

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3424-21

NEW JERSEY DIVISION OF  
CHILD PROTECTION AND  
PERMANENCY,

Plaintiff-Respondent,

v.

J.J.,

Defendant-Appellant.

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IN THE MATTER OF THE  
GUARDIANSHIP OF J.K.J.  
and E.R.J., minors.

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Submitted May 31, 2023 – Decided July 14, 2023

Before Judges Gilson, Rose and Messano.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Family Part, Camden County,  
Docket No. FG-04-0135-21.

Joseph E. Krakora, Public Defender, attorney for  
appellant (John A. Albright, Assistant Deputy Public  
Defender, of counsel and on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Juliana L. Stiles, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Steph Kozic, Assistant Deputy Public Defender, of counsel and on the brief).

#### PER CURIAM

Defendant J.J. (Joe) appeals from a June 20, 2022 judgment terminating his parental rights to his son, J.K.J. (Jack), and daughter, E.R.J. (Erin), and granting the Division of Child Protection and Permanency (Division) guardianship of the children, with the plan that they be adopted by their maternal grandmother.<sup>1</sup> Joe also appeals from a May 19, 2022 order finding him competent to participate and assist in his guardianship matter. He argues that the family court erred in determining that he was competent and in terminating his parental rights because the Division failed to offer him meaningful services and the court should have granted kinship legal guardianship (KLG) rather than terminate his parental rights. The record and law do not support Joe's arguments. Accordingly, we affirm.

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<sup>1</sup> We use initials and fictitious names to protect privacy interests and the confidentiality of the record. See R. 1:38-3(d)(12).

## I.

We summarize the relevant facts and procedural history from the record, including the record developed at trial and various court proceedings concerning Joe's competency.

Joe was married to S.J. (Sarah), and they had two children: Jack, born in October 2018; and Erin, born in November 2019. Sarah was murdered in December 2019, and Joe has been charged with her murder. Jack and Erin have been in the custody of the Division since December 2019, and for the last three years, L.P. (Lisa), their maternal grandmother, has been caring for them. Lisa is committed to adopting the children.

The Division first became involved with the family after it received a referral concerning Jack. In April 2019, Jack was brought to a hospital with second-degree burns to his abdomen, groin, and testicles. Joe reported to the Division that he had placed Jack in a bath that was too hot. The Division investigated the incident but, at the time, determined that the injuries were caused accidentally.

Less than a year later, in December 2019, the Division received a referral concerning Erin. Erin, who at the time was less than three weeks old, was brought to a hospital with injuries to her leg, including a bilateral tibia and

fibula fracture and a femur fracture. Joe initially told the Division that the injuries occurred when his aunt was caring for Erin. Joe later admitted, however, that he probably caused the injuries when he "got too rough" while attempting to change Erin's diapers. Joe also admitted that he had made up the story about a fictitious aunt caring for Erin.

Joe was arrested and charged with second-degree child endangerment of Erin, N.J.S.A. 2C:24-4(a)(2). Shortly thereafter, the Division removed Jack and Erin from their parents' care and filed a complaint to assume custody, care, and supervision of the children.

Joe was released from jail on the pending child endangerment charge on December 13, 2019. Several days later, a Division worker met with Sarah and noted that she had bruising on her face. The following day, the Division received a call from the Federal Bureau of Investigation and Human Services police reporting that Sarah was missing.

On December 19, 2019, the Division was notified that Sarah had been found dead in a partially burnt vehicle in a wooded area. The following day, Joe was arrested. Thereafter, he was charged with first-degree murder, arson, hindering apprehension, and tampering with evidence. He has been

incarcerated since his arrest and the criminal charges against him were still pending at the time of the June 2022 judgment.

Following the removal of the children, Joe was ordered to comply with various services, including psychological evaluations and parenting skills training. Those services, however, were held in abeyance by a court order because of Joe's pending criminal charges. Nevertheless, the Division maintained contact with Joe, provided him with updates on the children, and encouraged him to take advantage of all mental health services offered at the jail.

Beginning in December 2020, the Division made efforts to provide virtual visits among Joe and his children. Jack did not react well during those visits; he hid from the camera and became aggressive afterwards. Visits were temporarily suspended in 2021, after Joe assaulted an officer. When the virtual visits resumed, Joe was sporadic in his attendance.

In March 2020, the children were placed with Lisa over Joe's preference to place the children with his mother. After conferring with the paternal grandmother, the Division and paternal grandmother agreed that the best long-term plan for the children was for them to remain with their maternal grandmother.

Approximately a year after the children had been in Lisa's care, the Division sought and obtained court approval for a permanency plan of termination of parental rights followed by adoption. On December 29, 2020, the Division filed a guardianship complaint.

Dr. Allan J. Lee, a psychologist retained by the Division, met with Joe on three occasions between September 2021 and March 2022 to evaluate Joe's mental health and fitness as a parent. Based on his evaluations, Dr. Lee opined that Joe was unlikely to be able to parent Jack or Erin. The doctor also raised concerns regarding Joe's ability to participate meaningfully in the guardianship matter.

The guardianship trial was initially scheduled for January 2022. Approximately one month before the trial was to commence, Joe's counsel filed a motion to adjourn the trial and raised concerns regarding Joe's competency to participate in the guardianship trial.

In response to Dr. Lee's concerns and defense counsel's motion, Judge Francine I. Axelrad, retired and on recall, conducted a conference with counsel. Thereafter, on February 9, 2022, Judge Axelrad appointed Eric Foley, Esq. to act as Joe's guardian ad litem (GAL) for the "limited purpose of investigating and providing a report to the court regarding his assessment of

the mental competency of [Joe] to understand the nature and significance of the pending termination of parental rights litigation, and to understand the roles of the [j]udge and other counsel, including his attorney" in the litigation. The judge granted the GAL the authority to conduct interviews and review relevant documents. Judge Axelrad also adjourned the trial date.

The GAL then spent several months investigating Joe's competency, during which he interviewed Joe and Dr. Lee. He also reviewed various documents, including the Division records, police reports, various evaluation reports concerning Joe, and other records. Among the evaluation reports reviewed by the GAL was a report by Dr. Peter D. Paul, who had prepared a preliminary report concerning Joe's competency to stand trial on the criminal charges concerning the murder of Sarah.

On May 13, 2022, the GAL issued a twenty-six-page report to the court and counsel. Approximately one week later, Judge Axelrad conducted a two-day hearing concerning Joe's alleged mental competency. Joe declined to attend the hearing in person, but the judge arranged to have him appear virtually.

At the competency proceedings, the GAL presented his report and testified concerning his investigation. He was then subject to cross-

examination by all counsel. In short, the GAL opined that Joe understood the nature of the guardianship litigation and could meaningfully participate in that litigation. Accordingly, the GAL recommended that the court need not conduct a competency hearing under Rule 4:86.

Following arguments by counsel, Judge Axelrad issued an extensive oral decision on May 19, 2022. The judge found that Joe was able to explain the nature of the proceedings to the GAL and convey his desire that his mother be appointed as the KLG of his children. The judge explained that she had carefully considered the GAL's report and testimony, but her determination was grounded in her independent factual findings based on the record, including her observations of Joe during numerous pretrial proceedings.

Judge Axelrad also considered the evaluations prepared by Dr. Lee and Dr. Paul but noted that those evaluations had not made a definite conclusion concerning Joe's competency. Based on her evaluation of the facts, the judge found that Joe had been able to accurately describe the status of his criminal case and the plan for his competency evaluation in connection with the criminal case. Ultimately, the judge determined that Joe was competent to participate and assist in the guardianship trial. She also determined that there



was no need for a hearing under Rule 4:86, and that the matter would proceed to trial in June 2022.

Shortly after the judge made that ruling, defendant filed an emergent application for leave to appeal. Joe also sought a stay of the trial. We denied those applications.

A two-day guardianship trial was conducted on June 15 and 16, 2022. Two witnesses testified: Dr. Lee and a Division caseworker. Joe refused to attend the trial. He also declined the opportunity to speak privately with his attorney via Zoom.

The Division worker testified about the Division's involvement with the family and its efforts to work with Joe even while he was incarcerated. The worker detailed the Division's efforts to arrange virtual visits among Joe and his children. The worker also explained that the children, especially Jack, did not react well to these visits and that Joe's attendance was sporadic. The worker also detailed the Division's attempt to provide services to Joe and explained the limitations on those services given Joe's incarceration. Furthermore, the worker testified about how the Division had encouraged Joe to take advantage of mental health services provided by the jail.

In addition, the worker testified that she had explained the differences between KLG and adoption to Lisa and had informed her that both options were considered equal in terms of providing permanency for the children. Lisa had informed the worker that she preferred adoption given the pending criminal charges against Joe and the poor relationship between Lisa and Joe. According to the worker, Lisa worried that under KLG, Joe could petition for visitation rights.

Dr. Lee testified extensively regarding the multiple evaluations he conducted of Joe. He explained that Joe had told him of his history of mental illness, including hallucinations and being diagnosed with schizophrenia. Dr. Lee raised concerns regarding Joe's mental health, cognitive functioning, anger, resentment, and violent behavior. He opined that Joe's "functional deficits" would likely prevent Joe from providing Jack or Erin with safe and stable parenting. Dr. Lee testified that he could not support Joe as an independent caregiver to the children and opined that Joe's prognosis for change was poor.

Dr. Lee also testified concerning the bonding evaluations he had conducted. He explained that he had evaluated the children's bond with Joe, as well as Lisa. He opined that Jack and Erin had insecure attachments to Joe and

would be at a low risk of enduring harm if that relationship was ended. By contrast, Dr. Lee opined that Jack and Erin had significant and positive attachments to Lisa and they would suffer significant harm if that relationship was ended.

On June 20, 2022, Judge Axelrad announced her decision to terminate Joe's parental rights. The judge then gave an extensive and thoughtful oral decision on the record explaining her findings of facts and conclusions of law. The judge found both Dr. Lee and the Division caseworker to be credible. Judge Axelrad then addressed the four prongs of the child's best interests standard, N.J.S.A. 30:4C-15.1(a), and found that the Division had proven each prong by clear and convincing evidence.

Addressing the first and second prongs of the standard, Judge Axelrad found that both children had been harmed by Joe and that Joe was unlikely to be able to safely parent either child. In that regard, the judge found that Joe had caused Erin physical harm and had initially lied about how Erin had been injured. The judge also found that Jack had suffered burns as a result of Joe's parenting and, although those injuries were deemed accidental, Jack had endured scarring and had received follow-up treatment.

Judge Axelrad also found that Joe had cognitive and mental health issues that would significantly limit his ability to care for young children. In making that finding, the judge noted that those problems would be present even if Joe was not incarcerated, but the incarceration created a barrier to safe and effective parenting. Consequently, the judge found that Joe's "intellectual limitation" and "severe mental illness" would subject the children to further risks of harm if they were placed in Joe's care.

Concerning the third prong, Judge Axelrad found that the Division had made reasonable efforts to provide services to Joe and there was no good alternative to termination of his parental rights. The judge noted the Division's attempts to maintain communications with Joe while he was incarcerated. The judge also found that the Division had placed the children with Lisa after conferring with various family members. In addition, Judge Axelrad found that the Division had arranged for ongoing contact with paternal relatives and had kept the paternal grandmother involved with the children's care.

The judge rejected Joe's argument that the case should proceed as a KLG matter. Judge Axelrad reasoned that KLG is now considered an equivalent permanency plan to adoption, but it is not necessarily the preferred plan. The judge then found that the circumstances of this case supported adoption.

Finally, the judge found that under the fourth prong, termination of Joe's parental rights will not do more harm than good. In making that finding, the judge relied on Dr. Lee's unrebutted testimony and found that the maternal grandmother was meeting all the children's needs, including maintaining a relationship with paternal relatives.

That same day, the judge issued a judgment terminating Joe's parental rights and granting guardianship to the Division with the plan that the children be adopted by Lisa. Joe now appeals from that judgment.

## II.

On appeal, Joe makes three main arguments. He contends that the trial judge erred in finding he was competent to participate and assist in his guardianship matter. He also argues that the Division failed to establish prong three of the best interests standard because it failed to provide meaningful services to him, and it did not properly consider KLG. Finally, Joe contends that the trial judge erred in finding prong four because KLG was a viable permanent alternative to the termination of his parental rights.

### A. Our Standard of Review.

Appellate review in termination of parental rights cases is limited. N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 552 (2014). We defer to

the factual findings underlying the trial court's decision if they are supported by "'adequate, substantial, and credible evidence' on the record." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007) (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)). "We accord deference to fact findings 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)).

"Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark' should an appellate court intervene and make its own findings to ensure that there is not a denial of justice." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). Nevertheless, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." R.G., 217 N.J. at 552 (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

B. Joe's Competency.

If there are grounds to question a litigant's mental competency, the trial court should follow the procedures outlined under Rules 4:26-2 and 4:86. See S.T. v. 1515 Broad St., LLC, 241 N.J. 257, 276-79 (2020). Rule 4:26-2(a) provides that a mentally incapacitated person "shall be represented in an action by the guardian of either the person or the property." Before a guardian is appointed to act in this capacity, however, the court must determine that the person is mentally incapacitated. S.T., 241 N.J. at 277. To make that competency determination, Rule 4:26-2(b) provides that the "court may appoint a [GAL] for . . . [an] alleged . . . incapacitated person" on its own motion or a motion filed by a party or interested person.

When a GAL is appointed, the GAL should conduct an investigation to determine the party's "mental capacity and then to make a recommendation to the court whether [his or] her best interests require[] the filing of an action for a limited or general guardianship . . . in accordance with Rule 4:86." S.T., 241 N.J. at 277. "The [GAL's] recommendations are not binding on the court; ultimately the court must make its own independent fact findings." Id. at 278-79. As our Supreme Court has explained:

Thus, when a [GAL] is appointed pursuant to Rule 4:26-2(b) to represent an individual who is "alleged"

to be mentally incapacitated, the [GAL]'s function is to inquire into the individual's alleged mental incapacity. The role of a [GAL] is to act as an independent investigator and inform the court on the subject of the client's mental capacity. In that sense, the [GAL] serves "as 'the eyes of the court' to further the [client's] 'best interests.'" After completing its inquiry, the [GAL] submits a report to the court containing the results of the investigation and recommends whether a formal hearing should proceed under Rule 4:86. The [GAL]'s recommendations are not binding on the court; ultimately the court must make its own independent findings.

[S.T., 241 N.J. at 278-79 (citations omitted).]

Judge Axelrad followed the procedures outlined in Rule 4:26-2, and then made independent factual findings regarding Joe's competency. The judge appointed a GAL, and the GAL conducted an extensive and thorough investigation. The GAL then prepared a written report, which was reviewed by the judge and counsel. Thereafter, Judge Axelrad held a proceeding at which the GAL presented his report and provided extensive testimony.

As part of that proceeding, the judge was provided with evaluations prepared by psychologists who had raised questions about Joe's mental competency. Significantly, none of those reports were final reports concluding that Joe was incompetent to proceed in the guardianship matter. Moreover, at the time that Judge Axelrad made her decision, the criminal court had not



decided whether Joe was competent to proceed in the criminal matter. Indeed, neither party has submitted anything on this appeal showing that there has been a ruling on Joe's competency in the criminal matter.

Significantly, Judge Axelrad then made independent findings based both on the GAL's report and recommendations and her own independent review of the record and observations of Joe at numerous court proceedings. Specifically, the judge pointed to her interactions with Joe at a number of case management conferences in which he was able to "clearly and articulately and . . . accurately" describe the status of his criminal case and the plan for his competency evaluations in connection with it. Consequently, Judge Axelrad found that Joe was competent to participate and assist in the guardianship matter. Those findings are supported by substantial and credible evidence, and we discern no error in the judge's legal analysis. Moreover, Joe has not identified any prejudice he suffered from his choice not to participate in the guardianship trial.

C. Prong Three.

To terminate a parent's rights, the Division must prove, by clear and convincing evidence, four prongs under the child's best interests standard. See

N.J.S.A. 30:4C-15.1(a). Those prongs are set forth in the governing statute. Ibid. Joe has challenged the findings concerning prongs three and four.

Prong three requires the Division to make "reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home." N.J.S.A. 30:4C-15.1(a)(3). It also requires the court to "consider[] alternatives to termination of parental rights." Ibid.

Reasonable efforts "depend on the facts and circumstances of each case." R.G., 217 N.J. at 557. "Reasonable efforts include consulting with the parent, developing a reunification plan, providing services essential to realize the reunification plan, informing the family of the child's progress, and facilitating visitation." Ibid. (citing M.M., 189 N.J. at 281). The Division "must monitor the services, change them as needs arise, identify and strive to overcome barriers to service provision and service utilization." In re Guardianship of D.M.H., 161 N.J. 365, 387 (1999).

In addition, the Division must prove that there were no reasonable alternatives to termination of parental rights. N.J.S.A. 30:4C-15.1(a)(3). Alternatives include placement with caregivers under KLG. See, e.g., R.G., 217 N.J. at 558; N.J. Div. of Youth & Fam. Servs. v. K.L.W., 419 N.J. Super. 568, 579-80 (App. Div. 2011). "The Division must perform a reasonable

investigation of [timely-presented alternative caretakers] that is fair, but also sensitive to the passage of time and the child[ren]'s critical need[s] for finality and permanency." N.J. Div. of Youth & Fam. Servs. v. J.S., 433 N.J. Super. 69, 87 (App. Div. 2013). "Delay of permanency or reversal of termination based on the Division's noncompliance with its statutory obligations is warranted only when it is in the best interests of the child." K.L.W., 419 N.J. Super. at 581.

In July 2021, the Legislature enacted amendments to various statutes concerning children, including N.J.S.A. 30:4C-15.1, governing termination of parental rights proceedings, and the Kinship Legal Guardianship Act, N.J.S.A. 3B:12A-1 to -7, governing KLG proceedings. L. 2021, c. 154. Under those amendments, KLG is now considered equal to adoption in terms of providing permanency to children. L. 2021, c. 154 § 4; see also N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 26-28 (App. Div. 2022) (explaining how the recent amendments strengthen the position of KLG). The 2021 amendments did not elevate KLG above adoption; rather, it put those options on equal footing.

Based on the evidence presented at trial, Judge Axelrad found that the Division had made "more than reasonable efforts" to provide Joe with services.

The judge found that the Division made repeated attempts to arrange in-person therapeutic visits, but those visits were frustrated because of the restrictions of Joe's incarceration and the COVID-19 pandemic. The judge also found that the Division coordinated virtual visits among Joe and the children, even though Jack often reacted negatively during those visits. The judge further determined that the Division kept Joe and his mother informed about the status of the proceedings and the care of the children. All those findings are supported by substantial credible evidence. Moreover, we discern no error in the application of those findings to the governing law.

The evidence at trial also demonstrated that the Division explored alternatives to Lisa's adoption of the children. The Division considered the children's paternal grandmother as a potential placement option. After discussing the matter with both grandmothers, Lisa and the paternal grandmother agreed that placing the children with Lisa was the best long-term option for the children. In addition, the Division explored the possibility of KLG with Lisa. In that regard, the Division worker testified that she discussed KLG as a possibility with Lisa, but that Lisa expressed a desire to adopt the children.

Judge Axelrad found that the Division had appropriately considered KLG as an alternative to termination but found that adoption would be in the best interests of the children given Lisa's "valid" and "compelling" concerns regarding KLG. Those factual findings are supported by substantial credible evidence. We also hold that Judge Axelrad correctly reasoned that KLG is now considered "equivalent" to adoption under the 2021 amendments.

We reject Joe's contention that the 2021 amendments established a preference for KLG over adoption. Instead, the statutes now ensure that a resource parent's willingness to adopt no longer forecloses the possibility of KLG at the time the permanency plan is selected by the court. The 2021 amendments do not make KLG the preferred permanency outcome over adoption; rather, it has removed the requirement that adoption be infeasible or unlikely. See L. 2021, c. 154, §§ 2 and 3.

We also reject Joe's contention that the New Jersey Supreme Court's recent opinion in State v. Gomes, 253 N.J. 6 (2023), modified traditional canons of statutory interpretation in a way that impacts how we should interpret the recent amendments to the KLG statute. Joe contends that Gomes supports the proposition that "the newest amendments to statutes supersede existing law." He then contends that the 2021 amendments evidenced a "clear"

preference for KLG over adoption. We reject that argument. A plain reading of the amendments makes clear that KLG and adoption are on equal footing and courts must still consider the totality of the individual circumstances of each case in determining the child's best interests in a permanent plan. L. 2021, c. 154.

D. Prong Four.

Prong four requires the court to determine that "termination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). This prong does not require a showing that no harm will come to the children "as a result of the severing of biological ties." In re Guardianship of K.H.O., 161 N.J. 337, 355 (1999). Instead, the inquiry is "whether a child's interest[s] will best be served by completely terminating the child's relationship with that parent." E.P., 196 N.J. at 108. "The crux . . . is the child's need for a permanent and stable home, along with a definite parent-child relationship." N.J. Div. of Youth and Fam. Servs. v. H.R., 431 N.J. Super. 212, 226 (App. Div. 2013). Prong four can be satisfied by "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)).

In making a determination under prong four, the court must use a "totality of the circumstances approach" and can take into account the harm that would occur if the children's relationships with their current caregiver were terminated. D.C.A., 474 N.J. Super. at 28-29 (explaining that the 2021 amendments to N.J.S.A. 30:4C-15.1(a), which prohibit consideration of harm from the termination of the relationship with the caregiver under prong two, did not prevent an appropriate consideration of the termination of that relationship under prong four).

Based on the un rebutted testimony of Dr. Lee, Judge Axelrad found that termination of Joe's parental rights would not do more harm than good. The judge relied on Dr. Lee's testimony that the children had an "ambivalent and insecure attachment" with Joe. Judge Axelrad also appropriately considered Dr. Lee's testimony that the children had formed a "significant and positive attachment and bond" with Lisa.

Judge Axelrad's factual findings under prong four were supported by substantial credible evidence, including Dr. Lee's testimony. Dr. Lee was a "well[-]qualified expert who has had full opportunity to make a

comprehensive, objective, and informed evaluation" of the children's relationship with both Joe and Lisa. J.C., 129 N.J. at 19.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION