SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3650-15T2

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

S.L.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP
OF A.L., a minor.

Submitted April 4, 2017 – Decided May 12, 2017

Before Judge Messano and Suter.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FG-13-82-14.

Joseph E. Krakora, Public Defender, attorney for appellant (Daniel DiLella, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Megan E. Shafranski, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Michele C. Scenna, Designated Counsel, on the brief).

PER CURIAM

Defendant S.L. appeals from the Family Part's April 14, 2016 order terminating his parental rights to his daughter, A.L. (Amy).[1] Defendant argues the Division of Child Protection and Permanency (the Division) failed to prove by clear and convincing evidence each prong of the statutory best-interests-of-the-child standard contained in 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 [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.

[1] We use initials and pseudonyms of those involved to maintain confidentiality.

[Ibid.; see also In re Guardianship of K.H.O., 161 N.J. 337, 347-48 (1999).]

The Division and Amy's Law Guardian counter by arguing the judge correctly concluded the Division had met the requisite burden of proof, and both urge us to affirm the termination order. We have considered the arguments raised in light of the record and applicable legal standards. We affirm.

I.

Amy was born prematurely in July 2012. Upon birth, Amy and her nineteen-year-old mother, J.N. (Janet), tested positive for marijuana, and Amy remained hospitalized in the Neo-Natal Intensive Care Unit (NICU) for the next four months. Janet admitted smoking marijuana throughout her pregnancy and did not receive pre-natal medical care. The Division investigated and substantiated a finding of neglect against Janet.[2]

The Division had been involved with defendant and Janet since 2010, when their eleven-week-old son was taken to the hospital with a fractured femur and parenchymal hemorrhage of the brain. Defendant dropped Janet and the child off at the hospital but never went inside because he had outstanding warrants for his arrest. The child was returned to Janet's care in February 2011,

[2] Janet executed a voluntary surrender of her parental rights during the course of this litigation.

but, in July, he accidentally choked to death on candy while left alone in his crib. In the interim, in January 2011, Janet and defendant had a second child, a girl, who was born prematurely and perished the same day.[3]

In September 2012, the Division filed a verified complaint seeking care, custody and supervision of Amy. At the time, defendant, who was forty-one-years old, was incarcerated at the Monmouth County Correctional Institute (MCCI), where he remained until January 2013. The Division placed Amy in a resource home upon her discharge from the NICU in October 2012. She has remained there ever since, and Amy's resource family wishes to adopt her.

Defendant provided contact information to the Division upon his release from the MCCI. However, he did not seek visitation with Amy. The Division's efforts to contact defendant met with little success thereafter, and, in May, when defendant called the Division to report Janet's excessive drinking, he told the caseworker he was facing additional criminal charges and possible incarceration.

In August 2013, defendant was arrested for failing to appear in court and remanded to the MCCI. In January 2014, defendant told the Division that N.B. (Nancy), the mother of two of

[3] In total, defendant fathered six children with four different women.

defendant's other children, was seeking custody of Amy at defendant's request. The judge denied Nancy's application but ordered the Division to evaluate her for placement purposes. Although Nancy was licensed by the Division in July, the Division did not support her visitation with Amy because she was not a relative. Nancy did not seek the court's intervention, and neither of Nancy's two children, Amy's half-siblings, who were adults at the time, ever contacted the Division.

In April 2014, the judge entered an order permitting defendant to have visitation with Amy at the MCCI one day per week. However, defendant was transferred shortly thereafter to Northern State Prison, and Amy's first visit with defendant took place there in October. The Division attempted to continue visitation at the prison, but there were frequent roadblocks, including defendant's placement in administrative segregation. In total, Amy had approximately five visits with defendant, many of which were non-contact visits where defendant and Amy interacted from different sides of a glass partition. The child's obvious distress caused by traveling to and entering the prison shortened a December 2015 visit at defendant's request.

In the interim, defendant had pled guilty to two indictments and was sentenced to eight years' imprisonment with a four-year period of parole ineligibility. Defendant was incarcerated when

the guardianship trial began in June 2015, and remained so through its completion in April 2016. His first parole eligibility date was February 17, 2017, and his maximum release date was February 19, 2019.[4]

At trial, the Division produced eight lay witnesses and Dr. Alan J. Lee, Psy.D., as an expert. Dr. Lee conducted a psychological evaluation of defendant and a bonding evaluation of Amy and her resource parent. The Law Guardian called an expert witness, Dr. David R. Brandwein, Psy.D., who also conducted a bonding evaluation of Amy and her resource parent.

Defendant testified and called Nancy as a witness. Dr. Jesse Whitehead, Jr., Psy.D., testified as defendant's expert witness. Dr. Whitehead had performed a psychological evaluation of defendant.

In his oral opinion following trial, Judge Terence P. Flynn reviewed the evidence, including defendant's lengthy criminal record, his failure to comply with Division services regarding the other two children he fathered with Janet and his lack of contact with the Division after Amy was released from the hospital. The judge cited Nancy's trial testimony, which "provided some insight into the defendant and his involvement with her children." Judge

[4] During the pendency of this appeal, we have not been advised of any change in defendant's custodial status.

Flynn noted defendant never lived with Nancy, never provided child support and never contributed to the college costs of his two adult children. The judge noted that defendant never thought of Nancy as a permanent placement for Amy, but rather viewed Nancy as "a temporary caretaker for his children. His ultimate goal was to personally care for [Amy]."

The judge recounted the Division's efforts to facilitate visitation between Amy and defendant. He noted defendant's refusal to permit the Division to access his prison records in order to verify defendant's assertion that he had participated in classes during his incarceration.

Judge Flynn reviewed the expert testimony. He found Dr. Lee's testimony to be credible. The judge accepted Dr. Lee's opinions regarding defendant's personality disorder and "maladaptive personality and character traits that adversely affect his overall functioning and . . . negatively affect . . . his ability to parent." The judge credited Dr. Lee's opinion that these "character traits were long lasting and unlikely to change." Dr. Lee opined that defendant "remained at a heightened risk for criminal recidivism" and could not be considered "an independent caretaker [for Amy] now or within the foreseeable future."

The judge noted similarities between Dr. Lee's and Dr. Whitehead's opinions. While Dr. Whitehead disputed Dr. Lee's

diagnosis, Dr. Whitehead "found . . . talk of reunification would be premature . . . . [S]uch talk . . . could only occur after the defendant had been further assessed upon his release from prison." In sum, Judge Flynn stated Dr. Whitehead's opinion, "at . . . best . . . [was] that there was some potential for doing well on [defendant's] part[,]" but there was "no way [to] be certain of fulfillment over a definite period of time." Judge Flynn further noted that both Dr. Lee and Dr. Whitehead agreed that a bonding evaluation between defendant and Amy would be "fruitless," because "no bond could be expected."

Judge Flynn credited Dr. Brandwein's opinion that Amy was "securely attached" to her resource family, and there was "a bond that could be expected to be strengthened over time." He noted Dr. Lee's opinion that Amy had a strong bond with her resource family, was "clearly free of stress" and "needed permanency." Although she continued to need medical attention, Amy was "thriving" and ready to be adopted.

Judge Flynn then considered the four prongs of N.J.S.A. 30:4C-15.1(a). We discuss his reasoning more fully hereafter. The judge entered the judgment terminating defendant's parental rights to Amy, and this appeal ensued.

II.

The principles guiding our review are well-known. "The focus of a termination-of-parental-rights hearing is the best interests of the child." N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 447 (2012). The four standards contained in N.J.S.A. 30:4C-15.1(a) require a fact-sensitive analysis, and "are neither discrete nor separate. They overlap to provide a composite picture of what may be necessary to advance the best interests of the children." N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 280 (2007) (quoting N.J. Div. of Youth & Family Servs. v. F.M., 375 N.J. Super. 235, 258 (App. Div. 2005) (emphasis in the original)).

"We will not disturb the family court's decision to terminate parental rights when there is substantial credible evidence in the record to support the court's findings." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (citing In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). We defer to the factual findings of the trial judge, who had "the opportunity to make first-hand credibility judgments about the witnesses . . . [and] has a 'feel of the case' that can never be realized by a review of the cold record." Ibid. (quoting M.M., supra, 189 N.J. at 293). Moreover, because of "the family courts' special jurisdiction and expertise in family matters," we accord even

greater deference to the judge's fact finding. N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)).

"Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark' should an appellate court intervene and make its own findings to ensure that there is not a denial of justice." E.P., supra, 196 N.J. at 104 (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552-53 (2014) (quoting Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995)).

Defendant argues the Division failed to prove he caused Amy harm and, instead, relied upon defendant's incarceration as the sole basis to prove prong one. He contends that Judge Flynn misapplied case law regarding the importance of a parent's incarceration on the best interests analysis. We disagree.

We have recognized that incarceration "necessarily limits a person's ability to perform the regular and expected parental functions. It also may serve to frustrate nurturing and the development of emotional bonds and [may be] a substantial obstacle to achieving permanency security, and stability in the child's

life." N.J. Div. of Youth & Family Servs. v. S.A., 382 N.J. Super. 525, 534 (App. Div. 2006) (citations omitted) (internal quotation marks omitted). Incarceration alone, however, "is an insufficient basis for terminating parental rights." R.G., supra, 217 N.J. at 556. Rather, the Division must present "particularized evidence of how a parent's incarceration affects each prong of the best-interests-of-the-child standard." Ibid. In considering incarceration within this framework, relevant issues are:

> [P]erformance as a parent before incarceration, to what extent his children were able to rely on him as a parent, and what effort, if any, he has made to remain in contact with his children since his incarceration. The court should also consider whether [the parent] will be able to communicate and visit with his children; what effect such communications and visitation will have on the children in terms of fulfilling the parental responsibility to provide nurture and emotional support, to offer guidance, advice, and instruction, and to maintain an emotional relationship with his children. Further, the court must consider the risk posed to his children by [the parent]'s criminal disposition; what rehabilitation, if any, has been accomplished since [the parent]'s incarceration; and the bearing of those factors on the parent-child relationship. The court should, with the aid of expert opinion, determine the need of the children for permanency and stability and whether continuation of the parent-child relationship with [the parent] will undermine that need. Further, the court should determine the effect that the continuation of the parent-child relationship will have on the

> psychological and emotional well-being of the children.
>
> [Id. at 555-56 (quoting In re Adoption of Children by L.A.S., 134 N.J. 127, 143-44 (1993)).]

We conclude Judge Flynn scrupulously followed the Court's guidance.

Judge Flynn carefully considered defendant's lack of involvement with Amy before he was incarcerated. The judge acknowledged defendant desired visitation with Amy after he was incarcerated, but only because of the Division's efforts. Judge Flynn noted that defendant's criminal history was an indicator of recidivism. Relying on our decision in New Jersey Division of Youth and Family Services v. T.S., 417 N.J. Super. 228 (App. Div. 2010), certif. denied, 205 N.J. 519 (2011), Judge Flynn concluded that defendant had effectively abandoned Amy. See id. at 242-43 (noting the defendant's lack of prior relationship with his child and failure to demonstrate an ability to parent evidenced an abandonment of parental responsibility).

Defendant argues the Division failed to prove prong two, i.e., that he was unable or unwilling to ameliorate the circumstances that led to Amy's placement. He contends Judge Flynn erred by relying upon Dr. Lee's opinion that defendant was unlikely to be a fit parent in the foreseeable future.

The second prong "relates to parental unfitness," which may be established by demonstrating that "the parent is 'unwilling or unable to eliminate the harm'" or "the parent has failed to provide a 'safe and stable home'" and "a 'delay [of] permanent placement' will further harm the child." K.H.O., supra, 161 N.J. at 352 (quoting N.J.S.A. 30:4C-15.1(a)(2)); see also F.M., supra, 211 N.J. at 451 ("Prong two may also be satisfied if 'the child will suffer substantially from a lack of . . . a permanent placement and from the disruption of [the] bond with foster parents.'" (alteration in original) (quoting K.H.O., supra, 161 N.J. at 363)).

Judge Flynn found that on one level, defendant's continued incarceration made it impossible for him to parent Amy. However, based upon the expert testimony, he also concluded defendant was unable or unwilling to change his criminal lifestyle. The judge noted defendant continued his life of crime after Amy was born, rejecting Dr. Whitehead's opinion that the earlier accidental death of defendant's child was a "wake up call." Moreover, Judge Flynn cited the expert testimony that Amy needed permanency in her life, not the disruption of the bond already formed with her putative adoptive family.

Regarding the third prong, defendant contends the Division failed to follow through on placement options he provided, including Amy's placement with Nancy. He argues the most

appropriate placement for Amy was with her half-siblings, and the Division failed to do what was necessary to foster visitation and potentially forge a relationship with them.

The Division must make "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 must "consider[] alternatives to termination of parental rights." N.J.S.A. 30:4C-15.1(a)(3). Services under the third prong "contemplate[] efforts that focus on reunification." K.H.O., supra, 161 N.J. at 354. "Experience 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. "Even if the Division ha[s] been deficient in the services offered to" a parent, reversal is not necessarily "warranted, because the best interests of the child controls" the ultimate determination regarding termination of parental rights. N.J. Div. of Youth & Family Servs. v. F.H., 389 N.J. Super. 576, 621 (App. Div.), certif. denied, 192 N.J. 68 (2007).

Judge Flynn found the Division had exercised reasonable efforts to reunify defendant and Amy, but defendant failed to cooperate. He noted the Division was only able to locate defendant after he was incarcerated, and problems with visitation were not the result of "any lack of effort by the Division." The judge

noted the litigation was more than eighteen months old before defendant offered Nancy as a placement alternative, and defendant always considered Nancy as only an interim caretaker for Amy.

We have recognized "the difficulty and likely futility of providing services to a person in custody[.]" F.H., supra, 389 N.J. Super. at 621 (quoting S.A., supra, 382 N.J. Super. at 535-36). Further, the need to provide services may be "obviat[ed]" when the parent "ha[s] no relationship with [his child] and could not offer the child permanency." T.S., supra, 417 N.J. Super. at 242.

Defendant cites our decision in New Jersey Divison of Youth and Family Services v. K.L.W., 419 N.J. Super. 568 (App. Div. 2011), for the proposition that the Division was required to place Amy with Nancy, because, although Nancy was not a relative, Nancy's two adult children were defendant's children and Amy's half-siblings. Defendant misconstrues our decision.

K.L.W. only recognized the Division's statutory obligation to explore placement options with relatives. Id. at 577-80. However, there is no presumption in favor of placement with a relative. Id. at 580.

In this case, the Division considered Nancy as a placement option even though Nancy was not Amy's blood relative. Notably, neither of Nancy's children, who were blood relatives of Amy, came

forth to exercise visitation with the child, much less offer themselves as placement resources.

Finally, defendant argues the Division failed to prove prong four. He cites Dr. Whitehead's opinion that Amy, who is African-American, would be best served by a placement with her African-American half-siblings, or, alternatively with an African-American resource family, and, thirdly, with an economically capable family of another race, like her resource family. Defendant contends the judge ignored the "entire program" Dr. Whitehead "laid out" for defendant to regain custody of Amy. He argues that Amy's placement with Nancy was a critical component of that plan. Additionally, defendant contends Dr. Brandwein specifically opined that, given Amy's young age, severing ties with her putative adoptive family would not cause enduring harm.

The statute's fourth prong mandates a determination as to "whether a child's interest will best be served by completely terminating the child's relationship with that parent." E.P., supra, 196 N.J. at 108. Prong four "serves as a fail-safe against termination even where the remaining standards have been met." G.L., supra, 191 N.J. at 609.

In most circumstances, the court must examine the child's bond with both biological and foster parents. K.H.O., supra, 161 N.J. at 355. "[W]here it is shown that the bond with foster

parents is strong and, in comparison, the bond with the natural parent is not as strong," termination may be appropriate. Id. at 363. "[A]fter considering and balancing the two relationships," the question becomes will "the child . . . 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[?]" Id. at 355. Answering that question "necessarily requires expert inquiry specifically directed to the strength of each relationship." Ibid. (quoting In re Guardianship of J.C., 129 N.J. 1, 25 (1992)).

Judge Flynn found that Amy had no relationship with defendant, had been in a nurturing, safe, and secure home since birth and was thriving. There was no harm in terminating defendant's parental rights because there was no bond between Amy and defendant. Judge Flynn credited Dr. Lee's opinion that Amy would in fact suffer serious harm if the bond with her foster family was broken.

In sum, as to each of the four statutory prongs, there was "substantial credible evidence in the record to support the court's findings." E.P., supra, 196 N.J. at 104. We find no reason to reverse the order under review.

Affirmed.