SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2656-15T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

L.A.K.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF T.D.K., T.L.K., T.O.K., T.E.K. and T.C.K.,

Minors.

Submitted January 19, 2017 – Decided February 21, 2017

Before Judges Alvarez and Accurso.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FG-04-104-16.

Joseph E. Krakora, Public Defender, attorney for appellant (Kourtney J.A. Knop, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of

counsel; Salima E. Burke, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Charles Ouslander, Designated Counsel, on the brief).

PER CURIAM

Defendant L.A.K. appeals from a final judgment terminating her parental rights to the younger five of her nine children, a son, Tommy,[1] three-and-a-half years old and two sets of twins, two-and-a-half and one-and-a-half years old. She contends the Division of Child Protection and Permanency failed to prove the four prongs of the best interests standard of N.J.S.A. 30:4C-15.1a(1)-(4) by clear and convincing evidence. She also contends the court erred in not reopening the record to allow her to testify six weeks after the court rendered a decision terminating her parental rights.

The Law Guardian joins with the Division in urging we affirm the judgment. Having considered defendant's arguments in light of the record and controlling law, we affirm the termination of her parental rights.

The facts are fully set forth in Judge Axelrad's comprehensive oral opinion, and need not be repeated here.

[1] This name is fictitious to protect the child's identity.

Suffice it to say the family first came to the Division's attention in 2001, when defendant gave birth to her third child, who tested positive for marijuana. Defendant was subsequently substantiated for neglect.

Defendant's four oldest children were the subject of an emergency removal in 2010, after her thirteen-year-old daughter called 911 afraid that her mother, reportedly intoxicated, would harm her and her siblings. Defendant tested positive for PCP (phencyclidine), methamphetamines, alcohol and marijuana. Following a fact-finding hearing, the judge concluded defendant had abused and neglected her four children by using drugs while they were solely in her care.

Defendant admitted at the time that she had been diagnosed with bipolar disorder and "self-medicates." A subsequent guardianship action was terminated after defendant voluntarily surrendered her rights to one of the children, two others remained in the custody of their father and the fourth was placed in the custody of defendant's sister.

This matter was instigated in 2013 at the time of Tommy's birth when the hospital reported defendant admitted using marijuana and receiving no prenatal care. The Division made an emergency removal of the baby on his release from the hospital and placed him with a family friend. The friend applied for and

was granted custody of Tommy with defendant's consent in a non-dissolution proceeding. The abuse and neglect proceeding against defendant was closed with an order that defendant's visits with Tommy remain supervised.

In June 2014, defendant gave birth to her first set of twins, both of whom tested positive for PCP. Defendant tested positive for PCP, benzodiazepine and opiates. Although neither of the twins suffered withdrawal symptoms, both were removed from defendant's care upon their release from the hospital. Defendant was allowed supervised visitation with the children, but visited only for the first couple of months of their lives. She never visited again.

Defendant refused services and evaluations, complaining the Division was not giving her credit for services she attended after removal of the older children. When workers explained that testing positive for PCP and other opioids at the twins' birth made plain additional services and treatment were necessary, defendant declined, explaining she had severe anxiety and could not deal with all the negativity. The children were placed in a non-relative resource home where they remained at the time of the January 2016 guardianship trial.

Defendant's refusal to visit the children or accept services led to the court's approval of a permanency plan of

termination of parental rights followed by adoption by the resource family. The Division filed a complaint for guardianship and terminated the abuse and neglect action.

In July 2015, defendant gave birth to her second set of twins, both born testing positive for PCP. She told the worker in the hospital that she wanted someone else to have full custody of the babies and wanted to "sign her rights over." The Division removed the newborns upon their release from the hospital and placed them in a resource home. Although defendant was permitted supervised visitation, she never visited.

Shortly thereafter, the family friend caring for Tommy informed the Division she could not continue to care for him as she could no longer deal with defendant. Tommy was removed from her care and placed in a foster care home. Defendant was granted supervised visitation.

When defendant appeared at a court-ordered psychological evaluation slurring her words and admitting she had smoked PCP, the evaluation had to be rescheduled due to her "impaired cognitive state and inability to communicate coherently." At the rescheduled evaluation, defendant admitted using drugs and not taking her prescribed medication. The psychologist concluded defendant clearly "has some difficulty with her thought process but it is not clear if she had this problem

before she started using PCP or if it was brought on by the drug use."

The Division thereafter amended its guardianship complaint to include Tommy and the younger twins. Defendant subsequently missed scheduled substance abuse assessments and bonding evaluations and refused to schedule a psychiatric evaluation.

Based on a detailed rendition of the facts adduced at trial and her assessments of the credibility of the witnesses who testified, Judge Axelrad determined the Division established all four prongs of the best interests standard by clear and convincing evidence. She found defendant's persistent and untreated drug problem and refusal to take medication prescribed to treat her acknowledged bipolar condition posed a substantial risk of harm to her children, and that her unwillingness to address her problems and provide them a safe and stable home, demonstrated her unwillingness to eliminate the harm.

Cataloging the many services the Division attempted to provide defendant, the judge concluded the Division had easily met its obligation to provide her the services she needed to correct the conditions that led to the children's placement. The judge also found the Division had explored, without success, alternatives to termination, including kinship legal guardianship.

Finally, the judge concluded, based on the expert testimony, that termination of defendant's parental rights to all five children would not do more harm than good. The judge relied on the results of the bonding evaluations that the resource parent of the first set of twins had become the children's psychological parent and that separating them from her would cause them lasting and significant harm. The resource mother wanted to adopt the twins and was committed to visitation among the siblings.

Although the second set of twins were too young at the time of the evaluation to have developed a secure bond with their resource parents, the judge accepted the Division's expert's opinion that they were well on their way to doing so and that separating the children from the only parents they had ever known would cause them lasting harm. Those resource parents were likewise committed to adopting the twins in their care and supporting visitation among the siblings. They were also considering providing a home for Tommy, whose resource parent had determined that adoption would not be possible.

Based on the testimony, the judge concluded that all five children deserved the stability and permanency their mother had been unwilling or unable to provide and that termination of her rights would further that end.

Our review of a trial court's decision to terminate parental rights is limited. N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012). We generally "defer to the factual findings of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a 'feel of the case' that can never be realized by a review of the cold record." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007)).

Our review convinces us that Judge Axelrad's findings are amply supported by the trial testimony. Defendant never managed to get free of her drug and mental health problems so as to provide these children with a safe and stable home at any point, and she let months go by without any effort to see them. Indeed she never visited the younger twins after they left the hospital. "A parent's withdrawal of that solicitude, nurture, and care for an extended period of time is in itself a harm that endangers the health and development of the child." In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999).

We reject defendant's argument that our opinion in New Jersey Division of Child Protection & Permanency v. K.S., 445 N.J. Super. 384 (App. Div. 2016), decided several months after

entry of judgment in this matter, requires reversal and a remand to allow defendant an opportunity to testify. There we held the trial judge abused his discretion in refusing K.S.'s request to reopen the record to permit her to testify, where the application was made shortly after the close of the evidence and before the judge had rendered his decision terminating her parental rights. Id. at 390.

Defendant did not appear at trial, despite receiving notice of the trial dates in open court well in advance and her counsel's many efforts to contact her before and after trial began. After the Division rested and defendant had still not appeared, the judge held open the record for another day to allow for defendant's testimony.

When defendant had not appeared by 9:35 a.m. the following day, her counsel rested, and the judge rendered her decision, making detailed findings on the record. The judge made her termination finding part of a multi-purpose order entered that same day but did not sign a judgment. Although proceedings had been concluded as to defendant, the Division had not been able to serve the man reported to be the children's father. The judge thus held off signing a final judgment in order to allow substituted service on the co-defendant father.

When the parties returned to court to enter the co-defendant father's default on the record, defendant appeared asking to testify. Judge Axelrad denied the request. The judge noted she had entertained several FD applications filed by defendant during the guardianship proceeding to obtain custody of her children and had held open the record at the guardianship trial to allow defendant the opportunity to testify. When defendant failed to appear without excuse, the judge rendered her decision on the record in the presence of defendant's counsel.

Motions to reopen the record "are addressed to the sound discretion of the trial court and will not be disturbed unless that discretion has been clearly abused." Quick Chek Food Stores v. Springfield, 83 N.J. 438, 446 (1980). Unlike the situation in K.S., where the defendant sought to reopen the record ten days after the close of the evidence and before the court had rendered its decision, here, defendant sought to reopen the record to allow her to testify approximately six weeks after the court had rendered its final decision in the matter. K.S. is thus plainly inapposite. We cannot find Judge Axelrad abused her discretion in declining to reopen the record to allow plaintiff to offer evidence six weeks after the judge had rendered her decision in the case.

We are satisfied the record supports the judge's findings that the children's safety, health and development were endangered by defendant, who, unwilling or unable to eliminate the harm, refused and failed to complete the services offered and that termination of her parental rights will not do more harm than good. We affirm the judgment substantially for the reasons expressed by Judge Axelrad in her thorough and thoughtful opinions from the bench on January 6 and February 16, 2016.

Affirmed.