RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3783-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

D.S.-S.R.,

Defendant-Appellant,

and

M.M.,

Defendant.

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IN THE MATTER OF THE
GUARDIANSHIP OF
H.J.R., a minor.

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Argued March 14, 2023 – Decided April 14, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FG-15-0030-20.

James P. Gentile, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; James P. Gentile, on the briefs).

Amy Melissa Young, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Melissa H. Raska, Assistant Attorney General, of counsel; Amy Melissa Young, on the brief).

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

PER CURIAM

Defendant D.S.-S.R. (D.R.)[1] appeals from a judgment of guardianship terminating her parental rights to her son, H.J.R., who was born in December 2018. D.R. is challenged by severe and permanent cognitive limitations. She is unable to care for herself and lives in a group home for developmentally disabled adults. D.R. does not dispute that she will never be able to parent H.J.R or provide him with a stable and safe home. However, she seeks to maintain a legally enforceable right of visitation through a kinship legal guardianship

[1] We use initials to protect the privacy interests of the parties and the confidentiality of the record. See R. 1:38-3(d)(12).

(KLG)[2] arrangement with the resource parents who have provided a home for the child since his birth. The child's biological father, codefendant M.M., is not a party to this appeal.

D.R. argues that the statutory best interests cause of action codified at N.J.S.A. 30:4C-15.1(a) focuses on harmful parental conduct and does not provide a cause of action to terminate parental rights based solely on a parent's irremediable developmental disability. She also contends, in the alternative, that the trial court erred by not appointing the resource parents as the child's kinship legal guardians. D.R. argues that recent amendments to the child-placement statutory framework, L. 2021, c. 154 (the 2021 Amendments),[3] elevate KLG

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[2] A kinship legal guardian is "a caregiver who is willing to assume care of a child due to parental incapacity, with the intent to raise the child to adulthood, and who is appointed the kinship legal guardian of the child by the court." N.J.S.A. 3B:12A-2. KLG transfers "certain parental rights" to the guardian, "but retains the birth parents' rights to consent to adoption, the obligation to pay child support, and the parents' right to have some ongoing contact with the child." N.J.S.A. 3B:12A-1(b).

[3] Those amendments took effect on July 2, 2021, almost a year before the guardianship trial was convened. As we explain in Section IV, the only amendment to the termination of parental rights "best interests" factors, N.J.S.A. 30:4C-15.1(a), was the deletion of the sentence: "[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." N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super 11, 25 (App. Div. 2022). In all other respects, the "best interests" test remains unchanged and in full force and effect for purposes of termination proceedings.

over adoption. She also contends that, in this specific instance, the trial court erred in finding that the resource parents expressed their unequivocal and informed preference for adoption.

After carefully reviewing the largely undisputed record in light of the governing legal principles, we affirm. Ultimately, the best interests of the child remains the foundational principle in the termination of parental rights statutory framework. Although we are sympathetic to D.R.'s situation—and emphasize that she is in no way responsible for the circumstances that render her permanently unable to parent the child—we conclude the record amply supports the trial court's determination that the child's interests are best served by his adoption by the resource parents who have cared for him since he was five-days-old.

I.

In November 2019, Judge James M. Blaney conducted a permanency hearing and approved the plan submitted by the Division of Child Protection & Permanency (Division) calling for termination of D.R.'s parental rights followed by adoption. The Division filed a guardianship complaint in January 2020.

In April 2021, the Division filed an amended guardianship complaint, naming the child's father, M.M., as a defendant after D.R. identified him to a

Division worker.[4] On October 12, 2021, Judge Blaney approved the Division's permanency plan of termination of both parents' parental rights followed by adoption.

Judge Blaney convened the guardianship trial over the course of four days between March and June 2022. Before the trial began, M.M. entered an identified surrender of his parental rights in favor of the resource parents.

On July 19, 2022, Judge Blaney entered a judgment of guardianship terminating D.R.'s parental rights, rendering an oral decision. The judge found that the Division had proven the four factors of the best interests standard by clear and convincing evidence and that adoption was in the child's best interest. By consent, visitation between D.R. and the child has continued through the pendency of this appeal.

D.R. raises the following contentions for our consideration:

> POINT I
>
> THE LANGUAGE OF THE STATUTORY BEST INTERESTS CAUSE OF ACTION TO TERMINATE PARENTAL RIGHTS, ENACTED AT N.J.S.A. 30:4C-15(c) AND N.J.S.A. 30:4C-15.1(a)(1) to (4), AND THE CONSISTENT JUDICIAL INTERPRETATION OF

[4] The child is the product of a sexual assault. Codefendant M.M. ultimately submitted to a court-ordered paternity test in July 2021, which confirmed he is the child's biological father. M.M. was charged with aggravated sexual assault of an incapacitated person, N.J.S.A. 2C:14-2(a)(7), and was incarcerated.

THE BEST INTERESTS CAUSE OF ACTION, FOCUSES ON HARMFUL PARENTAL CONDUCT WHICH CAN BE CORRECTED THROUGH REASONABLE EFFORTS; IT DOES NOT PROVIDE A CAUSE OF ACTION TO TERMINATE PARENTAL RIGHTS SOLELY ON THE BASIS OF A PARENT'S IRREMEDIABLE DEVELOPMENTAL DISABILITY WHEN THAT PARENT HAS PRESENTED NO HARMFUL CONDUCT TOWARD HER CHILD.

A. STANDARD OF APPELLATE REVIEW.

B. THE STATUTORY BEST INTERESTS OF THE CHILD CAUSE OF ACTION TO TERMINATE PARENTAL RIGHTS ENACTED UNDER N.J.S.A. 30:4C-15(c) AND N.J.S.A. 15.1(a)(1) TO (4).

C. HARMFUL PARENTAL CONDUCT IS THE STARTING POINT OF ANALYSIS UNDER THE BEST INTEREST[S] CAUSE OF ACTION.

POINT II

THE TRIAL COURT ERRED IN CONCLUDING THAT AN AWARD OF KLG TO [THE RESOURCE PARENTS] IS NOT THE APPROPRIATE PERMANEN[CY] PLAN; KLG ASSURES H.R.'S HEALTH, SAFETY, WELFARE AND PERMANENCY AND IS THE PLAN THAT IS CONSISTENT WITH THE LEGISLATURE'S RECENT STATUTORY AMENDMENTS AND DECLARATIONS.

D.R. additionally raises the following points in her reply brief:

POINT I

DCPP AND [THE OFFICE OF THE LAW GUARDIAN] [(]OLG[)] FAIL TO REFUTE D.R.'S ARGUMENT THAT THE STATUTORY BEST INTERESTS CAUSE OF ACTION ANTICIPATES HARM CAUSED BY PARENTAL CONDUCT WHICH IS ABLE TO BE REMEDIATED THROUGH REASONABLE EFFORTS; INDEED, THEIR RELIANCE UPON THE COURT'S DECISION IN IN RE GUARDIANSHIP OF D.M.H., 161 N.J. 365 (1999) FURTHER SUPPORTS D.R.'S ARGUMENTS.

POINT II

DCPP AND OLG FAIL TO REFUTE D.R.'S ARGUMENT THAT THE TRIAL COURT ERRED IN NOT CONCLUDING THAT KLG IS THE APPRORIATE PERMANENCY PLAN FOR H.R.

II.

Our review of a family judge's factual findings in a guardianship trial is limited. In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002). Findings by a Family Part judge are "binding on appeal when supported by adequate, substantial, and credible evidence." Cesare v. Cesare, 154 N.J. 394, 412 (1998) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). We may reverse a family court's factual finding only if it was so "clearly mistaken" or "wide of the mark" that it results in a "denial of justice." Parish v. Parish, 412 N.J. Super. 39, 48 (App. Div. 2010) (quoting N.J. Div. of Youth & Fam.

Servs. v. E.P., 196 N.J. 88, 104 (2008)); see also Cesare, 154 N.J. at 412 (holding an appellate court should not disturb the trial court's factual findings unless they are "so manifestly unsupported by or inconsistent with the competent, relevant, and reasonably credible evidence as to offend the interests of justice" (quoting Rova Farms, 65 N.J. at 484)).

"[T]he conclusions that logically flow from those findings of fact are, likewise, entitled to deferential consideration upon appellate review." N.J. Div. of Youth & Fam. Servs. v. R.L., 388 N.J. Super. 81, 89 (App. Div. 2006). However, the "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). "Whether the facts found by the trial court are sufficient to satisfy the applicable legal standard is a question of law subject to plenary review on appeal." State v. Cleveland, 371 N.J. Super. 286, 295 (App. Div. 2004); see also N.J. Div. of Child Prot. & Permanency v. A.B., 231 N.J. 354, 369 (2017) ("[W]e review the judge's legal conclusions de novo.").

III.

We first address D.R.'s contention that the statutory framework does not authorize the termination of parental rights based on a parent's irremediable

developmental disability but rather focuses on harmful parental conduct, requiring that parents be provided an opportunity to remediate such harmful conduct.

A parent has a constitutional right to raise his or her biological child, which "is among the most fundamental of all rights." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 447 (2012) (citing E.P., at 102). However, 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).

By enacting N.J.S.A. 30:4C-15(a) to (f), the New Jersey Legislature established five[5] distinct causes of action for termination of parental rights: (1) when a parent has been convicted of child abuse, N.J.S.A. 30:4C-15(a); (2) when termination of parental rights is proved to be in the best interests of a child in Division custody, N.J.S.A. 30:4C-15(c); (3) when a parent has failed to remove the circumstances that have led to the placement of a child after one year of placement, N.J.S.A. 30:4C-15(d); (4) when a parent has abandoned a child,

[5] The condition contained in N.J.S.A. 20:4C-15(b) was deleted by amendment, L. 1991, c. 275.

N.J.S.A. 30:4C-15(e); or (5) when a parent has been convicted of specifically enumerated offenses, N.J.S.A. 30:4C-15(f).

With respect to the best interests cause of action at issue in this appeal, the Legislature created a multi-part test. Specifically, N.J.S.A. 30:4C-15.1(a) requires the Division to prove four prongs by clear and convincing evidence:

> (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).]

These 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). "The considerations involved in determinations of parental fitness are 'extremely

fact sensitive' and require particularized evidence that address the specific circumstances in the given case." Ibid. (quoting In re Adoption of Child. by L.A.S., 134 N.J. 127, 139 (1993), superseded by statute on other grounds, N.J.S.A. 9:3-46(a)). The trial court must consider "not only whether the parent is fit, but also whether he or she can become fit within time to assume the parental role necessary to meet the child's needs." R.L., 388 N.J. Super. at 87 (citing In re Guardianship of J.C., 129 N.J. 1, 10 (1992), superseded by statute on other grounds, N.J.S.A. 9:3-46(a)). When applying the best interests test, moreover, a trial court must pay careful attention to "the need to secure permanency and stability for the child without undue delay." D.M.H., 161 N.J. at 385.

Our Legislature did not include a specific condition identifying a disability-related ground for termination of parental rights. However, nothing in the text or legislative history of N.J.S.A. 30:4C-15 precludes a court from considering a parent's disability in determining whether all four prongs of the best interests test have been proven. Here, the court's consideration of D.R.'s severe and permanent cognitive limitations was based on unrefuted expert testimony, including the opinion of her own expert.

It is well-settled that "a psychiatric disability can render a parent incapable of caring for his or her children." N.J. Div. of Youth & Fam. Servs. v. I.Y.A., 400 N.J. Super. 77, 94 (App. Div. 2008). This is so even if parents are "morally blameless." N.J. Div. of Youth & Fam. Servs. v. A.G., 344 N.J. Super. 418, 438 (App. Div. 2001) (citing In re Guardianship of R., 155 N.J. Super 186, 194 (App. Div. 1977)). Sympathy for a parent's situation, moreover, "cannot blind us to the parens patriae responsibility to consider the needs and the interests of" the child. In re Guardianship of A.A.M., 268 N.J. Super. 533, 545 (App. Div. 1993). Applying those general principles, we thus reject the notion that the trial court was foreclosed from considering D.R.'s permanent disability in applying the best interests test.

We likewise reject D.R.'s assertion that the four-pronged best interests test cannot be applied absent proof that the parent caused harm to the child. We reiterate that N.J.S.A. 30:4C-15 does not require proof of harmful conduct, but rather provides in no uncertain terms that the "Division shall petition to terminate parental rights" whenever it appears to be in the child's best interests. N.J. Div. of Youth & Fam. Servs. v. I.S., 202 N.J. 145, 196 (2010). Actual harm is not required as "[c]ourts need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." D.M.H., 161 N.J. at

383 (citing N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 616 n.14 (1986)). Accordingly, the Division was authorized, and indeed obliged, to file the action to terminate D.R.'s parental rights. So too, Judge Blaney applied the appropriate analytical framework—the best interests test—in reaching his decision to terminate D.R.'s parental rights.

IV.

We turn next to D.R.'s arguments regarding KLG. She quotes L. 2021, c. 154 § 1 for the proposition that "the Legislature proclaimed kinship care is the 'preferred' plan for children who are removed from their parents because parental rights must be 'preserved and protected whenever possible.'" D.R. also relies on the following language embedded in the 2021 Amendments:

> Kinship care is the preferred resource for children who must be removed from their birth parents because use of kinship care maintains children's connections with their families. There are many benefits to placing children with relatives or other kinship caregivers, such as increased stability and safety as well as the ability to maintain family connections and cultural traditions.
>
> [L. 2021, c. 154 § 1(b).]

But D.R. reads these two sentences out of context. Contrary to her expansive interpretation, the 2021 Amendments did not elevate KLG above adoption; rather, it put these options on equal footing. The law remains that a

court is not required to impose KLG where the caregiver has decided against KLG in favor of adoption and when adoption is in the child's best interests. Indeed, all parties agreed at oral argument before us that KLG cannot be imposed on resource parents against their will.

D.R. also misinterprets the significance of the Legislature's elimination of language from the KLG statute at N.J.S.A. 3B:12A-6(d)(3) requiring the court to 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 that requirement is a relevant factor in a determination as to whether KLG is an appropriate permanency option. But contrary to the gravamen of D.R.'s legal argument, the revisions to the KLG statute have no application to a termination of parental rights trial. Rather, the statute now ensures 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 simply because it removed the requirement that adoption be unfeasible or unlikely.

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 interests 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 otherwise unchanged plain text of N.J.S.A. 30:4C-15.1(a)(2) to (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 the resource parent in its determination of whether delay of permanent placement will add to the harm facing the child.

V.

Finally, we address D.R.'s contention that Judge Blaney abused his discretion in finding that the resource parents made clear their preference for adoption over KLG. The resource mother testified that she and her husband want to adopt the child because they want him to be "a hundred percent" part of their family. The Division had discussed KLG and adoption with them, and they want to adopt the child because they believe it is "more permanent," would allow them to give the child their last name, and would prevent the biological parents from trying to vacate or amend the KLG.

D.R. relies on an isolated portion of the resource mother's cross-examination in which she testified—when presented with a hypothetical ultimatum—that she would keep the child if the court ordered KLG against her unequivocal preference for adoption. After testifying that she and her husband understood the difference between adoption and KLG, want to adopt H.J.R. as opposed to being his kinship legal guardians, and explained their reasoning, the following exchange occurred:

> [D.R.'S COUNSEL]: But as [D.R.]'s attorney, I have to make legal arguments that are available to her and one of them would be to try to convince the [c]ourt that [KLG] is the appropriate permanent plan for [H.J.R.]. If [D.R.]'s arguments to that extent are successful, would you still keep [H.R.J.] in your home?
>
> [RESOURCE MOTHER]: Yes.

On redirect, the resource mother further explained her concerns regarding KLG. She expressed disgust regarding the biological father and fear that KLG would allow him or the maternal grandmother to try to get involved or otherwise upset H.J.R.'s permanency.

Judge Blaney found that the Division explained to the resource parents on more than one occasion what KLG meant, they understood, and they indicated that they were only interested in adoption. He noted the resource parents' "position never changed except to the extent that [the resource mother] . . .

indicated during her testimony that [if ordered] by the [c]ourt to have [KLG], she would still care for [the child]." Nevertheless, Judge Blaney found that "her answer given during cross-examination that she would ultimately accept a court ruling requiring a KLG did not in any way diminish her and her husband's desire to adopt."

It is well-settled that evidence that establishes a resource parent's clear and informed preference for adoption remains relevant to, though not dispositive of, a trial court's finding that there are no alternatives to termination of parental rights under the best interests test. N.J. Div. of Child Prot. & Permanency v. M.M., 459 N.J. Super. 246, 262–64 (App. Div. 2019). The record amply supports Judge Blaney's finding that the resource parent's preference for adoption was clear, informed, and unequivocal. See id. at 264–65; N.J. Div. of Youth & Fam. Servs. v. T.I., 423 N.J. Super. 127, 130 (App. Div. 2011). We reiterate that we owe substantial deference to the trial court's factual findings. Cesare, 154 N.J. at 412.

To the extent we have not specifically addressed them, any remaining arguments raised by D.R. lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). As we have indicated, by consent, D.R.'s visitation with the child has continued throughout the pendency of this appeal. At D.R.'s request and by

consent of respondents before us at oral argument, we direct that such visitation shall continue throughout the pendency of any appeal or petition to the Supreme Court from our decision.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION