RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1955-21
A-2176-21

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

D.P. and J.A.T.A., a/k/a J.R.,

Defendants-Appellants,

and

F.S.,

Defendant.

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IN THE MATTER OF THE GUARDIANSHIP OF N.A.P. and J.A.P., minors.

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Submitted March 1, 2023 – Decided March 28, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FG-16-0034-20.

Joseph E. Krakora, Public Defender, attorney for appellant D.P. (Deric Wu, Assistant Deputy Public Defender, of counsel and on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant J.A.T.A. (Richard Sparaco, Designated Counsel, on the brief).

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Todd Wilson, Designated Counsel, on the brief).

PER CURIAM

In this consolidated matter, defendants D.P. (Dawn)[1] and J.A.T.A. (John)[2] appeal from the February 10, 2022 guardianship judgment terminating their

[1] We use initials and pseudonyms to protect the identity of defendants, their children, and the children's resource parent. R. 1:38-3(d)(12).

[2] John falsified his identity when this case began, but later admitted he used an alias out of fear he would be arrested on outstanding charges in Puerto Rico.

parental rights to J.A.P. (Joey), and Dawn's parental rights to N.A.P. (Nina).[3] We affirm, substantially for the reasons set forth by Judge Scott Bennion in his thorough and thoughtful oral opinion.

I.

Nina was born in 2016; Joey was born in 2019. Dawn has two other children, and John has three other children, none of whom are in defendants' care nor subject to this appeal.

In August 2018, plaintiff Division of Child Protection and Permanency (Division) received a referral from an emergency housing hotline that defendants and Nina were homeless. Dawn reported the three had been sleeping in a park. She also advised she previously received financial assistance from the Passaic County Board of Social Services (BSS) but her benefits were suspended. Further, Dawn stated she was four months pregnant, John was not the father, and she had no contact with Nina's father.

The Division temporarily placed Nina and defendants in a motel before securing a thirty-day placement for Dawn and Nina at a shelter. Although Dawn was still homeless, she declined the shelter placement because she did not want

[3] Because Nina's biological father, F.S. (Fred), does not appeal from the February 10 judgment, any references to "defendants" include only Dawn and John.

to leave John. The Division received a second referral on September 6, 2018, confirming defendants and Nina were homeless again. The Division offered to place Dawn at another shelter; she refused, despite not having another option. Later that day, the Division executed an emergency removal of Nina and placed her in a non-relative resource home. The trial court awarded the Division custody of Nina, subject to Dawn having supervised visits.

As the Division worked to reunify Dawn and Nina, it explored relative placements for the child. One relative placement suggested by Dawn lived in Connecticut. She was ruled out after canceling a home assessment and declining to become involved. The Division also referred Dawn to BSS for further housing assistance and she received a housing voucher for placement at the Hispanic Multipurpose Center, where she had a private bedroom and bathroom. Days later, Dawn left the center to rent a room with John.

Additionally, the Division referred Dawn for a psychological evaluation with Dr. Richard Coco. The doctor determined Dawn had below average intelligence, exercised poor judgment, and would likely have difficulty in parenting. He recommended that she engage in individual therapy and parenting classes. The Division arranged for Dawn to attend parenting skills classes and provided Dawn with a parent mentor from Parenting with a Purpose.

By the time Joey was born in January 2019, Dawn and John were homeless again. John denied he was Joey's father and refused to take a paternity test. Accordingly, two days after his birth, the Division removed Joey and placed him with his current resource parent, P.J. (Pam). Weeks later, the Division placed Nina in Pam's home. Both children have remained there ever since.

In February 2019, Dawn and John were evicted from their rented room because John cut another resident's face with a liquor bottle. Dawn reported John attacked the resident "in a fit of jealousy" and "wanted to control her every move." The Division gave her contact information for a domestic violence liaison and placed Dawn in a motel.

After John was arrested and detained in the Passaic County Jail for the assault, John notified the Division he lied about his identity because of outstanding charges in Puerto Rico.[4] John asked a Division caseworker for a paternity test, advising that if paternity was established, he hoped he could be released from jail. John offered no alternative placements for Joey pending the results of his paternity test and refused to provide his parents' names or addresses. Months later, after testing confirmed John was Joey's father, the

[4] The Division later determined John was wanted in Puerto Rico on charges of attempted murder, and possession and use of a bladed weapon.

Division coordinated in-person jailhouse visits for John and his son.

By March 2019, Dawn was sleeping at a warming station, having rejected the Division's plan for her to stay at a shelter. The Division advised her what steps she needed to take to obtain aid, and put her in touch with BSS. BSS informed Dawn she had to participate in certain training programs to receive assistance. Dawn failed to submit the requisite paperwork or participate in the necessary trainings to remain eligible for assistance.

A few months after Joey was born, Dawn agreed to stay at a nonprofit behavior health and social services center. She remained there for approximately six months but was evicted in October 2019, purportedly for engaging in aggressive behavior toward staff. During her stay at the center, she received supervised visits, mental health services, and was able to attend ESL and parenting classes.

John was extradited to Puerto Rico on criminal charges in October 2019. The following month, Division workers met with the children's resource mother to discuss the children's placement, as well as the differences between adoption and kinship legal guardianship (KLG).[5] Pam told the Division she wanted to

[5] KLG is an alternative that allows a relative or resource parent to become the child's legal guardian and commit to care for the child until adulthood, without

adopt the children and was unwilling to consider KLG.

In December 2019, Dawn was evaluated by Dr. Samiris Sostre, a psychiatrist. Dawn admitted during the evaluation that she recently experienced hallucinations. Dr. Sostre diagnosed Dawn with "major depressive disorder, severe, with psychotic features, [and] post-traumatic stress disorder." She recommended Dawn continue in therapy and receive psychiatric treatment.

Although the Division continued to provide services to Dawn until the entry of the guardianship judgment, she was unable to maintain stable housing. In fact, from the time the Division became involved in this case in August 2018 until the guardianship trial concluded, Dawn moved approximately twenty-four times. Dawn also failed to maintain stable employment during this same timeframe, although she held a variety of jobs.

In January 2020, the trial court accepted the Division's plan of termination of parental rights, followed by adoption. The following month, a Division caseworker contacted John at his detention facility in Puerto Rico to ask him about potential relative placements. John suggested his mother could serve as a placement, but she also was incarcerated. Additionally, John offered his brother,

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terminating the parents' rights. N.J. Div. of Youth & Fam. Servs. v P.P., 180 N.J. 494, 508 (2004).

C.T. (Cory), and his sister, L.T. (Lori) as alternative placements. The Division ruled Cory out because his wife did not agree to the placement. It also assessed and reassessed Lori but ultimately ruled her out after Lori declined to cooperate with the Division or submit to an interstate evaluation.

In June 2020, Thailyn Alonso, Ph.D., conducted psychological and bonding evaluations between the children and Dawn, and between Pam and the children. The doctor opined Dawn was "unable to meet her own basic needs which raise[d] significant concern for her ability to meet her children's basic needs." Dr. Alonso further concluded Dawn was unlikely to become a viable parenting option in the foreseeable future so the doctor could not recommend reunification. After conducting updated evaluations in 2021, Dr. Alonso continued to recommend against reunification and opined the children's best interests would be served by the Division's permanency plan of adoption.

In December 2020, Dr. Alonso evaluated John. She found John had "a high level of instability and several identifiable risk factors" that placed Joey at risk of harm. The doctor also concluded John was "unlikely to become a viable parenting option in the foreseeable future." Further, she determined "there [was] no evidence . . . [John] would be able to mitigate the harm of [Joey] being separated from his resource parent," whereas "preserving his relationship with

[Pam,] his only consistent caregiver would likely serve to mitigate any reaction [Joey] may experience through the loss of another relationship."

In February 2021, John was sentenced to a five-year prison term in Puerto Rico after pleading guilty to "two counts of violation of The Weapons Act[,] possession and use of bladed weapons, and two counts . . . [of] aggravated battery." John admitted during the guardianship trial that these offenses resulted from him stabbing his former paramour, who was eight months pregnant with his child. John's anticipated release date was between 2023 and 2025.

In April 2021, Dr. Sostre found Dawn's low-level functioning did not appear to be related to the severity of her depression. The doctor recommended Dawn undergo a neuropsychological evaluation to assess any cognitive deficits. Two months later, Joël Núñez, Ph.D., conducted an intellectual and cognitive evaluation of Dawn and found she had an IQ of sixty, "placing her in the mild intellectual disability range." He also determined Dawn had "profound, pervasive and persistent cognitive and intellectual disabilities." Dr. Núñez opined that due to the young ages of her children and Dawn's "compromised functioning in memory, attention, planning, . . . insight and judgment," it did not

appear she could "ensure [her children's] healthy, holistic development."[6] Therefore, he concurred with "the Division's plan for termination of parental rights followed by adoption."

In June 2021, Dawn submitted to another psychological evaluation, this time with her expert, Aida Ismael-Lennon, Psy.D. The doctor also performed bonding evaluations involving Dawn, Pam and the children. Dr. Ismael-Lennon found Dawn had a strong positive bond with Nina and Joey and met the "minimum standards of adequate parenting." The doctor recommended reunification, contingent on Dawn maintaining stable housing for herself and the children, and the appointment of a power of attorney (POA) who would assist Dawn with decisions about the children.

II.

The guardianship trial commenced before Judge Bennion in July 2021 and ended five months later, after thirteen days of trial.[7] The Division called seven witnesses: permanency worker Luisa Gonzalez; adoption worker Arlene

[6] Around the time Dr. Núñez evaluated Dawn, she gave birth to another child. Weeks later, the Division removed the baby and placed her with Nina and Joey in Pam's home.

[7] Because John remained detained in Puerto Rico throughout the trial, he appeared virtually.

Laureano; adoption supervisor Jessica Checo; Pam; and Drs. Núñez, Alonso, and Sostre. Defendants, along with Dawn's friend, A.A.-M. (Ann), and Dr. Ismael-Lennon also testified. The Law Guardian called no witnesses but supported the Division's plan for termination of parental rights, followed by adoption.

The expert witnesses discussed their prior evaluations and testified consistent with their earlier reports. Dr. Alonso stated that based on her evaluations, Dawn "was not capable of parenting her children, . . . and . . . she was unlikely to become a viable parenting option for them in the foreseeable future." She further stated, "termination of parental rights and adoption by [Pam] would do [the children] more good than harm." Dr. Alonso explained that although Dawn received services from the Division, she was "unable to achieve stability for herself even after the stresses of parenting were removed." Moreover, Dr. Alonso stated Nina's attachment with Pam was "secure," whereas her attachment to Dawn was "insecure," and Joey "was securely attached to the resource parent" but not "securely attached" to Dawn. Dr. Alonso further opined Dawn would be unable to ameliorate any harm the children would suffer if they were separated from their current caretaker.

Additionally, Dr. Alonso testified John had "very little to no contact as a

caregiver for any of his children, including [Joey]." She opined John was incapable of parenting, "not because he was incarcerated, but because of the persistent antisocial behaviors he'[d] engaged in over time, and . . . the likelihood [he would] continue to engage in those behaviors." Finally, she concluded John "was unlikely to become a viable parenting option for [Joey] in the foreseeable future."

Dr. Sostre testified Dawn understood "the Division was concerned [ab]out her housing stability" but "didn't seem to understand . . . what it was that she was doing or not doing that was leading to this situation." Dr. Sostre further stated Dawn's "inability to fully grasp the problems . . . [were] not fully explained by [her] major depressive disorder."

Dr. Núñez testified Dawn's intellectual impairments "would impact on a daily basis her ability to properly and independently care for her children." He also opined she "would have difficulty consistently carrying out behavior that allow[ed] her to be self-sufficient and socially responsible."

When Pam testified for the Division, she confirmed she understood the differences between KLG and adoption, having discussed her options with the Law Guardian and a Division worker, and conducted her own research. She also stated, "I have always said that I want to adopt."

John testified he expected to be released from prison by 2023 and planned to return to New Jersey to support Joey. He asked that Joey live with Dawn but if that were not permitted, he stated Joey should live with his friend, F.D. (Faye) in New York. John admitted he had never been to Faye's home, and she had never met Joey. The Division had previously ruled Faye out due to concerns about her running an illegal business and the physical condition of her home.

Dawn testified she was ready and able to have Joey and Nina returned to her custody. Dawn stated she only moved "about five times" after the Division removed Nina but conceded she did not secure her own apartment after Nina's removal in 2018. Dawn also testified she was willing to execute a POA so that her friend, Ann, could assist her with decisions about the children, but she did not want Pam to act as the POA. Further, Dawn stated she could care for her children without a POA. During Ann's subsequent testimony, she expressed a willingness to serve as Dawn's POA if Dawn was reunified with the children.

Dr. Ismael-Lennon testified Nina and Joey had an "emotional bond" with Dawn and Pam, and that Dawn met the criteria for "minimum parenting standards." Additionally, the doctor stated the children could be returned to Dawn's care so long as a POA was appointed to "assist her, should [Dawn] need to make decisions about the children."

On February 10, 2022, Judge Bennion rendered an oral decision, finding the Division met its burden under N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence and that termination of defendants' parental rights was in Nina's and Joey's best interests. He entered a conforming guardianship judgment that day.

III.

On appeal, Dawn argues there was insufficient evidence under prong two to prove she was unable to secure safe and stable housing for herself and the two children. Further, she contends Judge Bennion "went against current law when [he] considered the harm of separating the children from their foster parent under prong four of N.J.S.A. 30:4C-15.1(a)."[8]

John urges us to reverse the guardianship judgment, contending the Division failed to prove Joey's "health and development had been or would be endangered by his parental relationship with" John or that John "was unable or unwilling to eliminate any harm or provide a safe and stable home for" Joey. John also contends the Division failed to establish: it "made reasonable efforts

[8] Because Dawn does not contest Judge Bennion's findings under the first or third prongs of the best interests test, any challenge on these prongs is waived by her. See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("[A]n issue not briefed is deemed waived.").

to correct the circumstances leading [to Joey's] placement"; there were no "alternatives to termination of [John's] parental rights under the third prong" even though "KLG was available"; and termination of John's parental rights to Joey would not do more harm than good.

An appellate court's scope of review of an order terminating parental rights is limited. N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007) (citing In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). A reviewing court will uphold a trial court's factual findings if they are "supported by adequate, substantial, and credible evidence." N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 552 (2014) (citing N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). 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)). But we review a trial court's legal conclusions de novo. N.J. Div. of Youth & Fam. Servs. v. I.S., 202 N.J. 145, 183 (2010).

Parents have a constitutionally protected right to raise their children. N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 599 (1986). But that right

is not absolute. R.G., 217 N.J. at 553 (citing In re Guardianship of K.H.O., 161 N.J. 337, 347 (1999)). Parental rights are "tempered by the State's parens patriae responsibility to protect the welfare of children," K.H.O., 161 N.J. at 347 (citation omitted), when the child's "physical or mental health is jeopardized," A.W., 103 N.J. at 599 (quoting Parham v. J.R., 442 U.S. 584, 603 (1979)).

Under N.J.S.A. 30:4C-15.1(a), the Division must satisfy the following prongs before a parent's rights can be terminated:

> (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;[9]
>
> (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.

[9] On July 2, 2021, the Legislature enacted L. 2021, c. 154, deleting the last sentence of N.J.S.A. 30:4C-15.1(a)(2), which read, "[s]uch harm may include evidence that separating the child from [the child's] resource family parents would cause serious and enduring emotional or psychological harm to the child." During his oral opinion, Judge Bennion referenced the now deleted provision under prong two and stated the removed clause would "not be considered."

The Division must prove each of the four prongs by clear and convincing evidence. R.G., 217 N.J. at 554. The four prongs are not "discrete and separate" but "relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." K.H.O., 161 N.J. at 348.

Regarding prongs one and two, John argues the Division's proofs were lacking to show he presented a risk of harm or that a delay in permanent placement would add to Joey's harm. He also contends the judge relied solely on John's incarceration to find the Division met its burden under these prongs. On the other hand, Dawn contends the Division failed to meet its burden under the second prong, considering she consistently obtained housing and worked steadily. These arguments are not convincing.

Prongs one and two of the best interests test "are related to one another, and evidence that supports one informs and may support the other as part of the comprehensive basis for determining the best interests of the child." In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999) (citation omitted). The first prong of the best interests test requires the Division to demonstrate that the "child's safety, health, or development has been or will continue to be endangered by the parental relationship." N.J.S.A. 30:4C-15.1(a)(1); see K.H.O., 161 N.J. at 352. A trial court must be concerned not only about actual

harm to the child but also the risk of harm. D.M.H., 161 N.J. at 383. And the focus is not on a single or isolated event, but rather 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. Thus, our Supreme Court has held "[a] parent's withdrawal of . . . nurture[] and care for an extended period of time is in itself a harm that endangers the health and development of the child." D.M.H., 161 N.J. at 379 (citation omitted). When children "languish in foster care," their parents' "delay in establishing a stable and permanent home . . . engender[s] significant harm." Id. at 383.

The second prong of the best interests determination "in many ways, addresses considerations touched on in prong one." F.M., 211 N.J. at 451. This prong "relates to parental unfitness," K.H.O., 161 N.J. at 352, and "the inquiry centers on whether the parent is able to remove the danger facing the child," F.M., 211 N.J. at 451 (citation omitted). The Division can satisfy this inquiry by showing a parent 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). See also N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 281 (2007).

The Division may utilize expert testimony to show that, despite a parent's good intentions, that parent's cognitive limitations or mental health issues are sufficiently severe to prevent them from providing minimally adequate parenting in a safe and stable environment. N.J. Div. of Youth & Fam. Servs. v. A.G., 344 N.J. Super. 418, 440 (App. Div. 2001). And though incarceration alone is insufficient to establish parental unfitness, "particularized evidence of how a parent's incarceration affects each prong of the best-interests-of-the-child standard" can support termination of parental rights of an incarcerated parent. R.G., 217 N.J. at 556.

Here, Judge Bennion determined prongs one and two were satisfied as to both parents. He concluded Dawn harmed the children by not obtaining or maintaining stable housing while the case was pending, stressing she moved "approximately [twenty-four] times and still [did] not have stable housing for the children." He further found Dawn repeatedly refused to cooperate with agencies that tried to assist her with housing.

Additionally, the judge credited the opinions of the Division's experts regarding Dawn's impairments. He accepted Dr. Alonso's testimony that Dawn "continue[d] to present with global parenting deficits that negatively impact her ability to meet the children's basic needs," and agreed with the doctor that "due

to [Dawn's] cognitive deficits, her participation in treatment, albeit important for her mental health, . . . [was] unlikely to mitigate the risk of harm to her children." Further, the judge credited Dr. Alonso's conclusion that Dawn was "unable to ameliorate the risk of harm that led to the children's removal, and she was unlikely to become a viable parenting option for the children in the foreseeable future."

Judge Bennion next highlighted that Dawn's own expert, Dr. Ismael-Lennon, acknowledged Dawn could not independently parent her children, having recommended that a POA be appointed for Dawn to assist her if the court allowed Dawn to reunify with Nina and Joey. The judge found the recommendation for a POA was "not viable and . . . not in the best interest of the children." He reasoned the children would not reach majority "for [thirteen] and [fifteen] years respectively" and "[t]here [was] no guarantee that the person initially chosen to serve as the [POA] w[ould] continue to serve throughout this entire time period." The judge also stated Dawn might not "be satisfied with [the POA's] services during this period of time," or she or the POA might relocate without one following the other to the new location. The judge found that if one of these changes occurred, "a qualified replacement would have to be located and the same issues . . . would . . . be presented, and this process would

go on for [thirteen] to [fifteen] years."

Additionally, the judge credited Dr. Sostre's opinion that "more aggressive treatment of [Dawn's] depression w[ould] not improve her general functioning." Therefore, he concluded Dawn could not and would not "be capable of providing the children with a safe and stable home."

Next, the judge found the Division met its burden under prongs one and two as to John. Contrary to John's argument, the record reflects the judge did not rely solely on John's incarceration to find these prongs were established. Instead, the record shows the judge credited Dr. Alonso's testimony to find Joey was and would continue to be harmed by a relationship with his father.

In reaching this conclusion, the judge noted Joey "never lived with his father since birth" and John's "unavailability . . . led to his son's removal and placement in foster care." Further, the judge found John's "incarceration . . . prolonged [Joey's] placement" and "compounded the child's harm." Additionally, Judge Bennion credited Dr. Alonso's unrebutted expert opinion that "John presented with a high level of instability and several identifiable risk factors, including his limited parenting experience, [his] valuing corporal discipline and presenting no viable parenting plan, as well as a history of violent crimes with no verbalized remorse . . . and displacement of the blame." Further,

the judge accepted Dr. Alonso's opinion that "this type of presentation could be an indicator of low empathy which increases the likelihood of future anti-social behaviors[,] [and] the risk of child abuse and neglect[.]" The judge also credited Dr. Alonso's conclusions that John had "minimal con[tact] with his son throughout the child's life" and was "currently not capable of independently parenting [Joey] and . . . . unlikely to become a viable parenting option in the foreseeable future."

Next, consistent with the testimony of the Division's experts, Judge Bennion found the children needed permanency, yet neither parent was able to provide this, and any further delay of permanent placement would add to the harm Nina and Joey already endured. These findings relative to prongs one and two are well supported on the record and entitled to our deference.

Turning to prong three, John contends the Division did not make reasonable efforts to provide services to him and did not inform him of Joey's progress, development, or health. Additionally, he argues the Division failed to explore alternatives to termination or fully inform Pam of the differences between KLG and adoption. These arguments fail.

The third prong requires clear and convincing evidence that "[t]he [D]ivision . . . 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." N.J.S.A. 30:4C-15.1(a)(3). "Reasonable efforts may include consultation with the parent, developing a plan for reunification, providing services essential to the realization of the reunification plan, informing the family of the child's progress, and facilitating visitation." M.M., 189 N.J. at 281 (internal quotation marks and citations omitted). The reasonableness of the Division's efforts in providing services to a parent is not measured by the success of the services. D.M.H., 161 N.J. at 393. Indeed, the Division's "best efforts may not be sufficient to salvage a parental relationship." F.M., 211 N.J. at 452. Moreover, "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) (citation omitted).

Additionally, under prong three, a court must consider alternatives to termination. N.J.S.A. 30:4C-15.1(a)(3). Alternatives may include placement with a kinship caregiver leading to KLG. N.J.S.A. 30:4C-15.3, 3B:12A-6(d)(3); R.G., 217 N.J. at 561-63; N.J. Div. of Youth & Fam. Servs. v. K.L.W., 419 N.J. Super. 568, 579 (App. Div. 2011).

Here, John initially denied he was Joey's father, but once paternity was established, the Division coordinated in-person visits between John and Joey while John was detained in the Passaic County Jail. The Division also provided him with virtual visits after he was extradited to Puerto Rico. Importantly, as the judge noted, there was a period of time during John's incarceration that he "was offered the opportunity for . . . . [a]dditional visitation . . . but [John] determined . . . he was satisfied with having the visits during [Dawn's] visits." Further, the judge observed John only resumed "his own . . . supervised visitation schedule with" Joey after he was sentenced in Puerto Rico.

Judge Bennion also found the Division referred John to parenting classes and provided him with a psychological evaluation with Dr. Alonso, but John did not fully cooperate with this evaluator. In fact, he neglected to complete and return the doctor's questionnaire and "never scheduled" "[t]he second part of his evaluation" with Dr. Alonso, having "failed to respond to the Division" regarding his availability.

Under these circumstances, and considering John's failure to explain how his inability to receive additional developmental updates about Joey from the Division prejudiced John's ability to "correct the circumstances which led to the child's placement outside the home," N.J.S.A. 30:4C-15.1(a)(3), we decline to

disturb the judge's finding the Division made "reasonable efforts" to help John rectify the circumstances leading to Joey's placement with Pam.

Regarding John's assertion the Division failed to explore alternatives to termination, we note that until recently, KLG was considered "a more permanent option than foster care when adoption '[was] neither feasible nor likely.'" P.P., 180 N.J. at 512-13 (quoting N.J.S.A. 3B:12A-6(d)(3) to (4)). But on July 2, 2021, the Legislature enacted L. 2021, c. 154 which, in part, removed the statutory requirement that adoption be "neither feasible nor likely." P.P., 180 N.J. at 512-13 (quoting N.J.S.A. 3B:12A-6(d)(3) to (4)). Significantly, the Legislature did not delete paragraph (d)(4) of the KLG statute, which requires a court to find "awarding [KLG] is in the child's best interest," N.J.S.A. 3B:12A-6(d)(4), before it can order KLG. Thus, the amended KLG statute simply ensures a resource parent's willingness to adopt no longer forecloses KLG.

However, the amendment to N.J.S.A. 3B:12A-6(d)(3) does not affect the trial court's application of the best interests test for parental termination cases as codified under N.J.S.A. 30:4C-15.1(a)(1) to (4). Therefore, a trial court is not required to impose KLG where the caregiver has decided against it in favor of adoption, and the judge finds adoption is in the child's best interests.

"The decision of a resource parent to choose adoption over KLG must be

an informed one." N.J. Div. of Child Prot. & Permanency v. M.M., 459 N.J. Super. 246, 260-61 (App. Div. 2019). Not only should the caregiver's consent be informed, "but also unconditional, unambiguous, and unqualified." Id. at 264. The statute requires the Division to fully inform caregivers "of the potential benefits and burdens of KLG before deciding whether . . . to adopt." Id. at 263. Once informed, "the caregiver's preference between the two alternatives should matter . . . ." Ibid.

Here, Judge Bennion credited Pam's testimony that she was "not interested in KLG" once "she was made aware of the differences between [KLG] and adoption." The judge also believed Pam's statement "that she would like to adopt the children should they become legally free."

Next, the judge found the Division "explored all relatives and friends" that defendants offered as alternative placements, "many of whom . . . never met the children or were not familiar with the children's . . . needs, which are significant." The judge determined "several relatives and friends proposed were unwilling [or] unable to care for the minor children and [were] ruled out" and "those rule outs . . . were not appealed."

Judge Bennion's findings on prong three are amply supported by competent evidence in the record. Thus, his legal conclusions under this prong

are unassailable.

Lastly, defendants challenge the judge's findings under prong four. Dawn contends the judge erred when he "considered the harm of separating the children from their foster parent"; John argues Judge Bennion erred by finding termination of his parental rights would not do more harm than good. These arguments are unavailing.

The fourth prong of N.J.S.A. 30:4C-15.1(a)(4) serves as "a 'fail-safe' inquiry guarding against an inappropriate or premature termination of parental rights." F.M., 211 N.J. at 453 (citations omitted).

> [T]he fourth prong of the best interests standard cannot require a showing that no harm will befall the child as a result of the severing of biological ties. The question to be addressed under that prong is whether, after considering and balancing the two relationships, the child will suffer a greater harm from the termination of ties with [the child's] natural parents than from the permanent disruption of [the] relationship with [the child's] foster parents.
>
> [K.H.O., 161 N.J. at 355.]

"The crux of the fourth [prong] 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) (citing N.J. Div. of Youth & Fam. Servs. v. C.S., 367 N.J. Super. 76, 119 (App. Div. 2004)).

Therefore, "to satisfy the fourth prong, the State 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." M.M., 189 N.J. at 281 (quoting In re Guardianship of J.C., 129 N.J. 1, 19 (1992)).

A determination on the fourth prong cannot be made simply by showing "the child has bonded with foster parents who have provided a nurturing and safe home," or that terminating parental rights "likely will not do more harm than good" because it would provide the child with the benefit of a "permanent placement with a loving family." E.P., 196 N.J. at 108 (citations omitted). Nor can it be made simply upon finding that the bond with the foster parent is stronger than the bond with the biological parent, because that is an expected result of an early or lengthy removal. G.L., 191 N.J. at 608-09. Termination is only appropriate when the absence of permanency will cause harm to the child, and when the biological parent is unlikely in the reasonably foreseeable future to become capable of primary caregiving for the child. N.J. Div. of Youth & Fam. Servs. v. L.J.D., 428 N.J. Super. 451, 483-87 (App. Div. 2012).

Here, Judge Bennion agreed with Dr. Alonso the children needed permanency and stability, neither of which defendants could provide. The judge

also concurred with Dr. Alonso's conclusion that Nina and Joey had formed a meaningful sibling bond, and they were in a stable home with a resource parent to whom they were securely attached and viewed as their psychological parent. Additionally, the judge credited Dr. Alonso's opinion that severing the children's relationship with Dawn or Pam would cause harm, but Dawn would not be able to mitigate such harm, whereas Pam could.

Similarly, Judge Bennion credited Dr. Alonso's opinion that Joey's placement with John would cause him "severe and enduring harm," and given Joey's secure attachment with Pam, termination of John's parental rights would not cause the child more harm than good. Further, the judge agreed with the doctor it was unlikely Joey formed any type of attachment with John and would suffer great harm if he were separated from Nina and Pam. Given these well supported findings, we find no basis to conclude Judge Bennion erred in finding termination of defendants' parental rights would not do more harm than good.

Finally, Dawn argues the recent amendment to the second prong of N.J.S.A. 30:4C-15.1 precluded Judge Bennion from considering evidence of Nina and Joey's relationship with Pam as to prong four. We disagree.

As already noted, N.J.S.A. 30:4C-15.1(a)(2) was amended in 2021 to remove the provision: "[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." But the Legislature "did not alter the other components of the best interest standard." N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 25 (App. Div. 2022). Accordingly,

> [w]e construe the deletion from prong two [of N.J.S.A. 30:4C-15.1] . . . narrowly . . . , in a way that . . . remains coherent with prong four. The amended statute . . . requires a court to make a finding under prong two that does not include considerations of caregiver bonding, and then [to] 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.]

Thus, in D.C.A., we made clear we do "not understand the amendment to prong two [of N.J.S.A. 30:4C-15.1] to mean that . . . a bond [forged between a child and resource caregivers] may never be considered within any part of the best interests analysis." Id. at 26 (emphasis in original). Therefore, it was proper for Judge Bennion to consider the children's bond with Pam under the fourth prong.

Any remaining arguments raised by defendants are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.