, 2013, the Division filed an order to show cause and verified complaint to obtain temporary custody, care, and supervision of A.M.A.F.W. pursuant to N.J.S.A. 9:6-8.21 and N.J.S.A. 30:4C-12. Although defendant appeared at the hearing, he did not offer himself as a placement for the child due to his substance abuse problem. Defendant suggested his mother, M.W., and his niece, K.W., as potential relative-placements. M.W. ruled herself out; she informed the Division that she was too old to properly care for her granddaughter. On October 13, 2015, the Division sent M.W. a formal rule-out letter. With respect to his niece, defendant informed the Division that K.W. "suffers from migraines[.]" K.W. later advised the Division that she was unable to care for A.M.A.F.W. because she "works, goes to school, and has her own child." The appellate record does not contain a copy of a Division rule-out letter for K.W.³

On October 28, 2013, the Family Part entered an order placing A.M.A.F.W. in the custody, care, and supervision of the Division. The court's order required defendant to submit to psychological

³ Although T.M.F. provided the Division with two potential relative placements, these individuals were not deemed appropriate. We have opted not to provide more details on this subject because T.M.F. did not appeal.

and substance abuse evaluations by healthcare professionals selected by the Division. The court granted defendant "weekly supervised visitation contingent upon 24-hour advance confirmation." The court order also included the following admonition:

The failure of defendants to comply with any provision of this order or their continuing failure to appear may result in a default being entered by the court and may result in the commencement of a termination of parental rights proceeding. A termination of parental rights would free the child[] for adoption.

The Division advised defendant that, if necessary, it could arrange to assist him with transportation to the evaluation sites.

Defendant tested positive for opiates on October 28, 2013, October 31, 2013 and December 20, 2013. Defendant also admitted to taking oxycodone without a prescription on multiple occasions. At his substance abuse evaluation with Preferred Children's Services (PCS), defendant denied any opiate dependency issues. Following this evaluation, the PCS counselor recommended that defendant attend an outpatient treatment program located in Irvington called "The Bridge." PCS ultimately terminated defendant from its outpatient program due to minimal attendance and failure to comply with treatment recommendations.

The Division also referred defendant to Dr. Sally Morcos of Evermore Wellness, LLC, for a separate psychological evaluation.

Although defendant attended his first scheduled meeting with Dr. Morcos, he failed to attend three additional appointments. Consequently, the Division was unable to determine what kind of psychological services defendant required prior to his reunification with A.M.A.F.W.

The Division provided defendant with a train pass to assist him in attending his court-ordered weekly visitation sessions with A.M.A.F.W. Despite this accommodation, defendant's record of attending these visits with his daughter was, at best, sporadic. His first visit was on October 31, 2013. The Division contact sheet documenting the visit described his interactions with the child as pleasant. The second visit took place approximately two weeks later, on November 14, 2013. Once again, the contact sheet described the interaction between father and daughter as "friendly[,]" "appropriate[,]," and reflective of a "mutual bonding relationship [between] a loving child and [her] [father]." The record shows the visit concluded with the two saying "I love you" and "hugging and kissing . . . in a loving [fashion]."

However, although the court order entitled defendant to "weekly supervised visitation," the next time defendant saw his young daughter was on December 20, 2013, thirty-six days after his last visit. In fact, defendant saw the child only three times during a three-month period. An entry in a Division contact sheet

dated December 5, 2013 provides an explanation for this outcome: "[Defendant] continues to be inconsistent with his attendance at visits[,] often calling at the last minute to state he has to work or cannot make . . . the visit for transportation reasons[,] despite having [a] train pass."

Defendant's participation and attendance in a Family Team Meeting (FTM), a Division-sponsored program, provides additional information on defendant's circumstances. The meeting took place at defendant's mother's home. A "Family Summary" includes the following description of defendant's situation at that time:

[A.W.] is the [49-year-old] father of [A.M.A.F.W.]. [A.W.] denied having any other children. [A.W.] is unemployed at this time and is not receiving any benefits. [A.W.] reported residing between his mother's home in Irvington, [New Jersey] and a Transitional Home in New York. [A.W.] does not have a stable home in order to present a place for [A.M.A.F.W.] to be returned to his care. There are also concerns regarding [A.W.]'s admission that he has taken medication that is not prescribed to him. [A.W.] is willing to work with the Division and has expressed an interest in complying with the court[']s order.

Although he identified his love for his daughter, his willingness to make sacrifices for her well-being, and strong family support as "strengths" favoring reunification, defendant acknowledged that reunification could occur only if he could find stable housing, secure employment with benefits, and remain

"substance abuse free[.]" The Division agreed to continue to provide defendant with a safe location for him to have weekly supervised visitation with A.M.A.F.W., including transportation if necessary. Defendant was required to notify Division workers "immediately" of the need to reschedule any visits.

On January 21, 2014, the Division revoked defendant's train pass. Caseworker Stephanie Restrepo informed defendant that the record showed he was not using this service to visit his daughter. Restrepo also asked defendant if he intended to seek treatment for his substance abuse problem. Although defendant indicated he intended to seek treatment, he declined the Division's offer to arrange referrals to resources in his area. On February 7, 2014, Restrepo contacted defendant to determine whether he planned to attend the visitation with his daughter scheduled for that day. When defendant responded that he did not have funds to pay for transportation, Restrepo told defendant that the Division would reimburse him for his travel expenses at the rate of thirty-one cents per mile. Defendant stated he was unable to attend. Defendant did not have any contacts with A.M.A.F.W. in January or February 2014.

Defendant's next visit with A.M.A.F.W. took place on March 6, 2014, at the Division's local Hunterdon County office. Division records reflect that the interaction between father and daughter

was positive. When defendant arrived, A.M.A.F.W. "jumped into his arms and gave him a hug." Defendant "spoke appropriately" with his daughter throughout; he kissed the child goodbye at the end of the visit and told her he would see her soon. Despite this innocuous facade, Division staff noted defendant seemed to be "under the influence of an illegal substance[.]" He "appeared to be falling asleep during the visit and his speech was not legible." At the Division's request, defendant agreed to provide a urine sample at the end of visit. Defendant tested positive for cocaine and opiates.

On March 14, 2014, defendant cancelled his scheduled visit with A.M.A.F.W. because he was "feeling weak and light headed." Restrepo told defendant that the Division had secured a March train pass for him and emphasized the importance of attending all weekly visits. Defendant apologized and asked that the visit be rescheduled. He told Restrepo that he needed to find an inpatient treatment program for his substance abuse problem. He alleged he had "called a few places[,]" but did not provide Division staff with the names of any specific facility or program. Despite numerous attempts by Division staff to communicate with defendant, both on the telephone and in person, defendant did not respond until January 2015. He did not see his daughter again until

October 2015, more than 500 days from his last visit on March 14, 2014.

C

A.M.A.F.W.'s emotional stability worsened during this period of time. Due to her behavioral issues, she was removed from her resource home on January 17, 2014, and placed in a second home. Her psychotherapist at the time opined she was not "benefitting from therapy" due to her "cognitive and developmental delays." Division records note A.M.A.F.W. displayed tendencies to act aggressively with other children, and she continued to have "boundary and personal space issues." She was "behind academically as compared to her peers[,]" and could not identify colors, letters, and numbers.

On January 29, 2014, the Division arranged a psychological evaluation to "assess [A.M.A.F.W.]'s . . . functioning, . . . and to make treatment recommendations that would meet her needs." Psychologist Dr. Margaret DeLong noted A.M.A.F.W. "demonstrate[d] delays that suggest emotional and social deprivation as well as [a] lack of academic and educational stimulation during her early years." Dr. DeLong found A.M.A.F.W. was "behind with [her] social skills[;]" she "cannot sit still or focus for any length of time[;]" and she has a "hard time relating with other children[.]" Dr. DeLong opined that A.M.A.F.W. would benefit from a Child Study

Team evaluation, as well as placement in a specialized "preschool handicapped" program or a "therapeutic preschool." Dr. DeLong also recommended that A.M.A.F.W. participate in individual play therapy, recreational activities with her peers, and supervised visitation with her mother.

Consistent with Dr. DeLong's recommendations, the Division referred A.M.A.F.W. to counseling, as well as several evaluations to assess her speech and overall developmental delays. Based on a speech evaluation conducted at TC Kids-Therapy Center, Dr. Jacek Sakowski diagnosed A.M.A.F.W. with "moderate-severe receptive language and moderate expressive language delay." Dr. Sakowski recommended that she receive bi-weekly speech therapy with an "emphasis on receptive language and vocabulary syntax development."

In April 2014, Dr. Tosan Livingstone, a pediatrician associated with Morristown Memorial Hospital, conducted a pediatric neurodevelopmental evaluation of A.M.A.F.W.'s behavior. She concluded that A.M.A.F.W. was "in the clinically significant range for hyperactivity, aggression, depression, atypicality, attention problems[,] and functional communication." Dr. Livingstone diagnosed A.M.A.F.W. with ADHD, Fetal Alcohol Effects, and "Learning Difficulty." Finally, the Clinton Public School District determined A.M.A.F.W.'s disabilities would affect her

educational performance, thus requiring special education and related services.

II

On April 21, 2014, the Family Part conducted a fact-finding hearing. The court found, by a preponderance of the evidence, that both defendant and her biological mother T.M.F. had "grossly neglected" A.M.A.F.W. by leaving her unattended at the High Bridge train station. See N.J.S.A. 9:6-8.21. The court found A.M.A.F.W. was placed in a "position of imminent danger[,]" because she was only four years old at the time and incapable of protecting herself. Although both parents were represented by counsel, neither parent attended the hearing.

