

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1921-20
A-1926-20

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

C.C. and B.H.,

Defendants-Appellants.

IN THE MATTER OF
THE GUARDIANSHIP OF
H.H., II, a minor.

Submitted May 16, 2022 – Decided June 8, 2022

Before Judges Mayer and Natali.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Warren County,
Docket No. FG-21-0101-21.

Joseph E. Krakora, Public Defender, attorney for appellant C.C. (Ruth A. Harrigan, Designated Counsel, on the briefs).

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

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Amy Melissa Young, 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 S. Wilson, Designated Counsel, on the brief).

PER CURIAM

Defendants C.C. (Clara)¹ and B.H. (Bob) appeal from a February 25, 2021 Family Part order terminating their parental rights to H.H. II (Harry), their now four-and-a-half-year-old son, entered by Judge Haekyoung Suh following a two-day guardianship trial. Both parents appeal, contending the Division of Child Protection and Permanency (Division) failed to meet its burden of proving all four required elements of N.J.S.A. 30:4C-15.1 by clear and convincing evidence. Clara and Bob also assert the judge abused her discretion by denying,

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

in a January 8, 2021 order, their pretrial motions to compel the production of documents related to Harry's maternal grandmother J.T.'s (Joan) health issues, and past Division records related to Clara's history of sexual abuse while in Joan's care. The Law Guardian and the Division urge that we uphold the judge's decisions.

We affirm, substantially for the reasons expressed by Judge Suh in her forty-nine-page written opinion accompanying her February 25, 2021 order and the statement of reasons appended to her January 8, 2021 order. We nevertheless provide an extended discussion of the relevant facts and procedural history along with an amplification of the reasons supporting our decision in light of the significant consequences resulting from the termination of Clara and Bob's parental rights.

I.

The Division first became involved with the family in June 2018, when Joan became concerned with Clara's behavior after she hallucinated that her children were dead in the car and tried to "sneak [Harry] out of the home and go hide 'from them.'" Clara also explained to her mother that she smelled gasoline in the house and suffered a panic attack.

Clara was thereafter involuntarily committed for psychiatric treatment as she was exhibiting "psychotic, paranoid" behavior with "postpartum onset." She was later referred to the Division by the treatment facility. Clara was diagnosed with bipolar disorder and tested positive for amphetamines. Joan informed the Division that she believed Clara was not fit to care for her children.

Clara was transferred to Saint Michael's Hospital, where she tested positive for amphetamines, which she attributed to Adderall prescribed for attention deficit hyperactivity disorder (ADHD). A social worker at Saint Michael's spoke with Joan, who reported that Clara had been suffering from depression, anxiety, and panic attacks since Harry's birth, but had not sought treatment. Another therapist at Saint Michael's reported that Clara appeared to be "doctor shopping," and she admitted she was "red flagged" by pharmacies due to over usage.

Clara also has a history of heroin addiction and had previously been incarcerated in New Jersey in 2016 and Pennsylvania in 2017 for possession and related drug paraphernalia. Clara reported that she was sexually abused by her mother's boyfriend when she was in elementary school, and the Division acknowledged she received services in 2001. Clara stated that the abuse caused

her to begin using "any drug she could get her hands on," and she became depressed at the age of sixteen, when she attempted suicide.

Bob also had a history of drug abuse. He was hospitalized in April 2018 after suffering a "narcotics overdose and possible cardiac arrest" while at work. The EMTs reportedly administered Narcan to revive him, and the hospital found amphetamines in Bob's system. He spent over a month in the hospital in a coma until he was discharged on May 15, 2018.

After Saint Michaels discharged Clara, a Division caseworker implemented a safety protection plan (SPP) for the family. The Division scheduled Clara for a drug screen, but she missed the appointment and refused to submit to the test due to an unspecified "bladder condition." Bob submitted to a urine screen and tested positive for THC (the active component of marijuana or cannabis). Bob admitted to prior cocaine and methamphetamine usage and smoking marijuana daily. As a result, the Division implemented another SPP restraining Bob's contact with Harry to "line of site" supervision due to his illicit drug use. The Division also referred Bob to intensive outpatient treatment.

Joan thereafter filed an emergent application requesting sole legal and physical custody of Harry. The court granted Joan's request, subject to supervised visitations, "to avoid immediate and irreparable harm to [Harry]."

The court also concluded it was in Harry's best interest to remain in Joan's care and ordered Bob and Clara to participate in various mental health and substance abuse services.

The Division closed its case in September 2018, and returned custody to Bob and Clara in October 2018, despite their apparent noncompliance with court-ordered services. The order returning custody to Bob and Clara also allowed Joan to visit with Harry on weekends.

On December 12, 2018, the Division received a call from Harry's doctor expressing concerns of neglect, as Joan had reported to the doctor that defendants were using heroin, had missed Harry's doctors' appointments, and did not have heat in their home. When the Division investigated, Clara told the caseworker that she was "staggering" Harry's vaccines, as she believed Harry's immunizations had caused "complications" with Bob's health.

The Division filed a complaint against Bob and Clara seeking care and supervision of Harry. On January 10, 2019, the court entered an order granting the Division's application and ordered Bob and Clara to undergo updated substance abuse evaluations and urine screens, and participate in psychological evaluations. The court further ordered the Division to assess defendants' home

twice per month and to refer Clara to Catholic Charities for counseling and medication management.

Though her drug screen came back negative for amphetamines, cocaine, opiates, THC and other drugs, a substance abuse evaluation found that she met criteria for "moderate heroin use disorder." Clara admitted to using Xanax from an inactive prescription and was recommended for Level I outpatient treatment.

After missing his first appointment, Bob attended a rescheduled substance abuse evaluation on January 30, 2019, and tested positive for amphetamines, methamphetamines, alprazolam, and THC. The Division therefore implemented a new SPP on February 5, 2019 that restricted Bob's contact with Harry and required his visits to be supervised. Bob agreed to leave the family home.

In July 2019, Bob called Joan informing her that Clara and Harry were missing. Police responded and found a paranoid Clara walking "out of the woods" with Harry at about 11:00 p.m. after she reported she was seeking shelter under trees as it had been raining. Neither Clara nor Harry was injured, and when the Division caseworker spoke with Clara, she did not believe Clara to be under the influence of any drugs. Clara reported, however, that she believed she had a stalker from Portland, Washington following her.

The Division determined that allegations of neglect were unfounded, as Harry was unharmed during the incident, but noted that Clara's mental health remained "unaddressed despite the court ordering her to address [these] issues." After a compliance hearing on August 29, 2019, the court ordered physical and legal custody to remain with Bob and Clara, but required supervision for all parenting time for Clara due to her "untreated mental health concerns and recent allegations of auditory hallucinations and paranoia." The court further ordered Bob to submit to a urine screen, and authorized supervised parenting time in the home if his urine screen was negative. Clara agreed to have Joan provide 24/7 supervision of Harry.

The Division continued to require Bob and Clara to submit to urine screens, and on September 2, 2019, Bob overdosed, requiring EMS to revive him with Narcan. Two days later, the court ordered emergency removal of Harry and his placement in Joan's custody. The court ordered Bob and Clara to undergo psychological and substance abuse evaluations and required them to submit to urine screens, as well as hair follicle tests for Clara.

In October 2019, after Clara refused to attend a number of intensive outpatient treatment programs (IOP) referred by the Division, she was directed to attend Caring Family Community Services (CFCS), where she only attended

three therapy sessions. The CFCS clinician reported that Clara was "very anxious" and recommended Clara engage in a higher level of care, but Clara refused. The family was later evicted from their home in October 2019 after foreclosure proceedings, resulting in Bob and Clara to begin living in motels or on friends' couches.

The court entered another order requiring Bob and Clara to comply with substance abuse treatment and mental health services, and allowing visitations with Harry three times per week. The order also required defendants "to explore alternate housing options."

In November 2019, Dr. F. Guenther, Psy.D., evaluated Clara and prepared an extensive report. Dr. Guenther concluded that Clara suffered from generalized anxiety disorder, major depressive disorder, posttraumatic stress disorder, somatic symptom disorder and opioid use disorder (in remission). He further reported that she "ruminates about the trauma that she has experienced" and she is chronically fearful.

In January 2020, Bob and Clara submitted urine screens, and both tested positive for amphetamines. A substance abuse evaluation in January 2020 diagnosed Bob with "moderate methamphetamine use disorder," "mild marijuana use disorder," and "mild benzodiazepine use disorder." Bob reported

"being high on crystal meth for consecutive days" and "using marijuana while in the care of his children," "driving while under the influence of marijuana" and "taking more than his prescribed [one milligram] of Xanax daily."

Accordingly, the Division recommended Bob engage in Level 2.1 outpatient treatment. After completing an intake at a facility, however, Bob failed to appear for treatment for the first two weeks and submitted only one urine screen. Throughout February and March 2020, Bob and Clara missed or refused numerous urine screen appointments. On occasion, they claimed they were unable to drive to the appointments, despite the Division offering transportation, which Clara and Bob usually denied.

On February 5, 2020, Bob completed a psychological evaluation after the Division referred him to Catholic Charities. Dr. Michael C. Richardson, Psy.D., diagnosed Bob with "bipolar disorder and posttraumatic stress disorder [PTSD]," noting that "[e]ither disorder would make it more difficult to parent." Dr. Richardson further stated that Bob did "not see the Division as protecting his children" and Bob's habit of avoiding therapy or appointments was "typical of drug addiction." Dr. Richardson recommended Bob engage in therapy for his PTSD and bipolar disorder, and enter drug rehabilitation pending results of

regular urine screening. Dr. Richardson noted that if he addressed these issues, Bob had the "potential to be a good father" as he was "quite bright."

Later in February 2020, Joan signed a document acknowledging that she had received a fact sheet that detailed the differences between adoption and Kinship Legal Guardianship (KLG). The Division thereafter ruled out other relatives for Harry's placement. These included Harry's half-sister (Bob's daughter), Harry's maternal aunt and uncle. Joan and her husband, C.T. (Carl), later sent a letter to the Division indicating their desire and willingness to adopt Harry. In the letter, they noted that Harry had lived with them for twenty months in total and they were prepared to become a "permanent placement."

Sporadic in-person visitations continued until the onset of the COVID-19 pandemic in March 2020. Bob and Clara's unstable housing also persisted, and they avoided providing the Division with any evidence of a temporary or permanent address. Joan declined Clara's request to move in with her and reported to the Division that she believed Clara to be homeless, as she did not know where she was living. On March 16, 2020, Bob reported Clara missing.

Once the pandemic worsened, Joan informed the Division of her compromised immune system and expressed concern with respect to sending Harry to in-person visits, as she did not want him to become infected and return

to her house. When the Division reached out to Bob and Clara to schedule virtual visits, Bob stated he "did not have video capability," and the Division could not locate or contact Clara as she did not have a phone.

In early April 2020, Bob and Clara began video visitations with Harry, each attending only one. Joan also participated in video sessions with Division caseworkers and updated the Division on Harry's health and speech therapy sessions. Although some of Bob and Clara's interactions with Harry showed they were engaging and sensitive to his needs, they missed numerous virtual visits with Harry in May, June and July 2020. The Division also continued to try to assist Bob and Clara in obtaining mental health and substance abuse services to no avail.

On August 31, 2020, the court entered a permanency order approving the Division's plan to terminate Bob and Clara's parental rights, followed by adoption. The court reasoned that "[n]either parent has remedied the issues that [led] to the removal," and noted that neither Bob nor Clara was engaged in mental health or substance abuse services. Further, the court found that "[n]either party has shown that they are able to care for the child . . . [and] [n]either party has established housing or submitted proof of employment."

The Division thereafter filed a complaint for guardianship in conjunction with an order to show cause, which the court granted. At the return on the order to show cause hearing, the court ordered Harry to remain in Joan's care.

On October 24, 2020, police found Clara wandering the streets, "screaming and delusional," attempting to "fill multiple [prescriptions]" at various pharmacies. After she was brought to the hospital, she was transferred to Buttonwood Behavioral Health where she stayed for about two weeks. Upon discharge, the hospital recommended she participate in a partial hospitalization program.

On October 27, 2020, Bob participated in a psychological evaluation with Dr. Robert D. Kanen, Psy.D., upon a referral from the Division. Bob reported that he continued to lack stable housing, was living in a hotel, and he presented as very "suspicious and mistrustful," though he was oriented. Dr. Kanen noted no evidence of bipolar disorder or PTSD, but Dr. Kanen diagnosed him with "paranoid personality disorder." Dr. Kanen noted that Bob's prognosis for change was "poor," and "services [were] not likely to have an impact."

Dr. Kanen also evaluated Clara, on November 17, 2020. Dr. Kanen diagnosed Clara with major depressive disorder, PTSD, opiate use disorder in remission, borderline personality disorder and noted that she also lacked

adequate housing. Dr. Kanen reported that Clara is "prone to impulsivity and poor judgment," and concluded that she "may have difficulty recognizing psychological and physical dangers in the environment that could pose a risk of harm to her child." Dr. Kanen opined that returning Harry "to her care would expose [him] to unnecessary risk of harm."

The Division also ordered a bonding evaluation with Harry and his biological parents. Dr. Kanen completed this evaluation and concluded Harry had "an impaired attachment to his biological father" and did "not know [Bob] as a consistent, predictable, and reliable caregiver." As to Clara, Dr. Kanen noted that she was "warm and nurturing," and that Harry was "very responsive to his mother." However, Harry "did not refer to [Clara] as his mother during the evaluation," and Dr. Kanen noted an "insecure" attachment.

Dr. Kanen also completed a bonding evaluation between Harry and his maternal grandparents, Joan and Carl. Dr. Kanen noted that Joan and Carl had been married for twenty-two years and have provided Harry with a permanent, safe, and secure home since April 14, 2018, with the exception of the period from October 19, 2018 to August 29, 2019. Dr. Kanen explained that Harry showed "very different" behavior during the bonding evaluation with Joan and Carl than he did with Bob.

Dr. Kanen concluded that Harry perceived Joan and Carl as parents and noted that he called Joan "Nanna" and Carl "Pop-pop." He ultimately found Joan and Carl to be "permanent, competent, and nurturing caregivers to [Harry]," and "predictable and reliable." Dr. Kanen emphasized that they were the "only stable parents [Harry] has experienced" and he "developed a secure attachment." Further, Dr. Kanen concluded that Harry "would suffer serious and enduring harm if not allowed to remain with them."

Bob and Clara moved to compel documents under Rules 5:5-1(d) and 4:18-1(c). They requested "medical records in the Division's possession" with respect to Joan's medical history, which allegedly included a stroke, lupus, and hyperthyroidism, among others. They further requested documents pertaining to the Division's investigation of Joan's former paramour who sexually assaulted Clara at a young age, maintaining that Joan failed in her caretaking role. Bob and Clara argued that the medical records were relevant to Joan's "ability to care for [Harry] on a day to day" and "long-term" basis. As to the Division records, Bob and Clara maintained that those records were relevant to "whether [Joan] can keep [Harry] safe."

Judge Suh denied defendants' motion on January 8, 2021. In her accompanying statement of reasons, the judge explained that Joan's medical

records were not relevant to the issue of guardianship. Specifically, she reasoned that none of Joan's alleged health conditions would affect her "fitness to care for the child," and therefore rejected defendants' argument that it should override the patient-physician privilege to which those records were subject.

Judge Suh further rejected defendants' arguments as to the Division records because defendants "concede[d] the years-old investigation resulted in the allegations against [Joan] being unfounded." In addition, the judge noted that "the Division offered services to [Clara] for childhood trauma, and she declined treatment." Finally, Judge Suh noted that she did not find any reason to compel the production of "irrelevant, confidential reports."

Trial began on January 25, 2021 and lasted two days. Dr. Kanen testified as an expert on behalf of the Division, and stated, consistent with his reports, that although Bob did not have a "major mental illness," he suffered from a personality disorder, specifically noting that he was antisocial and paranoid. Dr. Kanen further opined that Bob had "the cognitive ability to function a lot better," but continued to be "irresponsible," highlighting his lack of employment and unlicensed driving. He concluded that Bob was not capable of parenting his son "today or in the foreseeable future."

Dr. Kanen testified that Clara "felt she had no weaknesses as a parent," but her borderline personality disorder created "intense unstable relationships that would interfere with functioning." He further stated that Clara's inability to articulate how her mental health impacts her parenting was concerning. He testified that Clara believed she had completed all possible services, and "as far as she was concerned, she didn't need to do anything else other than to get housing." Dr. Kanen similarly concluded that Clara was incapable of parenting her son "today or in the foreseeable future."

Division caseworkers Monique Horne, Rebecca LaBarre, Jacqueline Ptaschinski, and Gloria Aldarondo also testified, consistent with their extensive reports in the record. LaBarre testified that Clara denied engaging in any mental health or substance abuse treatment during April 2018 to October 2020, when Harry was first placed in Joan's temporary custody. She further explained that the Division first filed for care and supervision "due to the untreated mental health concerns for [Clara]" and because Bob did not engage in substance abuse treatment.

Ptaschinski stated that Clara and Bob did not have stable housing, and she often picked them up in public places. Though she offered them housing resources, neither followed through with her recommendations. She also stated

that she had difficulty getting Clara and Bob to submit to urine screens, despite court orders.

Horne similarly testified that she tried to convince Clara to engage in mental health services, but she was not willing to do so. She further noted that she attempted to assist Clara with disability applications and refer her to Easter Seals, which provides wraparound disability services, but Clara would not engage with the Easter Seals caseworker. Horne stated that she also attempted to help Bob engage in court-ordered psychiatric evaluations and urine screens, but he failed to comply and once "vehemently" declined. Neither Bob nor Clara presented witnesses or documentary evidence at trial.

After considering the testimonial evidence and numerous exhibits, Judge Suh entered a February 25, 2021 order terminating Bob and Clara's parental rights. In her accompanying forty-nine-page opinion, the judge found the Division's witnesses to be credible, and concluded that the Division had satisfied the four-prong test under N.J.S.A. 30:4C-15.1(a) by clear and convincing evidence.

Under the first prong, the judge observed that Harry had not been physically harmed while under the care of Bob or Clara, noted he was always adequately clothed and fed, and never exhibited any bruising or marks. Judge

Suh concluded, however, that "the irrefutable evidence showed that both parents may harm [Harry] in the foreseeable future due to their refusal to acknowledge and address their serious mental instability and substance abuse."

The judge reasoned that Clara showed a "pattern of mental instability" and "let her paranoia fest" instead of seeking help. She also noted Clara's hospitalizations and hallucinations, as well as her failure to seek recommended acute mental care. Relying on N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418 (App. Div. 2001), Judge Suh found that Clara's cognitive limitations and untreated mental illness posed "a real threat to [Harry's] health, safety, and development."

As to Bob, the judge similarly found that he "did nothing to remediate his addiction," and the five urine tests he submitted over the course of nearly two years all showed positive results for illicit substances. In addition, Judge Suh noted that Bob denied having a drug problem and neglected to complete any drug treatment program. The judge concluded that Bob's "mental impairments, combined with his refusal to engage in drug treatment or any other Division services" was sufficient proof that he had "endangered and will continue to endanger [Harry]'s health and development."

Under the second prong, Judge Suh concluded that Clara and Bob were unable to provide a safe and stable home for Harry. The judge highlighted Bob and Clara's failure to obtain any form of stable housing sixteen months after the foreclosure and eviction from their residence. Finding they remained "transient" and did not have a realistic plan to provide housing for Harry, the judge determined that there was no evidence establishing that Bob and Clara would ever be able to provide a safe and stable home. Further, Judge Suh concluded that removing Harry from the "secure, stable, and loving home" of his grandmother would cause "serious and enduring harm."

The judge also found that the Division satisfied the third prong. Judge Suh explained that the Division made extensive efforts to provide mental health and substance abuse services to Clara and Bob. When they did engage in evaluations, both failed to comply with recommended courses of treatment. The judge observed that the only time Clara "availed herself of mental health services was when she was involuntarily committed at a psychiatric hospital."

Judge Suh noted that the Division provided Bob and Clara housing assistance by way of "homeless hotline numbers, Section 8 references, and Family Promise referrals." In addition, the Division scheduled visitations and provided transportation to the family. Finally, the Division worked with Bob

and Clara to explore alternatives to the termination of their rights, and contacted other possible relatives for placement, other than Joan and Carl.

Under the fourth prong, Judge Suh concluded that termination of Bob and Clara's parental rights would not do more harm than good. In Dr. Kanen's unrebutted testimony, he acknowledged that Clara exhibited certain parenting skills, but stated that both parents had an insecure bond with Harry. The judge determined that Harry may "suffer harm if the bond with [Clara] were permanently severed," but noted Joan and Carl's willingness to allow Clara to visit with Harry assuming Clara was stable. The judge also contrasted Harry's poor bond with Bob with his strong attachment to Joan and Carl, and ultimately concluded that Joan and Carl could ameliorate any harm, as they were committed to Harry's current and future needs. The judge further noted the harm Harry might suffer could be mitigated by appropriate services. This appeal followed.

II.

Our scope of review in Title 30 guardianship cases is limited. In such cases, the trial court's findings generally should be upheld so long as they are supported by "adequate, substantial, and credible evidence." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014). The court's decision should

only be reversed or altered on appeal if its findings were "so wholly unupportable as to result in a denial of justice." N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 511 (2004). We must give substantial deference to the trial judge's opportunity to have observed the witnesses first-hand and to evaluate their credibility. R.G., 217 N.J. at 552. We must also recognize the expertise of the Family Part, which repeatedly adjudicates cases brought by the Division under Title 9 and Title 30 involving the alleged abuse or neglect of children. See, e.g., N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448 (2012); N.J. Div. of Youth & Family Servs. v. L.J.D., 428 N.J. Super. 451, 476 (App. Div. 2012).

As Judge Suh explained, termination of parental rights are decided under a four-part "best interests of the child" standard codified in N.J.S.A. 30:4C-15.1(a). Such actions require proof by clear and convincing evidence. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 103 (2008). The four prongs of the 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 consideration involved in determination of potential fitness are 'extremely fact sensitive' and require particularized evidence that addresses the specific

circumstances in the given case." Ibid. (quoting In re Adoption of Children by L.A.S., 134 N.J. 127, 139 (1993)).

Applying these principles, we first address Clara and Bob's challenges to Judge Suh's findings under N.J.S.A. 30:4C-15.1(1), by discussing each prong separately. We uphold Judge Suh's determinations and reject Clara and Bob's claims of reversible error.

A. Prong One

Bob and Clara argue they did not endanger Harry's safety, health or development as they did not cause him actual harm and there was no finding of abuse and neglect. Specifically, Bob maintains that the Division "failed to establish a causal link between Bob's substance abuse and mental health issues and any risk of current or future harm." Clara similarly contends that she took adequate care of Harry during visitations, and the court based its prong one conclusion on speculation alone.

The first prong of N.J.S.A. 30:4C-15.1(a)(1) requires the Division to prove that "[t]he child's safety, health, or development has been or will continue to be endangered by the parental relationship." "Although a particularly egregious single harm can trigger the standard, the focus is 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.

Bob and Clara both focus on the lack of physical harm to Harry during the short period of his life in which he was in their care. We have held that a parent's mental illness which affects his or her ability to carry out his or her parental responsibilities can be a basis for termination of parental rights. See, e.g., A.G., 344 N.J. Super. at 438-39; In re Guardianship of R., G. & F., 155 N.J. Super. 186, 194-95 (App. Div. 1977).

Further, it is well settled that "[s]erious and lasting emotional or psychological harm to children as the result of the action or inaction of their biological parents can constitute injury sufficient to authorize the termination of parental rights." In re Guardianship of K.L.F., 129 N.J. 32, 44 (1992). In J.N.H., our Supreme Court affirmed a finding of harm under prong one where a mother and child were affectionate during visitation, but the mother was addicted to drugs, made "no progress" with rehabilitation, "refuse[d] to take responsibility for her actions[,] and blame[d] others for her problems." In re Guardianship of J.N.H., 172 N.J. 440, 448-56 (2002).

Based on these principles, we are satisfied that Judge Suh did not abuse her discretion with respect to her prong one findings, as there was sufficient

evidence in the record to establish that both parents exposed Harry to a significant risk of harm. Their untreated mental conditions, and Bob's continued reliance on various illicit substances, supported a finding that neither was in a proper mental state to safely care for Harry, and therefore placed him at risk of harm.

With respect to Clara, the judge relied on the fact that her "refusal to treatment impedes her ability to parent" and noted that she is "prone to loose associations and paranoia that are transient and stress-related." As such, the court determined that she remained at "high risk for future psychiatric hospitalizations, poor judgment and emotional instability." Although Dr. Kanen opined that Clara was qualified to parent Harry if she complied with recommended psychiatric treatment, Clara showed very little interest in doing so. Further, as Judge Suh highlighted, the only time she "availed herself of mental health services was when she was involuntarily committed [to] a psychiatric hospital."

With respect to Bob, the court concluded that his "polysubstance abuse" and failure to remediate his addiction created an unsafe environment for Harry. Dr. Kanen also testified that Bob was unable to parent a child due to his paranoid personality disorder and behavioral history, including his failure to maintain

permanent housing or honor parenting responsibilities. Further, as the court found, Bob lacked stable housing or employment, and every urine screen he submitted established the presence of amphetamines and THC in his system. His drug addiction and mental illness resulted in an unstable lifestyle that did not support a long-term commitment to parenting. See In re Guardianship of R., G. & F., 155 N.J. Super. at 194-95.

B. Prong Two

Bob and Clara next argue the court erred in its finding that they were unable to eliminate harm to Harry or provide him with a stable home. Specifically, Bob maintains that he took "substantial steps to address his drug and mental health issues" and "repeatedly requested assistance from [the Division] in obtaining housing." Clara similarly asserts that she requested housing assistance from the Division, but the Division failed to provide sufficient resources.

The second prong of the best-interests test requires the Division to present clear and convincing evidence 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." N.J.S.A. 30:4C-15.1(a)(2). The relevant inquiries for the judge are

whether the parent cured and overcame the initial harm that endangered the child, and whether the parent is able to continue the parental relationship without recurrent harm to the child. K.H.O., 161 N.J. at 348-49. The first and second prongs are related, and often, "evidence that supports one informs and may support the other as part of the comprehensive basis for determining the best interests of the child." In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999).

Our Supreme Court has cautioned that "[m]ental illness, alone, does not disqualify a parent from raising a child." F.M., 211 N.J. at 450-51 (2012). "But it is a different matter if a parent refuses to treat his mental illness [and] the mental illness poses a real threat to a child." Ibid.; see also E.P., 196 N.J. at 105 (where the mother repeatedly relapsed into addiction, resulting in homelessness, unemployment, and a prison sentence); P.P., 180 N.J. at 512 (drug-addicted parents had not completed treatment and did not have stable housing); K.H.O., 161 N.J. at 34954 (addiction prevented the parent from "providing care and nurture or a stable home"); N.J. Div. of Youth and Family Servs. v. H.R., 431 N.J. Super. 212, 224 (2013) (where father enrolled in drug treatment programs but "routinely failed to complete them with positive results").

As Judge Suh found, the evidence established that Clara and Bob refused to participate in treatment, and the few times they attended evaluations, they

failed to take action and follow recommendations from their clinicians. See K.H.O., 161 N.J. at 353 (stating "the second prong may be met by indications of parental dereliction and irresponsibility, such as the parent's continued or recurrent drug abuse, the inability to provide a stable and protective home, [and] the withholding of parental attention and care"). Both parents struggled with drug abuse and mental health issues, and Bob was hospitalized for a drug overdose when Harry was only four months old, where he remained for over a month. Clara was also hospitalized involuntarily three times between June 2018 and October 2020.

Nonetheless, Clara continuously maintained that she felt she did not need therapy, and as the court noted, she refused to acknowledge her debilitating mental health issues. As to Bob, Dr. Kanen stated his "personality disorder [wa]s unlikely to change and [h]e ha[d] no insight into his personality problems [or] [how] they impact his life."

We are satisfied that Clara and Bob's unwillingness to accept psychiatric treatment, including medication, or the services offered by the various social service agencies, deprived Harry of any chance of a stable and safe home environment. Rather than taking steps to provide Harry with a supportive and stable home, Bob and Clara exhibited repeated dereliction of their parenting

duties throughout Harry's short life. They also missed numerous visitations, and virtual visits were few and far between during the COVID-19 pandemic.

In addition, both parents failed to establish any evidence of stable housing after the foreclosure and eviction from their home. Bob and Clara avoided providing the Division with any evidence of a permanent or temporary address, and at one point, Clara went missing during the pandemic and was unreachable. Neither parent expressed any plans, or even a willingness, to obtain a more permanent residence. As the court noted, "neither parent was able to prove the ability to secure housing in the future because both were unemployed." We are therefore satisfied that all of Judge Suh's prong two findings are amply supported by the record.

C. Prong Three

Bob and Clara argue the court erred in finding the Division provided reasonable efforts to provide services, and maintain that they both attempted to comply with treatment. Bob asserts the services the Division provided were not sufficiently tailored to his "individualized needs." For her part, Clara maintains that she faced "daunting circumstances" during the pandemic, and her lack of access to a car or a cell phone prevented her from communicating with caseworkers.

Under the third prong, the Division must prove that it "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." N.J.S.A. 30:4C-15.1(a)(3). Pursuant to the statute, the Division must: (1) work with parents to develop a plan for services; (2) provide the necessary services; (3) facilitate visitation; and (4) notify parents of the children's progress during an out-of-home placement. N.J.S.A. 30:4C-15.1(c).

This prong "contemplates efforts that focus on reunification of the parent with the child and assistance to the parent to correct and overcome those circumstances that necessitated the placement of the child into foster care." K.H.O., 161 N.J. at 354. Reasonable efforts depend upon the facts and circumstances of each case. D.M.H., 161 N.J. at 390. The services provided to meet the child's need for permanency and the parent's right to reunification must be "coordinated" and must have a "realistic potential" to succeed. N.J. Div. of Youth and Family Servs. v. J.Y., 352 N.J. Super. 245, 267 n.10 (App. Div. 2002) (quoting N.J.A.C. 10:133-1.3). However, "[t]he diligence of [the Division]'s efforts . . . is not measured by their success," but rather "against the standard of adequacy in light of all the circumstances." D.M.H., 161 N.J. at 393.

Here, the competent evidence in the record fully supports Judge Suh's finding that the Division made adequate efforts to assist Bob and Clara in overcoming those circumstances that necessitated the placement of Harry into Joan's care. The Division repeatedly referred Bob and Clara to substance abuse and mental health evaluations and treatments, individual counseling, in-home services, and resources for housing. It also facilitated visitation and provided transportation to in-person visits.

Any claim that the Division failed to provide Clara with recommended services for a mental health IOP is wholly unsupported by the record. Rather, Clara maintained she did not need services, and refused three different IOP programs to which the Division referred her. Horne testified that she offered to go with Clara to her therapy appointment at Family Guidance, as she knew Clara was "apprehensive." Horne further stated that she asked Family Guidance about modifying treatment for Clara, as Clara had indicated a dislike for group sessions, and Family Guidance was willing to do so, but as noted, Clara never went.

In addition, Clara's contention that she was unable to contact Division caseworkers is refuted by her own statement to Division caseworkers that she could be reached by email, and seemingly had a computer to visit with Harry

via Zoom. Horne also testified that they attempted to assist Clara in obtaining a phone through Medicaid.

As to Bob, he similarly rejected substance abuse treatment and counseling, and did not attend his court-ordered psychiatric consultations. He refused or missed the majority of his urine screens, and when Bob did show up, he tested positive for amphetamines and THC, among other substances. Horne also testified that the Division referred him to Catholic Charities Comprehensive Assessment and Treatment Service for individual therapy separate from his substance abuse treatment. Bob failed to attend either of these programs. As noted, the Division also referred Bob to an IOP after his hospitalization for a drug overdose in 2018.

Under prong three, an alternative to termination of parental rights is KLG. KLG allows a relative to become the child's legal guardian and commit to care for the child until adulthood, without stripping the parents of their rights. P.P., 180 N.J. at 508. The Legislature created this arrangement because it found "that an increasing number of children who cannot safely reside with their parents are in the care of a relative or a family friend who does not wish to adopt the child or children." N.J. Div. of Youth & Fam. Servs. v. L.L., 201 N.J. 210, 222-23

(2010). Clara and Bob claim that the court failed to consider alternatives to termination and did not appropriately evaluate the option of KLG.

Prior to July 2, 2021, KLG was considered "a more permanent option than foster care when adoption '[was] neither feasible nor likely.'" P.P., 180 N.J. at 512-13 (emphasis added) (quoting N.J.S.A. 3B:12A-6(d)(3) to (4)). "[W]hen a caregiver . . . unequivocally assert[ed] a desire to adopt," the standard to impose a KLG was not satisfied because the party seeking a KLG arrangement would not be able to show that adoption was neither feasible nor likely. N.J. Div. of Youth & Fam. Servs. v. T.I., 423 N.J. Super. 127, 130 (App. Div. 2011). In other words, when permanency through adoption was available to a child, KLG could not be used as a defense to the termination of parental rights. N.J. Div. of Youth & Fam. Servs. v. D.H., 398 N.J. Super. 333, 341 (App. Div. 2008).

On July 2, 2021, however, the Legislature enacted L. 2021, c. 154, which, in part, removed the KLG requirement that adoption be "neither feasible nor likely." P.P., 180 N.J. at 512-13 (emphasis added) (quoting N.J.S.A. 3B:12A-6(d)(3) to (4)). This means KLG may now remain a valid defense to the termination of parental rights, even when adoption is available as an option. Here, Clara argues retroactive application of this legislative change is warranted

by the legislative intent that L. 2021, c. 154 was specifically written to "take effect immediately."²

Our Supreme Court has held, however, that newly enacted legislation with "effective immediately" language indicates prospective intent. See State v. Parolin, 171 N.J. 223, 233 (2002) (holding that amendments to the No Early Release Act removing the offense for which defendant was convicted did not apply retroactively when the new law became "effective immediately"); Pisack v. B&C Towing, Inc., 240 N.J. 360, 370 (2020) (explaining that an amended statute's immediate effective date "bespeak[s] an intent contrary to, and not supportive of, retroactive application" (quoting Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 48 (2008))).

Regardless of whether the amendment applies retroactively, Joan and Carl considered the KLG alternative and rejected it. Here, the record establishes ample support for Judge Suh's conclusion that Joan and Carl's adoption of Harry was the most viable and appropriate option as it provided a realistic chance for Harry to achieve a permanent and stable home environment. Ptaschinski

² Bob raises this same argument in a footnote in his brief. Although such an argument is not appropriate under Rule 2:6-2(a)(6), see also State v. King, 210 N.J. 2, 22 (2012) ("Additional legal issues may not be raised by footnotes in a brief."), we reject Bob's arguments on the merits for the same reason we have rejected those made by Clara.

testified that she had a conversation with Joan and Carl about the differences between KLG and adoption, as did Horne—twice. Joan and Carl rejected KLG and chose to adopt, however, and were available to give Harry a permanent home. In addition, the record reveals a discussion between Horne and Bob regarding his consent to give Joan custody, and Bob indicated his desire that Harry remain in Joan's care, as he trusted her.

D. Prong Four

With respect to prong four, Bob and Clara argue that the court erred when it concluded that termination of their parental rights would not do more harm than good. Bob argues that the court "failed to consider whatsoever the impact which termination would have on Harry's ties to biological relatives and to his racial identity." Clara contends that the court ignored positive information with respect to her parenting, and she was "clearly committed to her son."

Under the fourth prong of the best-interests standard, the Division must prove that "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). The overriding consideration is the child's need for permanency and stability. See K.H.O., 161 N.J. at 357. "The question to be addressed under [the fourth] prong is whether, after considering and balancing the two relationships, the child will suffer a greater harm from the termination

of ties with [the child's] natural parents than from the permanent disruption of [the child's] relationship with [the child's] foster parents." Id. at 355.

In order to weigh any potential harm from terminating parental rights against a child's separation from his or her foster parents, a court must consider expert testimony on the strength of each relationship. In re Guardianship of J.C., 129 N.J. 1, 25-26 1315 (1992). "[W]here it is shown that the bond with foster parents is strong and, in comparison, the bond with the natural parent is not as strong, that evidence will satisfy . . . N.J.S.A. 30:4C-15.1(a)(4)." K.H.O., 161 N.J. at 363.

Here, the court had ample bases to conclude that termination of Bob and Clara's parental rights was more beneficial than harmful to Harry. Indeed, its analysis appropriately focused on Harry's need for permanency and concluded that only Harry's resource parents could provide him the permanency he needs "to develop and thrive." In reaching that conclusion, Judge Suh properly relied on the un rebutted testimony of Dr. Kanen, who she found credible. The judge also concluded that Harry had a strong attachment to Joan and Carl, and Joan and Carl were committed to meeting his needs. Dr. Kanen also emphasized that Joan and Carl were the "only stable parents [Harry] has experienced."

This contrasts with Dr. Kanen's findings with respect to Bob and Clara. As noted, Harry had "an impaired attachment to his biological father" and did "not know Mr. Harvey as a consistent, predictable, and reliable caregiver." Bob also told Division caseworkers he has "no problem" with Joan or the level of care she provides for Harry.

As to Clara, although Harry was "very responsive" to her, he did not refer to her as his mother, and Dr. Kanen noted that their attachment was "insecure." Judge Suh also noted that Joan's openness to maintaining contact with Clara and permitting her to visit—provided she was stable—was sufficient to mitigate this harm. Clara has not established that she was "clearly committed to her son." Rather, she was absent from his life for long periods of time due to her mental instabilities, missed a majority of scheduled visitations, and engaged in very little rehabilitation efforts in order that she could care for Harry.

III.

In their last point, Bob and Clara argue that that Judge Suh erred when she denied their motion to compel production of Division records pertaining to Clara's childhood sexual abuse, as well as Joan's medical records. This denial, they assert, violated their due process rights and resulted in an incomplete record at trial as it related to prongs three and four. Bob and Clara both argue the need

to determine whether Joan's health impacts her ability to parent Harry outweighs any privacy concerns related to her medical records.

As to the Division records relating to Clara's abuse, Bob argues the records were necessary to establish Clara's "emotional disturbance was so deeply entrenched and enduring and destructive to other persons" that it negatively affected their joint visitations with Harry. Clara argues the lack of access to these documents "deprived her of a meaningful defense in her termination trial."

Our role when reviewing a trial court's decision to grant or deny discovery is limited to a determination of whether the trial court abused its discretion or whether its determination is based upon a mistaken application of the law. Rivers v. LSC Partnership, 378 N.J. Super. 68, 80 (App. Div. 2005). Under Rule 4:10-2(a), "parties may obtain discovery regarding any non-privileged matter that is relevant to the subject of a pending action or is reasonably calculated to lead to the discovery of admissible evidence." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). Relevant evidence is "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." See N.J.R.E. 401.

In addition, due process generally "requires adequate notice and a fair opportunity to be heard." N.J. Div. of Child Prot. & Permanency v. K.S., 445

N.J. Super. 384, 390 (App. Div. 2016) (quoting N.J. Div. of Youth & Family Servs. v. M.Y.J.P., 360 N.J. Super. 426, 464 (App. Div. 2003)). As it relates to termination of parental rights specifically, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." Ibid. (quoting Santosky v. Kramer, 455 U.S. 745, 753–54 (1982)). While "[i]t is well[-]established as a matter of due process principle that procedural requirements are more demanding in parental termination cases than in ordinary civil actions," due process "is a flexible concept and calls for such procedural protections as the particular situation demands." M.Y.J.P., 360 N.J. Super. at 464, 467.

Bob and Clara's due process claims are without merit. The record establishes that they received adequate procedural protections, including fair notice and an opportunity to be heard. Judge Suh considered the parties' arguments as to the motion to compel at a hearing on December 15, 2020 and evaluated the motion on the merits after reviewing counsel's papers, and denied the motion in a January 8, 2021 order and accompanying six-page written opinion.

In denying defendants' application, the judge explained that none of Joan's health conditions would affect her fitness to care for Harry and she had, at that

point, "successfully parented [Harry] for more than one year without incident." Moreover, Joan lived with Carl, who was able to assist with parenting. Judge Suh rejected the argument that it should override any patient-physician privilege in order to admit these records.

We are satisfied that the judge did not abuse her considerable discretion when denying defendants' discovery requests as her findings are amply supported by the record. First, as to Joan's medical records, neither Bob nor Clara presented any evidence at trial as to the detrimental effects that someone with Joan's health conditions might have on child-rearing and her ability to parent. Rather, the record established that Joan and Carl provided Harry with a safe home, where he was healthy and well-fed, kept up with speech therapy, and current on all immunizations.

We are similarly satisfied that Judge Suh did not abuse her discretion with respect to Clara's Division records. The credible evidence in the record established that any allegations against Joan as to her failure to supervise were unfounded. The sexual abuse claims related to her then-paramour, and the court found the investigation to be irrelevant to the termination trial. Indeed, at the December 15, 2020 hearing, counsel for Bob stated that "there w[ere] no findings against [Joan]." Further, these records were twenty years old by the

time of trial, and any suggestion that the abuse affected Clara's mental health was well-documented by her various clinicians and the Division's reports. Various doctors commented on her PTSD, and those records were admitted at trial.

To the extent we have not addressed any of the parties' remaining arguments, it is because we have concluded they are of insufficient 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