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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1069-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

J.K.,

Defendant-Appellant,

and

J.J., SR., deceased,

Defendant.

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

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Submitted November 29, 2022 – Decided December 20, 2022

Before Judges Messano and Paganelli.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FG-15-0017-21.

Joseph E. Krakora, Public Defender, attorney for appellant (Amy M. Williams, Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Wesley Hanna, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Cory H. Cassar, Designated Counsel, on the brief).

PER CURIAM

Defendant J.K. appeals from the Family Part's November 19, 2021 judgment terminating parental rights to her son, J.J., Jr. (Johnny), who was born in March 2012.[1] Defendant contends the Division failed to prove each of the four prongs of the statutory best-interests-of-the-child test, N.J.S.A. 30:4C-15.1(a), which requires clear and convincing evidence that:

> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;

[1] We use initials and pseudonyms pursuant to Rule 1:38-3(d)(12). Defendant had another child, K.K. (Kate), who was born in 2000, is now an adult, and was not involved in the litigation after the guardianship complaint was filed.

> (2) The parent is unwilling or unable to eliminate the harm facing the child or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm;
>
> (3) The [D]ivision 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
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> (4) Termination of parental rights will not do more harm than good.
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> [N.J.S.A. 30:4C-15.1(a); see also In re Guardianship of K.H.O., 161 N.J. 337, 347–48 (1999).]

Additionally, defendant argues her trial counsel provided ineffective assistance. See N.J. Div. of Youth & Fam. Servs. v. B.R., 192 N.J. 301, 307 (2007) (applying standard adopted in Strickland v. Washington, 466 U.S. 668, 694 (1984), and approved by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987), to ineffective assistance of counsel claims in termination cases). The Division and Johnny's Law Guardian urge us to affirm the judgment terminating defendant's parental rights.

Having considered the voluminous record and applicable legal principles, we reject defendant's arguments and affirm substantially for the reasons expressed by Judge Madelin F. Einbinder in her oral opinion following trial.

I.

The Division of Child Protection and Permanency (the Division) has been involved with the family since 2000, when Kate exhibited withdrawal symptoms at birth, and defendant tested positive for opiates while in the hospital. Over the years, defendant attempted to deal with her seemingly intractable substance abuse, and the Division provided services to her and Johnny's father, J.J., Sr. (Senior). The documentary evidence revealed the Division removed Kate from defendant's custody at birth, but defendant evidenced a sustained period of sobriety, and the Division closed its case in 2007. However, by early 2016, defendant admitted she was injecting heroin daily. The Division's investigation resulted in a court order granting it care and supervision of both children. During the ensuing years, defendant's attendance at services provided by the Division was sporadic, and she continued to test positive on various drug screens.

Johnny's life, meanwhile, was in turmoil. For a period, he, Kate and Senior, who was in the midst of a period of sobriety, moved in with Senior's parents, V.J (Val) and J.J. (Jim). Defendant was limited to supervised visits with the children. In August 2019, Senior moved out of his parents' home with Johnny, and Kate joined them. Although defendant was limited to supervised

visitation with the children, the record reveals she frequently saw the children without supervision and stayed in Senior's house.

In October 2019, Senior was found unresponsive on the floor next to the bed in which Johnny was sleeping; defendant discovered the body and called emergency services. Medics administered Narcan and unsuccessfully attempted to revive Senior, who died from an apparent narcotic overdose. After Senior's death, defendant consented to the Division taking custody of Johnny, and, in November 2019, the Division placed the child with Val and Jim, where he has remained ever since.

The Division filed its guardianship complaint in December 2020, and the court ordered a continuation of services to defendant, Johnny, and his grandparents. Although supervised visitation between defendant and Johnny was sometimes tense, by the time of trial in September 2021, their relationship had improved, and Val and Jim were allowing defendant to visit with her son in their home and at family events and barbecues.

Nonetheless, in the months preceding trial, defendant's substance abuse problems apparently continued. Although she successfully completed an outpatient program in December 2020, she thereafter missed urine screens and failed to submit to court-ordered hair follicle tests. Four days before trial

commenced, defendant's urine screen was negative, but the results of a recent hair follicle test were positive for heroin.[2]

At trial, Judge Einbinder heard the testimony of two Division caseworkers, Val, Johnny, the Division's expert psychologist, Dr. David Brandwein, and Dr. Lykissa. Defendant did not testify or call any witnesses.

II.

"The focus of a termination-of-parental-rights hearing is the best interests of the child." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 447 (2012) (citing N.J. Div. of Youth & Fam. Servs. v. R.D., 207 N.J. 88, 110 (2011)). The four statutory prongs "are neither discrete nor separate. They overlap to provide a composite picture of what may be necessary to advance the best interests of the child[]." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 280 (2007) (quoting N.J. Div. of Youth & Fam. Servs. v. F.M., 375 N.J. Super. 235, 258 (App. Div. 2005)).

An order terminating parental rights is enrobed in a double layer of deference. We initially defer to the judge's factual findings because she had "the

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[2] Defendant objected to the admission of evidence regarding this positive test result. Judge Einbinder granted an adjournment mid-trial, and the Division later called Dr. Ernest Lykissa, Ph.D., a supervisor at the lab that performed the most recent hair follicle test, as a witness.

opportunity to make first-hand credibility judgments about the witnesses . . . [and] ha[d] a 'feel of the case' that can never be realized by a review of the cold record." Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting M.M., 189 N.J. at 293). Secondly, we accord additional deference to the Family Part's factual findings because of its "special jurisdiction and expertise in family matters." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)).

"Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark' should an appellate court intervene and make its own findings to ensure that there is not a denial of justice." E.P., 196 N.J. at 104 (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)). "However, '"where the focus of the dispute is . . . alleged error in the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom," the traditional scope of review is expanded.'" M.M., 189 N.J. at 279 (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188–89 (App. Div. 1993)).

A.

Defendant contends the Division failed to carry its burden of proof on prongs one and two of the statutory standard. She argues Judge Einbinder's findings were not supported by the record because they relied solely on

defendant's history of substance abuse, much of which was self-reported, and Dr. Brandwein's opinions. Defendant contends the record demonstrated her successful completion of some programs and extended periods of sobriety, which negated the judge's conclusions.

"The first two prongs [of N.J.S.A. 30:4C-15.1(a)] are 'the two components of the harm requirement' and 'are related to one another.'" N.J. Div. of Child Prot. & Permanency v. T.D., 454 N.J. Super. 353, 380 (App. Div. 2018) (quoting In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999)). "Therefore, 'evidence that supports one informs and may support the other as part of the comprehensive basis for determining the best interests of the child.'" Ibid. (quoting D.M.H., 161 N.J. at 379).

Under the first prong, "the Division must prove harm that 'threatens the child's health and will likely have continuing deleterious effects on the child.'" N.J. Dep't of Child. & Fams. v. A.L., 213 N.J. 1, 25 (2013) (quoting K.H.O., 161 N.J. at 352). The Division need not "wait 'until a child is actually irreparably impaired by parental inattention or neglect.'" F.M., 211 N.J. at 449 (quoting D.M.H., 161 N.J. at 383). Under prong two, "the inquiry centers on whether the parent is able to remove the danger facing the child." Id. at 451 (citing K.H.O., 161 N.J. at 352).

It is true that Judge Einbinder relied heavily on Dr. Brandwein's testimony in concluding the Division had met its burden regarding prongs one and two. Dr. Brandwein concluded that defendant was inconsistent both in complying with treatment and in submitting to drug screens, exhibited some periods of sobriety but always relapsed, and defendant's inability to sustain her sobriety negatively affected both her relationship with and ability to parent Johnny. The judge credited Dr. Lykissa's testimony demonstrating the accuracy of the positive hair follicle test result only days before trial commenced. Judge Einbinder found "[t]here [wa]s not one scintilla of evidence . . . that [defendant] has been able to sustain any significant period of sobriety."

Noting that prong two may be established by proof that a "delay of permanent placement will add to the harm," Judge Einbinder recounted Johnny's testimony. She found that defendant and Johnny loved each other, but that Johnny, now nine, expressed a desire to remain with his grandparents. The judge recounted Johnny's testimony that "it would not be safe for him" to live with his mother "because [she was] on bad medicine."

We acknowledge defendant's point that Johnny's testimony about his mother's current substance abuse was, on the whole, equivocal. But the child expressed a belief that his grandparents provided a safe home, and they would

"protect" him, and, by implication, that delaying permanency while defendant continued to struggle with her addiction would increase the harm he already suffered as a result of years of tumult occasioned by defendant's drug abuse. The judge's findings were amply supported by the record and support her conclusion that the Division met its burden of proof on the first two prongs.

B.

Defendant argues the judge gave little more than lip service to the Division's prong three proofs and failed to adequately consider then-recent statutory amendments to the N.J.S.A. 30:4C-15.1(a)(2) and the Kinship Legal Guardianship Act (KLG), N.J.S.A. 3B:12A-1 to -7.[3] Defendant contends that

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[3] The Legislature amended N.J.S.A. 30:4C-15.1(a)(2) on July 2, 2021, deleting what had been the second sentence of the subsection, which read: "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." With that amendment, the Legislature confirmed the Division cannot prove the harm referenced in the second prong based on the effects of terminating the child's bond with a resource parent.

The 2021 amendment also eliminated the phrase "and . . . adoption of the child is neither feasible nor likely" from the then-existing N.J.S.A. 3B:12A-6(d)(3). In removing this requirement, a court may make a KLG appointment even when adoption is an option or preferred by a resource parent.

given Dr. Brandwein's recognition of the loving relationship Johnny shared with his mother and grandparents, KLG was an option, as was a KLG designation of Kate, who was now twenty-one years old, had lived with Johnny most of her life, and had supervised defendant's visitation with Johnny.

N.J.S.A. 30:4C-15.1(a)(3) requires the Division to make "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 to "consider[] alternatives to termination of parental rights." However, "[e]xperience tells us that even [the Division's] best efforts may not be sufficient to salvage a parental relationship[,]" F.M., 211 N.J. at 452, and "[e]ven if the Division ha[s] been deficient in the services offered to" a parent, reversal is not necessarily "warranted, because the best interests of the child controls[]" the ultimate determination, N.J. Div. of Youth & Fam. Servs. v. F.H., 389 N.J. Super. 576, 621 (App. Div. 2007).

Judge Einbinder considered KLG as an option to termination, but concluded Val and Jim wanted to adopt Johnny, and Johnny expressed a desire to live with his grandparents "on a permanent basis." The judge did not consider this evidence as barring KLG, as it might have prior to the 2021 amendments. The judge also cited testimony of the Division's caseworkers regarding "the

large amount of services that were offered to [defendant]." The judge found defendant "did not avail herself of . . . all of them," although she did "do some of them." The judge credited the Division's assertion that "there were no more services that [it] could have offered to [defendant]." We see no reason to reverse based on the judge's prong three findings and conclusions.

C.

Defendant contends the judge made inadequate findings regarding prong four based on her "blind reliance on Dr. Brandwein." We again disagree.

Prong four "serves as a fail-safe against termination even where the remaining standards have been met." G.L., 191 N.J. at 609. "The question ultimately is not whether a biological mother or father is a worthy parent, but whether a child's interest will best be served by completely terminating the child's relationship with th[e] parent." E.P., 196 N.J. at 108. Typically, "the [Division] should offer testimony of a well[-]qualified expert who has had full opportunity to make a comprehensive, objective, and informed evaluation of the child's relationship with both the natural parents and the foster parents." F.M., 211 N.J. at 453 (quoting M.M., 189 N.J. at 281).

Judge Einbinder's oral opinion is peppered with repeated references to Dr. Brandwein's testimony and, therefore, defendant's characterization of the judge's

prong four findings as fully contained in "three sentences" is somewhat disingenuous. Dr. Brandwein had conducted two evaluations of defendant, an evaluation of Johnny, a bonding evaluation of defendant and Johnny, and a bonding evaluation of Johnny and his grandparents. The doctor acknowledged it was "abundantly clear" that defendant and Johnny were "bonded," as Johnny was with his grandparents. However, the doctor weighed "what permanency option [wa]s going to cause the least harm" to Johnny. He opined that Val and Jim would provide the child with something defendant could not "right now," specifically "a safe[,] stable home, free of substance abuse."

"Ultimately, a child has a right to live in a stable, nurturing environment and to have the psychological security that his most deeply formed attachments will not be shattered." F.M., 211 N.J. at 453; see also N.J. Div. of Youth & Fam. Servs. v. C.S., 367 N.J. Super. 76, 111 (App. Div. 2004) ("A child cannot be held prisoner of the rights of others, even those of his or her parents. Children have their own rights, including the right to a permanent, safe and stable placement."). The prong four proofs were sufficient.

III.

Defendant contends her trial counsel rendered ineffective assistance because during her summation she failed to reference the 2021 statutory

amendments we discussed above and also failed to argue for alternatives to termination, focusing her attention under prong three, instead, to asserting the Division failed to provide adequate services. We are unpersuaded.

In adopting the Strickland/Fritz standard for termination cases, the Court held a defendant must demonstrate: counsel's performance was objectively deficient—i.e., it fell outside the wide range of professionally acceptable performance; and counsel's deficient performance prejudiced defendant—i.e., there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." B.R., 192 N.J. at 307 (quoting Strickland, 466 U.S. at 694).

As to the first prong, "in addition to being 'highly deferential,' 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Id. at 307–08 (quoting Strickland, 466 U.S. at 689). Defendant fails to establish that counsel was unaware of the recent amendments, relying instead on counsel's choice not to advance a losing argument, i.e., that the grandparents' desire to adopt Johnny was irrelevant to the court's best-interests' decision. Removing the KLG Act's requirement that a court find adoption "neither likely nor feasible" before granting KLG is a factor in the determination as to whether KLG is the appropriate permanency plan, but

nothing in the amendments or any decisions since their passage implies a resource parent's desire to adopt is irrelevant to a court's analysis of the four prongs in N.J.S.A. 30:4C-15.1(a). Additionally, it is clear the judge considered alternatives to termination, including KLG, even if trial counsel did not advocate for that alternative in her summation.

Lastly, even if we were to conclude trial counsel's performance was deficient, defendant fails to demonstrate the deficiency affected the outcome of the guardianship trial. Judge Einbinder properly considered Val and Jim's desire to adopt Johnny in the context of N.J.S.A. 30:4C-15.1(a), and the judge also considered KLG as an alternative. In other words, even had defense counsel urged consideration of the 2021 amendments and KLG as an alternative, the result would have been the same. Under the second prong of the Strickland/Fritz standard, an attorney is not deficient for failing to raise a losing argument at trial. State v. Echols, 199 N.J. 344, 361 (2009).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION