

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1772-22

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

N.M.C.,

Defendant,

and

D.J.J.,

Defendant-Appellant.

IN THE MATTER OF THE
GUARDIANSHIP OF T.S.C.,
a minor.

Submitted October 23, 2023 – Decided October 31, 2023

Before Judges Sabatino and Mawla.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Essex County, Docket
No. FG-07-0053-21.

Joseph E. Krakora, Public Defender, attorney for appellant (Gilbert G. Miller, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Janet Greenberg Cohen, Assistant Attorney General, of counsel; Meaghan Goulding, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor T.S.C. (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Melissa R. Vance, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

Defendant D.J.J., an incarcerated father, appeals the Family Part's final judgment dated February 1, 2023, terminating his parental rights respecting his daughter T.S.C. ("Nellie").¹ Nellie has been in the care of the Division of Child Protection and Permanency since her birth in September 2019. Nellie's mother, co-defendant N.M.C., had a brief relationship with the father and reported domestic violence by him. Due to her problems with drug addiction and mental health, the mother could not and cannot capably care for the child. She did not appear at the trial, and she has not appealed from the trial court's termination of her own parental rights.

¹ We use initials and fictional names to protect the privacy interests of the child and the other persons involved. R. 1:38-3(d)(12).

At the time of Nellie's removal from the mother after birth, the father was not identified. The mother did not provide enough information to the Division on who he was, and the father did not know the child was his. Eventually the Division located the father in prison, after sending out numerous inquiries.

Nellie spent her first months in the care of one resource family but was removed from them. Since that time, she has been in the care of her current resource parents for more than two years. They have expressed an intention to adopt her.

The father was located when Nellie was about one-and-a-half years old. He has a history of criminality and had recently been re-incarcerated. After a paternity test confirmed his parentage, the Division facilitated monthly in-person visits between the father and Nellie and arranged psychological and parental evaluations of the father.

The father has four children from other relationships. He has not been their caretaker, although he has visited with them and provided some financial support. The father has a parole eligibility date in 2025, although he may be released sooner. At one point he was released to a halfway house but soon was returned to prison.

The Division assessed several persons who might care for the child while the father remained incarcerated, beginning with the father's fiancée at the time he was located. The fiancée, with whom he had lived before his imprisonment, was the mother of another one of the father's children. However, their relationship ended before the Division completed its investigation.

After the father and his fiancée broke off their relationship, he provided the names of two of his sisters for the Division to assess. The Division assessed one sister and ruled her out. The other sister, known as "Dee," was still being assessed by the Division as of the time of trial.

Dee has visited with Nellie and has expressed to a Division caseworker a desire to adopt her, pending the Division's assessment. According to the caseworker's trial testimony, she explained to Dee the features of kinship legal guardianship ("KLG"), but Dee was only interested in adopting the child and not entering into a KLG arrangement with the father.

The father proposes that Nellie live with Dee. He has no employment or housing arranged for after he is released from prison. He admits he would not be able to immediately take Nellie into his custody.

The guardianship trial was held over intermittent days in between August 2022 and January 2023. As its two witnesses, the Division presented the

caseworker and an unrebutted psychological expert who had evaluated the father. The expert opined the father was not currently, and would not any time soon, be able to take care of Nellie.

In her written opinion, the trial judge found the caseworker credible, noting she was "very familiar" with the case and "knowledgeabl[e]" about the services the Division provided. Those services included consistent visitations at the prison. The judge also found the expert credible, noting she was "responsive and straightforward" and "unwavering." Defendant did not testify and presented no witnesses.

After an analysis of the four prongs for termination set forth in N.J.S.A. 30:4C-15.1(a), the judge terminated the father's rights, issuing both an oral decision and a corresponding written opinion.

The applicable law is clear. When seeking the termination of a parent's rights under N.J.S.A. 30:4C-15.1(a), the Division has the burden of establishing, by clear and convincing proof, the following elements:

- (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).]

"These elements are not discrete and separate; they overlap to offer a full picture of the child's best interests." N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 554. (2014). We must bear in mind that termination of a parent's right to raise his or her child is a matter of constitutional magnitude. See In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999); see also In re Guardianship of J.C., 129 N.J. 1, 9-10 (1992).

As to the related prongs one and two of the statute, the trial judge found the Division had established that Nellie's "health and development has been and will continue to be endangered by a parental relationship" with the father. "[T]hrough his actions and inactions," the father had "demonstrated the kind of relationship he wants with [Nellie]—a relationship wherein he does not have full time responsibilities or accountability[—] one similar to that which he ha[s] with his other children wherein he is not the primary care giver and [i]s only involved to purchase things." The judge credited the expert's opinion that the

father's "prior behavior would put [Nellie] at risk of harm."

The judge found the Division had established that "it is not reasonably foreseeable that [the father] can cease to inflict harm upon [Nellie]." The judge noted that "[b]eyond wanting his sister . . . to adopt [Nellie] he has not provided a plan of care or expressed an intention to care for [Nellie] himself when he is released." In addition, the father "ha[d] not put forth a plan even if he were to be released in the near future. [He] ha[d] not identified safe and stable housing for himself or [Nellie] or a means for income. The only plan [he] provided was that he wanted his sister . . . to adopt [Nellie]."

The judge found the Division established prong three because it had "made reasonable efforts to provide services to help [the father] and that alternatives to the termination of parental rights were considered." The trial court noted the Division had provided "supervised visitation, relative assessments and evaluations." Those efforts were in addition to the numerous efforts to provide services to the mother.

Additionally, the judge found she had "not been presented with any viable alternatives" to terminating the father's parental rights. In this regard, the judge noted "[t]he Division did assess the relatives offered by the father." Specifically, "one sister was ruled out and the [other] is still proceeding through the licensing

process." That other sister had "expressed an interest and commitment only to adopting [Nellie] and not to KLG." (emphasis added).

Further, the judge found that the Division reasonably had adjourned the trial for the benefit of the father after he was located, in order to give him time and provide him with services. We reject the father's argument that the Division failed to make diligent efforts to locate him.

Finally, under the statute's fourth "best interests" prong, the judge "conclude[d] that the evidence support[ed] the order terminating the parental rights." More specifically, the judge found that the father was "unlikely to become a viable parenting option for [Nellie] now or in the foreseeable future," that he "remains incarcerated," and that he was "without a plan for [Nellie] beyond his sister—"who he support[ed] adopting [Nellie]." The judge further noted that Nellie "ha[d] been in placement for more than 849 days, almost her entire life," that she had "gone from being a child with developmental issues to a child with none and thriving," and that she was "being nurtured."

On appeal, the father challenges the court's findings on all four prongs of the statute. The Law Guardian sides with the Division in urging we affirm the court's decision.

Our scope of appellate review is limited. It is well established that in Title

30 cases we will not second-guess or substitute our judgment for that of the family court, provided that the record contains "adequate, substantial and credible evidence" to support the decision to terminate parental rights. R.G., 217 N.J. at 552. The Family Part's decision should only be reversed on appeal if its findings were "so wholly unupportable as to result in a denial of justice." N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 511 (2004).

We also recognize the expertise of the Family Part, which repeatedly adjudicates cases brought by the Division under Title 30. See e.g., N.J. Div. of Child Prot. & Permanency v. D.H., 469 N.J. Super. 107, 116 (App. Div. 2021) 420, 448; N.J. Div. of Child Prot. & Permanency v. M.M., 459 N.J. Super. 246, 258 (App. Div. 2019). That said, the trial court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

A main theme of the father's briefs is his contention that the trial judge unfairly penalized him for the fact of his incarceration. It is true that our law does not authorize the termination of a parent's rights simply because the parent is incarcerated, although it can be a relevant factor. See R.G., 217 N.J. at 556; In re of Adoption of Child by L.A.S., 134 N.J. 127, 143 (1993). However, the

judge did not use a per se approach in her analysis.

The record shows that the father initially resisted acknowledging paternity. After his paternity was established, the father had regular visits with Nellie in prison, in anticipation of having a potential relationship after he is paroled. He had applied for, but had not yet attended or completed, the parenting programs and services offered at the prison.

The trial judge duly took into account the father's plan to have Nellie live with his sister Dee but noted that Dee wished to adopt the child instead of co-parenting with him in a KLG arrangement. The record amply supports the judge's findings on prongs one and two.

With respect to prong three, the father contends the Division did not make reasonable steps to provide him with services. The trial judge soundly rejected that contention. The Division offered many services to the father, including but not limited to the monthly visits, an exploration of the alternative caretakers the father suggested, and the expert evaluations.

The judge reasonably concluded under prong three that the Division had properly considered alternatives to termination, including KLG. The current statute, as revised effective July 2, 2021, prior to this trial, provides that KLG is proper when:

(1) each parent's incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child;

(2) the parents' inability to perform those functions is unlikely to change in the foreseeable future;

(3) in cases in which the [D]ivision is involved with the child as provided in [N.J.S.A. 30:4C–85], . . . the [D]ivision exercised reasonable efforts to reunify the child with the birth parents and these reunification efforts have proven unsuccessful or unnecessary; and

(4) awarding kinship legal guardianship is in the child's best interests.

[N.J.S.A. 3B:12A-6(d) (emphasis added).]

The revision of the KLG statute did not eliminate the trial court's discretion, upon considering and weighing all of the evidence, to favor a child's need for permanency over proffered alternatives. See, e.g., J.C., 129 N.J. at 26 ("[C]hildren have an essential and overriding interest in stability and permanency."); N.J. Div. of Youth & Fam. Servs. v. J.S., 433 N.J. Super. 69, 87 (App. Div. 2013) (noting that a strong permanency interest bears upon a decision ruling out an alternative placement with relatives).

It is un rebutted in the record that Dee wished to adopt Nellie and not enter into a KLG arrangement with him. The caseworker testified that she discussed the differences between KLG and adoption with the sister, and that nonetheless


the sister did not favor KLG over adoption. This is not a situation like M.M., in which the record contains inconsistent or ambiguous statements by a relative about amenability to KLG. 459 N.J. Super. at 257. Moreover, the father's counsel had the opportunity to cross-examine the caseworker at the trial and did not challenge her testimony regarding KLG. Nor was there evidence proffered to contradict the resource parents' desire to adopt Nellie.

Lastly as to prong four, the trial court reasonably concluded—as recommended by the Division's unrebutted expert—that termination would not cause more harm than good. The father has never been a caretaker of Nellie and is not a custodial parent of any of his other four children. He has had limited interactions with Nellie, who has been raised since birth by resource families. The expert assessed the benefits and potential harms that the child would experience and concluded the best path for the child is in adoption by the resource parents, who have had her in their capable care for most of her life.

In sum, there is substantial credible evidence in the record to support the court's decision and it is consistent with the applicable law.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION