RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4841-15T3
A-4991-15T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

J.W. and J.J.,

Defendants-Appellants.

IN THE MATTER OF THE GUARDIANSHIP OF X.J.W.,

Minor.

Argued May 16, 2017 – Decided June 12, 2017

Before Judges Fisher, Ostrer and Moynihan.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FG-07-145-16.

Eric J. Meehan, Designated Counsel, argued the cause for appellant J.W. (Joseph E. Krakora, Public Defender, attorney; Mr. Meehan, on the brief).

Ryan T. Clark argued the cause for appellant J.J. (Joseph E. Krakora, Public Defender, attorney; Mr. Clark, Designated Counsel, on the brief).

Mary Harpster, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel; Natalie Behm, Deputy Attorney General, on the brief).

Randi Mandelbaum, Designated Counsel, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Mandelbaum, on the brief).

PER CURIAM

J.W. is the biological mother of X.J.W., a minor born in November 2004; J.J. is X.J.W.'s biological father. The New Jersey Division of Child Protection and Permanency (the Division) filed a guardianship complaint naming both parents as defendants. Judge Linda Lordi Cavanaugh heard testimony from five witnesses during a three-day trial, and entered a judgment of guardianship terminating defendants' parental rights and awarding guardianship to the Division. Both defendants filed separate appeals that we calendared back-to-back, and now consolidate so that these appeals may be decided by a single opinion. Each defendant claims that the judge's conclusions were not supported by clear and convincing evidence. We disagree and affirm.

Judge Cavanaugh recognized the import of a trial judge's decision to terminate a defendant's fundamental and highly protected parental rights. Santosky v. Kramer, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 1394-95, 71 L. Ed. 2d 599, 606 (1982); In re Guardianship of K.H.O., 161 N.J. 337, 346-47 (1999). The Legislature has declared, as a matter of public policy, "[t]hat the preservation and strengthening of family life is a matter of public concern as being in the interests of the general welfare." N.J.S.A. 30:4C-1(a).

Parental rights, however, are not inviolable. N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 599 (1986). "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." K.H.O., supra, 161 N.J. at 347. N.J.S.A. 30:4C-15-1(a) sets forth four factors that the Division must prove by clear and convincing evidence before parental rights may be terminated:

> (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.

See also A.W., supra, 103 N.J. at 604-11. These four standards "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.

Judge Cavanaugh heeded the mandate of the Court in conducting a fact sensitive analysis of the factors, specific to each defendant. Ibid. We affirm substantially for the reasons set forth in her insightful, comprehensive and well-reasoned ninety-six-page opinion.

As to the first statutory prong, Judge Cavanaugh found that, after two prior removals of X.J.W. by the Division, and the subsequent reunification of the child with J.W. following her compliance with services offered by the Division, J.W. left X.J.W. in October 2014 and moved from New Jersey to "start a new life." Remarkably, she left X.J.W. in the care of J.J., knowing he had physically abused the child, was barred from having unsupervised

visitation, had no source of income, and lived with his elderly grandmother who was incapable of caring for X.J.W. From the day she left until the day the court handed down its opinion on June 30, 2016, J.W. had no contact with X.J.W.; nor did she plan for her care or avail herself of any services ordered by the court. J.W. disappeared and provided no contact information to the Division, which was unable to find her. Judge Cavanaugh commented, "What is striking to this court is that she provided absolutely no definitive information about anything."

J.J., who was incarcerated at the time of the trial, had been in and out of prison several times during X.J.W.'s lifetime. He had neither stable employment, nor stable housing. He had an admitted substance abuse problem. He failed to maintain a consistent visitation schedule with X.J.W. The judge also found that "[a]t no time since [X.J.W.] was born, has [J.J.] been a stable person in her life." He failed to comply with court-ordered services: substance abuse treatment, parenting classes and individual therapy.

Judge Cavanaugh considered other proofs besides this compelling sampling, including testimony from the caseworker and

the "uncontroverted" expert[1] reports and testimony about the harm X.J.W. suffered because of "the actions and inactions of her mother and father." The evidence found by the judge clearly and convincingly established the first prong of the statutory requirements for termination.

The judge's conclusions relevant to the first prong dovetailed with her findings supporting the second prong, a common occurrence resulting from the overlap of these two factors. 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 judge found neither parent demonstrated the ability or willingness to change behavior that was detrimental to X.J.W. J.W. left her daughter and remained incommunicado. J.J. continued the pattern that existed throughout X.J.W.'s life and did nothing "to make himself a more viable parenting option." Judge Cavanaugh further found, from Dr. Nadelman's testimony and report, that X.J.W. "desperately needs a parent now," to address her urgent needs as a "wounded child." The judge concluded both parents were less fit in June 2016 than they had been when X.J.W. was removed in October

[1] The Division called Dr. Mark David Singer, who was qualified by the judge as an expert in psychology and bonding. Dr. Alice S. Nadelman was called by the law guardian; she was found to be an expert in "clinical child psychology with a special expertise in child abuse and neglect."

2014. Addressing the impact of a delay in permanent placement, the judge sagely observed, "Time for [X.J.W.] is a precious, and fleeting, commodity."

The court, in considering evidence related to the third prong, noted both parents refused or failed to comply with court-ordered services available through the Division. She also reviewed the Division's efforts to find familial options to care for X.J.W. Judge Cavanaugh found "there are no alternatives to termination of parental rights." She considered and agreed with the expert opinions that adoption would be in X.J.W.'s best interest.

Careful consideration was given to the fourth prong. Judge Cavanaugh weighed the evidence proffered by J.J. to prove his positive efforts to parent X.J.W. She ultimately found that evidence to be outweighed by J.J.'s "failure . . . to provide even minimal parenting to [his] child." She considered Dr. Singer's opinion that the termination of J.J.'s parental rights would not result in "significant and enduring harm" to X.J.W.

The judge also reflected that X.J.W. had been removed from J.W.'s care three times, and that the child had spent almost half her life in foster care. Notwithstanding the child's yearning to be with her mother, and J.W.'s professed desire to be reunited with X.J.W., the judge found J.W.'s choice to live life apart from her daughter, and her failure to take steps to care for the child,

supported Dr. Singer's opinion that a failed reunification "would result in further trauma and harm" to X.J.W. Judge Cavanaugh did not discount that the child "may suffer some loss from severing [parental] ties." She found, however, termination and subsequent adoption would give X.J.W. needed stability, consistency and permanency; that the child needed a family that could help her heal. As the judge said, X.J.W. "deserved better."

The thoughtful findings Judge Cavanuagh made as to each of the four prongs, as they related to J.W. and J.J., were supported by credible, clear and convincing evidence, and are entitled to our deference. N.J. Div. of Youth and Family Servs. v. F.M., 211 N.J. 420, 448-49 (2012); Cesare v. Cesare, 154 N.J. 394, 413 (1998).

J.J. also argues that he received ineffective assistance of trial counsel. R. 2:10-6; R. 5:12-7.

In order to establish a case of ineffective assistance of counsel, defendant must demonstrate a reasonable likelihood of success under the two-pronged test established by Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), and adopted by our Supreme Court in State v. Fritz, 105 N.J. 42, 58 (1987). N.J. Div. of Youth and Family Servs. v. B.R., 192 N.J. 301, 308-09 (2007). A defendant must first show that counsel was deficient or made egregious errors,

so serious that counsel was not functioning effectively as guaranteed by the Sixth Amendment of the United States Constitution. Strickland, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A defendant must also demonstrate that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. Further, because prejudice is not presumed, Fritz, supra, 105 N.J. at 60-61, defendant must establish "how specific errors of counsel undermined the reliability" of the court's findings. United States v. Cronic, 466 U.S. 648, 659 n.26, 104 S. Ct. 2039, 2047 n.26, 80 L. Ed. 2d 657, 668 n.26 (1984).

Defendant offers two bases for his claim of ineffective assistance of counsel: (1) counsel failed to make a closing argument and (2) counsel "did not bring up or cross-examine witnesses based on favorable evidence in the Division's own records."

Notwithstanding defendant's failure to state what counsel should have said in summation, and his failure to specify what

questions should have been asked of named witnesses, we find that even if defendant's contentions were true, the outcome of this case would not have been different; we deny defendant's claim. B.R., supra, 192 N.J. at 311.

Defendant points to twenty-six "facts" that, he argues, could have been used as fodder for cross-examination of the witnesses who testified at trial. We agree with the law guardian's classification of the proffered potential evidence in four categories: (1) instances of positive bonding between J.J. and X.J.W.; (2) J.J.'s expressions of interest in caring for X.J.W.; (3) information about services provided by the Division to J.J.; and (4) information about X.J.W.'s experiences in foster care.

The six instances of positive bonding are countered by a plethora of evidence that J.J. played no stable role in his daughter's life. Defendant's six expressions of interest in caring for X.J.W. are belied by his failure to take actual steps to accomplish that stated desire. Defendant also ignores the rift caused by his treatment of X.J.W., a rift so deep that X.J.W. did not want to visit with her father. The judge's findings regarding J.J.'s failings as a parent far outweigh the scant potential evidence defendant offers regarding those two issues.

Defendant cites five areas where he either criticizes the Division for services it provided or failed to provide, or where

he offers reasons why he did not utilize those services. The evidence relating to J.J.'s failure to comply with court-ordered services was vast. His complaint about the distance he had to travel to the service providers is countered by the Division's provision of his transportation to the providers.

Finally, defendant's nine complaints about foster care are irrelevant. The court intended for X.J.W. to be adopted. The child's treatment in foster care had no bearing on the judge's final decision.

The overwhelming evidence, painstakingly detailed by Judge Cavanaugh in her opinion, leaves no doubt that even if counsel's representation was deficient because she did not introduce defendant's twenty-six claims, the result here would still be the same; J.J.'s parental rights would still be terminated.

We also find that counsel's decision not to make a closing argument had no bearing on the outcome of this case. This was a bench trial by an attentive judge who obviously considered all of the evidence presented. A summation would not have swayed Judge Cavanaugh from the result she reached after her thorough examination of the proofs.

Affirmed.