RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1362-22

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

S.P.,

Defendant,

D.E.,

Defendant-Appellant.

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IN THE MATTER OF THE
GUARDIANSHIP OF R.B.E.,
a minor.

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Submitted October 3, 2023 – Decided October 19, 2023

Before Judges Sumners and Perez Friscia.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FG-07-0056-22.

Joseph E. Krakora, Public Defender, attorney for appellant (Carol L. Widemon, Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Sookie Bae-Park, Assistant Attorney General, of counsel; Julie Beth Colonna, Deputy Attorney General, on the brief).

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

PER CURIAM

Defendant D.E. (Dan)[1] appeals from the Family Part's December 19, 2022 judgment terminating his parental rights to his son, R.E. (Ray), and granting guardianship to the New Jersey Division of Child Protection and Permanency (Division) with the permanency plan that Ray be adopted by his resource parents. Dan argues the trial court erred in finding the Division had proven by clear and convincing evidence the four prongs of the best interests test necessary

[1] We employ initials and pseudonyms to identify the parties, the children, and others to protect the children's privacy and because the records relating to Division proceedings held under Rule 5:12 are excluded from public access under Rule 1:38-3(d)(12).

for the termination of parental rights. Ray's law guardian argues the Division has proven each of the best interest prongs to terminate Dan's parental rights and that the court's judgment should be affirmed. Having reviewed the record, the parties' contentions, and the applicable law, we affirm the judgment because the court correctly applied the law, and substantial credible evidence supports its findings.

I.

We summarize the pertinent facts established during the guardianship trial. The trial court after a four-day trial, terminated Dan and S.P.'s (Sybil) (collectively "parents") parental rights to Ray. Sybil is Ray's biological mother. Dan maintained he was Ray's biological father, but no parentage evidence was submitted.[2] Ray was born in August 2014. Ray has two half-siblings, Sybil's daughter B.P. (Beth), and Dan's daughter P.E. (Pam).

Between July 2015 and October 2020, the Division became aware of multiple incidents concerning Ray's family, which related to abuse, neglect, and substance abuse. On July 13, 2015, the Division received a referral from an anonymous source concerning "noise" emanating from Dan and Sybil's home in

[2] Ray's birth certificate did not list his biological father. Thus, the Division also sought termination against "[t]he biological father of [Ray], whomsoever he may be."

Elizabeth. "One infant and [two] small children" were allegedly in the home and the caller allegedly overheard Dan and Sybil argue about "pills." It was relayed that Dan and Sybil "always argue[d] and f[ought]." The source also heard "walls being hit and things being hit in the home," but could not determine "if the children [were] being hit." The Division attempted to investigate but could not reach the family.

Over two years later, the Division learned of Ray following a reported incident in September 2017. Police were advised that individuals at a highway rest stop "appeared to be under the influence of substances" and the police determined the parties were Dan, Sybil, and Beth. The family had allegedly "sle[pt]" in a pickup truck overnight at the rest stop. The police found heroin in the truck "in open view," in Beth's presence, and Dan had heroin on his person. Dan was arrested for possession of a controlled dangerous substance and "[c]hild endangerment," and Sybil was arrested for "[h]indering [a]pprehension" and "[c]hild [e]ndangerment." At that time, because the Division could not locate Ray and the parents would not disclose his whereabouts, Ray was listed as "missing."

In December 2018, the Division received a referral "with concerns for [Ray]." A caller notified the police that a woman, determined to be Sybil,

allegedly was "under the influence of drugs or alcohol begging for money with a young child by her side." Upon investigation, the police determined that Ray was the child with Sybil and Dan. The parents were arrested, and Ray was "released" to his step-grandfather.

In October 2020, the mother of Ray's cousin, I.M. (Isabel), advised the Division that there were "family members smok[ing] crack, us[ing] heroin, [and] pop[ing] pills" in the presence of Ray and Isabel in a residence in Newark. It was reported Ray's paternal grandfather, Ray, and Isabel were staying in the residence.

On October 28, 2020, the police received a phone call reporting "two adults . . . asleep in their car parked in front" of a hotel. The two adults were determined to be Ray's aunt and uncle. When the police searched their hotel room, they found Ray and Isabel "asleep" with paraphernalia in the vicinity. Ray's paternal grandparents were also present. Except for Ray's paternal grandfather, the adults present appeared "highly under the influence." The grandparents claimed Isabel and Ray were in their care. Ray could not "provide information about his address or his parents['] whereabouts." He also "could not establish how long he had been staying with" his paternal grandparents. The Division could not locate Dan and Sybil. The Division removed Ray and placed

him in "an unrelated resource home" with W.B. (Wyatt) and W.L. (Weston), who had adopted Ray's sibling Beth after Sybil's parental rights were terminated.

A six-year-old Ray explained to the police that his family's "old apartment" was infested with bugs and "his whole family had to move into a hotel so they [could] treat the bedbugs." Ray also advised his parents "never gave him food" and when there was no food he would "go without eating." Ray relayed he was "always running from the police" and he had never gone to school. Additionally, Ray stated he was "a little" fearful of his parents because they "never t[ook] care of him." Ray indicated his parents were incapable of caring for him because they would "sleep all day" after "smok[ing.]"

The guardianship trial took place over four days. The court heard testimony from four witnesses: caseworker Tiffany Banks; the Division's expert psychologist, Dr. Barry Katz; resource parent Wyatt; and Dan. Sybil did not testify at the trial.

Banks testified that when Ray was removed from his paternal grandparents' custody at the hotel he was not "being cared for while the adults in the room were engaging in substance use." At the time of removal, Ray's parents were incarcerated and visits between Ray and Dan were suspended. Banks testified the parents did not send Ray to school or offer documentation of

home-schooling. Banks also testified the parents did not take Ray for needed medical or dental appointments. As a result, at the time of Ray's removal, Ray "was outdated for immunizations" and was in pain from "dental issues." Ray had multiple cavities and required a root canal, even though he was approximately six years old.

Banks further testified that the Division considered "quite a few" friends and relatives for placement. However, after investigating options, the Division determined there were no viable placements. The Division closely considered B.M. (Bill), a "family member to [Dan]" residing in Florida whom Sybil claimed to have never met. Banks testified that because both parents preferred Ray to stay in the resource home with his sister, the Division ultimately ruled Bill out. It was relayed that Ray and Beth have a loving sibling relationship. The court found Bank's testimony was "very credible" based on "her demeanor," "professionalism," and " knowledge of the case."

Dr. Katz testified he performed a psychological evaluation of Dan while incarcerated at Northern State Prison and conducted a bonding evaluation between Ray and his two resource parents, Wyatt and Weston. At trial, Dr. Katz was stipulated as an expert. In Dan's evaluation, he admitted to Dr. Katz that he had used opiates since he was sixteen years old, had many arrests, and had been

incarcerated three or four times. Dr. Katz found Dan had a "disregard for the abuse" Ray endured, but opined that Dan had an "adept understanding of acceptable parenting practices." In his bonding evaluation with his resource parents, Ray indicated he did not like visiting with his parents. He relayed his parents hit him, he witnessed them doing "bad stuff," and he often did not have food to eat.

In preparation for his evaluations, Dr. Katz reviewed the expert report of Ray's psychological exam conducted at the Dorothy B. Hersh Center, by Jason E. Coleman, Psy.D., and Michelle S. Zuckerman, Psy.D. The court admitted the Hersh report into evidence with consent of Dan's counsel as to the diagnoses and opinions, but counsel specifically objected to Ray's statements as to his "wishes" regarding his parental relationships and residence. Dr. Katz relied on the Hersh experts' diagnoses that Ray suffered complex trauma and on the opinion that Ray distanced himself from Dan for emotional safety. Dr. Katz also referenced Dr. Alison Strasser Winston's psychological report, which defense counsel objected to as hearsay but consented to its admission "to show that the Division made the referral for services to [Ray] and the Division followed the recommendations made by report."

Dr. Katz testified that in conducting the bonding evaluation, he reviewed records from "prior investigative agencies . . . prior court actions, prior findings regarding the neglect and parenting problems, the police reports, as well as the psychological evaluations of [Ray] by Dr. Winston and by [Hersh]." Relevantly, he testified that when Ray was interviewed, Ray provided a "history similar to what had been reported." Ray relayed: "his exposure to parental abandonment by [Dan]"; "his exposure to being abused and exploited by the caretakers"; the lack of care he received; and his "current secure bonding and attachment to the resource parents." Dr. Katz testified that "all this has shown a clear and comprehensive picture of a very extensive history of abuse, neglect, [and] instability." Ray "had suffered multiple types of traumas," received therapy "on an ongoing basis," and specifically received "trauma informed therapy." Dr. Katz also testified that Ray was placed in the care of others throughout much of his young life, which care was often unsafe. Dr. Katz determined from the bonding evaluation that Ray was subjected to "repeated acts of abandonment," "exposure to domestic violence," "exposure to caretaker's substance abuse disorder," and "child exploitation."

Dr. Katz testified that termination of parental rights would do more good than harm for Ray because Dan was unable to meet Ray's needs and unable to

care for him "at this time or in the foreseeable future." Dr. Katz opined "delay[ing] [Ray's] adoption to [his] current caretakers at this time would likely result in severe and enduring harm to" Ray. The court admitted Dr. Katz's expert report into evidence by consent. The court found Dr. Katz a credible witness and that his testimony was "unimpeachable."

Wyatt testified he and Weston are committed to Ray and would like to adopt him as they had adopted Ray's sister Beth. Wyatt testified he and Weston have cared for the children, ensured the children attended school, and provided for their medical needs. The court found Wyatt was a "very, very sincere, credible witness" based on the "tone of his voice, facial expressions, demeanor as being somebody very sincere, wanting to help this child."

Dan testified that he "had a good relationship" with his son, like "a regular father and son bond." Dan testified that although he was not legally married to Sybil, he had been with Ray since birth and believed he was Ray's father even though he was not on the birth certificate. He testified that he "never hit [his] son," and he "gave [his] son anything he wanted, plus more." Dan acknowledged years of drug addiction and that he was in a treatment program. Further, Dan admitted he had been arrested and incarcerated multiple times and had committed various crimes over the years but was adamant he never took Ray to

any crimes that he committed. Dan was incarcerated until about two weeks before the trial. Dan testified he attended "anger management" classes, "parenting" classes, and "substance abuse treatment" while incarcerated. After his release from prison, Dan was residing at Eva's Village where he received rehabilitation services, and had begun working at UPS. Dan stated he would "do whatever it takes to be with [his] son," but acknowledged his son was doing well with the resource parents and wanted to remain there. The court found Dan credible to the extent of "[w]hat he told [the court]."

Sybil did not present any witnesses or otherwise testify herself. However, in her virtual appearance at the beginning of trial, Sybil expressed that she wanted "[Ray] to be with his sister [Beth]."

Finding the Division had proven all four prongs of the best interests standard under N.J.S.A. 30:4C-15.1(a), the court entered an order terminating the parents' parental rights, and awarded guardianship of Ray to the Division for permanent placement and adoption.

On appeal, Dan raises the following arguments for our consideration:

> POINT I: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING THAT [THE DIVISION] MET ITS BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE ALL FOUR PRONGS OF N.J.S.A. 30:4C-15.1(a), THE STATUTORY BEST INTERESTS TEST FOR

TERMINATION OF PARENTAL RIGHTS, AND THEREFORE THE JUDGMENT OF GUARDIANSHIP SHOULD BE REVERSED.

A. BECAUSE THE TRIAL COURT'S ERRONEOUS LEGAL CONCLUSION THAT [THE DIVISION] MET ITS BURDEN OF PROVING THE FIRST AND SECOND PRONGS OF THE BEST INTERESTS TEST RESULTED FROM THE INEFFECTIVE ASSISTANCE OF [DAN]'S TRIAL COUNSEL IN FAILING TO ARGUE THAT INADMISSIBLE COMPLEX DIAGNOSES AND OPINIONS OF NON-TESTIFYING PSYCHOLOGISTS ARE NOT MADE ADMISSIBLE BY THE PROVISIONS OF N.J.R.E. 703, THIS COURT SHOULD REVIEW THIS MATTER DE NOVO, VACATE THE JUDGMENT OF GUARDIANSHIP AND RESTORE [DAN]'S PARENTAL RIGHTS. (NOT RAISED BELOW.)

B. BECAUSE THE TRIAL COURT'S ERRONEOUS DECISION THAT [THE DIVISION] MET ITS BURDEN OF PROVING PRONG THREE OF THE BEST INTERESTS TEST RESULTED FROM [DAN]'S TRIAL COUNSEL'S FAILURE TO PROTECT HIS CLIENT'S CONSTITUTIONAL RIGHT TO VISITATION, THIS COURT SHOULD REVIEW THIS MATTER DE NOVO, REVERSE THE JUDGMENT OF GUARDIANSHIP AND RESTORE [DAN]'S PARENTAL RIGHTS. (NOT RAISED BELOW.)

C. BECAUSE [THE DIVISION] FAILED TO ASSESS KNOWN RELATIVES FOR [RAY]'S PLACEMENT, THEREBY DEPRIVING THE TRIAL COURT OF THE ABILITY TO CONSIDER ALTERNATIVES TO TERMINATION OF PARENTAL RIGHTS AND [DAN]'S TRIAL COUNSEL FAILED TO SO ARGUE, RESULTING IN

THE TRIAL COURT'S ERRONEOUS DECISION THAT [THE DIVISION] MET ITS BURDEN OF PROVING PRONG THREE, THIS COURT SHOULD REVIEW THIS MATTER DE NOVO, REVERSE THE JUDGMENT OF GUARDIANSHIP AND RESTORE [DAN]'S PARENTAL RIGHTS. (NOT RAISED BELOW.)

D. THE TRIAL COURT'S RELIANCE UPON DR. WINSTON'S REPORT AND POSSIBLE RELIANCE UPON DR. KATZ'S FOSTER PARENT BONDING EVALUATION IN REACHING THE LEGAL CONCLUSION THAT [THE DIVISION] MET ITS BURDEN OF PROVING PRONG FOUR BY CLEAR AND CONVINCING EVIDENCE CONSTITUTES PLAIN ERROR CLEARLY CAPABLE OF CAUSING AN UNJUST RESULT. (NOT RAISED BELOW.)

II.

We conduct a limited review of a trial court's decision to terminate parental rights. N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007). "Appellate courts must defer to a trial judge's findings of fact if supported by adequate, substantial, and credible evidence in the record." Ibid. 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). "Deference is especially appropriate 'when the evidence is largely testimonial and involves

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)). "[A] trial court's factual findings 'should not be disturbed unless they are so wholly unsupportable as to result in a denial of justice.'" N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 511 (2004) (quoting In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). However, we do not give "special deference" to "[a] trial court's interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"Parents have a constitutionally protected right to maintain a relationship with their children." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007). That right, however, "is not absolute" and is limited "by the State's parens patriae responsibility to protect children whose vulnerable lives or psychological well-being may have been harmed or may be seriously endangered by a neglectful or abusive parent." F.M., 211 N.J. at 447. In guardianship and adoption cases, such as here, it is well-established that "[c]hildren have their own rights, including the right to a permanent, safe, and stable placement." N.J. Div. of Youth & Fam. Servs. v. C.S., 367 N.J. Super. 76, 111 (App. Div. 2004). We acknowledge "the need for permanency of

placements by placing limits on the time for a birth parent to correct conditions in anticipation of reuniting with the child." Ibid. Thus, a parent's interest must, at times, yield to the State's obligation to protect children from harm. N.J. Div. of Youth & Fam. Servs. v. G.M., 198 N.J. 382, 397 (2009).

When terminating parental rights, the trial court applies the statutory best interests test, which requires considering four prongs:

> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
>
> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm;
>
> (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
>
> (4) Termination of parental rights will not do more harm than good.
>
> [N.J.S.A. 30:4C-15.1(a).]

The Division must prove each prong by "clear and convincing evidence." N.J. Div. of Child Prot. & Permanency v. D.H., 469 N.J. Super. 107, 115 (App. Div. 2021). These prongs are not separate and they overlap to inform a more

general inquiry that the termination of parental rights is in a child's best interests. N.J. Div. of Child Prot. & Permanency v. R.L.M., 236 N.J. 123, 145 (2018). "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 that parent." N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 26 (App. Div. 2022) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 107 (2008)), cert. granted, 253 N.J. 599 (2023) (No. C-629). "[P]arental fitness is the key to determining the best interests of the child." N.J. Div. of Youth & Fam. Servs. v. I.S., 202 N.J. 145, 170 (2010) (quoting In re Guardianship of K.H.O., 161 N.J. 337, 348 (1999)).

In 2021, the Legislature amended Title 30, which governs guardianship proceedings and contains the best interests standard, and Title 3B, which concerns kinship legal guardian (KLG) proceedings. L. 2021, c. 154. The Legislature amended only prong two of the best interests standard under N.J.S.A. 30:4C-15.1(a) by deleting the sentence "[s]uch 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." Compare L. 2021, c. 154, § 9 (current N.J.S.A. 30:4C-15.1(a)(2)), with L. 2015, c. 82, §

3 (prior version). The amendment does not preclude a court from considering "the child's bond to a current placement when evaluating prong four" to "fully consider" the overall circumstances. D.C.A., 474 N.J. Super. at 28. In fact, while "caregiver bonding" may no longer be considered under prong two, courts can still weigh that finding against "all the evidence that may be considered under prong four—including the harm that would result from disrupting whatever bonds the child has formed." Id. at 29.

As to Title 3B, the Legislature removed the requirement that courts find "adoption of the child is neither feasible nor likely" before courts can appoint a caregiver as a KLG. Compare L. 2021, c. 154, § 4 (current N.J.S.A. 3B:12A-6(d)(3)), with L. 2006, c. 47, §32 (prior version). As amended, the KLG Act ensures that a resource parent's willingness to adopt no longer forecloses KLG. See N.J.S.A. 3B:12A-6(d)(3). However, "awarding kinship legal guardianship" must still be "in the child's best interests." N.J.S.A. 3B:12A-6(d)(4).

We conclude the trial court's findings that the Division presented clear and convincing evidence to satisfy each of the four prongs of the best interests test are amply supported by the record. The court correctly applied the applicable legal principles to the factual findings. See N.J. Div. of Child Prot.

& Permanency v. P.O., 456 N.J. Super. 399, 407 (App. Div. 2018). The court's termination of Dan's parental rights was based on substantial credible evidence.

A.

The Division, under prong one of N.J.S.A. 30:4C-15.1(a), must prove by clear and convincing evidence that "the child's safety, health, or development has been or will continue to be endangered by the parental relationship." However, 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 In re Guardianship of DMH., 161 N.J. 365, 383 (1999)). Although "a particularly egregious single harm" can suffice, the "focus is on the effect of harms arising from the parent-child relationship over time on the child's health and development." K.H.O., 161 N.J. at 348. Parents' "withdrawal of that solicitude, nurture, and care for an extended period of time is in itself a harm that endangers the health and development of the child." DMH, 161 N.J. at 379.

Here, the trial court in considering prong one, found that the Division established by clear and convincing evidence that Dan: failed to provide Ray "safe and stable housing"; "exposed [him] to domestic violence"; "fail[ed] to enroll [Ray] in school"; neglected to provide "medical care"; and exposed him to drugs. Specifically, the court found the "[l]ack of medical care, lack of dental

care, development, lack of education, lack of having parents there 24/7 day in and day out to work with the child in his development" as well as the parents' criminal history and incarceration all harmed Ray's health. The court also found the delay in "establishing a stable, permanent home until the Division placed him with his two resource parents, and his sister" further harmed Ray. The court provided substantial findings of fact, which are well supported by the record, that the Division satisfied prong one proving Ray's safety, health, and development were in peril while in Dan's care.

At the time of trial, Dan was residing at Eva's Village while still in substance abuse treatment, and had not demonstrated an ability to provide a safe and healthy parental relationship with Ray. "When the condition or behavior of a parent causes a risk of harm, . . . and the parent is unwilling or incapable of obtaining appropriate treatment for that condition, the first subpart of the [best-interests test] has been proven." N.J. Div. of Youth & Fam. Servs. v. H.R., 431 N.J. Super. 212, 223 (App. Div. 2013). The substantial credible evidence in the record supports the court's finding that Ray would "continue to be endangered by the parental relationship" if Dan's parental relationship was not terminated.

B.

Pursuant to prong two, the Division must demonstrate that the parent "is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm." N.J.S.A. 30:4c-15.1(a)(2). The Division may seek termination when there are "indications of parental dereliction and irresponsibility, such as the parent's continued or recurrent drug abuse, [and] the inability to provide a stable and protective home." K.H.O., 161 N.J. at 353.

The court found under prong two that the clear and convincing evidence established that Dan was "unwilling or unable to eliminate the harm" to Ray. The court correctly determined, based on the substantial credible evidence, that there was "no probable expectation" that Dan would make "the necessary changes to provide [Ray] with a safe and stable home now or in the foreseeable future," and that Dan was unable to provide Ray with the basic needs of adequate housing, food, and a nurturing environment.

It was undisputed Ray had been injured from the unstable home environment he endured from Dan's neglect of Ray's medical and educational needs. The evidence amply supports the court's determination that "delaying

permanent placement of [Ray] will add to the harm" as Ray had been in placement from October 2020 to December 2022 and "deserves permanency."

C.

Prong three of the best interests test provides the Division must have "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 [must have] considered alternatives to termination of parental rights." N.J.S.A. 30:4C-15.1(a)(3). "Reasonable efforts" include, but are not limited to, the following: (1) "consultation and cooperation with the parent in developing a plan for appropriate services"; (2) "providing services that have been agreed upon, to the family, in order to further the goal of family reunification"; (3) "informing the parent at appropriate intervals of the child's progress, development, and health"; and (4) "facilitating appropriate visitation." N.J.S.A. 4C:15.1(c). Courts do not measure reasonableness by the "success" of the efforts. N.J. Div. of Youth & Fam. Servs. v. J.S., 433 N.J. Super. 69, 90 (App. Div. 2013) (quoting DMH, 161 N.J. at 393). What is reasonable "depend[s] on the facts and circumstances of each case." N.J. Div. of Child Prot. & Permanency v. R.G., 217 N.J. 527, 557 (2014).

Dan argues reversal under prong three is required because trial counsel was ineffective contrary to the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), as adopted by State v. Fritz, 105 N.J. 42, 58 (1987), in failing to seek a hearing on Dan's suspended visitation during the guardianship action, which prevented greater visitation from occurring thus changing the outcome at trial. See N.J. Div. of Youth & Fam. Servs. v. B.R., 192 N.J. 301, 308-09 (2007) (applying the two-prong Strickland/Fritz test when assessing a claim of ineffective assistance in termination of parental rights litigation). To succeed, a parent must show that "(1) counsel's performance [was] objectively deficient—i.e., it [fell] outside the broad range of professionally acceptable performance; and (2) counsel's deficient performance must prejudice the defense—i.e., there must be 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 307 (quoting Strickland, 466 U.S. at 694).

Our Court in addressing ineffective assistance of counsel in a parental termination trial found "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; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be

considered sound trial strategy.'" Id. at 307-08 (quoting Strickland, 466 U.S. at 689). When a defendant claims ineffective assistance of counsel, the defendant "must provide a detailed exposition of how the trial lawyer fell short and a statement regarding why the result would have been different had the lawyer's performance not been deficient." Id. at 311.

We conclude this ineffective assistance argument is unsupported by the record. It is undisputed that Dan was incarcerated during most of the guardianship litigation and was released to Eva's Village shortly before trial. Ray steadfastly relayed his fear of Dan, the pain and hardship he suffered, and it was unrefuted that Ray experienced trauma resulting from his years with Dan and Sybil. Dan acknowledged he was aware Ray did not wish to have visitation with him. The Division established services were offered to the parents. Based on the record, we conclude Dan has not demonstrated counsel was objectively deficient and has not shown that the outcome would have been different. Id. at 694.

As to reunification, the substantial credible evidence supports the court's finding that the Division investigated multiple family members for placement, including his paternal grandparents and Bill, who resided in Florida; however, the efforts were unsuccessful. The court's finding that the Division attempted

to work with the parents but the parents were often missing or were incarcerated is supported by the record. Moreover, as the court noted, "during a court hearing in February of 2022 both parents testified that they would prefer that [Ray] remain in his current resource home." No other alternative placements were provided by Ray's parents or discovered by the Division. While kinship guardianship is recognized as the "preferred resource," such placement is not at the expense of the child's welfare. See D.C.A., 47 N.J. Super. at 27 (quoting L. 2021, c. 154). Again, the substantial credible evidence in the record supports the trial judge's finding that the Division demonstrated by clear and convincing evidence that prong three was met.

D.

Under prong four, termination of parental rights must "not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). The issue is "whether a child's interest will best be served by completely terminating the child's relationship with that parent." E.P., 196 N.J. at 108.

The record substantially supports the court's determination that Dan has "no realistic likelihood" that he will "be able to safely and appropriately care for this child now or in the foreseeable future" because of his long history of "substance abuse," "inability to obtain stable housing," and "propensity towards

criminal conduct." The court determined with certainty that, based on the totality of evidence, terminating Dan's parental rights to Ray would not do more harm than good because Dan could not provide Ray with a safe environment, and that would not change. Further, the court found Ray was now with his foster parents and his "sister, in a safe and stable home, going to school, going to the doctor, having dental work done," and in a nurturing environment.

The court based its decision partly on Dr. Katz's "unimpeachable" credible testimony as to his opinions and findings that Dan "[wa]s unable to meet Ray's needs, and unable to care for him at this time or in the foreseeable future." The court noted Dr. Katz's report was unobjected to "coming into evidence." The court also relied on the testimony of Banks and Wyatt that Ray "has repeatedly and consistently" maintained that he wanted to stay with his resource parents and sister. The court was permitted to consider all admissible evidence in evaluating if termination would do more harm than good and regardless of the evidence as to the resource parents' bond with Ray, substantial credible evidence supported the court's finding under prong four. Dan's argument that the court relied "solely upon the report of Dr. Winston" is unsupported. The court's findings are well supported that: delaying Ray's placement in a safe and stable home would be more harmful; Dan should not "have contact with [Ray] at this

time or in the future as [Dan] continues to be a cause of trauma and disruption"; and further interaction would likely result in "enduring harm." The court's determination that the Division established the fourth prong by clear and convincing evidence is supported by the substantial credible evidence. We conclude the court provided sufficient findings that the Division has satisfied "each of the prongs in the best interest[s] of the child standard."

III.

Lastly, we address Dan's argument that his trial counsel was ineffective in not objecting to the admission of "inadmissible complex diagnoses and opinions contained in the Hersh and Winston reports . . . bootstrapped into evidence via Dr. Katz's report and testimony." We find the argument unavailing.

