

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0149-22

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

S.S.,

Defendant-Appellant,

and

J.F.,

Defendant.

IN THE MATTER OF THE
GUARDIANSHIP OF A.F.J.,
a minor.

Submitted August 29, 2023 – Decided September 12, 2023

Before Judges Gilson and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FG-09-0117-20.

Joseph E. Krakora, Public Defender, attorney for appellant (Bruce P. Lee, Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Nicholas Dolinsky, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Jennifer Sullivan, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

S.S. (Sasha) appeals from a judgment terminating her parental rights to her daughter, A.J. (Amelia), and granting guardianship to the Division of Child Protection and Permanency (the Division) with the plan that Amelia be adopted by her resource parents, who have cared for her since she was born.¹ Sasha argues that the Division failed to establish prongs three and four of the standard necessary for the termination of her parental rights. She also contends, for the first time on appeal, that the trial court lacked jurisdiction because a guardian

¹ We use initials and fictitious names to protect the confidentiality of the record and privacy interests. See R. 1:38-3(d)(12).

ad litem (GAL) should have been appointed to represent her at trial. Having reviewed the record and the applicable law, we reject those arguments and affirm the judgment.

I.

Sasha has had three children: X.A. (Xander), born in June 2013; J.X.A. (James), born in May 2017; and Amelia, born in December 2018. Xander tragically died and Sasha's parental rights to James were terminated in 2019 following a guardianship trial. We affirmed that judgment, N.J. Div. of Child Prot. & Permanency v. S.S., No. A-1779-19 (App. Div. Oct. 23, 2020), and the Supreme Court denied certification, 245 N.J. 375 (2021).

This appeal involves only the termination of Sasha's parental rights to Amelia. Amelia's biological father, J.F., voluntarily surrendered his parental rights and is not appealing.

Sasha has a history of mental health issues. She suffers from depression, psychosis, and bipolar disorder. She has been diagnosed with schizoaffective disorder and a rule-out diagnosis of shared psychotic disorder tied to her mother. Sasha has refused to acknowledge her disorders, does not always take her prescribed mental health medications, and has repeatedly been hospitalized due to her mental illnesses.

The Division has worked with Sasha for over five years. Since 2018, the Division has offered her numerous services, including mental health counseling, partial hospitalization programs, assistance with housing and finances, and therapeutic parental visitations. Sasha has been inconsistent in availing herself of those services and she has often refused to cooperate with her mental health treatment.

Given Sasha's history with James and her non-compliance with services, the Division removed Amelia the day after Amelia was born. Amelia was placed with non-relative resource parents, who have cared for her for over four years.

Sasha acknowledges that she does not have the ability to independently care for a child. She told the Division that her plan would be for her mother to assist with the care of Amelia. Sasha has also acknowledged, however, that her mother will not cooperate with the Division. The Division, and a psychiatrist hired by the Division, have recommended that Sasha participate in counseling to assist her in living independently from her mother. Sasha, however, has not availed herself of that counseling and has never developed the ability or a plan to live independently from her mother.

A two-day guardianship trial was conducted on June 1 and 2, 2022. The Division called three witnesses: Merbalis Reyes, a Division adoption worker;

Dr. Samiris Sostre, an expert in psychiatry; and Dr. Jonathan Mack, an expert in psychology and bonding. The Law Guardian, who represented Amelia and supported the Division's plans to terminate Sasha's parental rights, called Dr. Karen Wells, an expert in psychology and bonding, and one of Amelia's resource parents, K.G. (Kay). Sasha did not testify, nor did she introduce any evidence.

Reyes testified about the Division's involvement with Sasha and her children. She explained how the Division had worked with Sasha with the initial goal of reunification with Amelia. Reyes also testified concerning the Division's attempt to find an appropriate relative placement for Amelia. In that regard, she detailed the Division's contact with Sasha's two sisters, her mother, her father, an uncle, and an aunt. She explained that none of those relatives were willing or able to care for Amelia. On cross-examination, Reyes acknowledged that Sasha had many positive visits with Amelia.

Dr. Sostre was qualified as an expert in psychiatry. She had evaluated Sasha on several occasions and had diagnosed her with schizoaffective disorder and a rule-out diagnosis of shared psychotic disorder tied to her mother. Dr. Sostre also explained that Sasha did not agree with those diagnoses and did not believe that she suffered from any type of mental disorder. Dr. Sostre reviewed the various recommendations she had made for Sasha to follow up on her mental

health issues. She explained that the treatment of schizoaffective disorder requires antipsychotic medication. She also explained that currently the condition can only be managed, not cured. During her evaluations, Sasha informed the doctor that she only took her medications when she felt she needed them. Dr. Sostre opined that Sasha's prognosis for dealing with her mental illnesses was poor because Sasha does not acknowledge that she has those disorders and does not consistently comply with treatment.

Dr. Mack testified as an expert in the field of psychology and neuropsychology. He conducted a neuropsychological evaluation of Sasha and bonding evaluations between Sasha and Amelia and Amelia and her resource parents. Dr. Mack opined that Sasha would be unable to take care of her own needs, would always need supervision, and would not be able to independently care for a child. Dr. Mack also opined that he did not believe that Sasha could become an effective parent in the foreseeable future.

Concerning the bonding evaluations, Dr. Mack opined that Amelia did not have a substantial bond with her mother. In contrast, he opined that Amelia was well-bonded with her resource parents.

Dr. Wells was qualified as an expert in psychology and bonding. Her opinions were consistent with Dr. Mack's opinions. She explained that she had

conducted psychological evaluations of Sasha and Sasha's mother, as well as bonding evaluations among Sasha, Amelia, and Amelia's resource parents. Dr. Wells opined that it would be problematic if Sasha's mother were to assist Sasha with caring for Amelia because Sasha's mother was not able to identify when she needed to intervene and provide childcare when Sasha could not.

Based on her evaluations, Dr. Wells diagnosed Sasha with schizoaffective disorder (bipolar type) and intellectual disability (moderate). Dr. Wells opined that Sasha would have a difficult time assuming care for her own day-to-day needs, as well as the needs of Amelia. Like Dr. Mack, Dr. Wells concluded that Amelia's bond with Sasha was insecure. She opined that there would be little harm in severing the relationship between Sasha and Amelia. By contrast, Dr. Wells opined that Amelia views her resource parents as her primary psychological parents and has a secure bond with them. She testified that severing that bond would cause harm to Amelia.

Kay described her and her partner's history of caring for Amelia. She explained that she understood the difference between kinship legal guardianship (KLG) and adoption. She testified she preferred adoption because she had already adopted another child and felt that Amelia might feel resentful if she

were not adopted. Kay also explained that she had arranged for and will continue to arrange for Amelia to visit with James and her biological father.

On August 26, 2022, the trial court issued an oral opinion finding that the Division had established all four prongs of the child's best interests standard set forth in N.J.S.A. 30:4C-15.1. Accordingly, the trial court entered a judgment terminating Sasha's parental rights to Amelia and granting guardianship to the Division with the plan that Amelia be adopted by her resource parents.

In its opinion, the court explained that all the witnesses who testified at trial were credible. The court then made findings under each of the four prongs of the child's best interests standard.

Under prongs one and two, the court found clear and convincing evidence that Sasha had harmed Amelia by failing to cooperate with the Division. The trial court noted that the Division had offered Sasha various programs and treatments, but Sasha was unable to obtain the level of stability needed to care for Amelia. In that regard, the trial court found that Sasha's mental instability created a situation where she was unable to adequately care for her child without supervision. Relying on the experts' testimony, the court found that placing Amelia in Sasha's care would put her at risk of harm and developmental delay.

Addressing prong three, the trial court found that the Division had provided reasonable efforts to reunite Amelia and Sasha and that there were no alternatives to termination of parental rights. The court described the numerous psychiatric and psychological evaluations the Division had arranged for Sasha and Sasha's inconsistent compliance with treatment. The court also found that the Division had explored numerous relative placements for Amelia, but those placements had been legitimately ruled out. The trial court also credited Kay's testimony that the resource parents understood KLG but wanted to adopt Amelia.

Addressing prong four, the trial court found there was clear and convincing evidence that termination of Sasha's parental rights would not do more harm than good. In that regard, the court relied on the unrebutted testimony of the experts concerning the limited bond between Amelia and Sasha and the strong bond between Amelia and her resource parents.

Sasha now appeals from the August 26, 2022 judgment.

II.

On appeal, Sasha makes three primary arguments, with numerous related sub-arguments. Sasha argues that the trial court erred in finding prong three because the court failed to consider KLG and because the Division failed to

make reasonable efforts to reunify Amelia. Sasha also challenges the court's finding under prong four, contending that the Legislature has recently amended statutes to protect parental rights whenever possible. Finally, for the first time on this appeal, Sasha argues that the trial court lacked personal jurisdiction because a GAL should have been appointed to protect her interests at trial. The facts and law do not support any of those arguments and we reject them.

A. Our Standard of Review.

An appellate court's review of a termination of parental rights case is limited. N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 552 (2014). We defer to the factual findings underlying the trial court's decision if they are supported by "'adequate, substantial, and credible evidence' on the record." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)). "We accord deference to factfindings of the family court because it has the superior ability to gauge the credibility of the witnesses who testify before it and because it possesses special expertise in matters related to the family." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448 (2012) (citing 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. Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). Nevertheless, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." R.G., 217 N.J. at 552 (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

B. The Alleged Need for a Guardian.

We begin by addressing Sasha's argument that the trial court lacked personal jurisdiction over her because her mental conditions rendered her an incapacitated person. Sasha contends that Dr. Mack evaluated her and found that she could not live on her own and, therefore, the trial court should have appointed a guardian to represent Sasha at trial.

Sasha acknowledges that she is making this argument for the first time on appeal; she did not present this argument to the trial court, nor did she ask for the appointment of a guardian. She also acknowledges that we rejected the same contention regarding her competency when we affirmed the termination of her parental rights to James. See S.S., No. A-1779-19, (slip op. at 3-7).

Appellate courts normally do not consider issues not raised at the trial court unless the issues are "jurisdictional in nature or substantially implicate the public interest." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 339 (2010). Sasha, represented by counsel, made a strategic decision not to raise the competency claim before the trial court. Instead, she argued that she had the ability to be reunited with Amelia, albeit with supervision. Given that she had previously made the competency and jurisdictional arguments concerning the guardianship trial involving James, it is apparent that she chose not to make those arguments during the guardianship trial involving Amelia.

Nevertheless, we will address the substance of the arguments. If there are grounds to question a litigant's mental competency, the trial court should follow the procedures outlined under Rules 4:26-2 and 4:86. See S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 276-79 (2020). Rule 4:26-2(a) provides that a mentally incapacitated person "shall be represented in an action by the guardian of either the person or the property." Before a guardian is appointed to act in that capacity, however, the court must determine that the person is mentally incapacitated. S.T., 241 N.J. at 277. To make that competency determination, Rule 4:26-2(b) provides that the "court may appoint a [GAL] for . . . [an] alleged . . . incapacitated person" on its own motion or a motion filed by a party or

interested person. See also S.T., 241 N.J. at 277-79 (explaining the different roles guardians and GALs play).

There is no evidence in the record that Sasha was an incapacitated person because of her limited mental intelligence. She never made that argument, nor did her counsel. Dr. Mack's evaluations were focused on her ability to independently care for her child. He did not opine that she was incapable of understanding legal proceedings. The trial court never found that Sasha was legally incapacitated. Instead, the court appropriately focused on Sasha's "intellectual disability," but was never asked to address Sasha's capability to understand the legal proceedings related to the termination of her parental rights.

Finally, we note that even if the court had appointed a GAL, nothing in the record supports the conclusion that the outcome of the trial would have been different. A GAL would not have been able to make legal decisions for Sasha. See Id. at 279 (explaining that "[n]othing in our court rules, statutes, or caselaw suggests that a [GAL] appointed to investigate a client's alleged mental incapacity has the power to make legal decisions for the client before a judicial determination on her mental capacity"). Moreover, Sasha was represented by counsel at trial and in the current record there is no argument that counsel was ineffective in failing to request a competency evaluation. Instead, three separate

experts evaluated Sasha and opined, without rebuttal, that she did not have the ability to parent Amelia. Two of those experts also opined that termination of her parental rights would not do more harm than good.

The record also reflects that Sasha understood the treatment recommendations and services offered to her but chose not to comply with those treatments or services. In short, there is nothing in the record that would support a reversal of the judgment based on the contention that the trial court should have appointed a GAL and therefore did not have jurisdiction.

C. Prong Three.

To terminate a parent's rights, the Division must prove, by clear and convincing evidence, four prongs under the child's best interests standard. See N.J.S.A. 30:4C-15.1(a). Those prongs are set forth in the governing statute. Ibid. Sasha challenges only the findings concerning prongs three and four.

Prong three 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." N.J.S.A. 30:4C-15.1(a)(3). It also requires the court to "consider[] alternatives to termination of parental rights." Ibid.

Reasonable efforts "depend on the facts and circumstances of each case." R.G., 217 N.J. at 557. "Reasonable efforts include consulting with the parent,

developing a reunification plan, providing services essential to realizing the reunification plan, informing the family of the child's progress, and facilitating visitation." Ibid. (citing M.M., 189 N.J. at 281). The Division "must monitor the services, change them as needs arise, and identify and strive to overcome barriers to service provision or service utilization." In re Guardianship of D.M.H., 161 N.J. 365, 387 (1999) (citation omitted).

In addition, the Division must prove that there were no reasonable alternatives to termination of parental rights. N.J.S.A. 30:4C-15.1(a)(3). Alternatives include placement with caregivers under KLG. See, e.g., R.G., 217 N.J. at 558; N.J. Div. of Youth & Fam. Servs. v. K.L.W., 419 N.J. Super. 568, 579-80 (App. Div. 2011). "The Division must perform a reasonable investigation of [timely-presented alternative caretakers] that is fair, but also sensitive to the passage of time and the child's critical need for finality and permanency." N.J. Div. of Youth & Fam. Servs. v. J.S., 433 N.J. Super. 69, 87 (App. Div. 2013). "Delay of permanency or reversal of termination based on the Division's noncompliance with its statutory obligations is warranted only when it is in the best interests of the child." K.L.W., 419 N.J. Super. at 581.

In July 2021, the Legislature enacted amendments to various statutes concerning children, including N.J.S.A. 30:4C-15.1, governing termination of

parental rights proceedings, and the Kinship Legal Guardianship Act, N.J.S.A. 3B:12A-1 to -7, governing KLG proceedings. L. 2021, c. 154. Under those amendments, KLG is now considered equal to adoption in terms of providing permanency to children. L. 2021, c. 154 § 4; see also N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 26-28 (App. Div. 2022) (explaining how the recent amendments strengthen the position of KLG). The 2021 amendments did not elevate KLG above adoption; rather, they put those options on equal footing.

Based on the evidence presented at trial, the court found the "Division provided a comprehensive number of reasonable efforts in this [matter] even before the birth of [Amelia]." The trial court detailed those services, which included arranging for psychiatric, psychological, neurological, and substance-abuse evaluations, assisting Sasha with housing and finances, and providing her with therapeutic visitations. The trial court's findings are amply supported by the credible evidence presented at trial.

The trial court also found that the Division explored alternative placements for Amelia but none of them were viable. In that regard, the court found that family placements were explored but appropriately ruled out. Those findings are also supported by substantial credible evidence in the record.

For the first time on this appeal, Sasha argues that the Division failed to prevent her mother from interfering with reunification because the Division did not challenge the mother's assertion that she had power of attorney over Sasha. That argument is not supported by the record. The record establishes that the Division investigated and learned that Sasha's mother only had a medical power of attorney over Sasha. Just as importantly, the Division did not defer to the decisions by Sasha's mother; rather, the Division worked directly with Sasha to provide her with services.

Sasha also argues that the trial court "erroneously concluded that the [resource] parents did not want KLG" because the resource parents only expressed a preference for adoption. Consequently, Sasha contends that this preference indicated a willingness to consider other options, and the trial court should have required KLG.

We reject that argument because the trial court heard the testimony of one of the foster parents, Kay, credited that testimony, and found that the foster parents wanted to adopt Amelia. The court also found that the foster parents understood the KLG option but did not want to pursue that option. Ultimately, the trial court correctly considered the foster parents' preferences within the

context of determining the child's best interests. See D.C.A., 474 N.J. Super. at 25-28.

D. Prong Four.

Prong four requires the court to determine that "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). This prong does not require a showing that no harm will come to the children "as a result of the severing of biological ties." In re Guardianship of K.H.O., 161 N.J. 337, 355 (1999). Instead, the inquiry is "whether a child's interest[s] will best be served by completely terminating the child's relationship with that parent." E.P., 196 N.J. at 108. "The crux . . . is the child's need for a permanent and stable home, along with a defined parent-child relationship." N.J. Div. of Youth & Fam. Servs. v. H.R., 431 N.J. Super. 212, 226 (App. Div. 2013). Prong four can be satisfied by "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." M.M., 189 N.J. at 281 (quoting In re Guardianship of J.C., 129 N.J. 1, 19 (1992)). In making a determination under prong four, the court must use a "totality of the circumstances" approach and can take into account the harm that would occur if the child's relationships with her current caregivers were terminated. D.C.A.,

474 N.J. Super. at 28-29 (explaining that the 2021 amendments to N.J.S.A. 30:4C-15.1(a), which prohibit consideration of harm from the termination of the relationship with the caregiver under prong two, did not prevent an appropriate consideration of the termination of that relationship under prong four).

Three experts testified at trial and the trial court found that they all provided credible testimony. Two of the experts conducted bonding evaluations. Relying on the unrebutted testimony of the experts, the trial court found that the Division had presented clear and convincing evidence that the termination of Sasha's parental rights will not do more harm than good. The court relied on the testimony of Dr. Mack and Dr. Wells concerning their bonding evaluations and found that the bond between Sasha and Amelia was "minimal." Dr. Mack and Dr. Wells were well-qualified experts who had full opportunities to make comprehensive, objective, and informed evaluations of Amelia's relationship with Sasha. See J.C., 129 N.J. at 19. Consequently, the record establishes that the trial court's factual findings under prong four were supported by substantial credible evidence, including expert testimony from two doctors.

To the extent that we have not expressly addressed other arguments raised by Sasha it is because they lack sufficient merit to warrant discussion in a written decision. See R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION