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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-4967-14T4
A-4968-14T4

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

B.K.L. and K.P.W.L.,

Defendants-Appellants.

IN THE MATTER OF THE GUARDIANSHIP OF N.F.L.,

Minor.

Submitted December 13, 2016 — Remanded January 30, 2017
Resubmitted September 18, 2017 — Decided September 28, 2017

Before Judges Fisher, Leone, and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FG-15-0027-12.

Joseph E. Krakora, Public Defender, attorney for appellant B.K.L. (Amy Kriegsman, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant K.P.W.L. (Elizabeth D. Burke, Designated Counsel, on the briefs).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa Schaffer, Assistant Attorney General, of counsel; Amy Klauber, Deputy Attorney General, on the briefs).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor N.F.L. (Damen J. Thiel, Designated Counsel, on the briefs).

PER CURIAM

This is the second time these appeals have come before us. In our January 30, 2017 opinion, we remanded for an evidentiary hearing. B.K.L. (Father) and K.P.W.L. (Mother) appeal Judge Robert E. Brenner's March 29, 2017 ruling which held they knowingly and intelligently waived their right to counsel during the guardianship trial. We affirm, substantially for the reasons stated by the Judge Brenner in his thorough March 29, 2017 opinion.

I.

We summarize the facts and procedural history detailed in our prior opinion. During a guardianship trial, Father and Mother filed a federal lawsuit against their attorneys. The trial court granted their attorneys leave to withdraw. Father and Mother represented themselves for the remainder of the trial. On June 22, 2015, the court issued an order terminating their parental rights over their child, N.F.L.

On appeal, Father and Mother challenged the trial court's decision to relieve their counsel and have them continue the trial pro se. We concluded that the court did not properly determine whether Father and Mother knowingly and intelligently waived their right to counsel, and remanded for an evidentiary hearing on whether Father and Mother would have chosen to waive counsel and represent themselves had they been properly advised of their rights. N.J. Div. of Child Prot. & Permanency v. B.K.L. (In re N.F.L.), No. A-4967-14/4968-14 (App. Div. Jan. 30, 2017) (slip op. at 21-23).[1]

On remand, the judge who had conducted the guardianship trial recused himself. As a result, Judge Brenner presided over the evidentiary hearing. The judge heard testimony from both Mother and Father, including testimony on what they would have done had they received a meaningful colloquy. The judge then considered the factors we described in our opinion.

The judge found "that Father and Mother did knowingly and intentionally waive their right to counsel in connection with trial," for several reasons. First, the judge found that Mother

[1] We required that any person challenging the ruling on remand order the transcript on an expedited basis, and that the briefs to be filed on a tight schedule. However, appellants failed to order the transcript on an expedited basis, and the last brief was not filed until August 2017.

and Father had no objection to the court's February 26, 2013 order relieving their counsel, who had been appointed by the Office of Parental Representation (OPR). Second, the judge found "both Mother and Father had the option of obtaining new appointed counsel in 2013 after their filing of the federal complaint against their OPR attorneys resulted in the discharge of said attorneys."

Third, the judge found "Mother was aware of her option to contact OPR to seek appointment of new counsel but chose not to do so." Similarly, the judge found that "Father was aware he had the option of obtaining new appointed counsel," and that "Father chose, instead, to proceed without counsel for the remainder of the trial." The judge found "no support" for Father's claim "that he made a request for the appointment of new counsel and was denied."

Fourth, the judge found "that even if Mother and Father had been given a colloquy and were fully informed by the court as to the dangers and difficulties of proceeding in a self-represented capacity during the trial, they still would not have sought to be appointed with new attorneys." "[N]otwithstanding the challenges facing a self-represented litigant at trial, the court finds, even accepting defendants' testimony regarding these challenges, they still would have chosen to proceed in a self-represented capacity if they had received the colloquy during the trial." Furthermore,

the judge found their testimony denying their awareness of and willingness to accept those challenges was repeatedly contradicted by the trial record. That record showed that they cross-examined witnesses, made objections, and called or tried to call witnesses including Mother, and that Father gave a closing argument, all without requesting the assistance of counsel during the extended trial.

The judge found "incredible the testimony given by both Father and Mother that, had they received a colloquy and been aware of their options for representation at the time of trial, they would not have chosen to proceed without counsel." The judge found their testimony was belied by "their statements and actions during the pendency of the trial," including Mother's declaration at trial that "I don't need an attorney."

II.

"Appellate review of a trial court's decision to terminate parental rights is limited[.]" In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002). Our task is to determine whether the decision "is supported by '"substantial and credible evidence" on the record.'" N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448 (2012) (citation omitted). "We ordinarily 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) (citation omitted). "Particular deference is afforded to family court fact-finding because of the family courts' special jurisdiction and expertise in family matters." N.J. Div. of Child Prot. & Permanency v. N.C.M., 438 N.J. Super. 356, 367 (App. Div. 2014) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)), certif. denied, 222 N.J. 18 (2015). Thus, "[w]e will not overturn a family court's factfindings unless they are so '"wide of the mark"' that our intervention is necessary to correct an injustice." F.M., supra, 211 N.J. at 448 (citation omitted). We must hew to our deferential standard of review.

III.

We affirm Judge Brenner's ruling on the waiver of counsel issue substantially for the reasons stated in his opinion. We add the following.

Judge Brenner found Father and Mother "were not credible," and his findings were "premised upon [their] lack of credibility." They challenge the judge's credibility findings. However, "reviewing courts should defer to the trial court's credibility determinations." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014). "Because a trial court 'hears the case,

sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Cesare, supra, 154 N.J. at 412 (citations omitted). "When the credibility of witnesses is an important factor, the trial court's conclusions must be given great weight and must be accepted by the appellate court unless clearly lacking in reasonable support." N.J. Div. of Youth & Family Servs. v. F.M., 375 N.J. Super. 235, 259 (App. Div. 2005).

The judge's credibility findings were amply supported. The judge found that "Father and Mother had an undeniable and powerful interest" to testify falsely at the evidentiary hearing, that their testimony was "often internally inconsistent and contradicted by the trial record," and that "Father's testimony throughout the evidentiary hearing was evasive and often non-responsive or argumentative."

In particular, Judge Brenner found "no basis to support defendants' claims [that] they were advised they may be disqualified from seeking appointment of new counsel based on the filing of the federal complaint and that the court advised them it would look into the possible disqualification." Father and Mother challenge that finding by pointing to a discussion they were not present to hear.

Before proceedings commenced on the fifth trial day, February 26, 2013, Father and Mother came to the courthouse and told their attorneys they filed a federal complaint against them. Father and Mother then left the courthouse. When court proceedings began that day, Father's attorney applied "to be relieved individually as counsel and also for [OPR] to be relieved." He stated he could not "guarantee there will be representation from [OPR] on March 25th," the next trial day, and that "it is a possibility" OPR would not have someone present on that day "due to the nature of the litigation, what is going on in the federal litigation."

We reject defendants' argument that these statements by Father's attorney show they were advised they were disqualified from seeking new counsel. Father and Mother did not hear the statements because they had absented themselves from the courthouse. Moreover, Father's attorney did not say that defendants would be disqualified from seeking new appointed counsel from OPR, only that there was a possibility that OPR would not be able to provide an attorney on March 25. Further, the trial court did not did not grant the application to relieve OPR, but only relieved the attorneys defendant named in the federal lawsuit. Finally, Judge Brenner found that Father and Mother were not disqualified from getting new counsel from OPR. That finding was supported by sufficient evidence, including that OPR furnished

Father and Mother with counsel throughout this appeal and on both remands.

Father and Mother also claim they were told the trial would continue whether they had counsel or not. They cite the trial court's comments on February 26 that it "still look[ed] on this trial as being viable," and that "if . . . come the 25th of March . . . these defendant litigants are self-represented . . . , the trial is going to proceed forward." Again, they had absented themselves from the courthouse and did not hear the court's comments. In any event, the comments did not suggest that counsel would not have been provided if requested by Father or Mother, with trial proceeding with counsel as before. Moreover, the trial court gave them at least four weeks to obtain new counsel.

Mother argues Judge Brenner gave undue weight to her experience in seeking appointment of new counsel. The judge stated: "Significantly, Mother knew she could call OPR to seek appointment of new counsel, as she had done so approximately six months prior to the entry of the February 26, 2013 order." Mother testified that OPR gave her the same attorney after her earlier request. She now argues she had no reason to believe a new request would be granted in February 2013.

However, the situation in February 2013 was quite different from the earlier situation. The trial court's February 26, 2013

order granting her attorney's request to be relieved, telling her she could come to court with a new attorney, and suggesting she contact OPR. The judge found Mother's "reasons for not doing so after [receiving] the February 26, 2013 order are neither reasonable nor believable."

Lastly, Father and Mother cite the 2017 decision in N.J. Div. of Child Prot. & Permanency v. R.L.M., 450 N.J. Super. 131 (App. Div. 2017). Of course, that decision came years after the 2013 proceedings here and could not have influenced the trial court, let alone Father and Mother. Nor does it support their arguments.

Mother argues R.L.M. held that parents in termination cases do not have the right to represent themselves. R.L.M. held a parent does not have "a constitutional right of self-representation" or an explicit statutory right. Id. at 147-48. However, we ruled that parents have "the Rule-based right to appear pro se" in a termination case. Id. at 148; see Rule 1:21-1(a).

Of course, that "right is not absolute." R.L.M., supra, 450 N.J. Super. at 148. "[A] court may relax the Rule-based right of self-representation in a termination of parental rights case if it concludes that, on balance, the parent's pro se efforts would significantly undermine the interests of the child, the State, and the court in achieving an accurate result without undue delay." Ibid.; see R. 1:1-2(a). Unlike the trial court in R.L.M., the

trial court chose to allow Father and Mother to exercise their Rule-based right to self-representation, and expressed its belief the trial still could viably serve those interests. Defendants do not show an inaccurate result, undue delay, or an abuse of discretion.

Mother cites our statement in R.L.M., supra, that, as in criminal cases, a self-representation request "must be made before meaningful trial proceedings have begun." 450 N.J. Super. at 150 (quoting State v. Buhl, 269 N.J. Super. 344, 363 (App. Div.), certif. denied, 135 N.J. 468 (1994)). Failure to make a timely request is a basis to "find no abuse of discretion in the trial court's denial of defendant's requests to proceed pro se," Buhl, supra, 269 N.J. Super. at 364, but it does not preclude a court from granting a mid-trial request under appropriate circumstances. See United States v. Banks, 828 F.3d 609, 617 (7th Cir. 2016), (ruling a defendant cannot "claim that the court was required to reject" an untimely request for self-representation), cert. denied, __ U.S. __, 137 S. Ct. 1122, 197 L. Ed. 2d 222 (2017). A mid-trial change in representation was unavoidable once Mother and Father sued their attorneys and caused them to be relieved.

Mother also notes that a request must be "unequivocal." R.L.M., supra, 450 N.J. Super. at 150 (quoting State v. Figueroa, 186 N.J. 589, 593 n.1 (2006)). Defendants' suit against their

attorneys unequivocally caused their removal. Judge Brenner found their subsequent conduct constituted a knowing and voluntary waiver of counsel, and that they would have done the same had they received the appropriate colloquy.

Father suggests R.L.M. requires the appointment of standby counsel. R.L.M. noted that in commitment hearings for sexually-violent predators, the Supreme Court held a "defendant has a statutory right to appear pro se at a commitment hearing, but only if standby counsel is present." Id. at 147 (emphasis added) (citing In re Civil Commitment of D.Y., 218 N.J. 359, 384 (2014) (citing N.J.S.A. 30:4-27.29(c) and -27.31(a))). However, the Sexually Violent Predator Act, N.J.S.A. 30:4-27.24 to -27.38, has no applicability to parental termination proceedings, where the right to counsel is governed by N.J.S.A. 30:4C-15.4.

In R.L.M., supra, we did not decide "whether N.J.S.A. 30:4C-15.4 grants a right to appear pro se with standby counsel," because the father there did not "propose to represent himself with the assistance of standby counsel." Id. at 148-49. Similarly, we need not decide that issue because neither Father nor Mother asked for the assistance of standby counsel. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); N.J. Div. of Youth & Family Servs. v. H.B., 375 N.J. Super. 148, 186 (App. Div. 2005).

Judge Brenner held the hearing, and considered the factors, which we mandated in our prior opinion. He found that Father and Mother had the option of obtaining new appointed counsel, that they were aware of that option and instead chose to represent themselves, and that they would have made the same choice if they had received the meaningful colloquy subsequently called for in In re Adoption of a Child by J.E.V., 226 N.J. 90, 114 (2016).

Judge Brenner's findings were supported by substantial credible evidence, as described in his opinion. His findings were also corroborated by the attitude of Father and Mother at trial. Father believed his OPR attorney was "representing" the Division and "working with the Division." Mother did not believe her OPR attorney "was representing [her]." Father and Mother then sued their OPR attorneys, alleging the attorneys were depriving them of their constitutional rights. The belief that the OPR attorneys were conspiring with the Division to deprive them of their rights gave Father and Mother an incentive to forego asking for new OPR attorneys, and instead to represent themselves.

Accordingly, we accept Judge Brenner's findings and reject defendants' claim that they involuntarily went pro se.

IV.

On appeal, neither Mother nor Father challenge the substance of the trial court's decision to terminate their parental rights.

Father's initial appeal made a challenge to prong four, but only "[b]ased upon the failure of the court to ensure that [he] knowingly and intelligently waived his right to counsel" at the trial. We have rejected that claim.

In the initial appeal, we did not reach Mother's claim that she was not given adequate notice of the specific statutory basis for termination, and thus was not afforded due process. We now reject that claim. The Division's complaint alleged it was seeking guardianship under N.J.S.A. 30:4C-15 through -22. In particular, the complaint alleged that: (1) "the parental relationship harmed the health and development of the child and threatens to do so in the future"; (2) the parents "are unwilling or unable to eliminate the harm facing the child, and are unwilling or unable to provide a safe and stable home for the child," and "[t]he delay of permanent placement for the child will add to the harm"; (3) the Division made efforts to provide services to both parents, and "has considered alternatives to termination of parental rights"; and (4) that "it would be in the best interest of the child . . . to be placed under the guardianship of the Division for purposes of adoption."

The complaint's allegations put Mother and Father on notice that the Division was seeking termination under N.J.S.A. 30:4C-

15(c)'s "best interests" test, whose four prongs are set forth 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 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.

At the guardianship trial, the Division and the Law Guardian presented evidence and argument seeking termination based on the "best interests" test in N.J.S.A. 30:4C-15(c) and 15.1(a). The trial court terminated Father's parental rights under the "best interests" test, but terminated Mother's parental rights based on abandonment. See N.J.S.A. 30:4C-15(e), -15.1(b).

Mother appealed, and filed a motion for remand. She stressed "[t]he complaint was based on the best interests of the child and the elements of the four-pronged test were discussed in detail."

She "request[ed] that this court order the trial court judge to re-evaluate the matter based on the four-prong 'best interests of the child' standard." The Division did not object to a remand "to clarify the court's findings under N.J.S.A. 30:4C-15 and the four-part best interest of the child test codified at N.J.S.A. 30:4C-15.1."

On January 27, 2014, we vacated the order terminating parental rights, and remanded. At the May 15, 2014 hearing, the Law Guardian raised whether the trial court should apply the "best interests" test. At the September 5, 2014 hearing, the Law Guardian and the Division urged the trial court to apply the "best interests" test, which Father's counsel agreed was permissible. On February 23, 2015, the court heard oral summations from the parties to determine if the evidence at trial was sufficient to support termination of defendants' rights under the "best interests" test. The court ultimately applied that test on June 22, 2015. Because Mother had repeated notice over a long period that her parental rights could be terminated under the "best interests" test, she received "procedural due process – fair notice and a meaningful opportunity to be heard." N.J. Div. of Youth & Family Servs. v. R.D., 207 N.J. 88, 120 (2011).

This bears no resemblance to the cases Mother cites. Cf. id. at 118 (finding an ambiguous "passing reference" did not give

notice of which burden of proof would be applied in an abuse or neglect proceeding); N.J. Div. of Youth & Family Servs. v. P.C., 439 N.J. Super. 404, 413-14 (App. Div. 2015) (reversing where the Division sought a finding of abuse or neglect only against the father, but the court sua sponte and "without prior notice" commenced abuse or neglect proceedings against the mother).

Mother notes she objected to considering the "best interests" test and argued the trial court on remand could consider only abandonment. Nonetheless, on February 23, 2015, Mother had the opportunity to argue whether the evidence met the four prongs.

Mother notes that our January 27, 2014 order "remanded for the [trial court's] reconsideration and additional findings on the abandonment issue." However, on July 8, 2014, we granted the Law Guardian's motion to clarify that order, stating:

> Th[is] court's intention in entering the January 27, 2014 order was — and is now — to obtain findings from the trial judge on the abandonment issue but, also, to provide the judge with the opportunity to modify the disposition of the case if the judge felt the need to do so upon rendering findings on the abandonment issue. We also intended no limit on the trial court proceedings that would be needed in order to allow the judge to rendered informed findings on the abandonment issue.
>
> [(Emphasis added).]

Thus, our intent in vacating and remanding was to permit the trial court to make adequate findings on the abandonment issue

and, if the court felt termination of parental rights could not be justified under abandonment, to modify the disposition by denying termination or by terminating on another basis. Accordingly, the court was allowed to consider termination on the basis of the "best interests" test under our July 8, 2014 order.[2]

In its June 22, 2015 oral opinion, the trial court considered the trial evidence under the four prongs of the "best interests" test. The court found "because we have a full-blown record that there does not need to be any additional testimony." The court also found the Division had proved, by clear and convincing evidence, all four prongs of the "best interests" test and terminated the parental rights of Mother and Father under that test. Father and Mother have not shown any basis for us to question the propriety of that order.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

[2] The trial court did so without first making findings on abandonment. However, Mother was not prejudiced, as the court abandoned abandonment as a basis to terminate her parental rights.