SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4671-14T1

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

M.N.B.,

Defendant-Appellant.

IN THE MATTER OF THE GUARDIANSHIP OF J.J.B. and J.M.L.,

Minors.

Argued September 19, 2017 – Decided October 25, 2017

Before Judges Fisher, Fasciale and Moynihan.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FG-07-0203-14.

Adrienne Kalosieh, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Kalosieh, on the briefs).

Vonnetta C. Dixon, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney;

Andrea M. Silkowitz, Assistant Attorney General, of counsel; Ms. Dixon, on the brief).

Olivia Belfatto Crisp, Assistant Deputy Public Defender, argued the cause for minors (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Crisp, on the brief).

PER CURIAM

Mae is the mother of two boys, Jack and Jason, born on January 10, 2001 and August 29, 2005, respectively.[1] The New Jersey Division of Child Protection and Permanency filed a guardianship complaint against Mae seeking to terminate her parental rights to Jack and Jason. On June 2, 2015, the trial judge heard testimony from two witnesses called by the Division, interviewed Jason in camera, and following an oral decision, entered a permanency order terminating Mae's parental rights to both boys.[2]

Mae appealed and while the appeal was pending, we granted the law guardian's application to resume visitation between Mae and her sons. We denied the law guardian's subsequent motion to remand the case to the trial court for a hearing on the best interests

[1] The pseudonyms used for the boys in defendant's brief, and "Mae," a name we gave to the defendant, are utilized here to protect their privacy.

[2] The order also terminated the parental rights of the boys' natural fathers. Jack's father executed a voluntary general surrender of his rights on June 2, 2015; after Jason's father could not be located, the court entered a default against him on May 14, 2014, and relieved the Division of having to serve him.

of the children, but issued a temporary remand to allow the law guardian to file a motion for relief from the trial court's judgment. R. 4:50-1. The motion was filed and, after hearing testimony from the Division caseworker and arguments of counsel, the trial judge denied the motion on April 26, 2016, ending the temporary remand.

Mae, and the boys through the law guardian, contend that the trial court erred in terminating parental rights, and in denying the motion for relief from judgment. We disagree and affirm both the order terminating parental rights and the order denying the law guardian's motion for relief.

"Our review of a trial judge's decision to terminate parental rights is limited." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (citing In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). Moreover, we accord even greater deference to the judge's fact-finding "[b]ecause of the family courts' special jurisdiction and expertise in family matters." Id. at 413. We will not disturb the trial judge's factual findings unless they are "so wide of the mark that a mistake must have been

made[,]" even if we would not have made the same decision. N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007).

"The balance between parental rights and the State's interest in the welfare of children is achieved through the best interests of the child standard." In re Guardianship of K.H.O., 161 N.J. 337, 347 (1999). Before parental rights may be terminated, the Division must prove the following four prongs by clear and convincing evidence:

> (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; 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 & Family Servs. v. A.W., 103 N.J. 591, 604-11 (1986).]

The factors "are not discrete and separate; they relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." K.H.O., supra, 161 N.J. at 348.

The trial judge conducted a fact-sensitive analysis of the first three prongs.

The judge's conclusions relevant to the first prong dovetailed with his findings supporting the second prong, a common occurrence resulting from the overlap of the two. N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006), certif. denied, 190 N.J. 257 (2007). The record supports his ruling that the Division established these prongs.

Dr. Charles Hasson was qualified at trial as an expert in psychology. He performed evaluations, including psychological testing and bonding evaluations on Mae and the children. Mae described her upbringing to Dr. Hasson, and revealed to him her mental health and substance abuse history. She also told him of her plans to enroll in Essex County College, obtain her GED, get a job and, then, an apartment. She admitted to the doctor that she had difficulty getting motivated. Dr. Hasson opined at trial

that Mae

> has mood disorder, a depressive disorder.
>
> Whether it's chronic depression, major depression, it doesn't matter. There's a depressive disorder there right, but more importantly pushing her behavior is the fact that she doesn't know where she's heading in life. There's a character disorder, so it's hard for her to get organized, to get in gear, to get things accomplished. And to provide . . . a safe, and nurturing environment for her children rather than taking responsibility for her own . . . mistakes.

He testified that marijuana use "de-motivate[s] people," and that, considering Mae's mental health status and her admitted abuse of marijuana, "the last thing she should rely on is marijuana."

The judge concluded that Mae was continuing the cycle of poor parenting to which she had been subjected. Belying Mae's contentions that the boys were well-fed, had appropriate housing and were attending school without issue, the judge noted instances of: physical and emotional abuse; behavior problems at school; and grooming and cleanliness issues. Crediting Dr. Hasson's testimony, the judge found Mae has severe psychological issues that rendered her incapable of parenting "now or in the foreseeable future." He observed that "she has not changed her situation, she has not bettered it[, and] she has not dealt with the issues that have seriously [prevented] her from being a parent for these children." He found that, despite almost three years of out-of-

home placement,[3] Mae was still unable to provide a stable home and was without a stable job, and that her stated plans to obtain same and continue her education were "pie in the sky." If the children were returned to her, he said "they would be taught the same lessons that she learned from her mother and her treatment when she grew up." He declared the "cycle" had to stop.

These conclusions were not, as contended by Mae, based on unsubstantiated hearsay, whether contained in the trial record or relied on by Dr. Hasson. Mae's admissions to the doctor formed the basis for these findings, and the judge properly ruled there was clear and convincing evidence to establish the first and second prongs.[4]

The trial judge determined that the State's burden with regard to the third prong was met because, notwithstanding the Division's provision of services to the family for ten years, Mae made no progress in providing stability and security for the boys.

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[3] The boys were placed in out-of-home care from October 2, 2012 through the trial in June 2015.

[4] We deem Mae's argument that the court's analysis was flawed because the Division's expert report was unreliable to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). The judge's decision did not rest on the portions of the report cited by Mae in her brief. Further, the doctor's report aids Mae's argument that she was bonded with Jason, and that termination would be difficult for him; Mae had no issue referencing those portions of the doctor's opinion.

Substantial evidence in the record supports his terse finding. The Division offered Mae programs for drug treatment, anger management, parenting skills, childcare and homemaking, as well as in-home monitoring services.

Although finding her "compliance is somewhat questionable," the judge acknowledged that Mae attended services. Nonetheless,

> [a]nd unfortunately, we are [twelve] years into Division history and it isn't a better situation at this point . . . . But there's no change in [her] life. There's no motivation, there's no apartment, there's no job, there [is] n[o] education, there's nothing that she has done in the years and years and years the Division[] [has] been involved, that has changed her situation one iota.

Mae continued drug use even after completion of treatment. She asserts, because of her participation in drug rehabilitation, she was not able to attend other programs, visit with the children and work. But she was not working during much of that period. And when she did work — in September through November 2013 — she told the Division that work interfered with her attendance at drug treatment and other services, a complaint she echoes on appeal. The Division, however, tried to find programs to accommodate her work schedule.

There is compelling evidence Mae simply failed to avail herself of the services offered by the Division. Mae admitted to

Dr. Hasson that her lack of motivation was a major problem, a problem he said was exacerbated by her marijuana use. The judge found Mae had not "dealt with the issues" that impeded her parenting abilities. Although Mae now complains the Division did not help her find housing, she and her counsel consistently represented to the court that she was on the verge of obtaining a subsidized apartment. Further, defendant refused to look at one residence suggested by a service provider and failed to follow up with that provider's housing office. We conclude the judge's finding that the Division made reasonable efforts to provide services over a number of years was amply supported.

In deciding whether the Division met its burden with regard to the fourth prong, the judge was not presented with perfect alternatives. He noted Mae's "total rejection" of Jack made him "an orphan in the house." And although, as Dr. Hasson opined, she had a strong bond with Jason, the judge found the boys would have "no future" if they were returned to Mae because she had not resolved the problems stemming from her "severe psychological issues" and drug use, and that "now and for the foreseeable future" she would be

> incapable of parenting for these children and will only repeat the procedures . . . and the abuse and neglect that she has . . . put upon them. Their behavior is not going to improve,

> it's going [to] . . . get worse . . . if they go back [to her].

The judge heeded the Court's mandate in K.H.O. and considered the "realistic likelihood that the [natural] parent will be capable of caring for the child in the near future," 161 N.J. at 357, and found none.

The judge weighed the impact termination had on Jack, and observed that Jack had shown improvement since removal. Dr. Hasson testified Jason would be upset by the termination of Mae's rights, and that he would be confused and act out. Nonetheless, he felt termination would be in Jason's best interest, calling it "a question of the lesser of evils." The judge reached the same conclusion.

The judge fully realized that if Mae's rights were terminated, there was no plan in place for adoption, querying:

> What are the possibilities if we don't terminate parental rights? What is the plan for these children? To stay in foster homes? To stay in homes that are not willing to adopt? To stay in specialized care? What is the possibility of ever reaching permanency, security, safety and the type of home that these children are entitled to?

Considering Mae had not addressed the issues that led to her sons' removal after many years of Division intervention, and still had not found stable housing, stable employment or sobriety, the judge properly considered the boys' need for "permanency and

stability," see ibid., and found "there is no other viable alternative in this case" other than select home adoption — an option he found less than ideal. He continued:

> But, even if that doesn't work out, their only, it's not the best, it's the only possibility of permanency, security, of finding an adoptive home is to terminate parental rights. There's no way you can find an adoptive home for these children unless you terminate parental rights.

Time was a factor in the court's decision. The judge found there was a "small window" to "get these children into an appropriate home . . . that will love and care for them, provide them permanency" so their "behavior will improve once they heal and get to a place where they . . . can be understood and loved and . . . get the appropriate attention."

Notwithstanding Mae's arguments that both boys expressed a desire to live with her, that Jason was bonded to her and, in fact, did act out after removal, and that the Division had not found adoptive homes, giving due deference to the judge's findings, N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012), we conclude the judge did not err in finding the Division provided clear and convincing evidence as to the fourth prong. The Division proved all four prongs and termination was properly ordered.

Mae and the law guardian also challenge the judge's denial of the law guardian's motion for relief from the court's termination of parental rights. The judge held hearings over two days. He weighed the contentions advanced by the law guardian and Mae that termination would do more harm than good. Regarding Jason, his foster mother no longer wanted to adopt him because, as anticipated by Dr. Hasson, his behavioral problems escalated after termination; he was performing poorly in school; and he maintained a desire to be with his mother. Regarding Jack, he was stepped down to a group home, his behavior had improved, and he now wanted to be returned to Mae's home. The judge agreed, however, with the Division's argument that Mae was in no better position to care for and provide permanency for the boys. He noted she still did not have stable housing, and had "negligible" employment which was inadequate to support herself alone, much less the boys. He recognized that mother and sons had successful visitation sessions, but there was nothing before him that showed Mae was better able to care for the children.

Mae reasserts the same points on appeal, arguing that the fourth prong was not proved by clear and convincing evidence, chiefly because the boys expressed their desire to be reunified with Mae, and have still not been placed in a permanent setting. Likewise, the law guardian reiterates the contentions she

presented to the trial judge, noting that the record is barren of proof that the Division's search for adoptive homes will be fruitful; hence the boys "face an uncertain future with no permanency in sight." The Division counters that Jason "continues in the same resource home" where he has resided for over four years, and Jack "continues to receive services and was stepped down from his residential placement" to a group home.

"Courts should use Rule 4:50-1 sparingly, in exceptional situations." Hous. Auth. of Morristown v. Little, 135 N.J. 274, 289 (1994). In a termination of parental rights case, "[w]here the future of a child is at stake, there is an additional weight in the balance: the notion that stability and permanency for the child are paramount." J.N.H., supra, 172 N.J. at 474-75 (citing K.H.O., supra, 161 N.J. at 357-58). "Thus, in determining a Rule 4:50 motion in a parental termination case, the primary issue is . . . what effect the grant of the motion would have on the child." Id. at 475. Further, "the passage of time in a parental termination case, especially where a child has successfully adjusted to a long term placement, is of much greater significance than it would be in practically any other context." Ibid. A trial court's decision on a motion under Rule 4:50-1 "will be left undisturbed unless it represents a clear abuse of discretion." Little, supra, 135 N.J. at 283.

We recognize that great harm can result if termination is ordered "without any compensating benefit, such as adoption," and that "[s]uch harm may occur when a child is cycled through multiple foster homes" following termination. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 109 (2008). But a child's need for permanency and stability is a "central factor" in these cases. K.H.O., supra, 161 N.J. at 357.

Based on the circumstances, the judge, after concluding Mae was incapable of parenting, found termination to be the boys' only chance for permanency. If Mae had made progress in addressing the issues that prevented her from offering her sons a stable environment, she may have offered a better alternative than the resource and group homes in which the boys then resided. E.P., supra, 196 N.J. 109-11. The post-trial changes did not present the judge with a viable option to termination. Although the boys were not adopted, Jason remained in the same foster home; Jack's situation, although changed, improved; and Mae's situation did not. The judge's denial of the motion for relief from judgment was not wide of the mark or clearly mistaken to warrant our intervention; it was a measured and supported decision.

We have considered the law guardian's report at oral argument regarding the status of the boys. Neither child has been adopted. Jack is living in a treatment home and has a goal of independent

living. Jason's residence changed in May. The goal set for him is select home adoption. Both Jack and Jason no longer want to be reunited with Mae.[5] We do not view these changes, especially since there is no evidence Mae's situation changed from that found by the trial judge, as requiring a remand for further review by the court. Such a proceeding may hamper the Division's efforts to find permanency for Jack and Jason, and there are no grounds to order such relief.

Affirmed.

[5] Although a child's wishes is "but one factor" in deciding the best interests of a child, as our Supreme Court observed, they "may often not be in their own best interests." E.P., supra, at 113.