RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1683-15T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.L.,

Defendant-Appellant,

and

C.S.,

Defendant.

IN THE MATTER OF THE GUARDIANSHIP OF S.R.S., a Minor.

Argued December 7, 2016 – Decided March 10, 2017

Before Judges Alvarez, Accurso, and Manahan.[1]

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[1] Hon. Carol E. Higbee was a member of the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that a

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FG-15-28-13.

Thomas W. MacLeod, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Mr. MacLeod, on the briefs).

Amy B. Klauber, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Arielle E. Katz, Deputy Attorney General, on the brief).

James J. Gross, Designated Counsel, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Mr. Gross, on the brief).

PER CURIAM

Defendant J.L. (Michael)[2] appeals from the termination of his parental rights to his then four-year-old daughter S.R.S. (Dawn). We affirm.

Dawn suffered from opiate withdrawal symptoms at her birth in December 2011, and tested positive for amphetamines, barbiturates, benzodiazepine, cannabis, cocaine, opiates, and phencyclidines. After her discharge from a rehabilitation hospital, she was placed with her maternal aunt (Mary), Mary's

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third judge should be added. Counsel has agreed to the substitution and participation of another judge from the part, and have waived reargument.

[2] We use pseudonyms to protect the child's privacy.

husband (Tom), and four other children where she has resided ever since. Tom and Mary wish to adopt. Dawn's mother executed an identified surrender of her parental rights in favor of Tom and Mary and is not a party to this appeal.

Termination of parental rights is warranted when the Division of Child Protection and Permanency (Division) establishes by clear and convincing evidence that:

> (1) the child's safety, health, or development has been or will continue to be endangered by the parental relationship;
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> (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.
>
> [N.J.S.A. 30:4C-15.1(a); N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 447-48 (2012).]

The trial judge rendered her decision from the bench, concluding that all four prongs were proven by clear and convincing evidence.

In this appeal, Michael argues that the Division entirely failed to satisfy the statutory test, and that "pursuant to N.J.S.A. 9:2-4.1, there is clear and convincing evidence that awarding custody of [Dawn] to [Michael] is in the child's best interest." Both the Division and the Law Guardian contend that the statutory standards for termination have been met, and that Michael did not establish, as required by N.J.S.A. 9:2-4.1(b),[3] by clear and convincing evidence that he should be awarded custody of Dawn because it was in her best interest.

Dawn came to the Division's attention when one of the two caseworkers the Division presented at trial, Christian Kempf, was assigned to investigate allegations that Dawn's then four-year-old half-brother was being physically abused by Michael. When Kempf conducted her initial interview, Michael covered the child's face with white cream in order to conceal the boy's injuries. The child told the caseworkers that Michael bit him and twisted his knee. When taken to a hospital, the child was found to have bruises and lacerations over his body including his forehead,

[3] N.J.S.A. 9:2-4.1(b) requires that a parent convicted of endangering the welfare of a child demonstrate by clear and convincing evidence that it is in the best interest of the child for the parent to be awarded custody.

earlobes, ears, lips, arms, spine, torso, legs, buttocks, and scrotum.

A Dodd[4] removal followed, and Michael was charged with child endangering on March 11, 2011. See N.J.S.A. 2C:24-4(a). That child was placed with his biological father. The bruising, according to a pediatrician who treated the child, was a result of multiple episodes of abuse over time. Michael was incarcerated on the charges, and on September 10, 2012, pled guilty. He was sentenced on October 26, 2012 to two years probation with credit of 596 days served and ordered to pay monetary penalties. When Michael was released from jail, Dawn was almost a year old. That was the first time Michael saw Dawn.

At the termination trial, the two Division caseworkers testified as to multiple services provided to Michael and the several psychological, substance abuse, and bonding evaluations which were performed. At various times while the litigation was pending, the Division lost touch with Michael for months.

Despite the fact Michael participated in therapeutic visitation from May 13, 2014, to August 2014, and completed parenting classes in October 2014, his connection with Dawn,

[4] "A 'Dodd Removal' refers to the emergency removal of a child from the home without a court order, pursuant to the Dodd Act, . . . N.J.S.A. 9:6-8.21 to -8.82." N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 26 n.11 (2011) (citation omitted).

according to the Division's experts, was virtually nonexistent. Michael also had visitation supervised by his mother.

The bonding evaluations depicted a very healthy and strong bond between Dawn, and Mary and Tom. One of the psychologists testified that if he had not known she was not their biological child before meeting the family, he would have assumed it from their interactions. Having lived with Tom, Mary, and the children her entire life, Dawn feels a part of the family. Although initially Dawn perceived Michael as if he were an adult playmate, by the second bonding evaluation, she seemed to have even less interest in him than at the first.

The Division's experts opined uniformly that reunification was simply not an option given Michael's life challenges, narcissism, and seeming lack of empathy. For example, he neither acknowledged the effect his conduct had on Dawn's older half-brother, or the grief and loss Dawn would experience were she to be removed from her home.

Although able to obtain employment, Michael struggled to achieve stable housing, living with his mother for at least some of the time. He became impatient during some evaluations, complaining that they took too long, or that he had better things to do with his time. Michael missed approximately half of his scheduled individual therapy appointments and was terminated from

treatment. He did not perceive himself to have mental health issues that required treatment.

As to the first prong of the statutory test, the trial judge found that Michael's poor insight, poor judgment, and lack of empathy posed a danger to Dawn's emotional well-being. The judge noted that Dr. David Brandwein, one of the experts, testified that Michael was unable to parent Dawn, despite participation in services. He simply did not change from the time of his release from jail to the date of the evaluation. Michael did not take responsibility for the physical abuse inflicted on Dawn's older half-brother, despite having entered a guilty plea, and did not perceive himself as having any need for treatment prior to reunification with his daughter.

The judge described Michael as "sleepwalking" through services; superficially cooperating some of the time while gaining no benefit. The harm his parenting posed to Dawn was thus not eliminated despite his efforts. The Division met the second prong as well.

With regard to the third prong, in addition to providing multiple services, the Division explored placement alternatives. Although Michael's mother filed for custody of Dawn shortly after the litigation was filed, after she was denied, there was no follow-through, although she did occasionally visit with the

child. Mary and Tom did not wish to be involved in kinship legal guardianship, rather, they wished to adopt Dawn.

The judge also referenced the testimony from both experts that if Dawn's bond was broken with her resource family, she would experience loss which Michael would not be able to ameliorate. In contrast with the harm that could be inflicted on Dawn if she were removed from Tom and Mary's home, termination of his relationship with the child would have minimal, if any, effect on Dawn. In the opinion of the experts, the resource parents are the child's psychological parents, and the bond between them is healthy and secure. They provide Dawn with a safe and nurturing environment, therefore the judge also found that termination would not do more harm than good.

N.J.S.A. 9:2-4.1(b) applies because Michael was convicted of endangering the welfare of a child. He was required, in order to overcome the presumption against any award of custody to him, to present clear and convincing evidence that it was in Dawn's best interest to be reunited with him. No such proof was demonstrated during the Division's case. Michael presented no evidence whatsoever.

Concluding that the Division met all four prongs by clear and convincing evidence, the judge terminated parental rights. She

also held that Michael failed to meet his burden of proof under N.J.S.A. 9:2-4.1(b).

I.

An appellate court's review of a trial court's decision to terminate parental rights is limited. F.M., supra, 211 N.J. at 448-49. We must be satisfied that there is "substantial credible evidence" to support the trial court's finding that the Division has demonstrated all four statutory criteria for termination by clear and convincing proof. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008). As part of that review, we generally "defer to the factual findings of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a 'feel of the case' that can never be realized by a review of the cold record." Ibid. (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007)). Those findings may not be disturbed unless "they are so manifestly unsupported by or inconsistent with the competent, relevant, and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974) (citation omitted).

The first prong of the statutory test "involves the endangerment of the child's health and development resulting from the parental relationship." In re Guardianship of K.H.O., 161

N.J. 337, 348 (1999) (citation omitted). The Division does not have to wait "until a child is actually irreparably impaired by parental inattention or neglect." F.M., supra, 211 N.J. at 449 (quoting In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999)). "The harm shown . . . must be one that threatens the child's health and will likely have continuing deleterious effects on the child." K.H.O., supra, 161 N.J. at 352.

In this case, Michael lacked a sense of responsibility for the physical harm he inflicted on Dawn's half-brother. That child was a toddler at the time, as was Dawn during the guardianship trial. Michael failed to consistently appear at visits, fully engage in treatment, and actually provide a home for his child. He does not understand Dawn's emotional or physical needs. Despite his assertions that he believed he could provide for Dawn, once released from prison on the child endangerment charge, he basically went his own way, securing employment, and living intermittently in his mother's home without making an effort to plan for Dawn.

Under the second prong of the statutory test, the State must establish that "the harm [to the child] is likely to continue because the parent is unable or unwilling to overcome or remove the harm." Id. at 348 (citing N.J.S.A. 30:4C-15.1(a)(2)). Here, the experts unequivocally shared the opinion that Michael could

not provide for Dawn's needs, despite the services in which he half-heartedly engaged.

Michael's argument that the experts erroneously discounted the possibility that he entered a guilty plea merely to avoid additional jail time, as opposed to actual guilt, fails. See State v. Taccetta, 200 N.J. 183, 195 (2005) ("The notion that a defendant can enter a plea of guilty, while maintaining his innocence, is foreign to our state jurisprudence."). It does not warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Michael neither denied nor acknowledged his conduct towards Dawn's older half-brother. He similarly neither appreciated the home Dawn had with Tom and Mary, nor understood why she would suffer harm if removed.

At the time the Division investigated the possibility of Michael's mother and brother as potential caregivers, they were in the process of relocating. They did not perceive themselves as then able to care for the child.

The fourth prong is the "'failsafe'" inquiry guarding against an inappropriate or premature termination of parental rights." F.M., supra, 211 N.J. at 453 (citing N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 609 (2007)). This child is entitled to and needs the continuation of the nurturing, secure, and safe

home she has found with Mary and Tom. Her father is not able to make the significant changes necessary for him to be able to provide such a home for his daughter. The evaluations uniformly concluded that there was no meaningful connection between Michael and Dawn, but a strong bond between Dawn, Mary, and Tom. Thus we are satisfied that termination would not do more harm than good.

Finally, N.J.S.A. 9:2-4.1(b) states that there must be clear and convincing evidence that it would be in a child's best interest to be placed in the custody of a parent who has been convicted of child endangering, even if the child who was injured is a different child. See ibid. (N.J.S.A. 9:2-4.1(b) applies to the parent's custody of or visitation rights "to any minor child"[.]) (emphasis added). No evidence was presented by anyone that it would be in Dawn's best interest for such a change to be made.

Affirmed.