RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-2728-20
A-2729-20

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

J.T. and C.J.,

Defendants-Appellants.

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IN THE MATTER OF THE
GUARDIANSHIP OF
B.R.B., a minor.

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Argued March 22, 2022 – Decided April 8, 2022

Before Judges Currier and DeAlmeida.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FG-12-0039-20.

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

Bruce P. Lee, Designated Counsel, argued the cause for appellant C.J. (Joseph E. Krakora, Public Defender, attorney; Bruce P. Lee, on the briefs).

Meaghan Goulding, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Meaghan Goulding, on the briefs).

Todd Wilson, Designated Counsel, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Meredith Alexis Pollock, Deputy Public Defender, of counsel; Todd Wilson, of counsel and on the briefs).

PER CURIAM

Defendants J.T. and C.J. appeal from the May 13, 2021 judgment of the Family Part terminating their parental rights to their son B.R.B.[1] In light of her recent death, we dismiss J.T.'s appeal as moot.[2] Because the record supports the trial court's decision with respect to C.J., we affirm the judgment as to him.

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[1] We identify defendants and the child by their initials to protect confidential information in the record. R. 1:38-3(d)(12).

[2] During the briefing of these appeals J.T. died. Although no personal representative has been substituted for J.T., the attorney appointed to represent her in this court has continued to appear on her behalf. In the event any

I.

Although we conclude that J.T.'s appeal is moot, we include facts relating to her because they are relevant to our review of the trial court's decision terminating C.J.'s parental rights. J.T. was twice charged with criminal sexual offenses involving minors. She was subject to Megan's Law registration at the time she gave birth to B.R.B. in 2015. He was J.T.'s fourth child. At the time of B.R.B.'s birth, none of J.T.'s other children were in her care. C.J., who has a long history of substance abuse, has three other children, not related to J.T., who are not in his custody. He did not meet B.R.B. until shortly before the guardianship trial, when the child was five years old. That was his only visit with his son.

Plaintiff Division of Child Protection and Permanency (DCPP or Division) first became involved with J.T. in 2003 when she and her then-husband were charged with sexually abusing a fifteen-year-old girl. After J.T. claimed to have not known the child's age at the time of the sexual acts, the State

applications are made on J.T.'s behalf after issuance of this opinion, the person seeking to represent her interests should comply with the practice for the substitution of a deceased defendant. See Rule 4:34-1(b); Campione v. Adamar of N.J., Inc., 155 N.J. 245, 269-70 (1998).

accepted her into the pretrial intervention program. DCPP substantiated the allegations of sexual abuse of a minor against J.T.

The Division again became involved with J.T. in 2014, when she admitted abusing alcohol while pregnant with her daughter. Shortly thereafter, J.T. was arrested and charged with endangering the welfare of a minor after the mother of a fifteen-year-old boy found naked photographs of J.T. on the boy's phone. J.T. entered a guilty plea to the charge and was sentenced to probation and parole supervision for life as a sex offender.

J.T. had an extensive history of substance abuse and domestic violence. She was diagnosed with bipolar disorder. In 2017, after J.T. admitted to being intoxicated while caring for B.R.B., the trial court granted the Division's application for care and supervision of the child. A few months later, DCPP effectuated an emergency removal of the child after J.T., who had agreed to be supervised at all times that she was with the child, left her home with B.R.B. for several days to an unknown location. At that time, J.T. had not attended her substance abuse program in over a month.

In September 2017, the Division filed a complaint for custody of B.R.B. The Division notified C.J. of an upcoming court date and, because both C.J. and K.B. had been identified as potential fathers of B.R.B., scheduled a paternity

test for C.J. near his home. C.J. failed to appear for the court proceeding or the paternity test.[3]

The court granted DCPP custody of B.R.B. A few days later, he was placed in a resource home, where he remains. His resource parents are committed to adopting him.

In the months that followed, J.T. was arrested for failing to comply with the conditions of her probation. She tested positive for controlled substances, was discharged from a substance abuse treatment program, and hospitalized for an overdose on heroin, cocaine, and alcohol.

J.T. subsequently entered another drug treatment program. She did well in the program and DCPP planned to reunite her with B.R.B. J.T. developed a relationship with B.R.B.'s resource parents, who offered to support her after reunification with the child. The resource parents, however, requested therapy for B.R.B. because he exhibited behavioral problems after visiting J.T.

In 2018, C.J., who had never met the child, admitted he could not care for B.R.B. He was living with his grandmother and had no plans to provide a stable home for his son. He declined an invitation to meet B.R.B., saying he could not travel to New Jersey from his home in New York. When a Division employee

[3] Paternity testing subsequently eliminated K.B. as B.R.B.'s father.

advised C.J. that DCPP would provide transportation to facilitate the visit, he said his hectic schedule prevented him from accepting the offer. C.J. declined subsequent offers by the Division to arrange for him to meet his son, including an offer to bring the child to C.J. for a visit.

After J.T. successfully completed her drug treatment program, she was released to a sober living home. She told the Division that she wanted to reunite with B.R.B., but needed "at least another year or two" to save money for appropriate housing. Although the Division sought several court-approved extensions of its plan to reunite J.T. and B.R.B., she struggled to maintain her sobriety. J.T. was evicted from the sober living home after testing positive for fentanyl. J.T. was later discharged from another substance abuse treatment program because of inconsistent attendance.

B.R.B. developed strong bonds with his resource parents. He also began developing a bond with J.T. during supervised and unsupervised visits, even though he had not been in her care for twenty-seven months. Although the visits went well, J.T. missed a number of visits.

In 2019, B.R.B. exhibited sexualized behaviors. He asked his therapist to "snuggle penises," which he appeared to indicate he learned from his resource mother. He later told his caseworker that he snuggled naked with his resource

mother, demonstrating the act with anatomically correct dolls. B.R.B.'s resource mother denied the allegations and stated that the child had seen her naked once when he opened a bathroom door. She also reported that B.R.B. had tried to kiss her "romantically" after returning from an overnight visit with J.T. She later reported B.R.B. engaged in additional sexualized behavior he reported to have learned from J.T. and her boyfriend. In addition, the child exposed his penis while in the driveway, saying that the behavior was appropriate because J.T.'s boyfriend did it. B.R.B.'s therapist advised that he may have been exposed to sexualized behaviors, but she did not believe he had been sexually abused.

By 2020, J.T. had relapsed on alcohol. She was evicted from her home after she got drunk, engaged in a dispute with her landlord, and blacked out. J.T. subsequently missed several visits with B.R.B. Division attempts to contact C.J. were unsuccessful. Both J.T. and C.J. failed to attend a meeting to discuss a plan for B.R.B.'s future. Neither appeared at a hearing at which the court approved the Division's plan to terminate parental rights to free B.R.B. for adoption by his resource parents.

J.T. lived with a series of friends. She left one home after a dispute with her host became physical. J.T. reported that she left her boyfriend because he was using heroin. She was receiving psychiatric care and medication. She did

not have a steady income. Her criminal sexual history was an obstacle to securing financial stability and housing. At the time, J.T.'s plan for B.R.B. was for him to live with someone from a group of friends she called her "family circle." She reported that for a period of time B.R.B. thought C.J. was dead.

While the Division's complaint for guardianship was pending, J.T. missed a majority of her scheduled visits with B.R.B. She overdosed on pills, blacked out for an entire day, and was hospitalized. J.T. admitted she had been using cocaine and drinking alcohol daily, and abusing prescription medication. She conceded that she could not care for herself and expressed her desire that B.R.B. be adopted by his resource parents, provided she could maintain contact with him. The Division referred J.T. to another substance abuse treatment program.

As the trial approached, C.J. expressed his intention to move to New Jersey and his desire to visit the child. Because B.R.B. did not know C.J. was his father, the Division consulted a therapist to develop a plan to implement visitation. At the time, C.J. was unemployed and living with three transient roommates in a home in which he rented one room. He believed he had sufficient space for B.R.B. to live. The Division provided a visit between C.J. and B.R.B. shortly before the trial, after which B.R.B. said he did not want to see C.J. again.

The Division conducted an independent search for relatives to care for B.R.B. After reviewing a list with J.T. and C.J., no viable placement options were identified. The resource parents considered kinship legal guardianship, but rejected that arrangement over concerns about their desire to control J.T.'s visitation with B.R.B.

C.J. failed to appear for the trial. The trial court issued an oral opinion in which it concluded the Division had established the statutory elements justifying termination of J.T.'s and C.J.'s parental rights. The court found credible the testimony of an expert in clinical and forensic psychology that J.T.: (1) presented a risk to the child because of her substance abuse and poor judgment; (2) was unable to effectively parent B.R.B. due to her psychological and emotional functioning; and (3) could not care for herself, making her unsuitable to have custody of a child. In addition, the court found C.J. had voluntarily absented himself from B.R.B.'s life and was emotionally and psychologically incapable of providing a stable home and support for the child.

Although the court recognized that B.R.B. had a psychological bond to J.T., it concluded that the child was likely to adjust to a severing of that bond, and the risk of reunification outweighed any harm he might suffer from the termination of her parental rights. There is no evidence in the record of a bond

between C.J. and B.R.B. The court found the Division's efforts at reunification were reasonable, neither parent made a meaningful attempt to provide a stable home for the child, and B.R.B.'s resource parents wanted to adopt him.

J.T. and C.J. filed separate appeals, which we consolidated for this opinion. Prior to her death, J.T. argued that the trial court's findings of fact and legal conclusions are not supported by the record. C.J. also challenges the sufficiency of support in the record for the trial court's decision. In addition, he argues that the trial court erred by: (1) refusing to consider evidence his attorney attempted to admit after the parties rested; (2) holding ex parte pretrial proceedings; (3) allowing the law guardian representing B.R.B. to make frivolous arguments; (4) making an impermissible inference from C.J.'s absence at trial; (5) inappropriately considering C.J.'s lack of suitable housing for the child; and (6) terminating C.J.'s parental rights in the absence of a paternity test establishing that he is B.R.B.'s father. The law guardian supports the trial court's decision.

II.

After the parties filed their initial briefs, J.T. died. We requested supplemental briefing on whether this tragic development rendered J.T.'s appeal moot. J.T.'s counsel argues the appeal is not moot because in the event the trial

court's decision is reversed, B.R.B. will have inheritance rights to J.T.'s estate and a right to social security benefits as a result of her death. In addition, J.T.'s counsel argues the court erred when it concluded that adoption by B.R.B.'s resource parents was in the child's best interests. Thus, he contends, regardless of J.T.'s death, the trial court decision should be reversed to facilitate a remand for development of a more suitable permanency plan for B.R.B.

The Division argues that J.T.'s appeal is moot because a decision from this court will have no practical effect on the present controversy. J.T. never offered a permanency plan other than her reunification with B.R.B. Thus, a reversal of the trial court decision terminating J.T.'s parental rights would leave B.R.B. in the same position he was in at the time of J.T.'s death (assuming the judgment terminating C.J.'s parental rights is affirmed): in the custody of his resource parents who wish to adopt him. The law guardian agrees with the Division.

With respect to B.R.B.'s eligibility for social security benefits, DCPP argues that the record contains no evidence that J.T. had a sufficient work history, during which she paid social security tax, to qualify B.R.B. for benefits.[4]

[4] At oral argument, the Division's counsel stated that regardless of the outcome of the appeal, the agency will apply for social security benefits on behalf of B.R.B. as his representative payee. See N.J. Dep't of Child. & Fams., Federal Benefits, CP&P IX-F-1-250 (2013). The Division represented that any benefit

In addition, the record contains no evidence suggesting J.T. has an estate of any meaningful financial value or executed a will naming her preference for a guardian for B.R.B. in the event of her death.

An issue is moot if this court's decision, "when rendered, can have no practical effect on the existing controversy." Redd v. Bowman, 223 N.J. 87, 104 (2015) (quoting Deutsche Bank Nat'l Tr. Co. v. Mitchell, 422 N.J. Super. 214, 221-22 (App. Div. 2011)). We may adjudicate a moot issue if it is "one of substantial importance, likely to reoccur but capable of evading review." Zirger v. Gen. Accident Ins. Co., 144 N.J. 327, 330 (1996). Dismissal of an appeal for mootness is appropriate at any point in the litigation. R. 2:8-2; State v. Davila, 443 N.J. Super. 577, 589 (App. Div. 2016).

We agree with the Division and law guardian that a decision with respect to the validity of the judgment terminating J.T.'s parental rights would have no practical effect on the controversy before this court. Prior to her death, J.T. argued the trial court's judgment should be reversed to allow her reunification with B.R.B. That relief cannot be accomplished.

B.R.B. receives would be applied toward his maintenance expenses and any additional funds would be placed in an interest-bearing trust for the child. After adoption, the adoptive parents may file a claim for social security benefits on the child's behalf. Ibid. It is not clear that B.R.B. will be awarded benefits.

J.T. did not offer a family member as an alternative placement for the child. Nor, in the approximately five months since J.T.'s death has a family member stepped forward to express an interest in adopting the child. In point III of this opinion, we affirm the termination of C.J.'s parental rights. Thus, if the judgment terminating J.T.'s parental rights were to be reversed, the child would be in the same position that he was in when the judgment was entered: in the custody of resource parents who wish to adopt him.

The arguments regarding B.R.B.'s inheritance rights and eligibility for social security benefits do not warrant a conclusion that J.T.'s appeal is not moot. First, those potential benefits inure to B.R.B., not J.T. The law guardian argues, and we agree, that B.R.B.'s need for permanency outweighs any speculative financial interest the child may have. The record contains no evidence J.T. died with an estate of any appreciable value or that her work history was sufficient to make B.R.B. eligible for social security benefits. While we do not discount the possibility that the financial interests of a child after a parent's death might, in some circumstances, warrant continuation of an appeal of an order terminating the deceased parent's parental rights, such extraordinary relief is not warranted here.

The holding in N.J. Div. of Youth & Fam. Servs. v. M.W., 398 N.J. Super. 266 (App. Div. 2008), on which J.T. relies, is inapposite. M.W. arose from the tragic death of a child, F.W. Id. at 271-76. The child's mother, M.W., abandoned him and his brothers, leaving them for years with her cousin, who physically abused, restrained, and neglected the children. Ibid. The cousin's son killed F.W. while the child was in her care Id. at 276. F.W.'s body was hidden in a container in a locked basement room, where it was discovered years later in a mummified state. Id. at 275. The Division of Youth & Family Services (DYFS), DCPP's predecessor, had been involved with the family and failed to investigate if the children were safe after they had been left with M.W.'s cousin. Id. at 277-82.

After the child's death, DYFS settled a lawsuit brought on behalf of F.W.'s estate for his wrongful death for $1 million. Id. at 283. Because the child died without a will, M.W. was entitled to inherit F.W.'s settlement proceeds under the intestacy statute. Ibid. DYFS sought leave to file a complaint retroactively terminating M.W.'s parental rights to F.W. in order to preclude her from inheriting the settlement proceeds that resulted, in part, from her abandonment of the child. Ibid. M.W. argued that DYFS lacked statutory authority to

terminate parental rights for a deceased child and that her right to inherit from F.W.'s estate should be decided in a probate action. Id. at 283.

We affirmed the trial court's decision rejecting M.W.'s arguments. Id. at 298. Noting "the public interest" in determining whether M.W. should be precluded from inheriting the proceeds of F.W.'s settlement was "of great significance," we found no error in permitting DYFS "to seek termination of parental rights of M.W. to her deceased child." Id. at 288. This was so because the termination action was similar to, and was subject to a greater burden of proof than, the alternative probate action proposed by M.W. Id. at 287. We considered the question of M.W.'s inheritance rights to be the equivalent of "probate actions arising out of family relationships" that previously had been found to be appropriately decided through application of the special expertise of the Family Part. Id. at 287 (citing In re Est. of Roccamonte, 174 N.J. 381, 398-99 (2002), Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 159 (App. Div. 2002), D'Angelo v. D'Angelo, 208 N.J. Super. 729 (Ch. Div. 1986), Berlin v. Berlin, 200 N.J. Super. 275, 278-79 (Ch. Div. 1984)). In addition, we noted that termination of M.W.'s parental rights to F.W. "would be in the economic interest of F.W.'s siblings," who were the subjects of a pending action to terminate M.W.'s parental rights, because they "would then inherit the settlement recovery

through intestacy" which "would also comport to the presumed intent of F.W." Id. at 288.

None of those factors apply here. While the termination of J.T.'s parental rights was of great importance to J.T. and B.R.B. when she was alive, the issue is not of significant public importance after her death. In addition, J.T.'s ability to inherit from the child through intestacy is not at issue, given that she predeceased him. Nor, as we noted above, is there evidence J.T. left an estate that B.R.B. might inherit through intestacy were J.T.'s parental rights restored. Finally, B.R.B. supports dismissal of J.T.'s appeal. The "extraordinary circumstances," id. at 298, before the court in M.W. are not present here.

III.

With respect to C.J.'s appeal, our scope of review is limited. N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007). We will uphold a trial judge's factfindings if they are "supported by adequate, substantial, and credible evidence." N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 552 (2014). "We accord deference to factfindings of the family court because it has the superior ability to gauge the credibility of the witnesses who testify before it and because it possesses special expertise in matters related to the family." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448 (2012); see Cesare v. Cesare,

154 N.J. 394, 413 (1998). "Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark' should an appellate court intervene and make its own findings to ensure that there is not a denial of justice." N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting G.L., 191 N.J. at 605). We also accord deference to the judge's credibility determinations "based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Fam. Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006). No deference is given to the court's "interpretation of the law" which is reviewed de novo. D.W. v. R.W., 212 N.J. 232, 245-46 (2012).

When terminating parental rights, the court focuses on the "best interests of the child standard" and may grant a petition when the four prongs set forth in N.J.S.A. 30:4C-15.1(a) are established by clear and convincing evidence. In re Guardianship of K.H.O., 161 N.J. 337, 347-48 (1999). "The four criteria enumerated in the best interests standard 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." Id. at 348.

At the time of the trial court's decision, N.J.S.A. 30:4C-15.1(a) required the Division to prove:

(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;[5]

(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.

After carefully reviewing C.J.'s arguments in light of the record and applicable legal principles, we are convinced there is substantial credible evidence supporting the trial court's findings of fact and legal conclusion that it was in B.R.B.'s best interests to terminate C.J.'s parental rights.

[5] Effective July 2, 2021, N.J.S.A. 30:4C-15.1 was amended to remove "[s]uch 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" from factor (2). L. 2021, c. 154, § 9.

C.J. has never provided a safe and stable home – or any home – for B.R.B. He has never had custody of the child or offered a meaningful plan for housing him or providing for his needs. Instead, C.J. absented himself from B.R.B.'s life until the child was more than five years old. Aware that he was B.R.B.'s father, that J.T. was incapable of caring for the child, and that B.R.B. was in the custody of a resource family, C.J. failed to appear for a paternity test, declined offers to visit the child, and did not appear at court proceedings at which his parental rights were at stake. C.J.'s absence from B.R.B.'s life was so prolonged that for a time the child thought C.J. was dead.

It was not until the trial of the Division's guardianship complaint was approaching that C.J. expressed an interest in visiting B.R.B. Because C.J. had never visited the child, it was necessary to develop a therapeutic plan with a clinician to introduce B.R.B. to his father. After the visit, B.R.B. stated that he did not want to see C.J. again. We are not persuaded by C.J.'s arguments that the Division created obstacles to prevent him from visiting B.R.B. after his belated declaration that he wanted to see the child. For years, C.J. made no effort to see or support his son. It is not surprising that special arrangements, recommended by a clinician, were necessary to determine how best to explain to a five-year-old that a man he was about to meet was his father, who had not

ever previously been present in his life and was responsible, in part, for him being in the care of resource parents.

As the trial court correctly concluded, C.J.'s effective abandonment of B.R.B. endangered the child's safety, health, and development. C.J.'s lack of a plan to care for the child, and the absence of a bond between C.J. and B.R.B., would have a deleterious effect on the child if C.J. were to remain his parent.

Harm to a child may be established by "a delay in establishing a stable and permanent home . . . ." In re Guardianship of DMH, 161 N.J. 365, 383 (1999). "A parent's withdrawal of . . . solicitude, nurture, and care for an extended period of time is in itself a harm that endangers the health and development of the child." Id. at 379. Additionally, a parent's "persistent failure to perform any parenting functions and to provide . . . support for [the child] . . . constitutes a parental harm to that child arising out of the parental relationship [that is] cognizable under N.J.S.A. 30:4C-15.1(a)(1) and (2)." Id. at 380-81.

The Division's efforts at establishing a relationship between C.J. and B.R.B. were rebuffed. C.J. offered no viable alternative placements for the child. The prospect of adoption by resource parents who love and support

B.R.B. clearly outweighs the slight harm he will suffer when his non-existent bond with C.J. is severed.

We have carefully considered C.J.'s procedural and evidentiary arguments and conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

J.T.'s appeal is dismissed as moot. The May 13, 2021 judgment is affirmed as to C.J.