

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**NOT FOR PUBLICATION WITHOUT THE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-2210-21
A-2223-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

D.W. and C.C. III,

Defendants-Appellants.

IN THE MATTER OF THE
GUARDIANSHIP OF C.A.C. IV.,
a minor.

Argued May 31, 2023 – Decided June 28, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex County,
Docket No. FG-12-0033-20.

Deric Wu, Assistant Deputy Public Defender, argued
the cause for appellant C.C. III (Joseph E. Krakora,

Public Defender, attorney; Deric Wu and Patricia Nichols, Assistant Deputy Public Defender, of counsel and on the briefs).

Kenneth Rosellini argued the cause for appellant D.W.

Leah A. Schmidt, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Leah A. Schmidt, on the brief).

David B. Valentin, Assistant Deputy Public Defender, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Meredith Alexis Pollock, Deputy Public Defender, of counsel; David B. Valentin, of counsel and on the briefs).

PER CURIAM

In these consolidated appeals, defendants D.W. (Dora)¹ and C.C. III (Nate) appeal from March 4, 2022 judgments terminating their parental rights to their biological child C.A.C. IV (Alan), born in 2009. Nate contends he was denied counsel during pre-trial proceedings. Dora argues she is willing and able to correct the harms that pose a potential risk to the child. Both argue the Division of Child Protection and Permanency did not make reasonable efforts to provide services and the trial court findings were unsubstantiated by the record.

¹ We use initials and pseudonyms to protect the parties' identities. R. 1:38-3(d)(12).

We conclude the trial court's decision to terminate parental rights was clearly and convincingly supported by the voluminous evidentiary record and affirm.

The guardianship trial occurred over eleven days. We recount the salient facts developed at trial.

The Division first became involved with the family in March 2010, when Alan was seven months old, because Dora was involuntarily committed for being a danger to herself and others. Between 2010 and 2017, the Division received fourteen referrals reporting concerns for Alan due to Dora's mental health, housing instability, and substance abuse, as well as domestic violence occurring between Dora and Nate. Prior to the current litigation, the Division conducted two prior emergency Dodd² removals of Alan in July 2011 and May 2013 due to reports of domestic violence and both parents' substance abuse.

Alan was reunified with Dora in July 2012 after her completion of court-ordered services. Nate's contact with Alan remained supervised until September 2012 because Nate tested positive for cocaine and marijuana and failed to comply with court-ordered substance abuse treatment. The first guardianship

² See N.J.S.A. 9:6-8.21 to -8.82; N.J. Div. of Youth & Fam. Servs v. N.S., 412 N.J. Super. 593, 609, n.2 (App. Div. 2010) ("A 'Dodd removal' refers to the emergency removal of a child from the home without a court order, pursuant to the Dodd Act").

complaint was dismissed in December 2012 upon Nate's attendance and completion of court-ordered counseling. After the second Dodd removal, in 2013, the court returned Alan to Nate's supervised custody. Alan was not reunified with Dora until she completed mental health treatment in June 2014. The court terminated those litigation proceedings in June 2015.

In October 2018, DCPD received another referral for then nine-year-old Alan. The Division received a call from two reporters who were trustees of a trust created for Alan by his deceased grandfather. Dora emailed the reporters stating she couldn't "take Alan anymore" and was "going to throw him out of the house." Dora had locked Alan out of the house before, prompting the child to call the police. Dora also displayed extreme and abusive language, including derogatory racial comments, on social media websites toward Alan.³

The Division called police to assist it with completing its investigation due to Dora's erratic behavior. Police transported Dora to Raritan Bay Medical Center where she tested positive for marijuana and was involuntarily committed for a mental health screening. On October 30, 2018, the court once again granted the Division temporary custody of Alan pursuant to a Dodd removal. At the

³ Dora is Caucasian and Alan is Black.

hearing, Dora appeared in-person and Nate appeared telephonically because he was out of state.

On November 15, 2018, the court ordered Dora to sign releases and attend random drug screens, a substance abuse evaluation, and therapy. The court also ordered Nate to attend psychological and substance abuse evaluations, submit to random drug screenings, and attend therapy. All visits with Alan by both parents were to be supervised.

On December 20, 2018, Nate's visits with Alan were suspended after he made disparaging remarks about Dora in Alan's presence. Nate was referred to a therapeutic visitation program to resume visits with Alan, but after missing three consecutive intake appointments, his referral was terminated. The Division continued to attempt to contact Nate about visitation, the case, and the court-ordered reunification programs.

Nate largely absented himself from the proceedings. Nate contends the Division did not keep him apprised of updates. Despite these contentions, the record shows the Division successfully contacted Nate on the following dates and in the following manners: November 27, 2018, in-person at Division offices; January 17, 2019, telephonically; March 14, 2019, telephonically; June 5, 2019, Nate arrived unannounced in-person at Division offices; June 24, 2019,

telephonically; January 9, 2020, via email; February 26, 2020, via email; April 6, 2020, via email; May 21, 2020, via email; June 9, 2020; telephonically and on July 16, 2020, telephonically. Additionally, Nate did not appear for Division arranged visits on three occasions.

Division meetings with Dora were "hostile and few," prompting worker safety alert warnings for the caseworkers. After attending nine out of fourteen visits, Dora's supervised visits with Alan were suspended when she encouraged Alan to disobey Division program rules. Her supervised visits were subsequently terminated when she refused to attend meetings regarding Alan's safety, and she stated her desire to terminate services with the visitation program.

On June 28, 2019, after six months in placement, the Division placed Alan with his paternal uncle, C.C. (Carl), and his wife S.C. (Sally) in Missouri through the Interstate Compact on the Placement of Children (ICPC), where Alan presently remains. Dora declined a final visit with Alan before he was moved. Both Dora and Nate declined multiple offers by the Division to fly them to Missouri for monthly visits.

On December 31, 2019, the Division filed a complaint for guardianship of Alan. The Division had difficulty serving Nate because he rebuffed efforts to

effect personal service. The Division was able to finally serve him only after he disclosed his address. However, Nate continually rebuffed Division communications. Despite Nate's contentions on appeal that he was deprived of counsel, he continuously misrepresented the status of his counsel at multiple points during pre-trial proceedings. At one point, Nate stated he had "twelve attorneys" working on his case. At another point, he referred the Division to a Maryland-based attorney whom he claimed was representing him but when Division caseworkers reached out to that attorney, the attorney informed them he had not agreed to represent Nate.

On August 3, 2020, Nate appeared virtually in court for the first time since Alan's removal hearing in October 2018. After the hearing, the court ordered Nate to provide an updated address to the Division, complete random urine screening, submit to substance abuse evaluations and a psychological and bonding evaluation. Nate disregarded parts of the court-ordered reunification plan. On October 20, 2020, Nate saw Alan for a bonding assessment, but he delayed a psychological evaluation until April 9, 2021. Nate participated in a virtual substance abuse evaluation in March 2021, but no urine sample was ever provided.

At the February 25, 2021 permanency hearing, the court advised Nate "it is urgent that you retain counsel," noting he had a history of dilatory tactics and stating "every time we meet you tell me you're getting a lawyer. So I don't convince you to get a lawyer because you tell me you have a lawyer on staff, or on call, and he's going to come into this case." The court encouraged Nate to obtain a lawyer given the impending May trial date, explaining going to trial on a permanency determination without counsel would be a "mistake."

After an initial adjournment of the trial date, on June 10, 2021, Nate filed a motion opposing termination of his parental rights, certifying he had secured housing and, as a business owner, was financially prepared to assume custody of Alan. On the first day of trial four days later, Nate appeared in court and completed paperwork for the assignment of a public defender. Nate was appointed counsel, and his public defender was granted a two-month adjournment to prepare for trial.

Leading up to trial, Dora continued to disregard court-ordered evaluations and treatment. Dora visited Alan three times after he was placed in Missouri, with one visit occurring during Dora's April 9, 2021 bonding observation in New Jersey. Dora did not appear for her flight to visit Alan in Missouri on Alan's birthday. While there was some phone contact between the two, Alan requested

less contact with Dora and declined to appear on camera or participate in joint therapy.

At trial, the Division called four witnesses, including two caseworkers and two experts. The trial court found caseworker Aimee Lee testified credibly and consistently about attempted reunification efforts. The trial court also found caseworker Melissa Cortes testified credibly about Dora and Nate's lack of cooperation with services.

The Division also called Dr. Winston, Ph.D., who was qualified without objection as an expert in child psychology, and Dr. Sostre, M.D., F.A.P.A., who was qualified without objection as an expert in psychiatry. The trial court found both experts testified credibly and consistently with their reports. The trial court accepted Dr. Winston's testimony regarding Alan's special medical needs, and further found Dora and Nate refused to acknowledge those needs, which put Alan at risk of harm.

The Law Guardian called Sally as a witness, and Nate called his brother Carl as a witness. Additionally, the trial court conducted an in-camera interview of Alan pursuant to Rule 5:8-6. The trial court found Carl and Sally testified credibly, expressing their love for Alan, demonstrating they understood his needs and understood the difference between kingship legal guardianship (KLG)

and adoption. They clearly expressed a commitment for the latter. The court found Alan to be intelligent, responsive, and credible during the in-camera interview, noting he did not want to say anything negative about his biological parents, whom he loved, but expressed a clear desire to stay with his aunt and uncle in Missouri.

Nate testified on his own behalf, and also called Dr. Figuerelli, Ph.D., FPPR, LCADC, CCFAS as an expert witness. After voir dire, Dr. Figuerelli was qualified without objection in the fields of psychology and substance abuse evaluation. Dr. Figuerelli conducted a substance abuse evaluation of Nate in anticipation of trial, wherein Nate admitted to using marijuana. The substance abuse evaluation was conducted virtually, and no urinalysis was taken. Although the trial court found Dr. Figuerelli testified credibly, it limited acceptance of his testimony because he was "forced to rely on information provided by Nate" during a virtual visit, and the court deemed Nate wholly incredible.

Dora testified on her own behalf and called her personal therapist as a fact witness. Dora's therapist testified Dora suffered from post-traumatic stress disorder (PTSD), but she was not qualified as an expert to make that diagnosis. The expert testimony from Dr. Sostre revealed and confirmed Dora was

previously diagnosed with and met the criteria for bipolar disorder. Dr. Sostre explained Dora needed lifelong treatment with psychotropic medication to stabilize her symptoms, which are incurable and chronic. Dora did not present expert testimony to rebut Dr. Sostre's expert testimony.

The trial court found both biological parents to be wholly incredible, noting their difficulty complying with reunification steps, and their frequent misrepresentations to the Division as well as the trial court. The court found the Division proved clearly and convincingly Dora and Nate had "unabated substance abuse issues" and their inability or unwillingness to address them rendered them incapable of appropriate long-term parenting.

A trial court's decision to terminate parental rights is subject to limited appellate review. N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007). Indeed, we have "invest[ed] the family court with broad discretion because of its specialized knowledge and experience in matters involving parental relationships and the best interests of children." N.J. Div. of Child Prot. & Permanency v. A.B., 231 N.J. 354, 365 (2017) (alteration in original) (quoting N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 427 (2012)). Where a family court relies upon evidence adduced at a hearing, we "defer to the factual findings . . . because it has the opportunity to make first-hand

credibility judgments about the witnesses who appear on the stand; it has a 'feel of the case' that can never be realized by a review of the cold record." N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 293 (2007)). We defer to family courts "unless they are so 'wide of the mark' that our intervention is necessary to correct an injustice." E.M., 211 N.J. at 427 (quoting E.P., 196 N.J. at 104). Therefore, the family court's decision to terminate parental rights will not be disturbed "when there is substantial credible evidence in the record to support the court's findings." E.P., 196 N.J. at 104. We will not second-guess or substitute our judgment for that of the family court, provided that the record contains substantial and credible evidence to support the decision to terminate parental rights. Ibid.

Nonetheless, appellate courts "owe no special deference to the trial [court's] legal determinations." Slawinski v. Nicholas, 448 N.J. Super. 25, 32 (App. Div. 2016).

Regarding prong one, N.J.S.A. 30:4C-15.1(a)(1), the trial court, relying on the expert testimony, found Dora and Nate's drug use caused and prolonged Alan's stay in resource care, and their inconsistent role in Alan's life concretely harmed him by delaying permanency.

With respect to prong two, N.J.S.A. 30:4C-15.1(a)(2), the court found Dora and Nate could not cease to inflict harm on Alan given their continued dereliction of parental duties, recurrent drug abuse, resultant neglect, unwillingness to acknowledge Alan's special needs, failure to accept Division services aimed at reunification, and lack of attention to Alan during the two-year pendency of the underlying guardianship complaint.

Regarding prong three, N.J.S.A. 30:4C-15.1(a)(3), the trial court found the Division exhausted all alternative avenues to termination and adoption, but reunification efforts were hampered by Dora and Nate's unwillingness and inability to become fit in time to meet the needs of the child. The court noted "years after [Alan's] removal from [Dora's] care, the same circumstances exist as were present when the case began." Given the two-year pendency of this latest litigation, the court found "no realistic likelihood" that Dora and Nate would be capable of caring for Alan in the near future.

Regarding prong four, N.J.S.A. 30:4C-15.1(a)(4), the court found the Division successfully placed Alan with his paternal uncle and aunt, where he was thriving, and termination of parental rights would not do more harm than good.

Our review of the record confirms the Division clearly and convincingly proved termination of Dora and Nate's parental rights was in Alan's best interests. See N.J. Div. of Child Prot. & Permanency v. P.O., 456 N.J. Super. 399, 407 (App. Div. 2018) (holding trial court's legal conclusion "unassailable" in light of the "fully supported" factual findings in record). The trial court weighed uncontroverted expert testimony more favorably than Dora and Nate's testimony, finding them both not credible. See N.J. Div. of Child Prot. & Permanency v. R.L.M., 236 N.J. 123, 146 (2018) ("[i]n a termination of parental rights trial, the evidence often takes the form of expert opinion testimony by psychiatrists, psychologists, and other mental health professionals"). The trial court explained its credibility determinations, which were supported by the record. E.P., 196 N.J. 104.

Nate argues for the first time in his reply brief that recent amendments to the KLG statute elevated KLG as preferable to adoption in termination cases. We note it is inappropriate to raise an argument for the first time on reply. Goldsmith v. Camden Cnty. Surrogate's Off., 408 N.J. Super. 376, 387 (App. Div. 2009). We nevertheless find Nate's interpretation of the amendments unavailing in light of the recent holding in N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 27-29 (App. Div. 2022) (narrowly

construing KLG amendments in conjunction with best interests test amendment). As the court in D.C.A. noted, interpretations of the amendments dispensing of the bests interest test in favor KLG contravene the plain language of both amendments and are without merit. Id. at 29.

Nate's interpretation is based on the Legislature eliminating language in N.J.S.A. 30:4C-15.1(a)(2) on July 2, 2021.⁴ The Legislature removed from the court's consideration "[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." The Legislature also simultaneously removed language from the KLG statute at N.J.S.A. 3B:12A-6(d)(3) requiring the court consider KLG as an option only when "adoption of the child is neither feasible nor likely." Compare L. 2006, c. 47, §32 with L. 2021, c. 154, §4.

Removing the KLG Act's requirement that a court find adoption "neither likely nor feasible" before granting KLG is a factor in a determination as to whether KLG is an appropriate permanency option. The KLG statute has no application to a termination of parental rights trial. The amendment to the KLG statute now ensures a resource parent's willingness to adopt no longer forecloses

⁴ The amendments to the KLG statute explicitly became effective the same day.

the possibility of KLG at the time the permanency plan is selected by the court. The enacted law does not make KLG the preferred permanency outcome over adoption simply because it removed the requirement that adoption be unfeasible or unlikely but rather put the two in equipoise.

Evidence that establishes a resource parent's clear and informed preference for adoption remains relevant in a termination of parental rights proceeding to a trial court's finding that there are no reasonable alternatives to termination of parental rights and termination will not do more harm than good. Because the legal analysis in the KLG statute is separate and distinct from the best interest test articulated in N.J.S.A. 30:4C-15.1(a), the considerations of delay in achieving permanency, alternatives to termination, and more harm than good must still be considered pursuant to the unchanged plain text of N.J.S.A. 30:4C-15.1(a)(2)-(4). The only amendment to N.J.S.A. 30:4C-15.1(a) occurred in prong two, which no longer requires the court weigh the potential harm caused by severing the bond between a child and its resource parent in its determination of whether delay of permanent placement will add to the harm facing the child. If the Legislature wanted to make kinship legal guardianship preferred over termination of parental rights, it clearly could have done so in the statutory text of the termination statute when it made these other revisions to both statutes.

Alan's resource parents testified they wished to adopt, and their decisions were based on understanding the differences between adoption and KLG. They were both unequivocal in expressing their preference to adopt rather than KLG.

The overarching question in a best interest analysis is "whether the parent can become fit in time to meet the needs of the children." N.J. Div. of Youth & Fam. Servs. v. F.M., 375 N.J. Super. 235, 263 (App. Div. 2005); see also N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 512 (2004) (indicating that even if a parent is trying to change, a child cannot wait indefinitely). The Division proved clearly and convincingly that, despite over a decade of services and court involvement, neither Dora nor Nate can become fit to meet Alan's needs in the foreseeable future.

To the extent we have not addressed other arguments raised by Nate and Dora, we find they are without sufficient merit to warrant discussion 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