During the months following the fact-finding hearing, A.M.A.F.W.'s resource mother reported that the child's behavior had significantly deteriorated and become increasingly "intolerable." She displayed inappropriate sexualized behaviors at her school and was physically aggressive against other children. She hit other children in the home, destroyed toys, refused to follow directions, and constantly demanded food. The resource mother initially stated she was unwilling to adopt, but would continue to care for A.M.A.F.W. until the commencement of the following school year. Unfortunately, the resource mother later rescinded her offer and requested that A.M.A.F.W. be removed as

soon as possible. The Division removed A.M.A.F.W. from this resource home on August 1, 2014. She was thereafter placed in a temporary resource home, pending the outcome of the Division's efforts to find a suitable pre-adoptive home.

Based on defendant's and T.M.F.'s history of noncompliance, the Division decided to file a guardianship action and seek the termination of their parental rights. The ultimate goal was to find and select a home suitable for adoption. The Division placed A.M.A.F.W. in a pre-adoptive home approximately one month later. The child thereafter was enrolled in kindergarten where she received special education services pursuant to her classification by the local public school district. A.M.A.F.W.'s new resource parent reported to the Division that it was "extremely difficult to manage her behaviors[.]" She had "frequent meltdowns[.]" including incidents in which she would throw herself on the floor and scream. According to the resource parent, A.M.A.F.W. constantly spoke about her biological parents, but would refer to them by their first names, as opposed to commonly used appellations such as "mom" or "dad." The Division referred A.M.A.F.W. to the Rutgers's Foster Care Counseling Project for individual therapy.

On October 20, 2014, the Family Part conducted a permanency hearing; defendant did not appear. The trial judge found the Division's plan of termination followed by adoption was both

"appropriate and acceptable." The court further found the Division had provided reasonable efforts toward reunification, including transportation to supervised visits and referrals to substance abuse evaluations and treatment programs. The court also transferred venue to Essex County. Division caseworker Stephanie Restrepo notified both parents via letter of the change in venue.

A.M.A.F.W.'s emotional stability took a dramatic turn for the worse in October 2014. Her resource parents described the child as having "full-blown meltdowns[]" in which she would violently strike the pets in her pre-adoptive home and incessantly repeat that she was "scared[.]" She would also repeatedly lie to the school nurse about being sick as an excuse to be sent home. Of particular concern were the reports of the child's sexualized behavior. As described by the resource parents, A.M.A.F.W. had a habit of "touching people" in inappropriate areas. For this reason, A.M.A.F.W.'s therapist expressed concerns that she may have been sexually abused. The resource parents told the Division they were hesitant to commit to long-term care of A.M.A.F.W. if her behaviors did not improve.

On November 6, 2014, the Division received a referral regarding troubling disclosures A.M.A.F.W. made to her resource parents concerning defendant. Specifically, A.M.A.F.W. stated that her biological father, defendant A.W., had "kissed her on her

vagina." She also said defendant "kissed her on the ear, licked her ear[,] and bit her lip." The Division, the Hunterdon County Prosecutor's Office, and the Clinton Police Department investigated these allegations. As these three agencies proceeded to investigate the child's allegations against defendant, A.M.A.F.W. also accused her biological mother, T.M.F. of physically abusing her. According to A.M.A.F.W., T.M.F. "used to pin her against the wall and hit her head against the wall" in addition to "kick[ing]" her and "elbow[ing]" her.

Lieutenant Kristen Larsen of the Hunterdon County Prosecutor's Office questioned T.M.F. about her daughter's allegations of physical abuse. T.M.F. strongly denied that she ever physically abused her daughter. Defendant denied he was ever sexually inappropriate with his daughter. He offered to take a lie detector test as a means of refuting these accusations. When pressed on the subject of sexual conduct, defendant admitted that A.M.A.F.W. had partially witnessed he and T.M.F. engaging in sexual activity. Ultimately, both the Hunterdon County Prosecutor's Office and the Clinton Police Department concluded there was insufficient evidence to support filing criminal charges against either parent. The Division also concluded that the allegations of sexual abuse against defendant were unfounded and the

allegations of physical abuse against T.M.F. were "[n]ot [e]stablished."

On November 13, 2014, the Division received a referral from A.M.A.F.W.'s resource home that A.M.A.F.W. had been admitted to the psychiatric unit of Robert Wood Johnson University Hospital after experiencing a psychotic episode. The resource parents stated A.M.A.F.W. had an "absolute crisis" moment in which she displayed extreme behaviors, such as running around the house, screaming, and attempting to kick her caretaker down a flight of stairs. The adults who were present stated that A.M.A.F.W. acted as if she was unaware of her surroundings. While en route to the hospital, they saw and heard A.M.A.F.W. having a conversation with herself. When asked who she was speaking to, she responded that she was speaking to a ghost who visits her every night when no one else is around. A.M.A.F.W. was transferred to Summit Oaks Hospital in Summit, where she remained hospitalized for approximately ten days.

During her stay at Summit Oaks Hospital, A.M.A.F.W. told her treating psychiatrist that voices in her head told her to kick her resource parent down the stairs. These same voices were also telling her to commit suicide. With respect to A.M.A.F.W.'s auditory hallucinations, the psychiatrist who examined her tentatively diagnosed her as suffering from "[b]ipolar [d]isorder

with psychotic features[.]" However, he hoped to rule out this diagnosis based on her young age. Ultimately, the psychiatrist was unable to complete an evaluation because A.M.A.F.W. was "restless" and unable to sit still.

Summit Oaks Hospital discharged A.M.A.F.W. on November 25, 2014. Following this incident, the third couple originally willing to be A.M.A.F.W.'s resource parents apprised the Division that they were no longer able to care for her and requested that she be removed from their home. The Division placed A.M.A.F.W. in a fourth Division-approved resource home. However, this placement was temporary because the Division had concluded that A.M.A.F.W. required a higher level of care. The goal then was to place her in a therapeutic treatment home. As part of its discharge plan, the hospital prescribed A.M.A.F.W. 0.5 mg of Tenex⁴ to be administered twice daily. Following her new placement, the Division registered A.M.A.F.W. as a student at the Marion P. Thomas Charter School in Newark. However, she continued to display physically aggressive behavior; she was defiant, uncooperative, and generally disruptive. She also engaged in "poor social

⁴ Tenex is a cognition-enhancing medication commonly used to treat high blood pressure and ADHD. Univ. of Ill.-Chi., Drug Info. Grp., Can Tenex Be Used to Treat ADHD?, HEALTHLINE, <http://www.healthline.com/health/adhd/tenex-adhd#introduction1> (last visited Aug. 23, 2017).

interactions" with children her age because she was constantly moving.

On December 3, 2014, the Division filed a complaint for guardianship in the Essex County Chancery Division, Family Part, seeking the termination of defendant's and T.M.F.'s parental rights to A.M.A.F.W. pursuant to N.J.S.A. 30:4C-15. The Division alleged that, notwithstanding its reasonable efforts to achieve reunification, both parents "substantially, continuously[,] and repeatedly" failed to maintain contact with their daughter or reasonably plan for her future. Under these circumstances, permanent adoption would be in A.M.A.F.W.'s best interests. The Division made the following specific allegations against defendant:

[A.W.] has failed numerous times to avail himself to the services provided by the Division. He has failed to make a permanent plan for the child, has abandoned the child to the care of others, and has substantially failed to perform the regular and expected functions of care and support for the child. He has partially complied with past [c]ourt orders. To return the child to the care of [A.W.] would expose the child to an unacceptable level of harm or risk of harm.

After he was served with the guardianship complaint, defendant contacted Division caseworker Michelle Montgomery to discuss a potential case plan. At a court hearing conducted on January 21, 2015, the Deputy Attorney General (DAG) who represented

the Division informed the court that the Division planned to resume scheduling weekly visits between defendant and his daughter. The DAG also indicated that defendant had agreed to submit to a drug screen. Unfortunately, defendant did not attend the case plan meeting he scheduled with caseworker Montgomery. Defendant also did not attend a meeting at A.M.A.F.W.'s school, despite receiving notice of the meeting at the January 21, 2015 hearing. Defendant also failed to report to a scheduled drug screening test at Catholic Charities. He was eventually discharged from this program for noncompliance after missing several appointments.

The record is uncontroverted in one key respect. Defendant consistently failed to attend multiple prescheduled visits with his daughter, and failed to appear at four court conferences that took place between March and July 2015. On May 5, 2015, the DAG informed the court that the Division had made "multiple efforts to try and reach [A.W.]." The DAG represented to the court that defendant had failed to respond to numerous attempts to contact him, both by phone and by letters sent to his last known address. As reflected in the multipurpose order entered on May 5, 2015, the court found that defendant "continues to be non-compliant with the Division despite [the Division's] efforts . . . to engage him."

On May 8, 2015, the Family Part directed both defendant and T.M.F. to report to Dr. Gianni Pirelli for psychological and

bonding evaluations. The Division designated Dr. Pirelli as its expert witness in the guardianship trial. On June 10, 2015, the Family Part entered an order finding that both defendant and T.M.F. failed to appear for these pre-scheduled evaluations. The court ordered that if the parties failed to attend their rescheduled evaluations, "they [would] be precluded from presenting their own psychological expert[s] at trial." On July 15, 2015, following the parties' repeated failures to attend their court-ordered evaluations with Dr. Pirelli, the Family Part entered an order barring defendant and T.M.F. from presenting their own experts at trial.

While the guardianship case was pending, the Division referred A.M.A.F.W. to New Jersey Mentor for a psychiatric evaluation. The evaluator reaffirmed an earlier diagnosis of ADHD and included a new diagnoses of post-traumatic stress disorder and oppositional defiant disorder. The evaluator recommended psychotropic medication, as well as "school support," "behavioral modifications," "anger management," "individual therapy," and "sexually specific traumatic focus therapy." With respect to her sexualized behavior, physicians who examined A.M.A.F.W. opined

that she may be experiencing "precocious puberty."⁵ In particular, her psychiatrist stated that A.M.A.F.W. "may be very confused because she is functioning on some levels at a [three-year-old] level, and [at an eleven-year-old level] in other areas[.]" The Division placed A.M.A.F.W. in a New Jersey Mentor treatment home shortly thereafter.

This placement proved to be short lived. On May 27, 2015, the Division removed A.M.A.F.W. from the New Jersey Mentor treatment home and placed her in a residential facility operated by the Youth Consultation Service Davis House (YCS Davis House). Division records describe the YCS Davis House as a shelter where the child could receive in-house therapy and medication monitoring. A.M.A.F.W. also attended weekly therapy at Wynona's House Child Advocacy Center (Wynona's House). The therapy at Wynona's House focused exclusively on A.M.A.F.W.'s sexually inappropriate behavior and explored the veracity of the child's allegations of sexual abuse against her father. The Division's plan was for A.M.A.F.W. to remain at YCS Davis House for six to

⁵ Precocious puberty is "when a child's body begins changing into that of an adult . . . too soon." Mayo Clinic Staff, Precocious Puberty, MAYO CLINIC (Nov. 11, 2016), <http://www.mayoclinic.org/diseases-conditions/precocious-puberty/home/ovc-20265997>.

nine months. At the end of this treatment phase, she would then be "stepped down" to another treatment home.

A.M.A.F.W. met on a regular basis with licensed social worker Amy Johnson, a staff social worker at YCS Davis House. In August 2015, the Family Part received a letter-report from Johnson describing A.M.A.F.W.'s treatment and the progress the child was making in dealing with issues related to her mother. During this same time period, the Division continued its attempts to contact defendant without success.

On September 14, 2015, defendant contacted Division caseworker Michelle Montgomery. Although he acknowledged having received timely notice of his missed evaluation appointments with Dr. Pirelli, he claimed he was still not ready to be evaluated or attend a CADC assessment. Montgomery advised defendant of the case management conference before the Family Part scheduled on September 22, 2015. Defendant confirmed he would attend and provided Montgomery with an updated telephone number through which the Division could contact him.

The court permitted defendant to appear by phone at the September 22, 2015 case management conference. Relying in large part on the progress report from A.M.A.F.W.'s therapist, the court continued the suspension of T.M.F.'s visitation rights. Defendant's counsel requested that he be allowed to visit his

daughter. Both the Law Guardian and the DAG on behalf of the Division requested an opportunity to consult with A.M.A.F.W.'s therapist on the issue of defendant's visitation. The court granted this request over defendant's counsel's objection.

Due to a postponement of the guardianship trial, the court modified its earlier order and gave defendant and T.M.F. an additional opportunity to attend their psychological and bonding evaluations with Dr. Gianni Pirelli. The court also ordered the Division and defendant to meet on September 28, 2015, for the purpose of establishing a case plan. Defendant failed to attend the case plan meeting. The Division rescheduled the meeting for October 1, 2015. Defendant again failed to attend. The following week, defendant met with a caseworker at the Division's Newark South Adoption Office to sign a family agreement. At this encounter, defendant requested, for the first time, that the Division investigate and determine the suitability of two relative placements for A.M.A.F.W.: (1) his sister, L.W.; and (2) his niece, K.W. Caseworker Montgomery testified at the guardianship trial that L.W. informed the Division that she did not wish to be considered as a placement for A.M.A.F.W. K.W. also advised the Division that she would be unable to serve as a placement for A.M.A.F.W. because she "works, goes to school, and has her own child."

On October 19, 2015, the Family Part conducted a permanency and pre-trial hearing. Though notified, defendant did not attend nor make any arrangement to appear telephonically. At this hearing, the court found, by a preponderance of the evidence, that the Division's plan of adoption was appropriate and acceptable. The court also found the Division made reasonable efforts toward reunification, and determined it would be unsafe to return A.M.A.F.W. to the custody and care of her parents. With respect to defendant's ongoing request for weekly visitation, the court deferred to the recommendations of A.M.A.F.W.'s therapist, who argued strongly against any contact with the parents.⁶ The Division sent defendant a letter documenting his failure to appear at the hearing and informing him of what had occurred therein.

On October 28, 2015, defendant finally attended his psychological and bonding evaluation with Dr. Gianni Pirelli. He

⁶ In a progress report sent to the court that same day, the therapist stated, in relevant part:

I do not recommend that [A.M.A.F.W.] resume visits with her mother or her father. Since the plan is not reunification, I feel that it would hinder [A.M.A.F.W.'s] progress in working toward her behavior goals in treatment. Visits would further serve to confuse [A.M.A.F.W.] as to whether or not she would be reunited with her parents and [would] also subsequently disrupt her progress and treatment at [YCS] Davis House.

had not seen his daughter in more than nineteen months. Caseworker Montgomery transported the child and defendant to the evaluation. In her report, Montgomery noted that despite the lengthy period of time since the child had had any contact with defendant, A.M.A.F.W. was "very talkative" and seemed "very happy to see him." The Division presented Dr. Pirelli's observations, findings, and conclusions as part of his testimony at the guardianship trial.

After his meeting with Dr. Pirelli, defendant did not respond to Montgomery's repeated attempts to contact him. Defendant also failed to appear at the Family Part's pre-trial hearings on November 16, 2015 and December 3, 2015. It was later determined that defendant had entered a detox program at the ACI Chemical Dependency Treatment Center (ACI) in New York City. After detox, defendant enrolled at the Salvation Army's Adult Rehabilitation Center for an extended inpatient treatment program for his heroin addiction. Defendant relied on the Salvation Army's anonymity rules to explain his failure to inform the Division of his whereabouts.⁷

⁷ An order dated December 3, 2015, reflects that defendant scheduled his own psychological and bonding evaluation. This order also states: "The Division was advised by [A.W.]'s mother that [A.W.] is in rehab in New York, but no other information was provided regarding his exact whereabouts."

At a pre-trial hearing held on November 16, 2015, the court: (1) denied without prejudice defendant's request to restore his visitation rights to A.M.A.F.W; and (2) granted the Law Guardian's application to require defendant to attend a psychological and bonding evaluation with Dr. Sean Hiscox. Defendant did not attend his scheduled evaluation with Dr. Hiscox. On December 21, 2015, caseworker Montgomery contacted defendant's mother. She advised the Division that defendant had mailed her a Christmas card with a return address in New York City. Montgomery confirmed that defendant was residing at the Salvation Army's Adult Rehabilitation Center at the time. In a letter addressed accordingly, Montgomery notified defendant that the guardianship trial was scheduled to start in January 2016.

III

Judge David B. Katz presided over the guardianship trial that began on January 8, 2016 and concluded on May 27, 2016. The Division called as fact witnesses caseworkers Restrepo and Montgomery, and adoption specialist Cheri Braithwaite. The Division called Dr. Pirelli to testify as an expert witness in psychology. Judge Katz admitted Dr. Pirelli in this capacity without objection from either defendant or the Law Guardian.

The Division caseworkers' testimony covered at length the hardships this child has endured since her birth. The caseworkers

also described in detail the services and programs the Division made available to defendant since this ordeal began, as well as defendant's repeated failure to keep appointments and take advantage of these opportunities. We will not reiterate here the events we described in great detail in Parts I and II of the opinion. However, we will identify how Dr. Pirelli's testimony supported Judge Katz's findings that the Division satisfied, by clear and convincing evidence, prongs two, three, and four of N.J.S.A. 30:4C-15.1(a).

Dr. Pirelli conducted defendant's psychological and bonding evaluations on October 28, 2015, before defendant entered detox at ACI or enrolled in inpatient treatment at the Salvation Army's Adult Rehabilitation Center. In his report, Dr. Pirelli noted that defendant freely admitted he was addicted to heroin. On the day Dr. Pirelli performed the psychological evaluation, defendant acknowledged that he had ingested heroin the previous night. As reflected in Dr. Pirelli's report, defendant began using heroin in "1991 or 1992." He also had enrolled in detox and/or rehabilitation programs on "three or four" occasions, all without success. His addiction to heroin at the time cost him "\$40 or \$50 per day."

Defendant denied using other illicit drugs until he was confronted with the test results showing positive for cocaine. At

that point, defendant admitted to consuming alcohol and "dabbling" in cocaine. Dr. Pirelli also noted that defendant struggled to pay child support for A.M.A.F.W., but managed to consistently find the means to pay for his expensive drug habit. In response to this observation by Dr. Pirelli, defendant stated: "That's a person [who] has to get help."

According to Dr. Pirelli, defendant and A.M.A.F.W. interacted pleasantly during the bonding evaluation. The two played board games and engaged in conversations about A.M.A.F.W.'s toys, her Halloween costume, and what she was like as a baby. By contrast, in the section of the report entitled "Integration of Findings, Conclusions, and Recommendations," Dr. Pirelli opined that defendant "exhibited significant parenting deficits[.]" Of particular concern was defendant's drug addiction and his "inability to acknowledge many of his problematic decisions[.]"

Defendant "attribute[d] much of the blame to [T.M.F.] and the Division," and minimized or overlooked the negative effect of his decision to use heroin the night before his psychological evaluation. Dr. Pirelli found defendant lacked any "appreciation for [A.M.A.F.W.]'s needs, particularly those pertaining to stability and permanency." In this regard, Dr. Pirelli expressed particular concern about defendant's decision to voluntarily

distance himself from A.M.A.F.W. and the Division for nearly two years.

Dr. Pirelli opined that reunifying defendant with A.M.A.F.W. exposed this special-needs, psychiatrically fragile child to "an to an abusive and/or neglectful environment." Dr. Pirelli found that defendant puts his own needs before those of A.M.A.F.W. and is "certainly not someone who would seek assistance[,]" because he "does not believe there are any notable problems he must address other than drug treatment." Based on "numerous risk factors" and history of non-adherence to the Division's recommendations and services, Dr. Pirelli concluded that defendant was unfit to parent A.M.A.F.W. He further opined it was "unlikely" that A.M.A.F.W. would suffer "notable effects" as a result of the termination of defendant's parental rights. Thus, Dr. Pirelli opined that termination of defendant's parental rights followed by a permanent, adoptive placement would be in A.M.A.F.W.'s best interest.

The Division concluded its case-in-chief by presenting the testimony of adoption supervisor Cheri Braithwaite. As Braithwaite explained, once a child becomes "legally free" for adoption, the Division has greater access to private adoptive homes, as well as out-of-state homes listed on the National Exchange. Braithwaite was confident in the Division's ability to

find a suitable adoptive home for a child she described as a "very friendly, loveable child[]" who has been able to "connect with families in the past[.]" According to Braithwaite, the Division has found suitable homes for children with needs greater and more significant than those of A.M.A.F.W.

The Law Guardian presented the testimony of Dr. Sean Hiscox, whom the court admitted as an expert in "clinical and forensic psychology with respect to parent[al] fitness, bonding[,] and children[.]" Dr. Hiscox conducted psychological and bonding evaluations with defendant and A.M.A.F.W. on February 12, 2016. At that point in time, defendant had spent approximately two and one-half months as a resident in the Salvation Army's Adult Rehabilitation Center. Echoing the impressions expressed by Dr. Pirelli, Dr. Hiscox opined that defendant's interactions with A.M.A.F.W. during the bonding evaluation were "easy and warm," with many instances of "positive, mutually gratifying exchanges."

Dr. Hiscox nevertheless expressed "significant concerns" regarding defendant's ability to provide A.M.A.F.W. with a "stable, secure, and safe home . . . on a day-to-day basis over the long run." Dr. Hiscox noted that despite the "controlled environment" provided by the Salvation Army's program, defendant's history shows he had only achieved intermittent periods of sobriety followed by relapses. Despite these misgivings, Dr. Hiscox's

opinion differed from Dr. Pirelli's opinion on the question of the reunification:

[A]t this time[,] it is my opinion that there are more factors supporting an attempt to reunify [A.M.A.F.W.] with [A.W.] than supporting the termination of [A.W.'s] parental rights. An additional factor . . . is that [A.M.A.F.W.] does not presently have an identified adoptive home and she has not started the process of stepping down in the intensity of her treatment. As a result, I recommend that [A.W.] be given additional time to show his stability and commitment to [A.M.A.F.W.] based on the positive progress he appears to be making. Given [A.M.A.F.W.]'s situation, I see no downside for her if he is given this opportunity.

[Emphasis added.]

On cross-examination, Dr. Hiscox acknowledged that his opinion was based only on conversations he had with defendant, A.M.A.F.W., the Law Guardian, and the child's therapist. In his report, Dr. Hiscox opined that after his release from the Salvation Army's inpatient treatment program, defendant could parent A.M.A.F.W. while residing at his mother's home. He acknowledged, however, that he was unaware that defendant's mother did not want A.M.A.F.W. residing in her home at the time he made this recommendation. Dr. Hiscox also agreed with the DAG that "past behavior is the best predictor of future behavior[.]" He thus could not state with certainty that defendant would successfully complete the Salvation Army's inpatient treatment program and

thereafter would not relapse. He testified that without these necessary prerequisites, defendant would not be fit to parent in the foreseeable future.

Defendant presented the testimony from Dr. Gerard Figurelli, whom the court admitted as an expert in clinical psychology and substance abuse evaluation and treatment. Dr. Figurelli prepared a report based on a psychological evaluation with defendant and a bonding evaluation with defendant and A.M.A.F.W. on February 24, 2016. The bonding report contained the same observations and characteristics of defendant's interactions with A.M.A.F.W. He noted that the two interacted cheerfully, affectionately, and positively. In Dr. Figurelli's opinion, it was "evident from the nature and content of their interaction that [A.W.] and [A.M.A.F.W.] share a sense of family identity and family connectedness."

