RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3950-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANANCY,

Plaintiff-Respondent,

v.

T.R.F. and K.L.,

Defendants,

and

K.W.,

Defendant-Appellant.

IN THE MATTER OF THE
GUARDIANSHIP OF T.N.F.,
T.J.W., and A.K.L., minors.

Submitted October 4, 2023 – Decided October 27, 2023

Before Judges Firko and Susswein.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FG-09-0115-20.

Joseph E. Krakora, Public Defender, attorney for appellant (Carol A. Weil, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Meaghan Goulding, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors T.N.F and T.J.W (Meredith Alexis Pollock, Deputy Public Defender, of counsel; David B. Valentin, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

Defendant, K.W.,[1] appeals from the August 2, 2022 Family Part order terminating his parental rights to his two minor children, T.N.F. (Theo), born in September 2011, and T.J.W. (Tessa), born in April 2015.[2] Judge Radames Velazquez, Jr., convened the guardianship trial and issued a twenty-five page written decision. The Law Guardian supported termination. Defendant

[1] We use initials and pseudonyms to protect the identity of the parties and confidentiality of these proceedings. R. 1:38-3(d)(12).

[2] The Family Part order also terminated the parental rights of the children's mother, co-defendant T.R.F. (Tammy). She does not appeal from the order.

contends the trial judge misapplied the "best interests" statutory test, N.J.S.A. 30:4C-15.1(a), in view of recent statutory revisions codified in L. 2021, c. 154 (the 2021 Amendments). After carefully reviewing the record in light of the parties' arguments and governing principles of law, we affirm.

I.

The pertinent facts and procedural history are fully recounted in Judge Velazquez's comprehensive written opinion and need only be briefly summarized. The Division of Child Protection and Permanency (the Division) presented testimony from two caseworkers, a psychologist, Dr. Gerard Figurelli, Ph.D., and the children's current resource parent, B.P. (Brenda). The Division became involved with the family immediately after Theo was born. Defendant and Tammy were teenage parents. The Division offered numerous services to assist them, including parenting classes, counseling, psychological evaluations, anger management services, substance abuse services, supervised visitation, and transportation services. Defendant was noncompliant.

Theo was born visually impaired and is legally blind. In September 2017, the Division was notified he had not been attending school. When Division caseworkers met with Theo in October, they observed marks and bruises on his

body. Theo disclosed defendant hit him after he urinated on himself. Theo further stated his father would strike him with his hand or a belt.

After a fact-finding hearing, in April 2018, a Family Part judge concluded defendant physically abused Theo by hitting him with a belt because he "peed" himself. Theo and Tessa were eventually placed with Brenda, who reads Braille and teaches it. She has been Theo's teacher since he was three years old.

The Division continued to offer services to defendant, but he remained noncompliant. Following visits with defendant, Theo experienced bedwetting, anxiety, and expressed concern about what would happen to him. Eventually, defendant stopped visiting the children and lost touch with the Division. His last visit with Theo and Tessa was in September 2021—Theo became upset and the visit ended early.

Dr. Figurelli performed a psychological evaluation of defendant in March 2020. Dr. Figurelli testified defendant did not accept responsibility for the Division's ongoing involvement in his life. When asked how he planned to discipline his children, defendant stated, "[u]nder five or four, you gotta do hand pops—pop their hand." Defendant further told Dr. Figurelli he would make Theo "stand up against the wall, hold books, and do squats." Dr. Figurelli expressed concern regarding whether defendant had adequately addressed his

anger issues. Dr. Figurelli recommended defendant engage with a parent mentor and participate in individual therapy, family therapy, and co-parenting counseling with Tammy. He also recommended defendant obtain stable housing and employment. Dr. Figurelli testified that his opinion would not change until defendant completed the recommended services.

Dr. Figurelli also testified regarding the bonding evaluations he conducted. He noted both children were comfortable and spontaneous with Brenda, and that Tessa's improved behaviors showed she now trusted Brenda. He further opined Brenda would be able to mitigate any harm caused by the loss of their relationship with defendant.

With respect to the bonding between the children and defendant, Dr. Figurelli testified Theo and Tessa displayed a significant positive attachment to their father. He noted, however, that while Theo and Tessa recognize defendant as their biological father, they view Brenda as their psychological parent. He concluded defendant's refusal to engage in services rendered him unable to safely parent Theo and Tessa, and delay in permanency would "do more harm than good."

Brenda testified she had been Theo's teacher since he was three. She explained he transitioned well into her home. Tessa's transition was more

difficult. She stole food and had tantrums at school and home. However, Tessa's behaviors improved within a year.

Brenda testified she understood the differences between Kinship Legal Guardianship (KLG)[3] and adoption. Her preference was to adopt the children because they need stability.

II.

Based on the trial testimony, Judge Velazquez found the Division proved all four prongs of the best-interests test by clear and convincing evidence. With respect to the first prong of the test codified in N.J.S.A. 30:4C-15.1, the judge found the children's health and development have been and continue to be endangered by defendant's aggression, physical punishment of the children, and lack of stable housing.

With respect to prong two, the judge found defendant failed and continued to fail to rectify the harms warranting the Division's involvement. The judge stressed, "both parents were granted multiple opportunities for visits,

[3] A KLG 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).

evaluations, and treatment programs, yet have displayed a wonton indifference toward these issues." The judge further found defendant failed to complete services offered by the Division and failed to obtain stable housing. The judge added defendant refused to maintain contact with the Division, failed to establish the baseline for reunification, and was unable to grasp the harm to the children.

With respect to the third prong, Judge Velazquez found the Division considered alternatives to termination by inquiring of relatives whether they were interested in KLG. The judge noted defendant was provided with opportunities to identify additional relatives he wanted assessed, but he failed to do so. The judge also found Brenda understood the distinction between KLG and adoption, and expressed a clear preference to adopt.

With respect to the fourth prong, the judge found termination of parental rights would not do more harm than good. In reaching that conclusion, the judge considered that the children have spent an extensive period of time in foster care. The judge stressed defendant had ample opportunity to engage in services offered by the Division but failed to take advantage of them. The judge also considered the children's progress while in Brenda's care. While acknowledging Dr. Figurelli's testimony that defendant had a bond with the children, the judge

reiterated defendant failed to engage in services, rendering him unfit to parent them.

III.

Defendant contends on appeal that the trial court erred by placing undue reliance on the caregiver bond to support termination of parental rights; by failing to consider the alternative of KLG in disregard of the 2021 amendments; and by holding the Division proved termination of parental rights would not do more harm than good.

We begin our analysis by acknowledging the legal principles governing this appeal. Our review of a Family Part judge's factual findings in a guardianship trial is limited. In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002). Those findings are "binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 412 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). We may reverse a factual finding only if there is "'a denial of justice' because the family court's 'conclusions are [] "clearly mistaken" or "wide of the mark."'" Parish v. Parish, 412 N.J. Super. 39, 48 (App. Div. 2010) (alteration in original) (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 Resort, Inc., 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. & Perm. v. A.B., 231 N.J. 354, 369 (2017) ("[W]e review the judge's legal conclusions de novo."). We add that no appellate deference is owed to a trial court's interpretation of a statute. Maeker v. Ross, 219 N.J. 565, 574 (2014) (citing Aronberg v. Tolbert, 207 N.J. 587, 597 (2011)); see also N.J. Div. of Child Prot. & Perm. v. Y.N., 220 N.J. 165, 177 (2014) ("[W]e need not defer to the Appellate Division's or trial court's interpretive conclusions.").

Turning to substantive legal principles, 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., 196 N.J. 88, 102 (2008)). 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).

To effectuate those concerns, the Legislature created a multi-part test to determine when it is in the child's best interest to terminate parental rights. 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 Division 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.

The four prongs of the statutory test 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 addresses 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. 81 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 a child's need for permanency and stability without undue delay. In re Guardianship of D.M.H., 161 N.J. 365, 385-86 (1999).

In July 2021, the Legislature adopted amendments to the kinship care statutory framework by enacting L. 2021, c. 154. The 2021 amendments

recognize the importance of supporting kinship care and the benefits of retaining the parent-child relationship. The amendments relaxed the requirements for a person to qualify as a caregiver for KLG. Relatedly, the requirement that adoption be "neither feasible nor likely" as a prerequisite to appointment as a kinship legal guardian was eliminated within the KLG statute, N.J.S.A. 3B:12A-6. As we later explain, the 2021 amendments made only one revision to the best-interests test codified in N.J.S.A. 30:4C-15.1. Specifically, the 2021 amendments deleted language from prong two that previously allowed a court to consider the harm separating the child from their resource family parent would cause to the child. N.J.S.A. 30:4C-15.1(a)(2). Importantly for purposes of this appeal, prongs one, three, and four were not altered by the 2021 amendments.

IV.

We first address defendant's contention the trial court failed to consider KLG as an alternative to termination of parental rights. Contrary to defendant's contention, the trial judge found the Division made efforts to evaluate alternatives to adoption. Judge Velazquez noted the Division explored multiple relatives to determine if they were interested in KLG. That finding is amply supported by credible evidence adduced at trial. The court entered an order on

August 30, 2021 directing defendants to provide the Division names and contact information for any relatives interested in KLG within 10 days. Neither parent provided any other names of possible kinship legal guardians. The Division was unable to assess any other relatives for possible kinship legal guardianship since that date.

We are unpersuaded by defendant's contention the judge failed to consider that the children had a "whole biological family and culture in addition to each other." The judge found the Division made adequate efforts to find a relative suitable for KLG. Although those efforts were unsuccessful, it was through no fault of the Division. We are satisfied, therefore, the judge's findings with respect to permanency alternatives to adoption are supported by credible evidence.

V.

We next address defendant's contentions concerning kinship care. Defendant argues the eligibility requirement for classification as "kin" was broadened in the 2021 amendments to include a non-relative caregiver, allowing Brenda to serve in a kinship care role, which would have protected and preserved his parental rights. He also argues kinship care is now the preferred resource for permanency under New Jersey law.

Specifically, the 2021 amendments revised N.J.S.A. 3B:12A-6(d)(3) by deleting language which required a court to find "adoption of the child is neither feasible nor likely" before appointing a kinship legal guardian. Defendant argues the deletion of this language means KLG is now the preferred permanency plan for children whose parents are unable to care for them but nevertheless share a positive bond.

Defendant overstates the breadth and impact of the 2021 amendments. Although those amendments strengthen the role of kinship care, see N.J. Div of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 27 (App. Div. 2022), they do not preclude adoption when KLG is possible. The 2021 amendment to the KLG statute ensures a resource parent's willingness to adopt no longer forecloses KLG. The amendment to N.J.S.A. 3B:12A-6(d)(3), however, does not alter the best-interests test set forth in N.J.S.A. 30:4C-15.1(a)(1) to (4). Had the Legislature intended to reformulate the best-interests test in the manner defendant suggests, it would have done so directly by amending N.J.S.A. 30:4C-15.1(a), not impliedly by amending N.J.S.A. 3B:12A-6(d)(3). Indeed, the Legislature did amend the best-interests test by deleting language from N.J.S.A. 30:4C-15.1(a)(2) (prong two) that previously allowed a court to consider the harm separating the child from their resource family parent would cause to the

child. The absence of any other revision to the best-interests test in the 2021 amendments is conspicuous and telling. Cf. DiProspero v. Penn, 183 N.J. 477, 495 (2005) ("'The canon of statutory construction, expressio unius est exclusio alterius—expression of one thing suggests the exclusion of another left unmentioned—sheds some light on the interpretative analysis.'" (quoting Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 112 (2004)). In sum, the plain language of the 2021 amendments shows the Legislature had the ability to amend the best-interests but did so only with regard to prong two.

VI.

We turn next to defendant's argument the Division did not prove by clear and convincing evidence that Brenda made a knowing choice of adoption. The law is well-settled that caretakers who may be interested in KLG must be adequately informed of the nature of such an arrangement" and the financial and other services for which they may be eligible." N.J. Div. of Child Prot. & Permanency v. M.M., 459 N.J. Super. 246, 260-61 (App. Div. 2019). Here, Brenda testified she had discussions with a Division caseworker about the differences between KLG and adoption and was given explanatory paperwork. The caseworker also testified and corroborated that Brenda was informed about the differences between KLG and adoption. Brenda testified she understood

what KLG is and expressed her preference to adopt rather than to become a kinship legal guardian. She even gave an explanation for that election, stating the children need stability and she could give them that by adopting them. Judge Velazquez's findings are thus amply supported by the evidence.

VII.

We likewise reject defendant's contention the Division failed to prove the fourth prong of the best interest test, that is, that termination of parental rights would not do more harm than good. In M.M., we explained "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." 189 N.J. at 281; see D.C.A., 474 N.J. Super. at 26.

Here, the Division presented expert testimony by Dr. Figurelli. Defendant contends the trial judge gave undue weight to Dr. Figurelli's opinion regarding the bonding evaluations he conducted. We disagree. We owe substantial deference to a Family Part judge's assessment of the credibility and weight to be accorded expert testimony. R.G., 217 N.J. at 552. We see no abuse of discretion here.

Defendant also contends Judge Velazquez failed to consider the secure and positive attachment Tessa and Theo had with their father. That argument is belied by the record. Dr. Figurelli testified there was a positive bond between defendant and the children. But the expert further opined that despite that bond, it would be in the children's best interests to be adopted so long as defendant had not completed and benefitted from the recommended services.

We stress that an overarching question in a best-interest analysis is "whether the parent can become fit in time to meet the needs of the children." F.M., 375 N.J. Super. at 263; see also N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 512 (2004), (indicating even if a parent is trying to change, a child cannot wait indefinitely); D.M.H., 161 N.J. at 385 ("[W]e are mindful of strong policy considerations that underscore the need to secure permanency and stability for the child without undue delay."). Finally, we address defendant's contention the trial court improperly considered Theo and Tessa's bond with Brenda under the fourth prong, on the grounds the 2021 amendments eliminated consideration under the second prong of whether proof that separating a child from the child's foster parents would cause serious and enduring emotional or physical harm.

In D.C.A., we held:

> The amended statute, in our view, requires a court to make a finding under prong two that does not include considerations of caregiver bonding, and then weigh that finding against all the evidence that may be considered under prong four—including the harm that would result from disrupting whatever bonds the child has formed.
>
> [D.C.A., 474 N.J. Super. at 29.]

We added, "[w]e do not understand the [2021] amendments to prong two to mean that such a bond may never be considered within any part of the best interests analysis." Id. at 26. Finally, we stressed, . . . "courts must, at the very least, consider the child's bond to a current placement when evaluating prong four. . . ." Id. at 28.

Accordingly, we hold in this instance, it was entirely appropriate for Judge Velazquez to consider Theo and Tessa's bond with Brenda in his prong four analysis. We add that the children's need for permanency is, of course, a vital consideration under the fourth prong. See M.M., 189 N.J. Super. at 281.

To the extent we have not addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.