RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1323-16T3

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

L.B.S.,

Defendant-Appellant,

and

R.L.G.,

Defendant.

IN THE MATTER OF THE
GUARDIANSHIP OF I.D.A.L.G.,

Minor.e

Submitted September 18, 2017 – Decided October 13, 2017

Before Judges Sabatino and Whipple.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FG-07-0136-15.

Joseph E. Krakora, Public Defender, attorney for appellant (Catherine Reid, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Mary L. Harpster, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Lisa M. Black, Designated Counsel, on the brief).

PER CURIAM

Defendant L.B.S., the mother of I.D.A.L.G. (Ivan[1]), appealed the Family Part's June 16, 2015, final judgment terminating her parental rights after a guardianship trial. On October 19, 2016, we affirmed the trial court as to prongs one and two of N.J.S.A. 30:4C-15.1(a)(1) and (2), but remanded for further proceedings as to prongs three and four, N.J.S.A. 30:4C-15.1(a)(3) and (4), in light of Ivan's February 2016, removal from the resource home where he resided at the time of trial and his placement with his paternal grandmother. N.J. Div. of Child Protection & Permanency v. L.B.S. & R.L.G., No. A-4845-14T2 and A-4846-14T2 (App. Div. Oct. 19, 2016). We have outlined the relevant facts in our earlier opinion and need not repeat them here.

[1] We use a pseudonym to protect the child's identity and for ease of reference.

We briefly discuss the facts applicable to the present appeal. Ivan was initially placed with his paternal grandmother, while defendant sought treatment for substance abuse. In January 2014, the Division of Child Protection and Permanency (the Division) removed Ivan from the grandmother's home because she had been substantiated for abuse and neglect in 1987. Ivan was then placed in a resource home, where he stayed throughout the trial. In September 2014, the Division ruled out the grandmother as a relative placement for Ivan because of her prior substantiation, but she successfully administratively appealed the substantiation. However, at the time of trial, the grandmother had not yet completed the parenting classes required to be licensed as a qualified foster home, so Ivan remained in the resource home.

At the June 2015, termination hearing, the trial judge found it in Ivan's best interest to remain with the resource home that committed to adopting him. During defendant's appeal, we learned Ivan was removed from the resource home in February 2016 and placed with the grandmother, where he remains.

At defendant's initial appeal, the record was incomplete as to whether the grandmother wanted to adopt Ivan or maintain a Kinship Legal Guardianship (KLG) arrangement with one or both parents. We therefore affirmed the trial court's findings with respect to prongs one and two, but vacated without prejudice as

to prongs three and four and remanded for further proceedings on those questions. We were not convinced the record supported the assertion that the grandmother was adequately informed of the difference between KLG and adoption. We also expressed concern the trial judge had misapplied the law in his determination that KLG was an unavailable option because Ivan was adoptable. One option does not necessarily foreclose the other, therefore, we asked the trial judge on remand to explore the KLG option with the grandmother.

The Family Part conducted a hearing on November 15, 2016, and considered testimony from the Division and the grandmother. The judge ultimately determined the grandmother was fully committed to adoption, and according to the Division, Ivan was adoptable. Therefore, KLG was not "appropriate, reasonable [or] available." This appeal followed.

On appeal, defendant argues the trial court did not carry out the mandate of the remand order because it failed to insure the grandmother's options were fully explained and examined, and it again misapplied the standard for consideration of KLG. We disagree.

"It is beyond dispute that a trial judge has the responsibility to comply with pronouncements of an appellate court." Tomaino v. Burman, 364 N.J. Super. 224, 232 (App. Div.

2003), certif. denied, 179 N.J. 310 (2004). While the trial court may disagree with our decision, it must still comply. Id. at 233.

Having reviewed the transcript, we are satisfied the trial judge complied with our prior opinion. In it, we directed the trial court to explain, on the record, the options available to the grandmother with respect to adoption of Ivan or a KLG arrangement, and to explore these options with counsel present. The differences between adoption and KLG were read to the grandmother on the record, and we are satisfied she understood the differences. The grandmother unequivocally stated she wished to adopt Ivan. She also said she was never coerced by the Division into agreeing to adopt Ivan, she spoke to the Division regarding the differences between adoption and KLG, and she signed a form stating she wished to adopt Ivan. The grandmother testified she would like her son to regain his parental rights, however, she also testified she would have allowed both defendant and Ivan's father to visit but both needed to get their lives together.

At the conclusion of the hearing, the judge found the grandmother "clearly indicated that she is committed to adoption and that is what she is willing to do." Additionally, the judge noted that the present case was not one where KLG was "appropriate, reasonable, [or] available." We defer to the trial court's factual findings as the judge "has the opportunity to make first-hand

credibility judgments about the witnesses who appear on the stand." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008). Based upon the record before us, we are satisfied the trial judge followed our remand instructions. The Division's attorney discussed the differences between adoption and KLG on the record, and counsel for the parties was able to question the grandmother's understanding. The judge asked the appropriate follow-up questions, and the grandmother unequivocally stated her wishes to adopt Ivan. The grandmother's statements, coupled with the trial judge's findings, demonstrate the grandmother sufficiently understood the differences between adoption and KLG to satisfy our remand instruction.

Defendant argues the record does not support a finding that the grandmother made an unequivocal commitment to adoption and the trial judge erred in terminating parental rights because KLG was not "available" or "appropriate." We disagree.

Where adoption of a child is "neither feasible nor likely[,]" the Division should consider KLG, which does not require the termination of parental rights. N.J.S.A. 3B:12A-1(b). The birth parent would retain the right to consent to adoption, change the child's name, visit the child, and be obligated to pay child support. N.J. Div. of Youth & Family Servs. v. D.H., 398 N.J.

Super. 333, 341 (App. Div. 2008). To appoint a Kinship Legal Guardian, the court must find by clear and convincing evidence:

> (1) each parent's incapacity is of such a serious nature as to demonstrate that the parents are unable, unavailable or unwilling to perform the regular and expected functions of care and support of the child;
>
> (2) the parents' inability to perform those functions is unlikely to change in the foreseeable future;
>
> (3) in cases in which the [D]ivision is involved with the child . . . (a) the [D]ivision exercised reasonable efforts to reunify the child with the birth parents and these reunification efforts have proven unsuccessful or unnecessary; and (b) adoption of the child is neither feasible nor likely; and
>
> (4) awarding [KLG] is in the child's best interests.
>
> [N.J.S.A. 3B:12A-6(d).]

In addition, our Court has recognized that KLG is "not meant to be a substitute for the permanency of adoption but, rather, to provide as much permanency as possible when adoption is not feasible or likely and a relative is willing to care for the child." N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 510 (2004). If a child is adoptable, "KLG cannot be used to defend against termination of parental rights." D.H., supra, 398 N.J. Super. at 341. Additionally, "[w]hen a caretaker 'unequivocally' asserts a desire to adopt, the statutory requirement that adoption

is neither feasible nor likely is not satisfied." N.J. Div. of Youth & Family Servs. v. H.R., 431 N.J. Super. 212, 231 (App. Div. 2013) (citation omitted). "There is no statutory authority that establishes any burden a caregiver who wants to adopt must meet in rejecting KLG." N.J. Div. of Youth & Family Servs. v. T.I., 423 N.J. Super. 127, 137 (App. Div. 2011). Where adoption is feasible or likely, there is "no need to determine whether KLG was in the best interest of" the child. Ibid.

We have found adoption appropriate, rather than KLG, where the child has been in the custody of the caretaker for quite some time, the caretaker is committed to adoption, and the differences between KLG and adoption have been explained. See T.I., supra, 423 N.J. Super. at 136. However, we have reversed permanency orders terminating parental rights where a caretaker was misinformed a child was ineligible for KLG because of the child's age, see H.R., supra, 431 N.J. Super. at 232-33, or where the trial judge incorrectly found KLG to be unavailable as a permanency plan. See D.H., supra, 398 N.J. Super. at 335, 342.

Here, the grandmother was committed to the adoption of Ivan. Based upon our review of the record, the grandmother understood the differences between adoption and KLG.

Defendant also argues the trial court's finding that termination will not do more harm than good is unsupported by substantial credible evidence in the record. We disagree.

To satisfy the fourth prong, the Division must prove by clear and convincing evidence that "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). The court must determine "whether a child's interest will be best served by completely terminating the child's relationship with that parent." E.P., supra, 196 N.J. at 108. "The crux of the fourth statutory subpart is the child's need for a permanent and stable home, along with a defined parent-child relationship." H.R., supra, 431 N.J. Super. at 226 (citation omitted). Where the child is living with foster parents, the court balances the relationship of the child with both the biological and foster parents. In re Guardianship of K.H.O., 161 N.J. 337, 355 (1999). The question is not whether the child will suffer any harm; rather, it is whether "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." Ibid. The answer to that question requires expert inquiry as to the strength of each relationship. Ibid.

Based upon a review of the record of the remand hearing, there was sufficient credible evidence that termination will not

do more harm than good. The grandmother has been caring for Ivan, confirmed her wish to adopt him, and recognized defendant and the grandmother's son had no capacity to properly care for Ivan. The child needs stability, which he would receive through adoption by the grandmother. Moreover, the grandmother testified neither parent had visited Ivan since the time of the initial appeal. Therefore, the Division has satisfied its burden of establishing termination will not do more harm than good.

Affirmed.