

## RECORD IMPOUNDED

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Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2757-16T1

NEW JERSEY DIVISION OF CHILD  
PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.K.,

Defendant-Appellant,

and

M.J.,

Defendant.

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IN THE MATTER OF THE GUARDIANSHIP  
OF C.K. and J.K., minors.

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Argued telephonically December 13, 2017 –  
Decided January 30, 2018

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Gloucester  
County, Docket No. FG-08-0022-16.

Christine Olexa Saginor, Designated Counsel,  
argued the cause for appellant (Joseph E.  
Krakora, Public Defender, attorney; Christine  
Olexa Saginor, on the briefs).

Nancy R. Andre, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Nancy R. Andre, on the brief).

Nancy P. Fratz, Assistant Deputy Public Defender, argued the cause for minor C.K. (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Nancy P. Fratz, on the brief).

Todd Wilson, Designated Counsel, argued the cause for minor J.K. (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Todd Wilson, on the brief).

PER CURIAM

Defendant S.K. (Father) appeals from a February 17, 2017 judgment of guardianship, terminating his parental rights to his daughters, C.K. (Carol) and J.K. (Jasmine),<sup>1</sup> and freeing the children for adoption by their maternal aunt and uncle, with whom they had been living, along with their two cousins, since August 2015. The court also terminated the parental rights of the girls' mother, M.J. (Mother), who does not appeal. Defendant contends the Division of Child Protection and Permanency (the Division) failed to establish any of the four prongs of the best interest test. See N.J.S.A. 30:4C-15(c). The law guardian for each child joins the Division in support of the judgment. Having reviewed

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<sup>1</sup> We utilize pseudonyms to protect the parties' privacy.

defendant's arguments in light of the record and applicable law, we affirm.

I.

The Division relied at trial on voluminous documentary evidence; expert testimony of James L. Loving, Ph.D., who evaluated defendant and the girls, and performed bonding evaluations; and testimony of Division caseworker, Kyle Harrison. Carol also testified in camera at her law guardian's request.

The Division removed the girls from the custody of Mother and her then-paramour, D.P., Jr. (Dante), in May 2014 upon allegations of inadequate supervision and exposure to drug abuse. They were living at a New Jersey campground or trailer-park. Carol and Jasmine were nine and three. The court granted the Division custody, care and supervision of the children after finding they were victims of corporal punishment, and were exposed to substance abuse. The court also was concerned about Mother's mental health. Father resided in York, Pennsylvania, at the time, and had not seen his daughters since June 2013.

In the subsequent Title Nine litigation, Mother was granted supervised visitation, and required to attend substance abuse and psychological evaluations, and follow their recommendations. Father informed the caseworker that he was unable to care for the children because he worked long hours and did not have suitable

housing, sufficient income, or support networks to assist with childcare. He was granted supervised visitation and ordered to notify the court if he obtained suitable housing. He was also ordered to attend psychological and substance abuse evaluations and comply with all recommendations. The Division was ordered to explore a visitation program that would enable Father to visit the children on weekends to accommodate his work schedule. After a fact-finding trial in December 2014, the court found that Dante abused or neglected the children and Mother did not; however, the children remained in foster care because of Mother's ongoing issues,<sup>2</sup> while the Division explored placement with their maternal aunt in Pennsylvania. Mother and Father were ordered to comply with services.

Father attended one drug screen for the substance abuse evaluation, but never returned for a required follow up screen and was terminated as non-compliant. He attended the ordered psychological evaluation in Moorestown, after the Division paid for his travel expenses. Father exhibited mood swings during the evaluation and became agitated and argumentative when his parenting skills were tested. The examiner determined Father's

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<sup>2</sup> As Mother does not appeal the court's judgment, we need not detail Mother's substance abuse and mental health issues, and her failure to comply with services, which prevented her reunification with the girls.

insight and judgment were poor. During the evaluation, Father reported prior involvement in the criminal justice system. The examiner concluded Father suffered from depression and anxiety disorders, and recommended individual therapy and supervised visitation because of anger management issues.

Father had a supervised visit with his children following the examination. This was his first visit with the children since their removal roughly seven months earlier. He did not request the Division's assistance to visit the children again while they were placed in New Jersey.

In August 2015, after finding that Mother and Father had not complied with services, the court approved the Division's plan for termination of parental rights followed by adoption. By that time, the children had been in foster care for over fifteen months. The court also ordered the children be placed with their aunt in Pennsylvania, which was the children's fourth placement. The Division's guardianship complaint followed.

At a hearing in January 2016, Father appeared by telephone and expressed his interest in weekend visitation with his daughters; he also sought visitation between Carol, Jasmine and his daughter from a previous relationship, who lived nearby in Pennsylvania. Father's attorney requested that the Division set up services, including anger management treatment, in

Pennsylvania. The Division had difficulty locating service providers. In March 2016, Father again appeared by telephone, and Carol's law guardian stated he visited his daughters regularly and attended their gymnastics practices. Although Father had more frequent contact with his children after they were placed in Pennsylvania, he complained that he had trouble reaching the aunt to set up visits.

Father did not appear at any hearing after March 2016, nor did he appear at the trial, although the Division offered him transportation. In the months prior to trial, Carol expressed, through her law guardian, discomfort with unsupervised visitation with Father; said he "caused a big scene" at her gymnastics class; stated she wanted her aunt to adopt her; and ultimately said she did not want to visit with Father because he made her uncomfortable. Visitation ceased in the summer 2016. Jasmine, through her law guardian, likewise expressed she wanted her aunt to adopt her. Father's housing situation was unchanged.

The Division was able to retain one service provider in Pennsylvania to conduct intensive therapeutic visitation and parenting education, to improve Father's parenting skills with the goal of reunification. But, the program rejected Father after he acted aggressively toward a clinician during their initial meeting, and his housing was deemed inappropriate for the home-

based program. Father told the Division's caseworker that he started anger management classes on his own through the Veterans Administration, but the caseworker was unable to verify it.

Trial began in January 2017. Carol, then twelve, testified she did not want to leave the stability and safety of her aunt's home to live with either parent. She said Father made her feel uncomfortable because "he was loud and obnoxious," and he lived in an unsafe neighborhood.

The caseworker reviewed much of the history of the case, which we have already outlined. He testified that Father never applied for assisted housing because he said he would be placed on a waiting list for two or three years. The Division lacked the access to housing assistance agencies in Pennsylvania that it has in New Jersey. It was unable to provide Father with the level of assistance it could have provided if he lived here. The caseworker also said the children were doing very well in their aunt's care.

According to Dr. Loving, Father indicated he could not bring himself to surrender his parental rights. While Father "wanted to obtain custody of his daughters . . . [he] knew that he was not in a position to do that" and, Father said, "the most feasible arrangement for now, would be for the girls to stay with their aunt and uncle" while he had more visitation. Father said he struggled financially; worked through a temp agency; owed fines

for past convictions; and earned just enough to get by. His only plan was to save enough money to move from his one-room quarters to housing that could accommodate his daughters, but he had made no progress toward that goal in three years. He conceded he had no family or friends who could support him in parenting the girls. Dr. Loving opined that Father lacked "plans that would allow reunification in the foreseeable future."

Based on Father's disclosures about his emotional health, and past treatment, Dr. Loving opined that Father had a major-depressive disorder, an unspecified anxiety disorder, and a cannabis-use disorder. He also provisionally diagnosed Father with a personality disorder with dependent features, and an intermittent explosive disorder. Dr. Loving highlighted Father's "long-standing problem[]" with controlling his anger. Father's personality disorders raised questions "[w]hether he could provide a home that is emotionally stable an[d] secure, and not extremely up and down, where he's functioning very poorly and acting erratically." Dr. Loving concluded that, putting aside his finances and housing, Father would have difficulty taking care of his children because he had difficulty living independently and taking care of himself. He stated he would have a poor prognosis for addressing those problems, even if offered therapy. Father



would need "quite a bit more time" and Dr. Loving doubted that Father would ultimately comply with treatment.

Dr. Loving concluded that Father's lack of housing and his behavioral health issues were serious impediments to his ability to care for his children. "The housing, I think, in one respect, is – is extremely important. His behavior . . . in a very different way is – is maybe the most important concern." Thus, even if his housing situation were resolved, "there are some very serious risks here, that he would need to address." Dr. Loving rejected the suggestion that Father's poverty, as distinct from his mental health issues, was the main factor in Father's inability to parent the girls.

During his bonding evaluation, Father's demeanor toward the children was "off-putting." Unable to pick up social cues from his daughters, "he was loud, he was gruff, he was in their faces." Although both girls warmed to him during the evaluation, Dr. Loving opined they were "uncomfortable spending time with him." Noting that Carol had previously lived with her father for eight years, and Jasmine for two, he concluded they have "fairly strong attachments, but complex ambivalent attachments to their father."

On the other hand, the children appeared "brighter," "more spontaneous" and "happier" with their aunt, and "looked as though[] a weight was lifted off of them from this more complicated visit

they had just had with their father." They saw their aunt as a source of stability and safety. Removing them from her care posed a "fairly high risk of harm" that would be exacerbated if they were placed with their father because of his "lack of stability, his sometimes erratic unpredictable behavior, [and] his inability to provide a safe, stable home . . . ."

Dr. Loving concluded the children would not suffer "serious and enduring harm" if Father's parental rights were terminated. The aunt would be able to mitigate any harm by providing consistency and support. He noted that the aunt could potentially permit a continuing relationship with Father. Dr. Loving opined that adoption by the aunt and termination of parental rights would offer the girls a needed sense of permanency that would not be available by continuing the status quo.

## II.

In a thirty-seven page written opinion, Judge Timothy Chell determined that termination of Father's and Mother's parental rights was in the children's best interests. The court evaluated the four prongs of the best interests of the child test, 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 [or her] 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.

The court found the Division established each prong by clear and convincing evidence.

As to prong one, the court found relevant Father's failure to make any progress toward improving his housing during the years of Division involvement. The court found this failure distinct from counsel's argument that Father's parental rights could not be terminated simply because he was "poor." The court relied on In re Guardianship of K.H.O., in which the Supreme Court observed that "[p]arental unfitness may also be demonstrated if the parent has failed to provide a 'safe and stable home for the child' and a 'delay in permanent placement' will further harm the child." 161 N.J. 337, 352 (1999) (quoting N.J.S.A. 30:4C-15.1(a)(2)). The trial court determined that the children would be harmed by a

delay in permanent placement due to Father's failure to secure housing and his long-standing mental health issues. The court also highlighted Father's failure to be actively involved in the children's lives during the litigation.

As to prong two, the court found that Father was unwilling and unable to eliminate the harm that endangered the children's safety, health and development. The court noted that Father made "zero progress" toward securing adequate housing and had not been involved in the children's lives between 2013 and the Division's involvement the following year. The court found the "children's safety, health, and development have been and will continue to be endangered by the parental relationship . . . ." Further, a delay in permanent placement would cause additional harm.

As to prong three, the court found "the Division undertook reasonable efforts to assist [Father] to address and eliminate that harm found in Prong One and to assist the family as a whole in possible reunification." The court understood that Father's residence in Pennsylvania posed a problem for the Division in providing services. Further, the services that were provided were limited. However, the court found the Division's efforts were reasonable based on the following: Father received regular visitation with his children after they were placed in Pennsylvania; his caseworker remained in contact with him and

attempted to locate service providers in his area; his behavior and housing prevented him from engaging in therapeutic visitation, the only service that the Division was able to arrange in Pennsylvania; and he did nothing to improve his housing, by saving money or applying for public assistance, despite knowing that it was an impediment to reunification.

As to prong four, the court found that termination of parental rights followed by adoption was in Carol's and Jasmine's best interests. The court noted that the children "derive a sense of safety, security and trust from their relationship with their relative caregivers. . . ." and found "severance of that strong attachment is likely to place the children at high risk for serious and enduring harm." Further, because the children "do not rely on [Father] as a central or important parent figure . . . the children would not suffer serious and enduring harm" if his parental rights were terminated.

### III.

Our scope of review of the trial court's judgment is limited. In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002). We defer to the trial judge's factual findings that are rooted in his familiarity with the case, his opportunity to make credibility judgments based on live testimony, and his expertise in family matters. Cesare v. Cesare, 154 N.J. 394, 412-13 (1998). We will

affirm the Family Part's decision to terminate parental rights when substantial, credible evidence in the record supports the court's findings. N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008). However, we are not bound by the trial court's legal conclusions. N.J. Div. of Youth and Family Servs. v. I.S., 202 N.J. 145, 183 (2010). Applying that deferential standard of review, we affirm substantially for the reasons set forth in Judge Chell's cogent written opinion.

We add the following comments. Father's main contention is that the court impermissibly terminated his parental rights because he is impoverished and the Division failed to provide him with adequate services, to essentially, lift him out of poverty. We disagree.

Although poverty alone is insufficient to demonstrate abuse or neglect, see N.J. Div. of Child Prot. and Permanency v. L.W., 435 N.J. Super. 189, 196 (App. Div. 2014), the court relied not on Father's poverty in terminating his parental rights, but his failure to play a significant role in his daughters' lives both before and after their placement; his failure to participate in services, albeit limited, that the Division offered; and his failure to avail himself of any governmental assistance. Notably, Father did not offer any competent evidence to establish the nature of his financial circumstances, to justify his failure to avail

himself of any governmental assistance, and to excuse his inability to improve his own circumstances since 2014.

"The harm that is shown under the first prong must be one that threatens the child's health and will likely have continuing deleterious effects on the child." K.H.O., 161 N.J. at 352. "Serious and lasting emotional [and] psychological harm to children as [a] result of the action or inaction of their biological parents can constitute injury sufficient to authorize termination of parental rights." In re Guardianship of K.L.F., 129 N.J. 32, 44 (1992) (emphasis added). "A parent's withdrawal of that solicitude, nurture and care for an extended period is in itself a harm that endangers the health and development of the child." In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999). In particular, "[t]he lack of a permanent, safe, and stable home" may warrant termination of parental rights. Id. at 383. The absence of physical abuse or neglect is not conclusive; the court must also consider the potential for serious psychological damage. N.J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 605 (1986); N.J. Div. of Youth & Family Servs. v. A.G., 344 N.J. Super. 418, 440 (App. Div. 2001); In re Guardianship of R.G. and F., 155 N.J. Super. 186, 194 (App. Div. 1977).

Prong two focuses on parental unfitness. K.H.O., 161 N.J. at 352. This factor "is aimed at determining whether the parent

has cured and overcome the initial harm that endangered the health, safety, or welfare of the child, and is able to continue a parental relationship without recurrent harm to the child." Id. at 348. "[T]he second prong may be met by indications of parental dereliction and irresponsibility, such as the parent's . . . inability to provide a stable and protective home, [and] the withholding of parental attention and care . . . ." Id. at 353.

The record evidence amply supports the trial court's conclusion that prongs one and two were met. Father was unable to offer himself as fit to parent his two daughters at any time during the more than two-and-a-half years that they were in the Division's care and custody. He allowed extended periods of time to pass without seeing his children. Although he attributed his inability to parent to his financial circumstances, he provided no just excuse for failing to avail himself of a housing assistance program. Furthermore, as Dr. Loving pointed out, Father's parenting ability was also impaired by his various behavioral health issues. The prognosis for alleviating those issues, particularly in a timely way, was poor.

We also reject Father's challenge to the trial court's prong three finding. The test is not the success of the Division's efforts. D.M.H., 161 N.J. at 393 ("The diligence of [the Division's] efforts on behalf of a parent is not measured by their



success." ). The reasonableness of the Division's efforts must be evaluated "in light of all the circumstances of a given case." Ibid. While Father's out-of-state residence complicated the Division's efforts to secure services, his limited role in the children's lives before the Division's involvement is also relevant. See ibid. (noting that it is reasonable for the Division to focus its efforts toward reunification on the custodial parent and primary caregiver "so long as [the Division] does not ignore or exclude the non-custodial parent"). Here, Father was not the primary caretaker of his children. He stated he was unable to parent the children in May 2014 after they were removed. Consequently, the Division initially focused its efforts on Mother.

However, the Division did not ignore or exclude Father. The Division attempted to locate several service providers in Pennsylvania, and the one program that it was able to locate refused to work with Father because of his aggressive behavior and inappropriate housing. Although the Division did not provide Father with therapy or other mental health treatment, Father apparently had access to V.A. programs. He reported to the caseworker that he availed himself of one such program, although he never provided proof. Father also argues that the Division failed to provide him transportation to New Jersey to see the

children other than the day of his psychological evaluation. However, the caseworker testified that Father never requested additional visits. Notably, Father declined transportation to New Jersey for court appearances, when Carol was present.

Finally, there was ample support for the court's prong four finding. The court credited the testimony of Dr. Loving, the only expert to testify, based on his evaluation of the children's bonds with Father and their aunt. See N.J. Div. of Youth and Family Servs. v. M.M., 189 N.J. 261, 281 (2007). "A child's need for permanency is an important consideration under the fourth prong." Ibid. (citation omitted).

Here, the Division offered Dr. Loving's expert opinion that severing the strong bond between the children and their aunt would cause the children enduring harm. On the other hand, severing the parental relationship with Father would cause less harm. The Division was not required to show that "no harm will befall the child as a result of the severing of biological ties." K.H.O., 161 N.J. at 355. Furthermore, the girls' aunt would be able to mitigate any resulting harm by her continued support.

The court's prong four determination ultimately involved the choice between two options: (1) terminating parental rights followed by adoption by the aunt and uncle who had served as capable, loving caregivers in a stable home for over a year-and-

a-half; or (2) continuing the uncertainty and lack of permanency in the children's lives, without any demonstrated likelihood that Father would become fit and able to parent in the foreseeable future. We discern no error in the court's conclusion that termination would not do more harm than good.

We add one final comment. We have no doubt that Father loves his daughters dearly, and genuinely wishes he were able to be the kind of parent his daughters need. However, the record supports the trial court's finding that Father is unable, and is likely to remain unable in the foreseeable future, to fill that role. The children cannot afford to wait, and are entitled to the permanency offered by their aunt and uncle, who have provided them with a safe, stable and loving home.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION