

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4043-21
A-4044-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

L.M.H. and R.C.T.,

Defendants-Appellants.

IN THE MATTER OF THE
GUARDIANSHIP OF A.M.T.,
a minor.

Submitted May 3, 2023 – Decided June 13, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Atlantic County,
Docket No. FG-01-0012-22.

Joseph E. Krakora, Public Defender, attorney for appellant L.M.H. (Amy Vasquez, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant R.C.T. (Louis W. Skinner, Designated Counsel, on the briefs).

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

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

PER CURIAM

In these consolidated matters, defendants L.M.H. (Lauren) and R.C.T (Richard) appeal from a final judgment terminating their parental rights to their daughter A.M.T. (Allison), now three years old.¹ They contend the Division of Child Protection and Permanency failed to prove the four prongs of the best interests standard of N.J.S.A. 30:4C-15.1(a)(1)-(4) by clear and convincing evidence. The law guardian for Allison joins with the Division in urging we affirm the judgment. Having considered defendants' arguments in

¹ These names are fictitious to protect the child's identity; records relating to Division of Child Protection and Permanency proceedings conducted pursuant to Rule 5:12 are excluded from public access. See R. 1:38-3(d)(12).

light of the record and controlling law, we affirm the termination of their parental rights.

The facts are fully set forth in the trial court's fifty-page written opinion, and we need not repeat them here. We summarize only so much of the record as necessary to put our decision in context.

Allison was born in June 2020, suffering withdrawal symptoms after Lauren lost her insurance, and thus her access to methadone, during her pregnancy and admitted resorting instead to morphine, Percocet and fentanyl lollipops. Although not the reason for the Division's initial involvement with Allison, Richard was not without his own drug problems. He had been a participant in drug court since 2017. Because neither Lauren nor Richard could safely assume Allison's care, the Division consulted them about who might be able to care for the baby in the short term. Lauren's mother was already caring for three of Lauren's other children and could not take on Allison, too. Richard mentioned his mother and sister lived locally, but he didn't provide the Division their names or any contact information. No one else they suggested could care for their daughter.

When Allison was finally released from the NICU (neonatal intensive care unit) over a month after she was born, the Division placed her with Ms. J

and her husband, who were raising Allison's half-sister, whom they'd adopted following the termination of Lauren's parental rights to that child. Doctors continued to treat Allison, the doctors having released her on phenobarbital. Ms. J reported Allison cried for hours on end as she was weaned off the drug. Neither Lauren nor Richard was ever able to assume Allison's care and custody, and she remained in resource care with Mr. and Ms. J through trial over two years later in the summer of 2022.

During those ensuing two years, the Division attempted to assist defendants in overcoming the conditions that led to Allison's removal from their care. Both Lauren and Richard engaged in a variety of in-patient and intensive out-patient drug treatment programs, resulting, however, in only temporary reprieves from what appear to be their intractable addiction problems. Richard's treatment was managed through drug court, but the Division made no fewer than nine referrals for substance abuse treatment programs for Lauren. She attended some, but with little success. The Division also oversaw supervised visitation for both Lauren and Richard and referred them to parent support services for assistance with budgeting, housing and other programs for parenting skills.

There were certainly times when both Lauren and Richard made positive strides. Lauren moved into a one-bedroom apartment in early 2021 with the help of a program that assists persons having "disabilities and disadvantages" with housing and employment. Although Richard was discharged from his intensive outpatient program in March after the staff reported intimidating behavior on his part, both parents re-engaged in parent support services. In May 2021 both Lauren and Richard were compliant with drug treatment and had found jobs. Lauren was working as a waitress and Richard as a barber. They were approved for unsupervised visits with Allison in June. Those ended in July, however, when both Lauren and Richard again tested positive for illicit drugs.

In August, both Lauren and Richard began to miss visits with Allison. Despite Lauren's and Richard's recent setbacks, the court again approved an extension of a permanency plan, the second, to further assess their compliance with services. In the ensuing weeks, Lauren failed to engage in treatment and declined to attend a four-day-a-week intensive out-patient program. Richard's Probation Officer recommended he enter a sober living home, but Richard had yet to do so. Both parents failed to respond to the Division's request they

provide urine screens. In September, the court approved a permanency plan of termination of parental rights.

Although Lauren and Richard visited Allison together in mid-September 2021, Lauren never visited her again. Richard entered another in-patient treatment program in October. That same month, Lauren admitted she was injecting the fentanyl Richard left behind into her hands, resulting in open, oozing wounds. Richard completed a month of in-patient treatment and transitioned to a sober living program where he could receive both mental health and substance abuse services. He stopped visiting Allison in December, however, a month before he walked away from the program in January 2022. He was arrested on a warrant in February for violating his drug court probation and was subsequently sentenced to five years in prison. He remained incarcerated at the time of trial.

Lauren never attended psychological or bonding evaluations, although they were repeatedly rescheduled for her. Thus, the Division's forensic psychology expert, Alan J. Lee, Psy.D., could offer no opinion of her parenting abilities or bond with Allison at trial. Dr. Lee, was, however, able to evaluate Richard. Dr. Lee testified Richard acknowledged prior incarcerations, and that he'd spent significant portions of his life in prison for drug-related offenses.

Dr. Lee found Richard had "an entrenched and maladaptive personality and character traits" in the making since his childhood, and the prognosis for lasting change was poor. The doctor opined Richard had a heightened risk of drug relapse and criminal recidivism and did not support Allison being committed to his care. Dr. Lee found Allison shared "an ambivalent and insecure attachment" with her father, and concluded she would likely not suffer any lasting harm if her relationship with him was ended.

In contrast, Dr. Lee found Allison shared a secure and positive attachment to both Mr. J and Ms. J, with whom she had lived nearly all of her short life. He opined Allison exhibited feelings of safety and security in their care and severing that relationship would cause Allison severe and enduring harm.

Based on her detailed rendition of the facts adduced at trial and her assessments of the credibility of the witnesses who testified, the judge found the Division established all four prongs of the best interests standard by clear and convincing evidence. The judge found Lauren and Richard harmed Allison by failing to provide her a safe and stable home because of their unremitting substance abuse, which prohibited them from "being independent caregivers" for their daughter. The judge found the persistence of defendants'

drug problems despite being offered a myriad of treatment options, Lauren's unwillingness to re-engage in services and Richard's failure to successfully complete drug court demonstrated their inability to recognize or eliminate the harm they'd inflicted, and that further delay in providing Allison a permanent home will only add to the harm they've already caused the child.

Cataloging the many referrals for services the Division provided Lauren and Richard, the judge concluded the Division had "unequivocally" met its obligation to provide them the services they needed to correct the conditions that led to Allison's placement. The judge also found the Division had explored, without success, alternatives to termination, assessing, and ruling out, all friends and relatives put forth by Lauren, as well as Richard's sister in Virginia, whom he offered as a possible placement for Allison only at the end of March 2022. Even then, however, he failed to provide the Division with his sister's contact information, resulting in her Interstate Compact investigation not getting underway until June 2022, only weeks before the start of trial.

The judge noted Richard's sister testified she only learned Allison was in resource care at the end of March 2022 when she contacted the Division. She offered herself as a resource parent or Kinship Legal Guardian. Richard apparently conceded to Division workers he'd not told his family that Allison

was in custody of the Division and in resource care. Richard's sister had never met Allison, although she'd had one video visit. She was not aware Allison had been with the resource parents from a month of her birth. The judge found delaying permanency for Allison to permit the Division to assess Richard's sister was not in Allison's best interest at the time of trial.

Finding Ms. J and her husband well-informed of the difference between adoption and KLG, the judge noted Ms. J testified at trial to her belief that adoption would be better for Allison than KLG, and that she and her husband were committed to adopting her. The judge noted Ms. J testified Allison "is doing well, has a bright future, and 'she should know she has and can depend on a nurturing, loving, dependable environment to grow up in.'" The judge found "KLG is not an option here," citing New Jersey Division of Youth and Family Services v. R.G., 217 N.J. 527, 558-59 (2014) (alteration in original) (holding "when the permanency provided by adoption is available, [KLG] cannot be used as a defense to termination of parental rights" (quoting N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 513 (2004))).

Finally, the judge concluded, based on the expert testimony, that termination of Lauren's and Richard's parental rights would not do more harm than good. She relied on the results of the positive bonding evaluations

between Allison and Ms. J and her husband and the expert's testimony that Allison would not be safe in her parents' care.

Specifically, the judge noted Lauren's acknowledgement, quoted by the Division worker at trial, that she didn't have a bond with Allison, and Dr. Lee's opinion that Richard's bond with Allison was neither significant nor positive. In contrast, the judge found Allison "has been thriving in the care of the resource parents." The judge also highlighted the testimony offered by Ms. J that she'd known Lauren and her family for many years before adopting Lauren's fourth child nearly sixteen years ago. The judge noted Ms. J's testimony about the positive relationship between Allison and her sixteen-year-old half-sister, and Ms. J's efforts to maintain Allison's connection to her grandmother, Lauren's mother, and Allison's other siblings. The judge concluded Allison deserved the stability and permanency her parents had been unwilling or unable to provide, and that termination of their rights would further that end.

Our review of a trial court's decision to terminate parental rights is limited. N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448-49 (2012). We generally "defer to the factual findings of the trial court because it 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)). As our Supreme Court has reminded in respect of termination of parental rights, "a trial court's factual findings 'should not be disturbed unless they are so wholly unsupportable as to result in a denial of justice.'" P.P., 180 N.J. at 511 (quoting In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)).

Our review convinces us the trial judge's findings are amply supported by the trial testimony and the Division's records in evidence. The record makes abundantly clear that neither Lauren nor Richard was able to overcome their addictions and provide Allison a safe and stable home at any point after she was removed from their care at birth.

We reject Lauren's claim the Division failed to prove the first two prongs of the best interests test because the absence of Allison's birth records and any finding of abuse or neglect left it unable to establish Allison tested positive for opiates at birth by clear and convincing evidence and would be harmed by continuing her relationship with Lauren, and that the Division did

not establish her unwillingness to remediate the harm because it never provided services to treat her underlying mental health issues.

The judge's first and second prong findings were not based on Allison being born addicted to drugs, but on Lauren's own unremitting addiction, which prevented her from ever safely assuming Allison's care. As for Lauren's claim that she never received appropriate mental health services, she was prescribed medication to address her mental health issues, and the record is clear she experienced improvements to her mental health when she complied with the program offered by her service providers — as when she was cleared for unsupervised visitation in June 2021. Indeed, the record makes abundantly clear that Lauren's inability to complete services, sustain sobriety and maintain consistent contact with Allison are what prevented her reunification with her daughter, not the Division "failing to individualize an appropriate case plan."

We likewise reject Richard's claim the Division failed to prove he "abandoned Allison" as a result of his incarceration, that his substance abuse and relapses, which do not constitute harm per se, did not harm Allison and that the trial court relied on his history of drug abuse in her findings on the first and second prongs instead of his "well-documented efforts" to remain clean and sober.

In arguing against abandonment, Richard responds to a claim the Division never made and the court never adjudicated. Moreover, Richard's parental rights were not terminated because he used illegal drugs on occasion or was sent to prison for it. The court found Richard harmed Allison because he was never able to safely assume her care and custody over the two years the litigation was pending because of his chronic, unremedied substance abuse, which deprived her of his care, protection and solicitude. See In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999) ("A parent's withdrawal of that solicitude, nurture, and care for an extended period of time is in itself a harm that endangers the health and development of the child.").

That Richard's substance abuse was of "such a serious nature" and "so pervasive" that he could not successfully address it even with the intense supervision and incentive of drug court, made clear to the judge that Richard is "unable to refrain" from continuing to injure Allison in the same manner. Richard's argument that the Division "focused efforts on treatment that was not at issue, namely substance abuse" instead of assisting him with housing is not of sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

We agree with Lauren the trial judge erred in finding "KLG is not an option here," because Ms. J and her husband were willing to adopt Allison. The 2021 amendment to the KLG statute, N.J.S.A. 3B:12A-6(d)(3), L. 2021, c. 154, § 4, deleted the condition a court find that adoption was "neither feasible nor likely" before awarding KLG, making KLG an equally available permanency plan for children in Division custody, like Allison.

Lauren, however, is incorrect in asserting the judge erred in comparing the harm Allison would suffer from terminating her relationship with Lauren and Richard with the harm she would suffer from terminating her relationship with Ms. J and her husband under the fourth prong. As our Supreme Court made clear in In re Guardianship of K.H.O., 161 N.J. 337, 355 (1999), that is the test of the "failsafe" fourth prong: "whether, after considering and balancing the two relationships," that is the child and her biological parents and the child and her resource parents, "the child will suffer a greater harm from the termination of ties with her natural parents than from the permanent disruption of her relationship with her foster parents." The 2021 amendments to N.J.S.A. 30:4C-15.1(a)(2) did not alter the fourth prong test.

The Legislature in 2021 amended the second prong of the best interests analysis, that "[t]he 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," by deleting the sentence that formerly followed, i.e., that "[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." L. 2021, c. 154, § 9.

The focus of the second prong has always been properly on the parents and their ability and willingness to abate the harm requiring the out-of-home placement. See In re Guardianship of J.C., 129 N.J. 1, 10 (1992); N.J. Div. of Youth & Family Servs. v. F.M., 375 N.J. Super. 235, 263 (App. Div. 2005). The statute's reference to the delay in permanent placement speaks only to the time a court can wait for a parent to resume care and custody. See N.J. Div. of Youth & Fam. Servs. v. C.S., 367 N.J. Super. 76, 111 (App. Div. 2004).

By prohibiting evidence of the emotional or psychological harm a child might suffer if separated from the resource parents in applying the test of the second prong, that is "whether the parent can cease causing the child harm before any delay in permanent placement becomes a harm in and of itself," N.J. Div. of Youth & Fam. Servs. v. A.G., 344 N.J. Super. 418, 434 (App. Div. 2001), the Legislature has focused courts on "the cornerstone of the inquiry,"

that is "whether the biological parents . . . can cease causing their child harm." J.C., 129 N.J. at 10. See also N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 29 (App. Div. 2022), certif. granted, No. 087604 (2023) (noting "[t]he amended statute . . . 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").

We consider the court's reference to the outdated standard for KLG harmless here because the court considered all other permanency options, including Richard's sister, notwithstanding Richard had only identified her as a resource for Allison less than three months before trial. The court noted the Division had placed Allison in a relative resource home with her half-sister over two years before, only a month after her birth, and Allison was thriving there in the care of Ms. J and her husband. And while finding Richard's sister a credible witness, willing to either adopt Allison or provide her kinship care, "as well as spend time with her and visit," the court concluded it was not in Allison's best interests to delay her permanency to consider out-of-state-placement with Richard's sister at this late date. See N.J. Div. of Youth &

Fam. Servs. v. K.L.W., 419 N.J. Super. 568, 582 (App. Div. 2011) (noting a parent cannot expect to "wait until the eve of the guardianship trial to identify a relative who is willing to adopt"). Because the record supports the court's conclusion, we find no reversible error.

Finally, we reject Lauren's claim, raised for the first time on appeal, that the court should have rejected Dr. Lee's testimony that termination of her and Richard's parental rights would not do more harm than good as an inadmissible net opinion, lacking any "recognized scientific basis." In addition to rejecting the argument because we ordinarily do not consider arguments for the first time on appeal unless they go to the court's jurisdiction or implicate matters of public concern, State v. Robinson, 200 N.J. 1, 20 (2009), neither of which applies here, we also reject it because it is without merit. See Townsend v. Pierre, 221 N.J. 36, 55 (2015) (explaining experts need only "identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992))). Dr. Lee's opinion that the slight harm Allison might suffer from the severing of her relationship with Lauren and Richard was substantially outweighed by the benefit she'll receive by adoption is amply supported by the record.

Defendants' remaining arguments, to the extent we have not addressed them, lack sufficient merit to warrant discussion in a written opinion. See 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