Dan's counsel reviewed the reports and made specific objections. While counsel consented to the admission of the Hersh report, counsel objected to Dr. Katz's opinion's reliance on Ray's statements regarding his wishes to reside with his resource parents and sister in the report. Specifically, counsel protested Dr. Katz's reference to "[Ray's] wishes" as expressed by Dr. Winston, and Dr. Katz's reference to the Hersh report, which "does the same thing." The record demonstrates counsel requested that Dr. Katz "be prevented from testifying as to [Ray's] out-of-court statement that [Ray] would like to remain . . . where he

is with his sister." The record demonstrates counsel contemplated the details and findings in the reports and consented to the admission of the Hersh report as to Ray's diagnoses. Further, counsel agreed that it was "fine" to admit the Dr. Winston's report as to "the referral[s]" made, "recommendations" provided, and that the Division "provided assistance and services to [Ray]." The court's reliance in its findings as to Dr. Winston's recommendations and the referrals as to visitation and reunification with Dan were also supported by Dr. Katz's expert opinion after his evaluations.

We recognize under N.J.R.E. 808, an expert's complex medical opinion contained in a report is generally inadmissible "because of the complexity of the analysis involved in arriving at the opinion and the consequent need for the other party to have an opportunity to cross-examine the expert." N.J. Div. of Child Prot. & Permanency v. N.T., 445 N.J. Super. 478, 501 (App. Div. 2016) (quoting N.J. Div. of Youth Fam. Servs. v. B.M., 413 N.J. Super. 118, 130 (App. Div. 2010)); see N.J.R.E. 803(c)(6). However, it is well recognized a party may waive objection to the admission of such hearsay evidence for strategic trial reasons. We observe, "by consenting to the admission of the [testimony and] documents, defendant deprived the Division of the opportunity to overcome any

objection" by calling the expert to testify. See N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 341 (2010).

We conclude counsel was not ineffective. Counsel's lack of objections to the diagnoses of trauma suffered by Ray in the Hersh report, and the recommendations and referrals based on the diagnoses in Dr. Winston's report, which were relied upon by Dr. Katz, were within counsel's reasonable trial strategy. Counsel objectively appears to have contemplated the cumulative testimony based on his statements on the record. Counsel also likely reflected on the fact that the opinions were unrefuted by a defense expert. Dan has not demonstrated otherwise. Dan has failed to demonstrate how counsel's trial positions were objectively deficient and would have reasonably resulted in a different outcome. See Fritz, 105 N.J. at 64 ("[P]urely speculative deficiencies in representation are insufficient to justify reversal" of a conviction.); State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) ("[A] defendant 'must do more than make bald assertions that he was denied the effective assistance of counsel.'" (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999))).

Simply stated, in light of the volume of the Division's other evidence and the court's credibility determination, Dan has not demonstrated that counsel's

limited objections and consent to the admission of the hearsay evidence in the Hersh and Winston reports was ineffective assistance of counsel. Further, the court did not abuse its discretion as the decision to admit or exclude evidence is left to the sound discretion of the court. While the court's reliance on Dr. Winston's findings as to the recommendations and referrals was based on consented to portions of the admitted report, any further extrapolation was harmless. See Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019); Medford v. Duggan, 323 N.J. Super. 127, 133 (App. Div. 1999). See R. 2:10-2 (noting that a trial error or omission may be disregarded "unless it is of such a nature as to have been clearly capable of producing an unjust result").

Lastly, we note Ray's statements were admissible under N.J.S.A. 30:4C-15.1a(a) as: "Previous statements made by a child relating to any allegations of abuse or neglect of that child shall be admissible in evidence in any hearing: to terminate parental rights." The court's additional findings relying on Ray's admissible statements were substantially corroborated by other evidence of Ray's abandonment into the care of others, his unstable environment, lack of medical care, frequent exposure to controlled dangerous substances, and lack of schooling.

To the extent that we have not addressed some of Dan's arguments, it is because they lack sufficient merit to be discussed in a written opinion. 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