

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3713-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

D.A.,

Defendant-Appellant,

and

S.M.,

Defendant.

IN THE MATTER OF THE
GUARDIANSHIP OF K.P.M.,
a minor.

Submitted June 20, 2023 – Decided July 12, 2023

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FG-12-0048-21.

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

Matthew J. Platkin, Attorney General, attorney for respondent (Sookie Bae, Assistant Attorney General, of counsel; Wesley Hanna, Deputy Attorney General, on the brief).

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

PER CURIAM

Defendant D.A. has never met his biological son, K.P.M. (Kyle),¹ who was born in June 2020. Following termination of his parental rights to the child, defendant appeals from the July 14, 2022 judgment of guardianship, and a March 29, 2022 order approving the permanency plan proposed by the Division of Child Protection and Permanency. The judgment of guardianship also accepted the identified surrender of Kyle's mother, S.M. (Claire), of her parental rights to

¹ Consistent with the parties' briefs, we use initials and pseudonyms to protect their privacy interests, see R. 1:38-3(d)(12), and for ease of reference.

her sister, S.T. (Sandra), and/or Sandra's husband, F.T. (Fred), who intend to adopt Kyle. Claire is not a party to this appeal.

The crux of defendant's contentions on appeal is that the trial court failed to approve his alternative plan for kinship legal guardianship (KLG) placement of Kyle with Sandra and Fred. In his overlapping points on appeal, defendant argues, by approving the Division's permanency plan of termination of his parental rights and adoption by his relative resource parents, the trial court "ignored the current legislative mandate making KLG the favored permanency option." Defendant also contends the Division failed to establish all four prongs of the best interests standard under N.J.S.A. 30:4C-15.1(a)(1) to (4), challenging the court's factual and legal findings for the judgment of guardianship. Kyle's law guardian supports termination and urges us to uphold the judgment. Because the trial court's findings are supported by the record, we affirm the guardianship judgment. To the extent defendant raises separate challenges to the permanency order, those challenges are rendered moot by the guardianship judgment, which found appropriate the Division's application for termination of defendant's parental rights and adoption by his relative resource parents.

I.

Kyle is the only child born to defendant and Claire; he has never lived with either parent. Defendant has two other children with two other women. Both children also were born in 2020. One child is in the Division's custody, the other lives with her mother. Claire has a long history with the Division, having lost custody of her seven other children. None of defendant's or Claire's other children are parties to this appeal.

The Division became involved with Claire and Kyle the day after his birth following a referral from the hospital that the baby was born drug addicted. Claire was incarcerated at the time and was returned to jail upon her release from the hospital. Claire claimed she did not know the identity of Kyle's father and refused to name any potential candidates.

Shortly thereafter, Claire identified Sandra as a caretaker for Kyle. Sandra and Fred had previously adopted Kyle's oldest sister and told the Division they were "committed [to] caring for K[yle] long term." Kyle was placed in their care upon his release from the hospital on July 13, 2020. Two days later, the court granted the Division's application for custody of Kyle and ordered Claire to provide the Division with information regarding the identity of Kyle's father. Claire failed to do so.

Apparently, however, in August 2020, a "relative provided [the] Division with the name of a man currently incarcerated." The Division's attempts to identify and locate defendant before March 11, 2021 are unclear from the record. On that date, the Division sent correspondence to defendant in prison advising that he had been named as a potential father of a child in its custody. But, the Division's April 27, 2021 guardianship complaint against Claire stated: "At the present time the identity and whereabouts of the biological father of K[yle] are unknown to the Division." The next day, on April 28, 2021, the trial court accepted Claire's identified surrender.

On May 17, 2021, the Division received defendant's handwritten letter requesting a paternity test. He also stated he was in contact with Sandra, whom he believed "would be a perfect choice of placement for K[yle]." Later that month, defendant was released from prison and placed in a residential substance abuse program.

In June 2021, Sandra advised the Division that Claire had not contacted her, but Kyle's "potential father" had done so and "w[a]s willing to surrender his parental rights to her." The following month, on July 8, 2021, the Division received the DNA results confirming defendant was Kyle's father.

In September 2021, the Division's adoption caseworker, Nicole Galeano, visited defendant at his halfway house. Defendant said he wanted to meet Kyle. Defendant acknowledged that he had been in contact with Sandra and expressed his intent to surrender his parental rights to Kyle. The same month, the Division amended its complaint for guardianship adding defendant as a party and noting defendant agreed to an identified surrender of his parental rights to Sandra and Fred.

At the end of October 2021, after he was assigned counsel, defendant told Galeano he no longer wished to surrender his parental rights, preferring to "get to know K[yle] and the relative caretaker." Noting he was still residing in a halfway house and would be living with his aunt upon release, defendant acknowledged he did not have a plan to care for Kyle.

During a December 2021 status conference, defendant confirmed he did not wish to surrender his parental rights. The Division requested that defendant submit to a psychological evaluation to assess any necessary services that would assist in parenting Kyle. Over defense counsel's objection, the court ordered defendant to attend a psychological evaluation. The court also ordered twice-weekly visitation, supervised "by a Division-approved supervisor." The

Division offered to provide transportation services. However, defendant neither submitted to a psychological evaluation nor visited Kyle.

Rather, during the ensuing months, defendant evaded the Division's attempts to schedule the psychological evaluation and visitation. As one notable example, on March 9, 2022, Galeano advised defendant a psychological evaluation had been scheduled later that month. Defendant told Galeano that "he might not take the psychological as he plans to surrender his parental rights." As of that date, he was still searching for employment.

Notwithstanding defendant's representation to the Division that he would contact Sandra to arrange visitation – and Sandra's willingness to supervise the visits between father and son – defendant did not reach out to Sandra. Nor did he attend visits arranged by Galeano.

During the March 29, 2022 permanency hearing, defendant opposed the Division's plan for termination of his parental rights and adoption by Sandra and Fred, proposing KLG as an alternative. Defense counsel asserted defendant "get[s] along very well with the maternal aunt" and regularly communicates with Sandra and Fred.

Defendant addressed the court. He acknowledged he could not care for Kyle and had not met his son. In response to defendant's efforts to visit his son,

defendant told the court he was not permitted to leave his residential substance abuse program and after his release from the program in November 2021, he "had a lot . . . going on in [his] life," including finding employment and a place to live while on parole. Defendant claimed he reached out to Sandra to arrange visitation, but she "never called" him. He also said his visits were impeded when Kyle and other members of the resource household had contracted COVID-19.

The Division objected to defendant's counterproposal, stating Sandra and Fred "made it very clear to Ms. Galeano and to past workers . . . that they wish to adopt K[yle]." In response to the court's inquiry, Galeano advised the court that she twice discussed KLG with Sandra and Fred "and they said they want straight adoption." The deputy attorney general also argued defendant had not demonstrated any "interest[] in being a father."

Kyle's law guardian supported the Division's permanency plan. She confirmed that the resource parents were prepared to supervise visitation, but defendant "never called to make any attempts to see them."

At the conclusion of the hearing, the court rendered a cogent oral decision approving the Division's permanency plan. The court credited Galeano's account that Sandra was not interested in KLG and wished to adopt Kyle. The court also expressed concerns that defendant had not visited Kyle after he was

released from his residential program in November 2021. Noting defendant lacked housing and employment, and Kyle "ha[d] been in placement for over two years," the court found defendant "ha[d] not provided the court with a plan to reunify with his child." The court thus concluded the Division's plan served Kyle's best interests under the governing law.

Turning to the compliance portion of the hearing, the court ordered defendant to attend psychological and bonding evaluations. Again, defendant failed to comply with the court's mandates.

The guardianship trial was conducted before a different judge the day before Kyle's second birthday in June 2022. To support its claim that defendant's parental rights should be terminated, the Division called Galeano, who testified about the Division's efforts to provide services to defendant and the relative resource parents' desire to adopt Kyle. The Division also introduced into evidence various documents, including contact sheets from June 30, 2020 to May 5, 2022. No other witnesses testified. No expert reports were admitted into evidence. Defendant did not appear at the hearing and did not present any evidence on his behalf.

At the conclusion of oral argument, the trial court reserved decision. On July 14, 2022, the court issued a decision from the bench setting forth its factual

and legal findings. The court credited Galeano's testimony, noting she had been employed by the Division for seventeen years, "was responsive to the questions posed, and was very familiar with the file."

The court found defendant "d[id] not have the means to take care of [Kyle]"; "did not make himself available for visitation with K[yle]"; and failed to attend the scheduled psychological and bonding evaluations. The court thus found defendant failed to "compl[y] with services offered by [the Division], or ordered by the court." Stating, "[i]n short, [defendant] did not provide any plan for [Kyle] at any time," the court found "[d]espite [defendant]'s inaction and lack of attention, K[yle] is doing well."

Turning to KLG as an alternative to termination of defendant's parental rights, the court found the relative resource parents "are willing to adopt K[yle] and want him to be part of the family." The court was persuaded that Sandra and Fred "know the difference between KLG and adoption, and also want K[yle] to reach out to all seven of his [maternal] siblings." The court further noted that defendant "ha[d] no concerns with the resource parents."

Against that factual backdrop, the court addressed each prong of the best interests test, summarized the evidence presented by the Division with citation to the governing law, and concluded the Division demonstrated by clear and

convincing evidence that defendant's parental rights should be terminated. The court thus entered the judgment terminating defendant's parental rights to Kyle.

II.

Our review of a trial court's decision to terminate parental rights is limited. N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 552 (2014). We will uphold a trial judge's factual findings if they are "supported by adequate, substantial, and credible evidence." Ibid. "Concomitantly, reviewing courts should defer to the trial court's credibility determinations." Ibid. We do so because the court "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)). Our Supreme Court has reiterated "a trial court's factual findings [in a guardianship action] 'should not be disturbed unless they are so wholly unsupportable as to result in a denial of justice.'" N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 511 (2004) (quoting In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). However, we review the trial court's legal interpretations de novo. R.G., 217 N.J. at 552-53.

To terminate parental rights, the Division must prove by clear and convincing evidence each element of the "best-interests-of-the-child [test]" codified by N.J.S.A. 30:4C-15.1(a). M.M., 189 N.J. at 280. The statutory test has 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) The [D]ivision has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and
- (4) Termination of parental rights will not do more harm than good.

[N.J.S.A. 30:4C-15.1(a).]

The four prongs "are not discrete and separate," but rather "relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." In re Guardianship of K.H.O., 161 N.J. 337, 348 (1999).

We first consider defendant's contentions that the trial court's findings were insufficient to establish the first and second prongs of the best interests

test. Defendant argues he neither caused harm to Kyle nor placed the child at risk of future harm because there is no evidence in the record that defendant violated parole. As to the second prong, defendant contends "[o]ther than visitation," the court failed to identify the specific services that defendant "did avail himself of." Citing his successful completion of the inpatient drug program and parole, and his attempts to obtain employment and housing, defendant claims he engaged in services that would enable him to meet Kyle's needs. Defendant also blames Galeano for his "confusion" in scheduling visitation, contending she incorrectly insisted on attending the sessions. He further contends Galeano should have recused herself from the matter after he made an unaccepted pass at dating her.

Defendant's focus on the "actual harm" component of prong one is misplaced. The Division need not demonstrate actual harm to satisfy this prong. N.J. Div. of Youth & Fam. Servs. v. A.G., 344 N.J. Super. 418, 440 (App. Div. 2001). The focus under the first prong is not on any "single or isolated harm," 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 harm may be established, as in this case, by the parent's "delay in establishing a stable and permanent home." In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999).

The Division is not required to "wait to act until a child is actually irreparably impaired by parental inattention or neglect." Ibid.

As is often the case, the trial court's findings regarding the first prong, informed and overlapped the second. See New Jersey Div. of Youth and Fam. Servs. v. R.L., 388 N.J. Super. 81, 88 (2006). The court's prong one and two findings not only focused on defendant's absence from Kyle's life, but also on his inability to eliminate his parental inattention. The court found defendant failed to avail himself of visitation with Kyle and failed to attend the psychological evaluation repeatedly requested by the Division and ordered by the court. That evaluation was necessary to determine the specific services defendant needed to assist him with eliminating the harm or risk of future harm to Kyle caused by defendant's absence from the child's life.

Contrary to defendant's argument, his post-incarceration efforts were not targeted toward Kyle's needs, evidenced by his failure to establish a relationship with his son prior to the guardianship trial. Nor does defendant explain how the Division's purported delay in notifying him that he was identified as Kyle's possible father impeded the provision of services.

For largely the same reasons that defendant's prong two argument fails, we reject defendant's contentions that the Division failed to make reasonable

efforts to provide services under the first clause of the third prong. The Division's services were reasonably tailored to defendant under the circumstances of this case. See D.M.H., 161 N.J. at 391.

Turning to the second clause of the third prong, defendant contends the trial court failed to consider KLG as an alternative to termination of his parental rights. At the guardianship trial, however, defendant did not propose KLG. He sought dismissal of the guardianship complaint and "more time within an FN^[2] to have an opportunity to facilitate parenting time and additional resources." Defendant challenges the court's finding under the second clause of the third prong by incorporating his lengthy argument that the permanency order violated the legislative mandate favoring KLG. Although we conclude defendant's contentions are rendered moot by the guardianship judgment, we briefly address his claims as they relate to the third prong of the best interests test.

Effective July 2021, the Legislature amended various sections of: Title 3B, governing KLG proceedings. L. 2021, c. 154; Title 9, governing acts of child abuse and neglect; and Title 30, governing guardianship proceedings. Pertinent to this appeal, the amendments included the removal of language from

² FN is the Family Part docket that "consists of abuse and neglect matters." N.J. Div. of Youth & Fam. Servs. v. I.S., 214 N.J. 8, 22 n.3 (2013).

the KLG statute, N.J.S.A. 3B:12A-1 to -7. Prior to the amendments, N.J.S.A. 3B:12A-6(d)(3) required a determination that adoption was "neither feasible nor likely" before awarding KLG as an option to termination of parental rights. The 2021 amendments deleted that condition, making KLG an equally available permanency plan for children in Division custody. Compare L. 2006, c. 47, § 32 with L. 2021, c. 154, § 4.

Considered as a whole, the amendments "strengthened the position of kinship caregivers" and altered the KLG analysis. See N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 27 (App. Div. 2022), certif. granted, 253 N.J. 599 (2023). As we stated in D.C.A., the Legislature "clearly intended to reflect a preference for viable kinship guardians and fit parents over unrelated foster caretakers." Ibid. (emphasis added). However, nothing in the amendments implies KLG by relative resource parents is the preferred outcome over adoption. A trial court is not required to impose KLG where the caregiver has decided against it in favor of adoption, and the judge finds – after considering the totality of the circumstances – adoption is in the child's best interests. See id. at 28.

Turning to the fourth prong, defendant emphasizes that Sandra and Fred should not have been a placement option because no bonding evaluation was

conducted between them and Kyle. Ordinarily, "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. At the time of trial in the present matter, however, Kyle had never met defendant. On the other hand, from mere weeks after he was born, Kyle continuously resided with his maternal aunt, her husband – and his own half-sister. Clearly comparative bonding evaluations were unnecessary.

Nor are we convinced the Division was required to produce expert testimony regarding Kyle's relationship with Sandra and Fred. The trial court credited the unrefuted testimony of the adoption caseworker that the relative resource parents wished to adopt; the documentary evidence confirms the placement was suitable; at various stages throughout the litigation, defendant urged the court to accept an identified surrender of his parental rights to the same resource parents; and the court expressly found defendant expressed no concerns about Kyle in the relative resource parents' care. Under these circumstances, we reject defendant's contention that a bonding evaluation between the relative resource parents and Kyle was necessary.

To the extent not addressed, defendant's remaining contentions lack 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