

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0659-16T4

NEW JERSEY DIVISION OF CHILD
PROTECTION AND PERMANENCY,

Plaintiff-Appellant,¹

v.

T.F.,

Defendant-Respondent.

IN THE MATTER OF THE
GUARDIANSHIP OF C.F.,

Minor-Appellant.

Submitted February 6, 2018 – Decided February 20, 2018

Before Judges Reisner, Hoffman, and Gilson.

On appeal from the Superior Court of New
Jersey, Chancery Division, Family Part, Hudson
County, Docket No. FG-09-0135-16.

Joseph E. Krakora, Public Defender, Law
Guardian, attorney for minor-appellant C.F.
(Rachel E. Seidman, Assistant Deputy Public
Defender, on the brief).

¹ The Division of Child Protection and Permanency joined in the
appeal filed by the Law Guardian.

Gurbir S. Grewal, Attorney General, attorney for Division of Child Protection and Permanency (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Lauren J. Oliverio, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, attorney for respondent T.F. (Amy M. Williams, Designated Counsel, on the briefs).

PER CURIAM

The Law Guardian, representing the child C.F. (Carl), appeals from a September 30, 2016 order dismissing a guardianship complaint filed by the Division of Child Protection and Permanency (Division) against the child's mother, T.F. (Tara).² The Division joins in the Law Guardian's appeal. Because we conclude that the trial court committed legal errors in evaluating the first two prongs of the best interests test, N.J.S.A. 30:4C-15.1(a), and made inadequate findings as to the fourth prong, we vacate the order on appeal and remand this matter to the trial court.

I

We summarize those aspects of the record that are most pertinent to our decision. Carl was born in December 2013. His mother Tara has a persistent, serious substance abuse problem, primarily involving her use of phencyclidine (PCP) and alcohol.

² We use initials and pseudonyms to protect the family's privacy. R. 1:38-3(d)(12).

From April 2014, when the Division received reports of Tara's PCP use, which was confirmed by a drug test, the agency made extensive efforts to keep Carl safe while leaving him in Tara's custody. Those efforts included placing round-the-clock homemaker assistance in her home. However, Tara was not always cooperative with the homemakers, and more significantly, she persisted in using PCP. The Division obtained custody of Carl on October 3, 2014, after a psychiatrist advised that Tara needed inpatient drug treatment.

Carl has lived with a resource parent, a maternal cousin, since October 2014. By the time the July 2016 guardianship trial began, Carl had been in foster care for almost two years. He had developed a secure bond with the resource parent, and she was willing to adopt him.

During the years when Carl was out of her custody, Tara repeatedly tested positive for PCP, barbiturates and alcohol. She was discharged from multiple drug treatment programs, due to her unwillingness or inability to follow the rules of the programs. She was incarcerated for violating probation, and was later arrested for robbery.³ Tara admitted to a Division caseworker

³ Tara did eventually successfully complete a reintegration program at Integrity House. However, as noted here, she later relapsed into using PCP and was arrested for robbery.

that she had relapsed on PCP and was high at the time of the robbery arrest.

Prior to Tara's most recent incarceration, the trial court stated that it would consider letting her participate in a "mommy and me" program, in which she could live with the child in a residential drug treatment program. However, for the child's safety, the court required Tara to take a hair follicle test to confirm that she was not still using PCP. Tara never cooperated with the Division's multiple attempts to have her take the follicle test, and her son remained in foster care. Additionally, Tara refused or failed to sign forms necessary for Carl to obtain early intervention services. Finally, the court signed an order authorizing the resource parent to consent to the services.

There was no dispute that Tara interacted appropriately with the child during her visits with him, including when the Division brought him to visit her in jail. Tara also completed anger management and parenting classes. However, more significantly, she did not overcome her drug issues, and she was in no position to care for Carl by the time of the guardianship trial. Throughout the trial, Tara was still in jail awaiting trial on the robbery charges.

The Division presented expert testimony from Dr. Karen Wells, explaining the ways in which a parent's use of PCP would put her

child at risk. Dr. Wells specifically testified that returning Carl to Tara's custody, while she was still using PCP and alcohol, would pose a "severe and grave" risk and would pose a threat of "unimaginable harm" to the child. She opined that, although Tara interacted well with Carl during the bonding evaluation, clearly loved him, and had an intellectual understanding of his needs, Tara minimized her drug problem and failed to appreciate the danger that her drug use posed to the child.

Dr. Wells also expressed concern that Tara might be using PCP to self-medicate for mental health issues, and that without successful mental health and drug treatment "her prognosis is poor." Dr. Wells opined that Tara was not able to provide a safe and stable home for Carl and was unlikely to be able to do so in the foreseeable future. Dr. Wells testified that Tara would need at least a year of complete sobriety before it would possibly be safe to return Carl to her care.

Dr. Wells testified that Carl did have a secure bond with Tara, in that "he has familiarity and is comfortable with her." However, she did not conclude that Carl looked to Tara as his psychological parent. He showed no distress on being separated from her at the bonding visit. Dr. Wells opined that he could be permanently separated from Tara without suffering severe harm.

On the other hand, Dr. Wells testified that Carl had a secure, intact bond with the resource parent, and that she had become his psychological parent. Dr. Wells testified that Carl would suffer immediate severe trauma if separated from the resource parent. Dr. Wells also explained Carl's strong need for a permanent, safe and stable home. Dr. Wells noted that although the resource parent wanted to adopt Carl, she told Dr. Wells that she would let Tara have continued contact with Carl, through family gatherings and other events. Tara did not present any witnesses at the trial.

In an oral opinion issued on September 30, 2016, the trial court concluded that the Division had not proven "each prong of the best interests standard" and found "that as of now it is not in the child's best interest to terminate [defendant's] parental rights." The court focused on the issue of parents who use drugs, expressing a concern that if expert testimony about the dangers of drug use were sufficient, then "in any case any party's drug use would be enough to terminate parental rights. That's not the law." The judge considered that Carl had lived with Tara for the first ten months of his life, although he had lived with the resource parent for about two years. He considered that Tara had "some good times in trying to beat the drugs." However, he found that, in part due to her attitude problems, Tara had resisted the Division's efforts to help her.

On the other hand, the judge was concerned that the Division had not presented expert testimony as to the amounts of PCP or alcohol in Tara's system when she had positive drug screens. Without that information, he concluded that he could not determine "the intensity of the drug use" and "whether her drug use might have a significant chance of causing future imminent harm." He also considered that Tara flunked out of most of her treatment programs due to "noncompliance, refusing to go, attitude problems," rather than noncompliance with medical treatment. He also considered that Tara did not actually harm the child while he was in her care for the first ten months of his life, and appeared able to care for him while the homemaker was in the house.

Based on that evidence, the judge concluded that the Division did not satisfy the first prong of the best interests test, because the agency did not prove that Tara "has already impaired" the child's health and development.

Considering the second prong, the judge found that there was no evidence that Tara had neglected the child or withheld attention and care from him. The judge then considered whether the agency had proven that Tara would be unable to provide a safe and stable home for Carl in the foreseeable future. The judge found "clearly" that Tara could not care for him now. However, he did not find that Dr. Wells's "general concerns" about Tara's use of PCP

justified a finding that Tara would be unable to care for the child in the foreseeable future.

The judge also was not persuaded that some additional delay in permanency for Carl would "add to the harm that the child will experience." He reasoned that: "In fact, the delay may inure to the child's benefit if, in fact, . . . whenever [defendant] get[s] this straightened out with the incarceration, actually get[s] rid of the anger, get[s] rid of the resistance . . . and get[s] over the hump of the drug addiction and the attitude problem." Based on that reasoning, the judge concluded that the Division had not satisfied the second prong.

The judge found that the Division had clearly provided extensive and appropriate services, and had satisfied the third prong "beyond a reasonable doubt." In addressing the fourth prong, the judge stated that he incorporated by reference defendant's arguments set forth in her attorney's written summation, without providing any additional factual findings or legal analysis. However, the judge cited a case in which a child was in foster care for several years with no improvement by the parent, apparently viewing that case as setting a possible outer limit for delay in permanency. See In re Guardianship of K.H.O., 161 N.J. 337 (1999). Addressing defendant, he stated, "If you come back

in a year or two years and we're spinning the wheel again I may have a different opinion about the clear and convincing standard."

II

To terminate parental rights, the Division must establish the following statutory prongs:

(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).]

These four prongs are neither discrete nor separate, but overlap "to provide a comprehensive standard that identifies a child's best interests." N.J. Div. of Youth & Family Servs. v. F.M., 211 N.J. 420, 448 (2012) (citation omitted); K.H.O., 161 N.J. at 348. "The considerations involved are extremely fact

sensitive and require particularized evidence that address[es] the specific circumstances in the given case." N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 554 (2014) (citation omitted). The Division must prove by clear and convincing evidence all four statutory prongs. Ibid. To meet this standard, such evidence must be "so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue." N.J. Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 168 (2010) (quoting In re Seaman, 133 N.J. 67, 74 (1993)).

Our review of a trial court's decision in a guardianship case is limited. R.G., 217 N.J. at 552. "[T]he trial court's factual findings should be upheld when supported by adequate, substantial, and credible evidence." Ibid. We accord deference to factual findings of the family court given its "superior ability to gauge the credibility of the witnesses before it and because it possesses special expertise in matters related to the family." F.M., 211 N.J. at 448.

"[G]reater deference is owed to a denial of an application to terminate parental rights than to a grant of an application because a termination of parental rights is final and cannot be re-visited by the court." R.G., 217 N.J. at 553. We will not overturn a family court's findings unless they were "so wide of

the mark that the judge was clearly mistaken." N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." R.G., 217 N.J. at 552 (quoting Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995)).

After reviewing the record of this case, we find ourselves unable to accord our usual deference to the trial judge's decision. In our view, the trial judge's opinion evinced an insufficient appreciation for current legal standards emphasizing the importance of permanency in a child's life and the need for parents to timely resolve drug issues that prevent them from caring for their children.

"[C]oncern has arisen for the best interests of children whose parents have forsaken their parental duties." The emphasis of the federal Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (codified as amendments in sections of 42 U.S.C.A.) "has shifted from protracted efforts for reunification with a birth parent to an expeditious, permanent placement to promote the child's well-being."

In our view, parents dabbling with addictive substances must accept the mandate to eliminate all substance abuse. Such unabated behavior initiates the foster care placement of their children and causes continuing harm by depriving their children of necessary stability and permanency. As directed by ASFA, the amendments to Title 9, L. 1999, c.

53 § 1, and N.J.S.A. 30:4C, the delayed reunification, accompanied by the concomitant consequence of allowing the child's attachment to a resource caregiver continues the significant harm to the child in satisfaction of N.J.S.A. 30:4C-15.1(a)(2).

[N.J. Div. of Youth & Family Servs. v. T.S., 417 N.J. Super. 228, 240 (App. Div. 2011) (quoting N.J. Div. of Youth & Family Servs. v. P.P., 180 N.J. 494, 505 (2004)).]

"We have made it clear that '[c]hildren must not languish indefinitely in foster care while a birth parent attempts to correct the conditions that resulted in an out-of-home placement.'" N.J. Div. of Youth & Family Servs. v. L.J.D., 428 N.J. Super. 451, 483 (App. Div. 2012) (citation omitted).

A parent's continuing failure to provide a safe and stable home for a child constitutes harm that can satisfy the first and second prongs of the best interests test. F.M., 211 N.J. at 449-52; In re Guardianship of DMH, 161 N.J. 365, 378-83 (1999); T.S., 417 N.J. Super. at 244-45. In those circumstances, it is not necessary for the Division to prove that the child was born addicted to drugs or was otherwise physically harmed. Bluntly stated, a drug-addicted parent causes harm when she leaves her child with a surrogate caretaker and lets the child live in limbo for years. Even a loving, well-meaning parent causes harm by inflicting that psychological insecurity on her child. See K.H.O., 161 N.J. at 363 ("We recognize that the continuing inability of

the mother to overcome her own addiction in order to care for her child constitutes endangerment of the child."). We conclude that the trial court erred in failing to focus on that harm in evaluating the first and second prongs.

On the other hand, we acknowledge that making the difficult judgment as to how long to give a parent to achieve sobriety - calculating the odds that giving her one more chance to achieve success will yield a better or worse result for the child - must be made on a case by case basis and is best left to the expertise of Family Part judges. See F.M., 211 N.J. at 448-49. However, in making that judgment, it is important that trial courts apply the correct legal principles. We emphasize that in this case, we are not remanding because we believe the trial court necessarily reached the wrong result, but because the court did not apply the correct legal standards.⁴ For example, the court's comment that if Tara did not achieve sobriety "in a year or two," there would be negative consequences, did not adequately take into account the years that Carl had already spent in foster care.

Moreover, the court appeared to unduly discount the evidence of Tara's serious, years-long addiction to PCP. This case does

⁴ We appreciate that in rendering his opinion, the trial judge appeared to have been under considerable time pressure, which may have lessened his ability to articulate his decision as fully as he would have liked to do.

not involve a parent who engages in the occasional use of marijuana or an occasional overuse of alcohol. This case involves a parent who uses PCP, a highly dangerous drug, as described by Dr. Wells, and whose use of PCP has required in-patient drug treatment.

We also cannot conclude that the trial court gave sufficient consideration to the fourth prong. We have reviewed defendant's written summation, which the trial court incorporated in its opinion. We find that, in significant respects, defendant's discussion of the fourth prong is not consistent with the record. The summation distorts Dr. Wells's opinion about Tara's inability to safely parent her child because of her persistent use of PCP and alcohol. The summation also inaccurately states that "[t]here was no testimon[y] that separating this child from the foster parent will cause the child serious and enduring emotional or psychological harm." Dr. Wells opined that Carl would suffer such harm.

Dr. Wells also opined that if Tara could overcome her addiction and if she were ready to safely care for Carl, then she could mitigate the harm that would befall Carl from separation from the resource parent. However, considering Tara's many past failures to overcome her drug problems, Dr. Wells believed that Tara was very unlikely to be able to care for the child in the foreseeable future. Dr. Wells also opined that if Carl were

reunited with Tara and she relapsed again, the resulting separation from Tara would cause Carl serious further harm.

For the reasons stated above, we cannot accord our usual deference to the trial court's factual findings and the legal conclusions based on those findings. On the other hand, we appreciate that the trial court has a feel for the case that we cannot obtain from a cold record. See N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 293 (2007). Accordingly, we decline the Law Guardian's invitation to decide the merits exercising original jurisdiction. Instead, we remand this case to the trial court for reconsideration.

We are also aware that, while this appeal was pending, the Division filed a second guardianship complaint. In response to our request for a status update, the Division advised us that the matter was ready for trial but was stayed by the trial court pending the outcome of this appeal. We were also provided with a February 2017 transcript, from which we understand that, at least at that time, Tara had been released from jail to Integrity House and was doing well in that program.

The guardianship issue should be decided based on current facts, and therefore, the second trial should proceed on remand. However, given the child's need for permanency, the trial must be expedited. We order that the trial be held, and a decision

rendered, within sixty days of the date of this opinion. In deciding whether the Division previously and currently has satisfied the best interests standard, the trial court should follow the guidance provided in this opinion.⁵ We do not retain jurisdiction.

Vacated and remanded.

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


CLERK OF THE APPELLATE DIVISION

⁵ The trial court already decided that the Division satisfied the third prong as of the date of the first guardianship trial - a finding amply supported by the record - and there is no need to relitigate or reconsider that issue.