

## RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2862-15T2

NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.K.,

Defendant-Appellant.

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IN THE MATTER OF THE GUARDIANSHIP  
OF T.K. and K.K., Minors.

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Submitted February 7, 2017 – Decided March 28, 2017

Before Judges Fisher and Ostrer.

On appeal from the Superior Court of New  
Jersey, Chancery Division, Family Part,  
Cumberland County, Docket No. FG-06-32-15.

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

Christopher S. Porrino, Attorney General,  
attorney for respondent (Melissa Schaffer,  
Assistant Attorney General, of counsel;  
Katrina A. Sansalone, Deputy Attorney General,  
on the brief).

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

PER CURIAM

Defendant J.K. appeals from a February 29, 2016 judgment of guardianship, terminating her parental rights to her daughters, T.K. (Tami), born in July 2001, and K.K. (Karen), born in February 2010.<sup>1</sup> The fathers of the two girls are deceased.<sup>2</sup> The children were removed from defendant's home in March 2014 and placed with her brother and his wife, G.W. and T.W., where they remained until trial. Defendant contends the Division of Child Protection and Permanency (the Division) failed to establish any of the four prongs of the best interest test. See N.J.S.A. 30:4C-15.1(c).

The Law Guardian joins the Division in support of the judgments. Having reviewed defendant's arguments in light of the record and applicable law, we affirm.

I.

The Division relied at trial on a voluminous documentary record; expert testimony of James B. Loving, Ph.D., who evaluated

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<sup>1</sup> We utilize pseudonyms for the reader's convenience.

<sup>2</sup> Karen's father, F.K., died of a drug overdose prior to trial. Tami's father, who was married to defendant prior to her relationship with F.K., died of a self-inflicted gunshot wound in defendant's home. Tami was present but did not observe the suicide.

defendant and the girls, and performed a bonding evaluation of the foster parents and the girls; expert testimony of Maryann McLaughlin, Psy.D., the girls' therapist; and testimony of Division worker Daniel Melendez. Defendant and a friend were the sole defense witnesses. Prior to trial, in lieu of a child interview, the court allowed Tami to read a statement as to her experiences and wishes, and briefly questioned her. We discern the following facts from this record.

In late 2013 and early 2014, the Division investigated reports of defendant's drug use, neglect of the children, and instances of domestic violence. During their multiple conversations with the Division in late 2013 and early 2014, defendant and her paramour, F.K., falsely denied habitual drug use; refused to submit to urine screens; and denied or minimized any strife in the home.

But Tami and Karen contradicted these denials in their statements to Division workers. Both children reported that the adults used multiple illicit drugs. Tami also reported both verbal and physical altercations between defendant and F.K. In one physical altercation, F.K. injured defendant's finger. In another incident, defendant suffered a cut to her face that required stitches.

The children also detailed instances of abuse and neglect against them. Karen said that F.K. disciplined them by hitting

them with a fly-swatter. Tami was sometimes left alone with responsibility for Karen. Both girls said that F.K. often used a racial slur in referring, or speaking to, Tami, a bi-racial child.

With defendant's consent, the Division implemented a safety plan in March 2014. It involved moving the children and defendant to the maternal grandmother's home. When the Division learned that defendant and F.K. planned to relocate out of state with the children, the Division effected a Dodd removal and placed the children with G.W. and T.W. instead.

After the children were removed, they supplemented their disclosures of drug use, neglect and abuse. Tami stated she and Karen witnessed the adults snort drugs in the car. Although the Division substantiated defendant and F.K. for neglect, the court found to the contrary after a fact-finding hearing in June 2014. Nonetheless, the court found the family was in need of services and continued the Division's custody, care and supervision of the children.

Over time, Karen disclosed details of repeated sexual abuse by defendant and F.K. She stated that she, F.K. and defendant showered together. During the showers, the adults engaged in sexual contact with her on multiple occasions. Karen further disclosed that F.K. once touched her with his erect penis in defendant's presence until defendant told F.K. to stop. She also

disclosed that she was brought into a room to witness her parents have intercourse. In addition, F.K. touched her with his penis on other occasions; and defendant once touched Karen's vagina with her nose and mouth, and engaged in other sexual contact with Karen.

Testimony from Tami and defendant offered indirect corroboration of the shower incidents. Although Tami did not observe the contact, she confirmed that Karen and the adults entered the bathroom at the same time. Defendant eventually admitted the group showering, but continued to deny inappropriate contact.

The Division substantiated both defendants for sexual abuse. F.K. was arrested and charged with sexual assault and endangering the welfare of a child. Defendant was also charged arising out of these incidents, but the charging document is not in the record and the related charges were later dismissed.

In addition to the allegations of sexual abuse, defendant was diagnosed with severe opioid dependence. Despite having earlier denied any drug use, she eventually admitted using heroin daily. She contended her addiction arose from use of pain killers for back pain. Despite referrals to drug evaluations and recommendations for drug treatment and domestic violence counseling in the spring of 2014, defendant did not comply with inpatient drug treatment until September 2014. She relapsed

shortly thereafter and was discharged from an intensive outpatient program in January 2015. She continued to attend evaluations in 2015, but did not reenter treatment until August 2015, when she was placed on Suboxone therapy.

Defendant was also recommended for domestic violence counseling, but she did not comply until late 2014. Defendant began personal psychological counseling in the spring of 2015, which continued until trial. The therapist, Dr. Scott R. Schafer, a licensed professional counselor,<sup>3</sup> reported that defendant denied Karen's allegations of sexual abuse and blamed G.W. and T.W. for alienating the girls against her.

Defendant exercised visitation with the girls for a few months after the removal. But her attendance was inconsistent, and when she did visit, she disparaged G.W. and T.W. and engaged in behavior that the court found violated the Children's Bill of Rights. N.J.S.A. 9:6B-1 to -6. In June 2014, the court allowed Tami to decline visitation. Karen also resisted visitation around that time. The court suspended visitation entirely in September 2014,

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<sup>3</sup> The record does not indicate the degree that qualified him to use the title of "Dr."

in accord with the recommendation of psychologists who opined that such contact was too traumatic for the girls.<sup>4</sup>

Months before trial, the girls' therapist, Dr. McLaughlin, recommended against a bonding evaluation with their mother because any contact would violate the children's wishes, and "would bring up past trauma and add to their trauma because their power would be taken from them." Defense counsel proposed that defendant's therapist also recommend whether a bonding evaluation should occur after evaluating Tami. At a subsequent case management conference, the deputy attorney general reported that the defense expert "decline[d] to do the bonding evaluation."

Dr. Loving performed a psychological evaluation of defendant and a bonding evaluation of the girls with their aunt and uncle. He reviewed the onset of defendant's addiction to opiate painkillers in her thirties, which progressed to abuse of heroin and other drugs. He recognized that she was in therapy, had completed a substance abuse program, had been sober for five months (although on Suboxone), and had stable employment. Nonetheless,

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<sup>4</sup> Defendant's visitation was also barred by a bail restriction imposed when she was criminally charged in connection with the sexual abuse allegations. After the charges were dismissed in October 2015, defendant unsuccessfully sought therapeutic visitation. Counsel argued, "I understand . . . it is late in the game, however, my client is very much engaged in all of the services the Division is requiring of her[.]"

based on her past long term use, her chronic pain issues, and her reliance on Suboxone, Dr. Loving found that she posed a significant risk of relapse. He also noted that she continued to make questionable judgments, such as allowing an active heroin user to share her apartment while she was in treatment.

Dr. Loving's diagnosis included: opioid use disorder, other substance use disorder, major depressive disorder, dependent personality disorder, and, provisionally, post-traumatic stress disorder (PTSD). In addition, he opined that defendant "pos[ed] some very serious risks in terms of parenting." He contended she had difficulty making decisions for herself and her children, and she was overly reliant on other people. He noted she demonstrated "surprisingly little insight or responsibility," and no additional services would enable her to resume the parenting role in the foreseeable future.

With respect to the allegations of sexual abuse, Dr. Loving noted that defendant continued to deny vehemently any such abuse occurred. As a result, returning the children – who asserted it did occur – would "invalidat[e] [their] feelings and sense of reality." Especially for Tami, it would convey the message that her voice was not heard. Returning the children could also trigger depression, anxiety and other emotional problems.



He described Tami as "bright and articulate," with the clear preference to remain with her aunt and uncle, with whom she felt safe and happy.<sup>5</sup> Both children had strong, positive, healthy and significant attachments to their aunt and uncle, whom they viewed as parent figures. Even without conducting a bonding evaluation, Dr. Loving opined that their attachment to their mother was "complicated and negative" and "the girls experience negativity and a sense of insecurity with her."

He opined that if the girls were removed from their aunt and uncle, they would be placed "at extremely high risk for suffering long-term emotional harm," noting they would "lose the experience . . . of safety and stability." Returning them to defendant would only make things worse, by "adding a layer of risk." It would remove them from a place where they felt safe and healthy, and put them where they felt "unsafe and unhealthy." Moreover, defendant was not able "to help the girls overcome that loss and to emotionally survive that transition." He opined that terminating parental rights would not cause more harm than good.

Dr. McLaughlin conducted psychological evaluations of the girls in May 2015 and continued to see them weekly over the following summer. She diagnosed Karen with PTSD and attachment

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<sup>5</sup> Dr. Loving did not interview Karen because of her age.

problems. She further concluded Tami suffered from dysthymia,<sup>6</sup> attachment problems and PTSD. The diagnoses were based on the trauma of witnessing drug use and domestic violence; physical and emotional neglect; in Karen's case, being sexually abused; and in Tami's, learning her sister was abused.

She noted the girls reacted to this trauma in different ways. Karen acted out, threw tantrums, and had difficulty forming relationships with others. Conversely, Tami internalized her reactions, had difficulty making friends, and focused on her school work, in which she excelled.

Dr. McLaughlin recommended against allowing defendant to see the girls, stating it would be "extremely traumatic" and contrary to their wishes. Although she did not conduct a bonding evaluation of defendant and the girls, she opined that the children had an "insecure attachment with their mother, with avoidant and disorganized features."

Dr. McLaughlin emphasized defendant's attempts at rehabilitation had little impact on the advisability of immediate reunification. She stated that the mother's past abuses made it

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<sup>6</sup> Dysthymia is defined as, "A chronic mood disorder manifested as depression for most of the day, more days than not, accompanied by some of the following symptoms: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration, difficulty making decisions, and feelings of hopelessness." Stedman's Medical Dictionary, 602 (28th ed. 2006).

too harmful for the children to reunite because they viewed their mother through the lens of her past behavior. She noted, "The mom who does well today has no bearing on the children's progress at all. They are still dealing with the past abuse and will continue to deal with it for a very long time."

Thus, Dr. McLaughlin did not believe reunification would be possible for the "foreseeable future." Instead, the children had to first develop a secure attachment with their aunt and uncle — which was in process — before being able to deal with their past trauma.

In a statement she read to the judge before trial, Tami urged the judge to allow her to remain with her aunt and uncle and opposed granting custody to her maternal grandmother. She alleged her mother neglected her and Karen; they often lacked basic necessities; and there were times the utilities were turned off. She described her mother's focus on getting drugs, which continued when F.K. was incarcerated. In particular, she recalled riding with her mother and F.K. on drug runs to Philadelphia, Camden or Gloucester County. During such excursions, she found herself sitting with drug dealers in the car's back seat.

She also discussed the abuse she and her sister experienced. She said her mother "allowed [F.K.] to put me, my race and my dad's race down and my mom would always do the same." Regarding

the allegations of sexual abuse, she said her sister "never wanted to go in the bathroom with [her parents] and had a fear of water."

Tami contrasted their experience to her present time with her aunt and uncle. She lauded them for focusing on her education, for loving them, and for making her and Karen feel a part of a family. Upon questioning from the judge, Tami confirmed that the statement was her own.

Defendant's friend briefly testified that she had known defendant for over twenty years and that she had observed defendant to be an attentive, caring mother. She stated that the children always appeared "appropriately clothed and cared for," and she did not believe defendant would intentionally harm her children.

Defendant, testifying at trial on her own behalf, admitted that she abused drugs and that she was a victim of domestic violence by F.K. But she sought to demonstrate her fitness as a parent. She discussed her completion of domestic violence classes, her recent sobriety, and her continued participation in outpatient drug treatment and individual therapy. She stated she never did anything to hurt her children, and denied she sexually abused Karen. She alleged someone must have told Karen to make those allegations against her.

## II.

In an oral decision, Judge Harold U. Johnson, Jr., credited and adopted the conclusions and recommendations of Dr. Loving and Dr. McLaughlin. He found the Division had proved the allegations in the complaint. He found that while defendant "convinced herself what she is saying is true[,]" he did not doubt that F.K. "did some really bad things to [Karen]." Further, the court concluded defendant "knew that [the abuse] was going on and . . . didn't do anything about it . . . ."

He concluded that the Division proved by clear and convincing evidence all four prongs of the best interest test codified at N.J.S.A. 30:4C-15.1(a):

(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 division 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;<sup>[7]</sup> and

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

[N.J.S.A. 30:4C-15.1(a).]

See also N.J. Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 604-10 (1986).

With respect to prong one, the court found that defendant exposed the children to sexual abuse, domestic violence, drug abuse, emotional neglect, and trauma. The court further concluded that if defendant were reunited with the children, she would

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<sup>7</sup> "Reasonable efforts" as used in paragraph 3 means:

attempts by an agency authorized by the division to assist the parents in remedying the circumstances and conditions that led to the placement of the child and in reinforcing the family structure, including, but not limited to:

(1) consultation and cooperation with the parent in developing a plan for appropriate services;

(2) providing services that have been agreed upon, to the family, in order to further the goal of family reunification;

(3) informing the parent at appropriate intervals of the child's progress, development and health; and

(4) facilitating appropriate visitation.

[N.J.S.A. 30:4C-15.1(c).]

continue to endanger them. Regarding prong two, the judge found that she would be unable to cease inflicting harm upon the children because she faced the risk of relapse. Although he acknowledged her recent success in drug treatment and compliance with services, the judge found defendant would not be able to eliminate the harms afflicting the children. Moreover, the court found that prong two was satisfied because the children would suffer substantially from a delay of permanent placement and from disrupting their bond with the resource family parents.

The court found the Division made reasonable efforts to provide services and to reunite defendant with the children, but "these children could not be returned to Mom without . . . significant, serious, enduring emotional and psychological harm to them . . . ." Lastly, the court found that termination would not do more harm than good.

This appeal followed.

### III.

Our scope of review of the trial court's judgment is limited, In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002). We defer to the trial judge's factual findings that are rooted in his familiarity with the case, his opportunity to make credibility judgments based on live testimony, and his expertise in family matters. Cesare v. Cesare, 154 N.J. 394, 412-13 (1998). We will

affirm the Family Part's decision to terminate parental rights when substantial, credible evidence in the record supports the court's findings. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008). However, we are not bound by the trial court's legal conclusions. N.J. Div. of Youth and Family Servs. v. I.S., 202 N.J. 145, 183 (2010) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Applying that deferential standard of review, we affirm substantially for the reasons set forth in the court's oral opinion. We add the following observations.

With respect to prong one, defendant contends that the Division failed to establish that she caused harm to her children. She relies on two Title Nine, N.J.S.A. 9:6-8.21 to -8.73, abuse or neglect decisions, N.J. Dep't of Children & Families v. A.L., 213 N.J. 1 (2013), and N.J. Div. of Youth & Family Servs. v. V.T., 423 N.J. Super. 320 (App. Div. 2011), in which a parent's drug abuse was an insufficient basis for finding abuse or neglect.

We are unpersuaded. Particularly with respect to drug abuse, we recognize that a parent's involvement with illegal drugs does not invariably lead to a finding of abuse or neglect. See A.L., supra, 213 N.J. at 23 (stating that "not every instance of drug use by a parent during pregnancy, standing alone, will substantiate a finding of abuse and neglect[,]" although proof of regular use



would be relevant); V.T., supra, 423 N.J. Super. at 330-31 (reversing neglect finding where there was no proof that a drug-using parent posed a risk to a child while he exercised supervised visitation). However, the Division was not required to demonstrate that the girls suffered actual or physical harm while defendant was under the influence of drugs. N.J. Div. of Youth & Family Servs. v. L.J.D., 428 N.J. Super. 451, 480-81 (App. Div. 2012). Rather, the court may consider the likelihood that a child's "safety, health, or development" under prong one will be endangered. See N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 440 (App. Div. 2001), certif. denied, 171 N.J. 44 (2002). The infliction of serious psychological or emotional harm, as distinct from physical harm, may also suffice. L.J.D., supra, 428 N.J. Super. at 480-82; A.W., supra, 103 N.J. at 605.

Dr. Loving and Dr. McLaughlin both testified that the children actually suffered significant psychological harm as a result of the trauma experienced while in defendant's care. They suffered from PTSD and attachment disorders. The harm arose from witnessing drug abuse and domestic violence, experiencing or witnessing sexual abuse, and, in Tami's case, being subjected to racist, disparaging comments.

Particularly with respect to drug abuse, the children were also unquestionably placed at risk of harm when they accompanied

defendant and F.K. on drug runs, sharing the back seat with drug dealers. Drug transactions present the potential of violence. See Nat'l Center on Addiction and Substance Abuse at Columbia University, No Safe Haven: Children of Substance-Abusing Parents 15 (1999) ("Violence and danger are intrinsic to the activities of drug dealing, including fights over drug turf, retribution for selling 'bad' drugs, violence to enforce rules within drug-dealing organizations and fighting among users over drugs or drug paraphernalia."). Tami reported to the judge that she rode in an automobile after defendant and F.K. took drugs. See N.J. Div. of Youth & Family Servs. v. R.M., 411 N.J. Super. 467, 481 (App. Div.) (Title 9 case), certif. denied, 203 N.J. 439 (2010).

Defendant also challenges Karen's credibility, citing her aunt's reports to Division workers that Karen had difficulty telling the truth. But there was sufficient corroboration of Karen's assertions. See, e.g. N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 436-37 (App. Div. 2002) (stating that corroborative evidence of a child victim's out-of-court statements may consist of circumstantial evidence, including psychological impacts). Defendant ultimately admitted that she allowed Karen and F.K. to shower together. Karen also experienced

psychological symptoms of abuse that both psychologists confirmed. Additionally, Dr. McLaughlin opined that Karen was not coached.<sup>8</sup>

Defendant challenges the prong two finding on the ground that she has always provided a safe and stable home. However, even assuming she had stable employment and housing – a point partially challenged by Tami's assertion that utilities were occasionally shut off – that was not enough to rebut the evidence of harm. Nor did her recent sobriety and compliance with services compel a finding she could eliminate the harm facing the children and provide a safe home. Although F.K.'s death removed the threat he posed to the children's safety, that did not ameliorate the risk of psychological harm that defendant continued to present.

Instead, both psychologists testified, without expert contradiction, that the children would suffer significant psychological injury if forced to reunite with defendant. They further opined that defendant could not, in the foreseeable future, remove that risk of harm. See A.W., supra, 103 N.J. at 607

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<sup>8</sup> We recognize that the trial court did not find, after an N.J.R.E. 104(a) hearing, that "on the basis of the time, content and circumstances" of Karen's statements, there was a probability that they were trustworthy. See N.J.R.E. 803(c)(27). Nevertheless, defendant presented no objection on this ground. Unobjected hearsay is generally evidential. We do not find it was plain error to admit and rely upon Karen's statements, particularly in view of the corroborative evidence. See N.J. Div. of Child Prot. & Permanency v. J.D., 447 N.J. Super. 337, 348-50 (App. Div. 2016).

(stating the court should focus on whether it is "reasonably foreseeable that the parents can cease to inflict harm upon the children entrusted to their care"); A.G., supra, 344 N.J. Super. at 434 (stating court must decide "whether the parent can cease causing the child harm before any delay in permanent placement becomes a harm in and of itself"). The psychologists also testified, in accord with the statute, that "separating the child[ren] from [their] resource family parents would cause serious and enduring emotional or psychological harm" that defendant could not ameliorate. N.J.S.A. 30:4C-15.1(a)(2). Thus, the trial court had ample grounds for finding that its prong two analysis favored termination of defendant's parental rights.

We discern no merit in defendant's challenge to the court's prong three finding. The test of compliance with prong three is not the success of the Division's efforts. See In re Guardianship of DMH, 161 N.J. 365, 393 (1999) ("The diligence of [the Division's] efforts on behalf of parent is not measured by their success."). As the court found, the Division offered a range of services to defendant. Her compliance with services was late in coming. Her visitation with the children was inconsistent, and marked by recriminations. Although defendant attributes the suspension of visitation to the whims of children, both

psychologists opined that suspension was justified to protect the children from harm.

We reject defendant's suggestion that the prong four finding was flawed because no bonding evaluation was performed of defendant and the girls. Instead, this case presented the rare instance in which a bonding evaluation was not necessary. Cf. N.J. Div. of Youth & Family Servs. v. A.R., 405 N.J. Super. 418, 440 (App. Div. 2009) (stating "we can envision very few scenarios in which comparative evaluations would not be required"). The Division opposed a bonding evaluation based on its experts' opinion that it would harm the children. Both psychologists also recognized that a bond existed between defendant and the girls, but they asserted that, based on their evaluation of the girls, it was a negative one.


Furthermore, defense counsel did not object to the omission of a bonding evaluation with defendant. Rather, defense counsel proposed to the court that defendant's therapist should be permitted to ascertain whether a bonding evaluation should proceed. The court acceded to that proposal, but at the following case management conference, the deputy attorney general reported, without contradiction, that the therapist had determined it should not proceed. Accordingly, the court's prong four finding was amply supported by the testimony of Dr. Loving and Dr. McLaughlin.

To the extent not addressed, defendant's remaining points lack sufficient 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