Dr. Figurelli noted defendant's history of substance abuse and addiction, as well as his prolonged absence from the child's life during a critical period of her development. Despite these deficits, Dr. Figurelli opined that permanently severing the parental bonds between defendant and his daughter would be harmful to the child and consequently not in her best interest. He stated that:

Given the fact that [A.W.] can, with more time, present as an appropriate permanent placement option for [A.M.A.F.W.], it is the opinion of this examiner that it does [A.M.A.F.W.] more harm than good to have her relationship [with] her father terminated. She appears to feel cared for by her father; she appears to care for her father; she shares a sense of family connectedness and family identity with him; and it appears that she anticipates that she will maintain their relationship going forward in her life. The severance of her relationship [with] her father and the loss of that attachment are likely to result in [A.M.A.F.W.] experiencing severe and enduring emotional and/or psychological harm.

Dr. Figurelli's testimony at trial was consistent with the findings, conclusions, and recommendations he expressed in his report.

Defendant was the last witness to testify. He emphasized that he had progressed to phase three of the Salvation Army's four-phase inpatient treatment program. He had submitted clean urine samples since the date of his admission; despite his past relapses, he believed he had finally achieved a level of success sufficient to maintain his sobriety after completing the Salvation Army's program. When asked how this Salvation Army's program was different from the programs he had previously attended, defendant emphasized the spiritual components of his current treatment.

He claimed the current Salvation Army's program has a "true structure," including group therapy, individual therapy,

mentorship, Bible studies, and chapel services at regular intervals. Defendant also emphasized the importance of the Salvation Army's "adjunct services[,] " such as treatment staff's willingness to assist with employment and housing and provide training on technical and vocational skills.

Defendant testified that he planned to reside with his mother upon his discharge from the Salvation Army's facility. When confronted with his mother's earlier statements that she did not support this plan, defendant stated:

[W]hat the Division probably [doesn't] truly understand is[] that's my mother. She will allow me to stay there. The last time I spoke with my mother was last Sunday. I spoke with my mother on the fact of, upon me returning there[;] she has no problem with it.

. . . .

[S]he said as long as I keep up my efforts in staying clean and working, she has no problem with it.

Defendant similarly minimized the significance of other relatives living in his mother's home. "[A]s long as my family is seeing me do the right thing, they will assist me in just about anything that I need."

IV

Judge Katz entered a Judgment of Guardianship terminating defendant's parental rights on May 27, 2016. He found the Division

satisfied all four prongs of the "best interest" analysis by clear and convincing evidence. See N.J.S.A. 30:4C-15.1(a); N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591 (1986). He identified the evidence for his findings of fact and explained the legal basis for his conclusions of law in an oral opinion delivered from the bench. In lieu of reciting the opinion, we incorporate by reference Judge Katz's well-reasoned decision.

This court is bound to defer to the Family Part's findings of fact that are "supported by 'adequate, substantial and credible evidence' [i]n the record." 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)). Deference is especially appropriate when the Family Part's factual findings are "largely testimonial" and involve "questions of credibility." Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). In contrast to its findings of fact, this court reviews the Family Part's legal conclusions de novo. N.J. Div. of Youth & Family Servs. v. S.I., 437 N.J. Super. 142, 152 (App. Div. 2014).

We have taken the time and effort to describe in detail the evidence the Division presented here to demonstrate the overwhelming factual and legal support for Judge Katz's decision. Judge Katz found defendant and T.M.F. exposed A.M.A.F.W. to a

substantial risk of physical harm when they left her unattended at the High Bridge train station. He also found A.M.A.F.W. was emotionally harmed by defendant's "withdrawal of solicitude, nurture[,] and care since the time of her removal." Judge Katz's findings are supported by irrefutable evidence in the record. See M.M., 189 N.J. at 279 (2007) (citation omitted).

The record shows defendant failed to visit A.M.A.F.W. for nineteen months. He failed to make any real effort to engage in treatment for his significant and chronic substance abuse problem until late November 2015, more than two years after the Division removed A.M.A.F.W. from his care. Defendant repeatedly tested positive for opiates and other illicit substances, thus precluding the Division from considering him as a viable placement for this psychiatrically fragile child. Defendant failed to attend numerous court hearings, thereby demonstrating an utter disregard for the rule of law and his daughter's well-being. Defendant's inability to provide A.M.A.F.W. with love, affection, and/or a home during this time period caused A.M.A.F.W. irrevocable harm and enormous suffering and distress. This is evidenced by her severe emotional issues, troubling behavioral concerns and psychological and psychiatric diagnoses. We thus affirm substantially for the reasons expressed by Judge Katz in his oral opinion.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION