RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2885-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

J.W.,[1]

Defendant,

and

L.R.,

Defendant-Appellant.

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IN THE MATTER OF THE
GUARDIANSHIP OF
N.R., a minor.

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Submitted January 19, 2023 – Decided February 17, 2023

[1] We utilize the parties' initials and pseudonyms to assure confidentiality pursuant to Rule 1:38-3(d)(12).

Before Judges Accurso and Firko.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket Number FG-08-0015-22.

Joseph E. Krakora, Public Defender, attorney for appellant (Phuong Dao, Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Sookie Bae-Park, Assistant Attorney General, of counsel; Meaghan Goulding, 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 C. Devlin, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

Defendant L.R. (Larry) appeals from the Family Part's May 2, 2022 order terminating his parental rights to N.R. (Nathan), born in December 2019. Defendant J.W. (Jane)[2], the child's mother, does not appeal the termination of her parental rights. Larry argues the Division of Child Protection and Permanency (Division) failed to establish by clear and convincing evidence each prong of the statutory best interests test under N.J.S.A. 30:4C-15.1(a). The Law

[2] Larry does not have any other children. However, Jane has three older sons aside from Nathan who are not part of this appeal.

Guardian seeks affirmance. We conclude, after reviewing the record in light of Larry's arguments, that the trial court correctly applied the governing legal principles, and sufficient credible evidence supports the court's findings. Therefore, we affirm.

I.

We begin our discussion with the legal framework regarding the termination of parental rights. Parents have a constitutionally protected right to the care, custody, and control of their children. Santosky v. Kramer, 455 U.S. 745, 753 (1982); In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999). That right is not absolute. N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 553 (2014). At times, a parent's interest must 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); In re Guardianship of J.C., 129 N.J. 1, 10 (1992). To effectuate these concerns, the Legislature created a test for determining when parental rights must be terminated in a child's best interests. N.J.S.A. 30:4C-15.1(a) requires the Division prove by clear and convincing evidence the following 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]
>
> (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 [judge] has considered alternatives to termination of parental rights; and
>
> (4) Termination of parental rights will not do more harm than good.

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. "The considerations involved [in determinations of parental fitness] are extremely fact sensitive and require particularized evidence that address[es] the specific circumstance[s] in the given case." R.G., 217 N.J. at 554 (internal quotation marks omitted) (quoting N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 280 (2007)).

II.

[3] We are aware that 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 reads "[s]uch harm may include evidence that separating the child from [their] resource family parents would cause serious and enduring emotional or psychological harm to the child."

A. Protective Services Litigation[4]

The Division became involved with Jane shortly after Nathan was born due to allegations of her drug abuse. Nathan was exposed to oxycodone in utero and treated for withdrawal symptoms following his birth. According to Jane, she took Percocet during the pregnancy. She ceased taking Vivitrol for her opioid dependence when she became pregnant. Larry claimed he told Jane to stop taking Percocet during the pregnancy because she might test positive for opioids. Jane and Larry were homeless before Nathan was born and resided in their car.

Periodically, defendants stayed with Jane's mother, Diane, or in hotel rooms. Diane provided financial assistance to Jane and Larry. Larry claimed Diane would not allow Nathan in her home, and she called Larry racist names. Larry planned to move to Oklahoma with his mother. A Division caseworker met with Larry before Nathan was discharged from the hospital and advised Larry that the Division was taking custody of Nathan and placing him in a non-relative resource home.

[4] Docket Number FN-08-0104-20.

The Division effectuated the Dodd removal and placed Nathan in his resource home with John and Dylan, the resource parents.[5] The Division substantiated the substance abuse allegation against Jane. The court granted the Division custody of Nathan and granted Larry weekly visitation in the Division's office. Larry was ordered to undergo parental capacity and substance abuse evaluations, submit to random urine screens and hair follicle testing, have therapeutic supervised visitation, and obtain stable housing and employment. Larry attended an evaluation in February 2020, and admitted he was arrested for marijuana possession and distribution four to five years ago. He denied using drugs but tested positive for methamphetamines at the evaluation. Larry did not complete the substance abuse treatment program or submit to hair follicle testing. His visits with Nathan were sporadic. During the COVID-19 pandemic in 2020, some of the visits were conducted by Zoom. The Division offered him transportation assistance. Later in 2020, Larry was incarcerated.

[5] "A 'Dodd removal' refers to the emergency removal of a child from the home without a court order, pursuant to the Dodd Act, which, as amended, is found at N.J.S.A. 9:6-8.21 to -8.82. The Act was authored by former Senate President Frank J. 'Pat' Dodd in 1974." N.J. Div. of Youth & Fam. Servs. v. N.S., 412 N.J. Super. 593, 609 n.2 (App. Div. 2010).

In October 2020, Nathan was placed with Larry's cousin, Reese. Larry missed a family team meeting. The court extended Larry an additional two months to comply with court-ordered services. The Division experienced difficulty contacting Larry because he provided different telephone numbers. Larry did not complete urine screens or undergo a paternity test as requested by the Division.

After failing to attend six previous appointments, Larry completed a psychological evaluation with Dr. Renee R. Maucher on February 25, 2021. Larry described his transient lifestyle with Jane, and advised they were living at his brother's house. Larry reported his criminal history, which included aggravated assault and a probation violation for possession of a gun. He also described a recent assault arrest and domestic violence incident involving Jane, who obtained a restraining order against him, which she later dismissed. The criminal charges related to the incident were also dismissed.

Dr. Maucher recommended that Larry attend parenting classes, therapeutic supervised visitation, and domestic violence services. Pursuant to Dr. Maucher's recommendations, the court ordered Larry to complete parenting and domestic violence classes. He was placed on a waitlist for a therapeutic visitation program. Larry was noncompliant with services and continued to lack

stable housing, claiming he was too busy working as a landscaper. Due to his lack of attendance, Larry was discharged from the substance abuse and parenting skills programs. He also did not comply with court ordered urine screens. Larry and Jane also failed to attend bonding evaluations with Dr. James Loving.

B. Guardianship Litigation

The protective services litigation was dismissed, and on September 1, 2021, the Division filed a complaint for guardianship. The court held a one-day trial on May 2, 2022. Larry and Jane did not appear for trial despite being offered transportation by the Division. At the time of trial, Larry was homeless and still in a relationship with Jane. Adoption worker Samantha Dimacale testified for the Division. John testified on behalf of the Law Guardian. Larry did not present any witnesses on his behalf. There was no expert testimony.

John testified that Nathan was initially placed with him and Dylan after Nathan was born, and they continued to provide backup care after the child relocated to Reese's house. Dimacale testified about the Division's efforts to assess relatives other than Reese, without success. After Nathan was placed back with John and Dylan in April 2022, the Division discussed with them the differences between adoption and Kinship Legal Guardian (KLG) using a

comparison chart. John and Dylan made clear they wanted to adopt Nathan because they believed it was in his best interests to have a permanent home.

Dimacale testified about the Division's involvement with Larry and his non-compliance regarding its programs and services. Dimacale highlighted that Larry did not respond to her requests to submit to random urine screens, and he admitted his urine screens would be "dirty for marijuana." In addition, Dimacale discussed the domestic violence between Larry and Jane, including her participation in a joint telephone call with them, where she heard Larry threaten Jane by saying she would "die" if she surrendered her parental rights to the resource family.

Dimacale confirmed John and Dylan provided backup care for Nathan when he was living with Reese. After a recent visit to John and Dylan's home, Dimacale observed that Nathan was "very comfortable, happy, loving, and affectionate" and his needs were being met.

III.

The court concluded—relying on the credible evidence the Division and Law Guardian provided—that it was in Nathan's best interests to terminate Larry's parental rights. Regarding prong one, Larry contends the Division failed to meet its evidentiary burden. Larry asserts the court erred because it did not

make any findings of specific harm as to Nathan. In particular, Larry notes that Jane, not he, tested positive for oxycodone when Nathan was born. The Division substantiated that Nathan had withdrawal symptoms at birth because Jane took Percocet while she was pregnant, and Larry argues he was not substantiated by the Division for Jane's opioid use. Larry also claims he acted appropriately when he visited Nathan, changed his diapers, and fed him. Additionally, Larry argues the court's reasoning is unsupported by the record. We disagree.

A.

The first prong of the best interests test requires the Division 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. The concern is not only with actual harm to the child but also the risk of harm. In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999) (citing N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 616 n.14 (1986)). 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.

The Court has explained a parent's withdrawal of nurture and care for an extended period is a harm that endangers the health of a child. Id. at 379 (citing

K.H.O., 161 N.J. at 352-54). When children "languish in foster care" without a permanent home, their parents' "failure to provide a permanent home" may itself constitute harm. Id. at 383 (second quotation citing N.J. Div. of Youth & Fam. Servs. v. B.G.S., 291 N.J. Super. 582, 591-93 (App. Div. 1996)).

The court emphasized that its conclusion regarding harm to Nathan was based on Larry's transient lifestyle despite the Division's repeated attempts to assist him. The court highlighted several instances of Larry's dereliction under prong one, including his refusal to address his domestic violence incident with Jane. Larry was referred to a batterers' program but did not attend. The court noted Larry did not attend parenting skills classes and was discharged due to his lack of attendance. The court stressed Larry's unstable housing situation and homelessness persisted since Nathan was born. The court stated for two-and-a-half years, Larry has not taken any steps to create a home for Nathan, and the child "would be endangered today just as that child was endangered when the removal took place" if Nathan lived with Larry.

The record clearly demonstrates the Division provided repeated assistance to Larry and directed him to multiple resources spanning several years. The court need not wait until children are "irreparably impaired" by parental abuse or neglect. D.M.H., 161 N.J. at 383. "The State has a parens patriae

responsibility to protect children from the probability of serious physical, emotional, or psychological harm resulting from the action or inaction of their parents." N.J. Div. of Youth & Fam. Servs. v. C.S., 367 N.J. Super. 76, 110 (App. Div. 2004). There is no basis for us to disturb the court's finding that the Division satisfied prong one as against Larry by clear and convincing evidence.

B.

The second prong of the best interests determination "in many ways, addresses considerations touched on in prong one." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 451 (2012). Evidence supporting the first prong may also support the second prong "as part of the comprehensive basis for determining the best interests of the child." D.M.H., 161 N.J. at 379 (citing K.H.O., 161 N.J. at 348-49). 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 (citing K.H.O., 161 N.J. at 352).

The Division can satisfy this inquiry by showing the parent or parents cannot provide a safe and stable home, and the child or children will suffer substantially from a lack of stability and permanent placement. M.M., 189 N.J. at 281 (quoting K.H.O., 161 N.J. at 363). Because the Legislature placed "limits

on the time for a birth parent to correct conditions in anticipation of reuniting with the child, the emphasis has shifted from protracted efforts for reunification with a birth parent to expeditious, permanent placement to promote the child's well-being." C.S., 367 N.J. Super. at 111 (first citing N.J.S.A. 30:4C-11.1; then citing D.M.H., 161 N.J. at 385; and then citing K.H.O., 161 N.J. at 357-58).

Larry contends the Division failed to satisfy its evidentiary burden under prong two. According to Larry, he struggled to complete therapy services, undergo drug treatment, and obtain stable housing because he prioritized receiving a steady paycheck to provide for his family. Larry also avers the court failed to highlight the "obvious exhaustion" he faced working as a landscaper. In addition, Larry claims he needed financial assistance and a home, but instead, the Division provided "unnecessary services such as counseling and random drug screens." We are unpersuaded.

As we have stated, "[k]eeping the child in limbo, hoping for some long-term unification plan, would be a misapplication of the law." N.J. Div. of Youth & Fam. Servs. v. A.G., 344 N.J. Super. 418, 438 (App. Div. 2001) (citing In re P.S., 315 N.J. Super. 91, 121 (App. Div. 1998)). Based on substantial credible evidence, the court held that prong two is satisfied because "the parents are unwilling or unable to eliminate the harm facing the child, was unable or

unwilling to provide a safe and stable home for the child, and the delay of permanent placement will add to the harm." The court reasoned Larry does not have a job or adequate housing.

In addition, the court found Larry "downplayed his use of amphetamines," considering he tested positive for methamphetamines in February 2020, refused to complete random urine screening, and failed to undergo hair follicle testing. Although the Division repeatedly attempted to assist Larry in attending his evaluations, substance abuse treatment, parenting skills classes, and domestic violence services, he failed to do so. Moreover, Larry failed to complete the updated psychological evaluation, which would have assessed his parenting capabilities for Nathan.

Larry highlights his positive visits with Nathan but fails to mention he was steadily absent for long periods of time. In order to accommodate his work schedule, the Division scheduled evening classes for him but experienced difficulty reaching him because he provided different telephone numbers. The court noted the maternal grandmother declined to be assessed, and Reese no longer wanted Nathan in her care. Based on the substantial credible evidence, the court found Larry lacks the capacity to take care of Nathan. The record supports the court's conclusion as to prong two.

C.

The third prong requires evidence that "[t]he [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 [judge] 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 omitted).

Larry argues the Division failed to show by clear and convincing evidence that it provided secure housing assistance for him and Jane, such as referring them to emergency transitional housing services. Further, Larry contends the court failed to consider an alternative plan to terminating his parental rights because Dimacale did not fully understand the concept of KLG based on her testimony that KLG and adoption are equally permanent plans. Larry reasons if Dimacale had told John and Dylan that KLG is the "more preferred" permanency plan under the amended statute, as opposed to adoption, they might have chosen KLG instead. Again, we disagree.

"[A]n evaluation of the efforts undertaken by [the Division] to reunite a particular family must be done on an individualized basis." D.M.H., 161 N.J. at 390. The evaluating court must also consider "the parent's active participation in the reunification effort." Ibid. In any situation, "[t]he services provided to meet the child's need for permanency and the parent's right to reunification must be 'coordinated' and must have a 'realistic potential' to succeed." N.J. Div. of Youth & Fam. Servs. v. L.J.D., 428 N.J. Super. 451, 488 (App. Div. 2012) (quoting N.J. Div. of Youth & Fam. Servs. v. J.Y., 352 N.J. Super. 245, 267 n.10 (App. Div. 2002)).

This requires the Division to "encourage, foster and maintain the parent-child bond, promote and assist in visitation, inform the parent of the child's progress in foster care and inform the parent of the appropriate measures [they] should pursue . . . to . . . strengthen their relationship." R.G., 217 N.J. at 557 (alterations in original) (internal quotation marks omitted) (quoting D.M.H., 161 N.J. at 390). What constitutes reasonable efforts varies with the circumstances of each case. D.M.H., 161 N.J. at 390-91.

In the matter under review, the court found it was "beyond dispute" that the Division made reasonable efforts to assist Larry to correct the circumstances leading to Nathan's placement with the resource parents. The court credited the

Division's efforts to provide Larry with repeated referrals for services and evaluations. And, the court emphasized that personal transportation was made available to Larry by the Division when necessary and bus passes were issued to him as well. Visitation with Nathan was altered by the Division to accommodate Larry's work schedule, but he still failed to show up consistently. In sum, the court found the Division had done everything "within its power" to provide Larry the tools necessary to overcome his challenges.

Moreover, the court "seriously considered" alternatives to Larry's termination of his parental rights, yet it did not find any other "reasonable or realistic" options. The court reasoned Larry knew the guardianship trial was upcoming, but he nevertheless was unwilling to attend the updated psychological evaluation despite being provided with transportation. The court noted Larry's visitation with Nathan was "sporadic at best, basically [non-existent] in the year 2022," and Larry historically has not submitted to random urine screens. For those reasons, the court found that while converting the case back to protective services litigation under Title Nine is an alternative plan, it "is not one that is without harm" because that plan would unreasonably delay permanency for Nathan. We have no reason to second guess those or any other findings.

Moreover, the record shows Dimacale adequately advised John and Dylan about KLG. John testified he understood the difference between KLG and adoption and was "positive" that he preferred adoption for Nathan. John further stated he would facilitate visits between Larry and Nathan. Because Larry declined the Division made referrals for appropriate services, and the resource parents were committed to adopting Nathan after having been thoroughly advised as to the option of KLG, we are satisfied the Division established prong three by clear and convincing evidence.

D.

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 (citing N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 609 (2007)).

> [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 [their] natural parents than from the permanent disruption of [their] relationship with [their] foster parents.
>
> [K.H.O., 161 N.J. at 355.]

"The crux of the fourth statutory subpart 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 C.S., 367 N.J. Super. at 119). "If one thing is clear, it is that the child deeply needs association with a nurturing adult. Since it seems generally agreed that permanence in itself is an important part of that nurture, a court must carefully weigh that aspect of the child's life." A.W., 103 N.J. at 610.

"It has been 'suggested that [a] decision to terminate parental rights should not simply extinguish an unsuccessful parent-child relationship without making provision for . . . a more promising relationship . . . [in] the child's future.'" N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 108 (2008) (alterations in original) (quoting A.W., 103 N.J. at 610). "[C]ourts have recognized that terminating parental rights without any compensating benefit, such as adoption, may do great harm to a child." Id. at 109 (citing A.W., 103 N.J. at 610-11).

Larry challenges the court's prong four findings, arguing termination of his parental rights will do more harm than good. Larry asserts he may not be the ideal father the Division wanted him to be, but he is on a path to becoming the best father for Nathan. During his visits with Nathan, Larry stresses the child was engaged with him and "very active." Larry also claims he was "very

appropriate" when he saw Nathan, since he cared for Nathan's needs, allowed him to fall asleep in his arms, and there were no safety concerns. Having thoroughly reviewed the record under our standard of review and the applicable law, we conclude Larry's arguments as to prong four lack merit.

The court weighed the testimony presented by the Division and the Law Guardian. Acknowledging there is always an element of harm in ending the relationship between the child and biological parent, the court found on balance that termination of Larry's parental rights would not do Nathan more harm than good. The court highlighted that since Nathan was then two-and-a-half years old, he needed to live in a stable household, which Larry's transient lifestyle could not support. The court underscored that Nathan is "very much bonded" with John and Dylan, who are motivated to adopt him. Dimacale visited John and Dylan's home and testified that Nathan was "very comfortable, happy, loving, and affectionate," and his needs were being met.

The Division did not proffer any expert testimony at the hearing because Larry and Jane refused to comply with their bonding evaluations with Dr. Loving. Analyzing potential termination generally requires a balancing of the two relationships between terminating the child's ties with the parents or disruption of ties with the resource family. In re Guardianship of J.C., 129 N.J.

1, 25 (1992). As such, there is usually a need for "expert evaluations and testimony with respect to natural and resource families" and a comparison of bonding evaluations. N.J. Div. of Youth & Fam. Servs. v. A.R., 405 N.J. Super. 418, 440 (App. Div. 2009). Moreover, bonding evaluations are not required to satisfy prong four where termination "[is] not predicated upon bonding, but rather reflects the child's need for permanency and [the parent]'s inability to care for [the child] in the foreseeable future." N.J. Div. of Youth & Fam. Servs. v. B.G.S., 291 N.J. Super. 582, 593 (App. Div. 1996).

Saliently, the court's finding here was not grounded on bonding issues but was based on Nathan's need for a permanent and stable home and Larry's intractable refusal to meaningfully participate in the services provided by the Division. Therefore, bonding testimony was not needed for the court to determine whether, under prong four, the termination of parental rights would do more harm than good, as this matter was not predicated on bonding issues. Rather, the matter was based on Nathan's need for permanency and Larry's inability to care for him. Here, the court duly found "a parent cannot avoid the remedy of a termination of parental rights by willfully refusing to attend and doing a scheduled psychological evaluation."

The court cautioned there is "no finish line in sight" for Larry, and nothing in the record that indicates Larry could parent Nathan in the foreseeable future. Larry had not visited Nathan since his second birthday in December 2021, a period of nearly six months. The court found a real parental relationship exists between Nathan and the resource parents, who are committed to adopting him. Greater harm is likely to befall Nathan by continuing a relationship with Larry. The record supports that finding under prong four.

IV.

Our review of a family judge's factual findings is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). "It is not our place to 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." F.M., 211 N.J. at 448-49 (citing E.P., 196 N.J. at 104). "We invest the family court with broad discretion because of its specialized knowledge and experience in matters involving parental relationships and the best interests of children." Id. at 427.

Although our scope of review is expanded when the focus is on "'the trial judge's evaluation of the underlying facts and the implications to be drawn therefrom,' . . . even in those circumstances we will accord deference unless the

trial court's findings 'went so wide of the mark that a mistake must have been made.'" M.M., 189 N.J. at 279 (first quoting In re Guardianship of J.T., 269 N.J. Super. 172, 189 (App. Div. 1993); and then quoting C.B. Snyder Realty, Inc. v. BMW of N. Am., Inc., 233 N.J. Super. 65, 69 (App. Div. 1989)). We are satisfied the Division has proven all four prongs of the best interests standard under both the old and amended version of N.J.S.A. 30:4C-15.1(a).

To the extent we have not addressed any other arguments, we conclude that they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.