

## RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1112-15T1  
A-2869-15T1

NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

M.A.W. and R.W.,

Defendants-Appellants.

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IN THE MATTER OF THE  
GUARDIANSHIP OF C.W. and T.W.,

Minors.

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Submitted January 25, 2017 – Decided March 22, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Middlesex  
County, Docket No. FG-12-68-15.

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brief).

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Guardian, attorney for minors (Toya Davis,  
Designated Counsel, on the brief).

PER CURIAM

In these consolidated appeals, defendants M.W. (Mary) and R.W. (Roger) appeal from an order entered by the Family Part terminating their parental rights to their minor children, C.W. (Charlie) and T.W. (Tim).<sup>1</sup> On appeal, they contend the Division of Child Protection and Permanency (Division) failed to prove the four prongs of the best interests standard of N.J.S.A. 30:4C-15.1a by clear and convincing evidence. The Law Guardian joins with the Division in urging we affirm the judgment. Having considered defendants' arguments in light of the record and controlling law, we affirm the termination of parental rights.

We derive the following from the record. Mary and Roger were married on July 14, 2006. On October 14, 2007, Mary gave birth to twin boys, Charlie and Tim, both of whom had special needs.

The relationship between Mary and Roger was marked by a significant history of domestic violence. In 2011, Mary obtained

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<sup>1</sup> We utilize fictitious names of the parties and the children for the purpose of confidentiality.

restraining orders which Roger violated. On at least two occasions, Roger beat Mary in the presence of the children. With the assistance of the Division, Mary was placed in a domestic violence shelter. However, she violated the shelter's rules by allowing Roger into the safe house. Thereafter, no other shelter would accept her. With assistance from the Division, Mary and the children's paternal step-grandmother executed a safety plan in which it was agreed that Roger could not reside in the same home as Mary or have unsupervised visitation with the children. Within that same year, Roger was sentenced to probation based upon two charges pertaining to violations of the restraining order.

In July 2011, the Division applied for the care and supervision of the children. After the trial court granted the request, an order was entered that prevented Roger from entering the home or having unsupervised visitation with the children. The court further ordered that Mary and Roger undergo substance abuse evaluations, participate in parenting skills classes, undergo psychological evaluations, and attend domestic violence counseling. The Division referred the children to therapy.

In September 2011, the paternal grandfather and step-grandmother, with whom Mary and the children had been residing, moved out of state. Mary obtained her own residence where she lived with the children. Roger sought to move into the residence

even though he had not completed domestic violence counseling or substance abuse treatment. Thereafter, in November 2011, the court granted Roger weekly overnight visits and ordered him to attend psychological evaluations, individual counseling, and domestic violence counseling.

After a Title 9 action was filed by the Division in January 2012, the court determined that Roger abused and neglected the children. In subsequent hearings, the court ordered that physical custody of the children remain with Mary. During this time, Roger had visitation. It was also during this time that Roger was continuously ordered to attend therapy, domestic violence counseling, parenting skills training, and substance abuse evaluations.

By April 2012, Mary remained noncompliant with the services offered, which included substance abuse treatment, despite that the Division provided her with transportation to attend the services. At the end of 2012, the court permitted Roger to have two supervised visits at the home per week. Despite these restrictions, the children reported that Roger was living at the house, spent time alone with them, and took them to school.

In February 2013, Roger's probation officer informed the Division that he tested positive for cocaine on two separate occasions. When the Division investigated this report, Mary

claimed she was unaware of Roger's drug use and also acknowledged she had not attended her substance abuse evaluation. Additionally, she downplayed how the Division came to be involved with the family by stating that the problems between she and Roger were "no big deal." Thereafter, Charlie informed the Division caseworker that Roger lived at home and that he threw Mary's cell phone when they fought. When confronted by the Division, Mary denied what Charlie reported. The allegations against Roger were later determined by the Division to be unfounded, principally because he was not the primary caretaker of the children.

Shortly thereafter during a court appearance, Mary tested positive for cocaine. After Roger tested positive for cocaine during a substance abuse evaluation, he was referred to outpatient treatment. Also during this time, a Division caseworker observed Roger's clothes and personal items in Mary's residence, although she denied that Roger lived in the home or had unsupervised visits with the children.

After a review hearing that both Mary and Roger failed to attend, the court found that the children's welfare was endangered due to Roger's continued positive drug tests combined with Mary's decision to allow Roger access to the home. The court also noted that Mary continually refused to submit to services, including a substance abuse evaluation. Predicated upon those findings, the

court ordered the removal of the children who were then placed in a resource home.

Subsequently, Mary and Roger were afforded visitation. Roger declined to visit with the children. During one of the visits by Mary, it was determined that she tested positive for cocaine and she was referred to an intensive outpatient drug rehabilitation program. After another act of domestic violence occurred prior to a court hearing, Roger was admitted to an intensive outpatient drug rehabilitation program.

Despite the opportunities presented to them by the Division to deal with their drug use, both Mary and Roger did not participate in the programs and continuously used drugs. Roger, for his part, denied that he needed any programs or that he had any drug or alcohol problem. Roger also displayed minimal interest in visitation with the children. Mary continued her pattern of not attending counseling and being noncompliant with her drug screenings. During this time, Roger violated his probation due to his failure to report, failure to comply with substance abuse counseling, and his discharge from the intensive outpatient drug rehabilitation program due to testing positive for drugs.

In October 2014, after a pattern and history of noncompliance by Mary and Roger, their inability to achieve a drug-free lifestyle, their history of relapse, and their resistance to

completing services aimed at reunification, the Division filed a complaint for guardianship. After the complaint was filed, Roger completed the domestic violence program, but still failed to attend visitations with his children, which had been moved to his mother's house. Mary continued to be noncompliant with services.

In early 2015, the Division explored placement of the children with family members to no avail. During this time, both Mary and Roger became more compliant with drug treatment and counseling.

At the Division's request, Dr. Karen D. Wells, Ph.D., performed psychological and bonding evaluations of Mary and Roger. During Roger's evaluation, he denied abusing Mary. He also expressed a lack of concern about the impact of domestic violence and his desire for reunification with the children. While Roger acknowledged he had substance abuse issues, Wells found him to lack credibility, particularly given his history of relapse. Wells believed that Roger would be unable to provide for the children's safety, stability, and well-being for the foreseeable future and endorsed the Division's plan of termination of parental rights followed by adoption.

During Mary's evaluation, she denied being the victim of domestic violence. Wells believed Mary was resigned to accept the domestic violence as a part of her marriage. Wells further found Mary made little progress in stabilizing her life, was dependent,

lonely, and prone to anxiety. It was determined by Wells that Mary lacked the psychological and emotional ability to care for the children and that Mary suffered from drug addiction. As such, Wells did not recommend the reunification of Mary with the children.

Concerning the bonding aspect of the evaluation, Wells noted that the children spoke about the activities they enjoyed with the resource family and their future with their resource parents. Wells further stated that neither child expressed any difficulty with separating from their parents at the end of the session.

Wells determined that neither child viewed Mary and Roger as their parent. As part of her evaluation, Wells met with the children and the resource parents. Unlike Mary and Roger, the children viewed their resource parents as their psychological parents and shared an intact and secure bond with them. Wells noted that both resource parents were attentive and loving with the children and that it was in the best interest of the children to be adopted by the resource parents.

The guardianship trial took place over four days. The Division presented the testimony of Farrah Coleman, a special response unit worker who testified about the instances of domestic violence. Coleman testified about her efforts on behalf of Mary and the children. Marsha Gold, a Division supervisor, and Valerie



Jordan, a Division caseworker, testified that the children were doing well in the resource placement.

Jordan noted that, prior to their placement, the boys' demeanor was poor, as was their attendance at school. Both of these areas improved according to Jordan after their placement. It was also noted by Jordan that the Division considered several alternative placements, including multiple relatives, as well as a daycare provider known to the family. Jordan testified relative to the provision of services to Mary and Roger, including the psychological evaluations, individual counseling, domestic violence counseling, and substance abuse treatment. Jordan further testified relative to the noncompliance by Mary and Roger with services including substance abuse treatment and stated Mary would reunify with Roger despite his failure to complete domestic violence courses. She also noted that after the children were removed, Roger did not visit with them for over two months, and Mary also did not regularly visit with the children.

Nicole Rogers, a Division caseworker, testified that Roger and Mary failed to attend services and when they did attend, they were often late. She stated that based upon their poor performance, they were discharged from programs. She also noted the paternal grandfather informed her that he wanted the children to be adopted by their resource parents.

Wells, the only expert presented, testified about the evaluations she performed, including the bonding evaluations between the parents and the children. Wells also related that, given the limitations of both Mary and Roger, as well as their addictive behavior, it was too risky to reunify the children with them. Wells testified she supported the termination of parental rights and adoption of the children by the resource parents. She noted the children were fully integrated into the lives of the resource family and the resource parents wanted to adopt. Wells concluded that the children would suffer severe and enduring harm if removed from their resource parents.

Roger presented as a witness Eliezer DeFranca, a licensed clinical social worker and substance abuse counselor. DeFranca testified that there has been no assessment of Roger relative to his drug abuse and that Roger was not in sustained remission.

At the conclusion of the hearing, the court held the Division satisfied all four prongs of the best interests test, N.J.S.A. 30:4C-15.1. On appeal, Mary and Roger raise numerous arguments directed at the failure of the Division to prove by clear and convincing evidence the statutory prongs. After carefully canvassing the record in light of these arguments, we reject them and conclude that the judge's findings are supported by credible evidence and entitled to our deference. N.J. Div. of Youth &

Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012); Cesare v. Cesare, 154 N.J. 394, 413 (1998). We add the following.

Parents have a constitutionally protected right to the care, custody and control of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599, 606 (1982); In re Guardianship of K.H.O., 161 N.J. 337, 346-47 (1999). "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights . . .,' and 'rights far more precious . . . than property rights.'" Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551, 558 (1972) (internal citations omitted). "[T]he preservation and strengthening of family life is a matter of public concern as being in the interests of the general welfare[.]" N.J.S.A. 30:4C-1(a); see also K.H.O., supra, 161 N.J. at 347.

The constitutional right to the parental relationship, however, is not absolute. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 553 (2014) (citing K.H.O., supra, 161 N.J. at 347); N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 599 (1986). At times, a parent's interest must yield to the State's obligation to protect children from harm. N.J. Div. of Youth & Family Servs. v. G.M., 198 N.J. 382, 397 (2009); In re Guardianship of J.C., 129 N.J. 1, 10 (1992). To effectuate these concerns, the Legislature created a test for determining whether

a parent's rights must be terminated in the child's best interests. N.J.S.A. 30:4C-15.1(a) requires that the Division of Child Protection and Permanency prove by clear and convincing evidence the following four prongs:

(1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;

(2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm. Such 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;

(3) The [D]ivision has made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home and the court has considered alternatives to termination of parental rights; and

(4) Termination of parental rights will not do more harm than good.

[See also A.W., supra, 103 N.J. at 604-11.]

During a guardianship trial, the Division must establish that the health, safety, and welfare of a child would be endangered if a relationship with the parents was allowed to continue. J.C., supra, 129 N.J. at 10. When a parent opposes termination, the court must determine whether the parent could care for the children without causing harm. N.J. Div. of Youth & Family Servs. v. F.M.,

375 N.J. Super. 235, 258 (App. Div. 2005). Significantly, our Supreme Court has held that a parent's inability to provide care is harmful and can endanger the health of a child. K.H.O., supra, 161 N.J. at 352; In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999) (observing that "[a] parent's withdrawal of [] solicitude, nurture, and care for an extended period of time is in itself a harm that endangers the health and development of the child"). A court must not wait to intervene until the child is actually irreparably harmed physically or emotionally. D.M.H., supra, 161 N.J. at 383; see also N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 438-39 (App. Div. 2001), certif. denied, 171 N.J. 44 (2002).

#### First Prong

There is credible evidence in the record that Roger repeatedly physically injured Mary in the presence of the children. In New Jersey Division of Youth & Family Services v. I.H.C., 415 N.J. Super. 551, 557 (App. Div. 2010), the court explained that evidence of domestic violence between parents is admissible to prove that a risk of harm to the children was present. Here, the children witnessed the violence between their parents and were able to recount the events to a Division caseworker. As a result, the trial court's acknowledgement of instances of domestic violence was proper and relevant, and played a role in the determination

whether the children would be at risk of harm in their parents' care.

For her part, Mary repeatedly allowed Roger to interact with herself and the children despite his violent behavior. In fact, Mary's decision to allow Roger near herself and the children resulted in her discharge from a safe house and her expulsion from other safe houses in the area, which placed her and the children at risk of homelessness. Mary allowed Roger to reside with her despite a court order and a Division safety plan stating otherwise. She resisted acknowledging the instances of domestic violence to her counselor and Division caseworker. Her actions demonstrated an unwillingness to protect her children from the harm of witnessing domestic violence and from possible harm inflicted on them by Roger.

After Charlie and Tim were removed, both parents expressed little interest in the children and rarely visited with them. See In re Guardianship of K.L.F., 129 N.J. 32, 44 (1992) (stating that parental inattention can injure children and serve to terminate parental rights, even in the absence of physical harm); see also D.M.H., supra, 161 N.J. at 379 (stating that a parent's failure to care for a child is harmful). Thus, defendants' failure to visit with the children was harmful to them and undermined the Division's initial plan of reunification. See D.M.H., supra, 161

N.J. at 379; see also In re Adoption by G.P.B., 161 N.J. 396, 414 (1999) (O'Hern, J., concurring) (stating that harm occurs when a child cannot recognize a parent due to parental disinterest).

Moreover, it was unlikely that Mary and Roger could responsibly care for the children or that their behavior would change over time. Both displayed a consistent refusal to complete services and learn from their services when they did attend, despite the Division's attempts at providing services aimed at reunification. Importantly, the court in I.H.C., supra, 415 N.J. Super. at 576, held that a parent's past conduct is relevant in determining his or her future conduct. See also J.C., supra, 129 N.J. at 10 (stating that a parent's past neglect can indicate whether a parent's prior unresolved issues would re-manifest).

Mary's struggle to successfully complete her substance abuse treatment programs and remain drug free for an extended period of time was notable. Our Supreme Court has acknowledged that ongoing and un-rehabilitated drug use can be harmful to children. K.H.O., supra, 161 N.J. at 363 (stating that a parent's inability to overcome his or her own addiction to care for a child constitutes the endangerment of that child). During the Division's involvement with the family, Mary continued to test positive for cocaine despite the Division's efforts to provide her with drug rehabilitation treatment. In addition, she was repeatedly

discharged from her drug treatment programs due to her failure to attend, her failure to submit urine samples, and her positive drug tests. She also had not been sober for an extended time prior to the completion of the guardianship trial.

Likewise, Roger struggled with completing his drug treatment programs, repeatedly relapsed, and had not achieved sobriety for an extended period by the time that the guardianship trial concluded, evidencing his inability to ever care for the children. See id. at 353. The continuing inability of a parent to overcome his or her addiction in order to care for a child constitutes the endangerment of that child. Id. at 363.

The court relied on the testimony of a qualified expert who had evaluated the children's relationships with the parents and an alternative caregiver. See J.C., supra, 129 N.J. at 19. Here, the court determined that the testimony of Wells was credible. Wells explained that the children did not view Mary and Roger as their psychological parents, whereas the children viewed their resource parents as their psychological parents. Specifically, Mary was unable to meet the children's primary needs of food, clothing, and shelter. Wells added that Mary failed to provide for the children's emotional needs by providing safety, stability, and security.

For his part, Roger's allegations that domestic violence



never occurred caused Wells concern because it demonstrated that Roger was dishonest. In addition, by Roger's failure to admit that he had a problem with domestic violence, he reinforced Wells' concerns that he would continue to be violent and place the children at risk. Like Mary, Wells stated that Roger could not meet the children's physical, emotional or psychological needs.

#### Second Prong

The court was presented with substantial credible evidence that both parents continued to struggle with substance abuse, and neither defendant had been in remission long enough to be considered able to parent the children. Roger relapsed several times and his counselors believed he had not engaged in meaningful efforts to rehabilitate. Mary offered no proof that she had successfully completed intensive outpatient treatment for eight months despite her claims to the contrary, had a history of substance abuse issues, and repeatedly relapsed into drug abuse. "[I]ndications of parental dereliction and irresponsibility, such as the parent's continued and recurrent drug use, the inability to provide a safe and stable home, [and] the withholding of parental attention and care . . ." can demonstrate parental unfitness. K.H.O., supra, 161 N.J. at 352.

Further, Roger's residence with Mary and the children in violation of a court order and the Division's safety plan

demonstrated his inability to provide the children with the required sense of stability and safety.

Mary not only struggled to remain drug free, but she also failed to protect the children from witnessing domestic violence and failed to provide them with safe housing. Parents have an obligation to protect children from harms that can be inflicted by the other parent. N.J. Division of Youth & Family Servs. v. M.M., 189 N.J. 261, 288-89 (2007).

When making an evaluation of the children's safety, the court is permitted to consider the children's bonds with their respective resource parents. D.M.H., supra, 161 N.J. at 379. Testimony from the Division workers noted the children's behavior and educational progress had improved since their resource placement and the resource parents wanted to adopt the children. The uncontroverted testimony of Wells supported that the children would be harmed if removed from their resource placements and that the children shared a strong and loving bond with their caregivers. See K.H.O., supra, 161 N.J. at 363 (stating that the second prong of the test can be proven by showing that a child will suffer if his or her relationship with a resource parent is disturbed).

### Third Prong

There is credible evidence in the record that the Division provided Mary and Roger with a plethora of services. Neither Mary

nor Roger engaged in efforts to improve their parenting to achieve reunification. See A.G., supra, 344 N.J. Super. at 437 (stating that the court has held that a parent must actively work to improve himself or herself during services). The failures of Mary and Roger do not reflect on the Division's satisfaction of this element of the analysis because the Division's efforts are not measured by a parent's success in services. D.M.H., supra, 161 N.J. at 393. Rather, the Court has stated that "[e]xperience tells us that even [the Division's] best efforts may not be sufficient to salvage a parental relationship." F.M., supra, 211 N.J. at 452. In sum, the Division made concerted efforts to reunify the family which failed due to the failure of Mary and Roger to take advantage of them. Reunification is not an option when it would cause harm to the children. A.W., supra, 103 N.J. at 605.

The Division explored multiple placements with family members, who were ultimately ruled out. See N.J.S.A. 30:4C-12.1(b) (explaining that the Division does not have an obligation to reevaluate potential caregivers once they have been ruled out). While Mary argues that the Division failed to assess the children's maternal uncle, paternal grandmother, and maternal grandparents, the record reflects that the Division did explore alternatives to the termination of parental rights.

As did the Family judge, we conclude that Mary and Roger were

provided with services but failed to participate in them to overcome their parenting deficiencies and that the Division made reasonable efforts to reunify Mary and Roger with their children.

#### Fourth Prong

The court may rely on expert testimony when analyzing this prong of the best interests test. K.H.O., supra, 161 N.J. at 363. Here, Wells observed a loving and stable relationship between the children and their resource parents. Wells testified that the children referred to their resource parents as "mommy and daddy," recounted happy memories, and expressed excitement about future plans. The children viewed their resource parents as their psychological parents, and the resource parents represented dependable, loving individuals who provided for their physical needs as well as their emotional security and safety. Importantly, Wells explained that removal from their current resource placement would cause serious and enduring harm. According to Wells, neither child expressed difficulty in separating from Mary and Roger, and the children would be harmed if they were reunited with their parents.

Where appropriate, terminating a parent's rights to his or her children is necessary to allow the children to have a secure and permanent home. N.J. Div. of Youth & Family Servs. v. B.G.S., 291 N.J. Super. 582, 595 (App. Div. 1996) (citing J.C., supra, 129

N.J. at 26). Here, termination was appropriate to allow the children the opportunity to have a secure and permanent home with their resource parents.

As this court has held, children should not "languish indefinitely" in an out-of-home placement while a parent attempts to correct his or her parenting problems. N.J. Div. of Youth & Family Servs. v. S.F., 392 N.J. Super. 201, 211 (App. Div.), certif. denied, 192 N.J. 293 (2007) (citation omitted). The children were in a resource placement that was stable, secure, and loving. Their resource parents wanted to adopt them. See In re Guardianship of J.E.D., 217 N.J. Super. 1, 17 (App. Div. 1987), certif. denied, 111 N.J. 637 (1988) (stating that when a resource parent wishes to adopt, an influential factor is introduced into the best interests analysis).

In sum, Mary and Roger are not able to provide their children with a safe and stable home environment. In consideration of the children's best interests, we conclude the judgment of guardianship was appropriate, as Charlie and Tim are entitled to the care and stability that adoption will provide.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION