

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2746-20

NEW JERSEY DIVISION  
OF CHILD PROTECTION  
AND PERMANENCY,

Plaintiff-Respondent,

v.

T.A.J.,

Defendant-Appellant,

and

E.S.,

Defendant.

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IN THE MATTER OF THE  
GUARDIANSHIP OF  
M.S.J., a minor.

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Submitted March 7, 2022 – Decided April 18, 2022

Before Judges Rothstadt and Natali.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Atlantic County, Docket No. FG-01-0026-20.

Joseph E. Krakora, Public Defender, attorney for appellant (Catherine Wilkes, Assistant Deputy Public Defender, of counsel and on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Julie B. Colonna, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Neha Gogate, Assistant Deputy Public Defender, of counsel and on the brief).

#### PER CURIAM

Defendant T.A.J. (Tiffany)<sup>1</sup> appeals from a May 13, 2021 Family Part order terminating her parental rights to her son, M.S.J. (Miles), following a two-day guardianship trial. The child's purported biological father, E.S., has not appealed from the termination of his parental rights.

On appeal, Tiffany argues the Division of Child Protection and Permanency (Division) did not prove all four prongs of the statutory "best interests of the child" test under N.J.S.A. 30:4C-15.1(a) by clear and convincing

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<sup>1</sup> We use initials and pseudonyms to protect the identity of the parties. R. 1:38-3(d)(12).

evidence. She further asserts that the court erred by relying on inadmissible hearsay. Finally, Tiffany argues she was denied the effective assistance of counsel. Having considered these arguments against the record and the applicable law, we affirm.

## I.

The Division's proofs at trial are summarized as follows. In July 2018, the Division received a referral reporting that Tiffany had been using phencyclidine (PCP) while in her third trimester of pregnancy and was exhibiting violent behavior. When the Division contacted Tiffany, she admitted to abusing drugs recently and since age fourteen, and agreed to accept the Division's services. The Division, unfortunately, was unable to maintain contact with her in the following weeks, and she failed to attend multiple scheduled appointments.

On August 3, 2018, Tiffany gave birth to Miles. Tiffany and Miles tested positive for PCP and marijuana and Tiffany checked herself out of the hospital the next day. Miles remained in the hospital for two weeks and was treated with phenobarbital to address his withdrawal symptoms. Thereafter, the Division removed Miles from Tiffany's care and placed him in a non-relative resource

home. Since that time, Miles has thrived in the care of that family, who wishes to adopt him.

The Division substantiated Tiffany based on Miles's prenatal exposure to PCP and subsequent withdrawal symptoms. Tiffany later agreed not to appeal that administrative substantiation.

During the two and a half years when Miles was not in her care, Tiffany failed to maintain stable housing and employment. Although Tiffany initially obtained rental assistance, an apartment, and part-time employment, in mid-2019 she became unemployed, lost her rental assistance, and moved out of her apartment. Since that time, Tiffany has remained unemployed with transient housing, despite the Division's efforts to assist her in obtaining a permanent residence.

In addition, Tiffany's participation in substance abuse and mental health services has been inconsistent. In 2018 and early-2019, Tiffany tested positive for illicit substances including PCP on multiple occasions. Thereafter, she regularly failed to comply with random urine screens and occasionally tested positive for alcohol when she did comply. Tiffany was also discharged from multiple joint substance abuse and mental health programs before completion, including one instance when she threatened to punch a group leader in the face.

She eventually completed a program in November 2020 but it took her approximately three months to complete her final two sessions. Tiffany was also thrice discharged from individual counseling, which was recommended by multiple service providers, due to her failure to attend.

The Division and affiliated service providers facilitated weekly supervised visitation between Tiffany and Miles, which Tiffany attended regularly. At various points, however, the supervisors reported concerns regarding Tiffany's behavior during the sessions. Between March and July 2020, Tiffany's visitation was conducted virtually due to the COVID-19 pandemic. Tiffany never progressed to unsupervised visitation.

The court conducted a guardianship trial on March 23 and 25, 2021. As the trial began, Tiffany requested that her counsel be relieved, stating counsel was "not representing [her] in the best light." After a colloquy with the court, however, Tiffany agreed to counsel's continued representation.

The Division's first witness, Dr. Alan Lee, testified regarding psychological and bonding evaluations of Tiffany he conducted on January 17, 2020 and September 11, 2020, and bonding evaluations of Miles's resource parents conducted on January 20, 2020 and September 11, 2020. Dr. Lee testified that in addition to his observations, he relied on "collateral source[s] of

information such as records that were made available . . . through the Division," which he asserted was a "method that is commonly relied upon by mental health professionals doing this type of evaluation." During Dr. Lee's interview of Tiffany, she admitted to using PCP as recently as 2019, including while pregnant with Miles.

Dr. Lee found Tiffany "less mature and less developed than most adults," and "impulsive" and "reactive." He also determined she was "prone to interpersonal problems," and had "a heightened level of anger and resentment." Dr. Lee concluded that Tiffany presented a "heightened risk for behavioral problems and life instabilities as well as criminal recidivism."

He also found that she had "maladaptive personality and character traits," which resulted in "behavioral [and] emotional . . . fluctuations." He described that treatment for a maladaptive personality is difficult and that the associated character traits are "entrenched, chronic, and enduring." Further, Dr. Lee determined Tiffany's "knowledge of parenting and child rearing was quite poor" resulting in a heightened "risk for parenting dysfunction" and Tiffany "not being able to properly respond to the child's needs." Overall, Dr. Lee opined that "there were significant concerns with [Tiffany] and [he] did not support her

being an independent caretaker of the minor child . . . within the foreseeable future."

As to the bonding evaluations, Dr. Lee found that Miles had an "ambivalent and insecure attachment with [Tiffany]," that there was "not a significant and positive psychological attachment or bond," and that there was a "low risk of the child suffering severe and enduring harm if [Miles's] relationship with [Tiffany] [was] permanent[ly] ended." Dr. Lee reached a similar conclusion during the September 11, 2020 bonding evaluation. On the other hand, Dr. Lee found that Miles was bonded to his resource parents, and would suffer significant harm if his relationship with his resource parents was ended. Tiffany's counsel did not challenge Dr. Lee's opinions on cross-examination.

The Division also presented testimony from caseworker Rasheeda Anderson. She testified that she had been involved with Tiffany's case since November 2019, and was the current custodian of the Division's records, which were made in accordance with ordinary Division practice.

In discussing Tiffany's behavior during supervised visitation with Miles, she described that Tiffany would quickly "go from zero to a hundred" and would sometimes become "abrasive," requiring supervisors to "redirect" her. Anderson

stated that as a result of Tiffany's behavior, the Division never felt that unsupervised visitation was appropriate. Tiffany's counsel similarly did not cross-examine Anderson.

On May 13, 2021, the court issued an order and opinion terminating Tiffany's parental rights. In its opinion, it stated that it "examined the entire record anew and made its own findings of fact" and found both Dr. Lee and Anderson to be credible.<sup>2</sup> The court explained its considerations in determining credibility included "the extent to which, if at all, each witness [was] either

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<sup>2</sup> We observe, as Tiffany notes, that fifty-four pages of the statement of facts in the court's opinion appear to be comprised of the court's near verbatim inclusion of the Division's pleading describing the factual and procedural events on which the complaint was based. We have stated that a court may not simply state agreement with a party's "summation of the evidence" in lieu of the findings of fact required and still withstand judicial scrutiny on appeal. See Esposito v. Esposito, 158 N.J. Super. 285, 291 (App. Div. 1978). Parties are entitled to the court's own independent view of the evidence and not the court's mere referral to and acceptance of a party's arguments or allegations.

Having said that, we are satisfied that the court did make independent findings entitled to our deference that eliminate any concern arising from the court's repetition of the Division's allegations. We reach this conclusion because after the court recited the operative facts that underlie the Division's claim that defendant's parental rights ought to be terminated — albeit in the Division's own words — the balance of the court's written opinion described in its own words its credibility findings, the legal principles that govern the action, and its own thorough and specific findings as to each of the statutory prongs that fully support the judgment under review and which are deserving of our deference.



corroborated or contradicted, supported or discredited by other evidence," and "whether the witness made any inconsistent or contradictory statement[s]."

The court then evaluated all four prongs of the standard for termination of parental rights codified in N.J.S.A. 30:4C-15.1(a).<sup>3</sup> In concluding the Division clearly and convincingly satisfied the first prong, the court found that Miles "tested positive for illicit substances [at birth] and subsequently suffered from withdrawal symptoms." It also determined that Tiffany's "mental health, substance abuse, and housing insecurities" were "issues of paramount concern."

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<sup>3</sup> N.J.S.A. 30:4C-15.1(a) provides:

a. The division shall initiate a petition to terminate parental rights on the grounds of the "best interests of the child" pursuant to subsection (c) of section 15 of P.L.1951, c. 138 (C.30:4C-15) if the following standards are met:

(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;

(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 acknowledged that Tiffany completed substance abuse treatment "over two years after [Miles's] removal," but noted that she "fail[ed] to comply with random urine screenings," had "not completed mental health services," and was discharged from two joint mental health and substance abuse treatment programs.

The court also deemed relevant Tiffany's failure to obtain stable housing, explaining that despite the Division's attempts to assist her, she "failed to actively engage in the housing search." On this point, the court noted several occasions when Tiffany did not complete paperwork or follow up with opportunities to obtain housing.

Finally, the court also relied on Dr. Lee's conclusion that Tiffany was "not capable of being a minimally adequate parent at the time of trial or in the foreseeable future." It noted Dr. Lee's "concerns for [Tiffany's] mental health and general lack of stability" and his finding that Tiffany "could not adequately care for herself, let alone a child of [Miles's] age."

In finding prong two satisfied, the court first "incorporate[ed] its findings from prong one." It explained further that Dr. Lee concluded Miles was not bonded to Tiffany, but was bonded to his resource parents, and that there would be "a significant risk of harm for the minor child to suffer severe and enduring

psychological or emotional harm if his attachment with his current caretakers [was] permanently ended."

The court also accepted Dr. Lee's conclusion that Tiffany "suffer[ed] from maladaptive personality issues," and concluded she "failed to effectively manage her maladaptive personality issue due to her inconsistency with treatment." It explained further that "[d]espite nearly three years of services, [Tiffany] has failed to remediate her mental health issues or complete all services to effectuate her reunification with [Miles]." Finally, the court found that Tiffany was "unwilling or unable to eliminate the aforesaid harms facing the minor child or to provide him with a safe and stable home, and that the delay of permanent placement will only serve to enhance the harms suffered."

Next, the court found that the Division had made reasonable efforts to facilitate reunification. It first explained that the Division attempted to begin providing services to Tiffany prior to Miles's birth, but she did not comply. The court found further that after Miles's birth, the Division provided Tiffany with substance abuse evaluations, substance abuse services, mental health services, parenting skills classes, visitation, individual counseling, housing assistance, and psychological and bonding evaluations. It also explained that the Division

made efforts to locate a relative who could care for Miles but that "all proposed relatives have been ruled out."

Finally, the court concluded that termination of parental rights would not do more harm to Miles than good. It found that Miles's resource parents "provided a stable, loving environment" and were willing to adopt him. On the other hand, the court explained that Miles was not bonded to Tiffany and would not suffer harm if their relationship was ended. It also noted that Miles had lived with his resource parents for his entire life. The court explained the need for permanency and that, as Dr. Lee found, only Miles's resource parents could provide stability and permanency. This appeal followed.

## II.

Tiffany challenges the court's May 13, 2020 order on three primary bases. First, she contends the court erred by improperly admitting and relying on impermissible hearsay. Specifically, Tiffany argues the court erroneously accepted the Division's exhibits as business records "without regard to embedded hearsay within those documents." She also claims Anderson's testimony constituted hearsay because she was not the caseworker for the entirety of Tiffany's involvement with the Division, and the court further

committed error by relying on her testimony without evaluating the foundation of her knowledge or whether the record supported her testimony.

In particular, Tiffany argues that no competent medical evidence established that Miles suffered from withdrawal symptoms at birth, and that the court improperly relied on Anderson's testimony to that effect. She also asserts the court erroneously relied on Dr. Lee's testimony that Tiffany had not completed mental health treatment, and Anderson's testimony in finding that "each service provider cited to concerns for [Tiffany's] mental health." Finally, Tiffany argues the court's finding that Tiffany threatened to punch a substance abuse group leader was based on double hearsay because Anderson was not the caseworker at the time and had not talked to Tiffany about the incident.

Second, Tiffany claims the court improperly found Anderson credible because portions of her testimony were contradicted by the record. In this regard, she asserts Anderson erroneously testified that Tiffany's individual counseling was court ordered, the hospital required Tiffany to be supervised following Miles's birth, and that, in addition to the service provider that supervised Tiffany's virtual visitation, Anderson was required to monitor those sessions due to concerns regarding Tiffany's behavior.

Finally, Tiffany notes that her counsel did not raise any objections at trial. She contends, however, that the court's error in admitting and crediting the complained of evidence amounts to plain error. We disagree that any of these arguments, individually or collectively, support reversal of the court's May 13, 2021 order.

Our review of a judgment terminating parental rights is limited. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 552 (2014). We must 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) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007)).

We defer to the family court's factual findings, because that court "has the superior ability to gauge the credibility of the witnesses . . . and because it possesses special expertise in matters related to the family." Ibid. Ultimately, a family court's decision should not be overturned unless it went "so 'wide of the mark'" that reversal is needed "to correct an injustice." Ibid. (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). The court's interpretation of the law or its legal conclusions are reviewed de novo. State in Interest of A.B., 219 N.J. 542, 554-55 (2014).

Generally, we do not consider issues not raised before the Family Part "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." N.J. Div. of Youth & Fam. Servs. v. B.H., 391 N.J. Super. 322, 343 (App. Div. 2007) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). "[A]n appellate court will not reverse an error not brought to the attention of the trial court unless the appellant shows . . . it was 'plain error,' that is, 'error clearly capable of producing an unjust result.'" Ibid. (quoting R. 2:10-2). "[A]n appellant faces an especially high hurdle in an appeal from a civil bench trial to establish that the admission of [unopposed] evidence constitutes 'plain error' . . . ." N.J. Div. of Child Prot. & Permanency v. J.D., 447 N.J. Super. 337, 349-50 (App. Div. 2016) (quoting R. 2:10-2).

Where "objectionable hearsay is admitted in a bench trial without objection, we presume that the fact-finder appreciates the potential weakness of such proofs and takes that into account in weighing the evidence." Id. at 349. We will not "weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." Slutsky v. Slutsky, 451 N.J. Super. 332, 344 (App. Div. 2017) (quoting Mountain Hill, LLC v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008)). Such findings are left to the deference of

the Family Part, especially "when the evidence is largely testimonial and involves questions of credibility." A.J. v. R.J., 461 N.J. Super. 173, 180 (App. Div. 2019) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)).

Division reports are generally admissible under the N.J.R.E. 803(c)(6)<sup>4</sup> business record exception to hearsay. See N.J. Div. of Child Prot. & Permanency v. N.T., 445 N.J. Super. 478, 493-96 (App. Div. 2016); R. 5:12-4(d). Because "requiring all [Division] personnel having contact with a particular case to give live testimony on all the matters within their personal knowledge would cause an intolerable disruption . . . it becomes necessary to allow certain evidence to be produced in a hearsay form." Id. at 496 (alteration in original) (quoting In re Guardianship of Cope, 106 N.J. Super. 336, 343 (App. Div. 1969)). Therefore, statements to the report's author "by Division 'staff personnel (or affiliated medical, psychiatric, or psychological consultants),

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<sup>4</sup> N.J.R.E. 803(c)(6) provides:

A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, [is not excluded by the rule against hearsay] if the writing or other record was made in the regular course of business and it was the regular practice of that business to make such writing or other record.



[made based on] their own first-hand knowledge of the case, at a time reasonably contemporaneous with the facts they relate, and in the usual course of their duties with the ' Division" are admissible. Ibid. (alteration in original) (quoting Cope, 106 N.J. at 343).

Here, we are satisfied the court's consideration of the record does not amount to plain error. First, the majority of the relevant information in the record is contained in Division reports and was, contrary to Tiffany's arguments, admissible. Id. at 495. Further, as custodian of the Division records, it was appropriate for Anderson to testify as to their contents. See ibid.; Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 17-18 (App. Div. 1996) ("[U]nder . . . the New Jersey . . . rules of evidence, the foundation witness generally is not required to have personal knowledge of the facts contained in the record.").

Second, Tiffany lodged no objection to the portions of the record that did contain otherwise-inadmissible hearsay, including the medical records establishing that Miles suffered from neonatal abstinence syndrome at birth and was treated with phenobarbital for his symptoms. As such, we "presume that the [court] appreciate[d] the potential weakness of such proofs and [took] that into account in weighing the evidence." J.D., 447 N.J. Super. at 349. We also note that Tiffany corroborated certain portions of those medical records by

admitting on multiple occasions to using PCP while pregnant. The medical records also confirm that Miles was treated with phenobarbital, a fact that was not a complex medical diagnosis barred by N.J.R.E. 808.

Further, had Tiffany objected to the admission of the evidence, it would have afforded the Division the opportunity to present additional witnesses through whom the evidence could have been admitted. In any event, in light of the wealth of competent proof in the record, we conclude that the court had adequate support for its ruling even excluding consideration of the objectionable hearsay evidence identified by Tiffany on appeal.

Third, we defer to the Family Part regarding the credibility of witnesses, and therefore, have no basis to question the court's finding that Anderson was credible. F.M., 211 N.J. at 448. That Anderson occasionally misstated the contents of the voluminous record does not render the court's credibility finding erroneous.

### III.

Tiffany next argues that the court erred in finding the Division established each prong of N.J.S.A. 30:4C-15.1(a). We disagree.

Termination of parental rights actions are decided under a four-part "best interests of the child" standard codified in N.J.S.A. 30:4C-15.1(a). E.P., 196

N.J. at 103. Such actions require proof by clear and convincing evidence. Ibid. The four prongs of the test are "not discrete and separate," but rather "relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." In re Guardianship of K.H.O., 161 N.J. 337, 348 (1999). "The considerations involved in determinations of parental fitness are 'extremely fact sensitive' and require particularized evidence that addresses the specific circumstances in the given case." Ibid. (quoting In re Adoption of Children by L.A.S., 134 N.J. 127, 139 (1993)).

A. Prongs One and Two

Tiffany argues that the Division failed to introduce any credible evidence supporting the court's conclusion that she endangered Miles or was unwilling or unable to remediate any harm she posed to him. First, she asserts again that no competent proof established her drug use during pregnancy harmed Miles. Specifically, she correctly maintains that drug use during pregnancy does not constitute harm under N.J.S.A. 30:4C-15.1(a)(1), unless the child suffered from withdrawal symptoms, relying on New Jersey Division of Youth and Family Services v. A.L., 213 N.J. 1, 25 (2013). Further, she claims the court erred in finding that Miles suffered from withdrawal symptoms because the supporting hospital records were inadmissible as complex medical diagnoses under

N.J.R.E. 808,<sup>5</sup> and it could not rely on the Division's administrative findings of abuse and neglect because Title Nine proceedings utilize a lesser burden of proof.

Second, Tiffany argues that the court erred in finding that she was unwilling or unable to remediate the harm based on findings that she was discharged from substance abuse treatment centers, took over two years to complete a substance abuse program, and failed to comply with random urine screens. She asserts that her discharges were not based on positive urine screens, and that no evidence supported that her response to treatment was slow. She also claims the Division's random urine screens were redundant because she was being tested in her substance abuse programs. Tiffany also asserts the court erred in finding that she had not complied with her mental health services

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<sup>5</sup> N.J.R.E. 808 provides:

Expert opinion that is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the court finds that the circumstances involved in rendering the opinion tend to establish its trustworthiness. Factors to consider include the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion.

because she received those services in her substance abuse program, which she completed.

Third, Tiffany claims her failure to attend individual counseling did not endanger Miles. In support, she asserts that she completed mental health treatment as a part of her substance abuse program and that her participation in individual counseling was never court ordered. Fourth, Tiffany argues the court erred in concluding she was unwilling or unable to obtain stable housing, claiming that the COVID-19 pandemic and lack of meaningful assistance by the Division precluded her from obtaining housing.

Fifth, Tiffany asserts the court erred by relying on Dr. Lee's testimony as substantive evidence in support of prongs one and two. Specifically, she claims Dr. Lee's testimony was based on incomplete information because he was unaware that Tiffany had completed a joint substance abuse and mental health program, did not consider the effects of COVID-19 stay-at-home orders on Miles's bonding with Tiffany and his resource parents, and did not review reports from Tiffany's visitation with Miles. She also claims Dr. Lee's opinion that Tiffany had not effectively managed her maladaptive personality issues was not supported by the record because she did complete a mental health treatment program.

Finally, Tiffany argues that recently-enacted L. 2021, c. 154, which modified N.J.S.A. 30:4C-15.1(a)(2) to eliminate consideration of the harm a child would suffer as a result of being separated from a resource family, should be applied retroactively, and therefore, a remand is warranted. Again, we disagree with all these arguments.

The first prong of N.J.S.A. 30:4C-15.1(a)(1) requires the Division to prove that "[t]he child's safety, health, or development has been or will continue to be endangered by the parental relationship." "Although a particularly egregious single harm can trigger the standard, the focus is on the effect of harms arising from the parent-child relationship over time on the child's health and development." K.H.O., 161 N.J. at 348.

Harm sufficient to satisfy this prong includes "[a] parent's withdrawal of . . . solicitude, nurture, and care for an extended period of time," In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999), and a child's unfulfilled need for a permanent home, New Jersey Division of Youth and Family Services v. B.G.S., 291 N.J. Super. 582, 591-92 (App. Div. 1996). Further, "an infant born addicted to drugs and suffering the resultant withdrawal symptoms has suffered harm that endangers [his] health and development within the meaning of N.J.S.A. 30:4C-15.1(a)(1)." K.H.O., 161 N.J. at 351. "Courts need not wait to

act until a child is actually irreparably impaired by parental inattention or neglect" to find this prong satisfied, D.M.H., 161 N.J. at 383, as the prong "addresses the risk of future harm to the child as well," New Jersey Division of Youth and Family Services v. H.R., 431 N.J. Super. 212, 222 (App. Div. 2013).

The second prong of the best-interests test requires the Division to present clear and convincing evidence that "[t]he 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." N.J.S.A. 30:4C-15.1(a)(2). The relevant inquiries for the judge are whether the parent cured and overcame the initial harm that endangered the child, and whether the parent is able to continue the parental relationship without recurrent harm to the child. K.H.O., 161 N.J. at 348-49. The first and second prongs are related, and often, "evidence that supports one informs and may support the other as part of the comprehensive basis for determining the best interests of the child." D.M.H., 161 N.J. at 379.

Here, the record fully supported the court's finding that the Division established the first two prongs of N.J.S.A. 30:4C-15.1(a). The court relied on several bases for its conclusion that the first prong was established, including Miles's withdrawal symptoms at birth, Tiffany's continuous struggles with

substance abuse, mental health, and housing insecurity, and Dr. Lee's conclusion that Tiffany was incapable of adequately caring for a child in the foreseeable future.

The court also fully supported its finding that the Division established the second prong by incorporating its findings regarding prong one and providing additional reasoning. Specifically, it relied on Dr. Lee's conclusions that Miles was securely bonded to his resource parents but not to Tiffany, Tiffany's failure to "remediate her mental health issues or complete all services to effectuate her reunification" with Miles, and the fact that Miles never resided with Tiffany. Because the court's findings that the Division established the first two prongs of N.J.S.A. 30:4C-15.1(a) were "supported by 'substantial and credible evidence'" we have no basis to depart from its conclusion. F.M., 211 N.J. at 448 (quoting M.M., 189 N.J. at 279).

Tiffany's arguments to the contrary are unavailing. First, although the court referenced the Division's administrative substantiation of Tiffany in its opinion, it did not rely specifically on that fact as substantive proof that the Division satisfied the first prong of N.J.S.A. 30:4C-15.1(a). Further, the court did not err by considering the medical records and other documents that included Tiffany's admission to using PCP during her pregnancy and the fact that Miles



was treated with phenobarbital after birth. As noted, Tiffany did not object to the admission of those records and, as such, we "presume that the [court] appreciate[d] the potential weakness of such proofs and [took] that into account in weighing the evidence." J.D., 447 N.J. Super. at 349. In any event, and as noted, we find the court's reasoning supporting its conclusion that the Division established the first prong of N.J.S.A. 30:4C-15.1(a) was sufficient even excluding its finding that Miles suffered from withdrawal symptoms at birth.

Second, the court did not err in basing its decision on Tiffany's discharges from substance abuse programs and failure to comply with random urine screens. While Tiffany is correct that she was never discharged for a positive urine screen, her discharges due to lack of attendance clearly demonstrate her inability to remediate the harm she posed to Miles. Tiffany also regularly failed to complete random urine screens requested by the Division, undermining the probative value of her period without testing positive for substances.

Similarly, the substance abuse program she completed reported a number of unexcused absences and expressed concerns that Tiffany's nonattendance allowed her to rid her body of substances without detection. While it does not appear the court was aware that the substance abuse program included mental health treatment, it nonetheless had ample support for its conclusion that Tiffany

failed to remediate her mental health issues based on Dr. Lee's evaluation and her repeated failure to engage in individual counseling.

Third, while individual counseling was never court ordered, multiple service providers recommended Tiffany engage in individual counseling, including Dr. Lee and another psychologist who evaluated Tiffany. Tiffany's repeated failure to participate in counseling, paired with Dr. Lee's testimony regarding Tiffany's need for counseling to manage her maladaptive personality issues, fully supported the court's finding that Tiffany failed to remediate the harm she posed to Miles.

Fourth, Tiffany's failure to obtain stable housing clearly supported the court's prong one and two findings. The COVID-19 pandemic cannot excuse that failure, especially because Tiffany was without stable housing from mid-2019 to the time of trial in 2021. Further, we are satisfied the record amply supports the conclusion that the Division made adequate efforts to assist her.

Fifth, the court did not err by relying on Dr. Lee's testimony. Dr. Lee's conclusions were based on his own observations of Tiffany and documentary evidence. As such, his findings were adequately supported. See Townsend v. Pierre, 221 N.J. 36 (2015) (An "expert opinion [may] be grounded in "facts or data derived from (1) the expert's personal observations, or (2) evidence

admitted at the trial, or (3) data relied upon by the expert . . . which is the type of data normally relied upon by experts."'' (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)).

We also find no merit in Tiffany's argument that L. 2021, c. 154 should apply retroactively. First, we note "[t]he law favors prospective application of a new statute." James v. N.J. Manufacturers Ins. Co., 216 N.J. 552, 556 (2014). Second, there is no indication, based on the statute's terms or its legislative history, that the Legislature intended the amendments to have a retroactive effect, nor is it "necessary to make the statute workable or to give it the most sensible interpretation." Gibbons v. Gibbons, 86 N.J. 515, 522 (1981); see also Olkusz v. Brown, 401 N.J. Super. 496, 501-02 (App. Div. 2008) (holding that when the Legislature is silent on the matter of retroactivity, it is a signal to the judiciary that it intended a prospective application of a statute or amendment). Third, the legislation clearly provides that the amendments "shall take effect immediately." L. 2021, c. 154 § 10. Our Supreme Court recently held that an immediate or future effective date within a statute demonstrates that the Legislature sought prospective application only. Pisack v. B & C Towing, Inc., 240 N.J. 360, 370-71 (2020).

In addition, the Legislature gave no guidance that would assist the Division in applying the changes retroactively in terms of timing or methodology. Finally, there is no evidence in the Legislative history that pipeline retroactivity was intended or that the Legislature wanted retroactivity for only certain matters such as pending direct appeals. In any event, even if L. 2021, c. 154 did apply retroactively, the court provided adequate support for its finding that prong two was established even excluding consideration of the harm Miles would suffer by being removed from his resource parents.

B. Prong Three

Tiffany also argues that the court erred in finding the Division provided reasonable efforts to effectuate reunification. She first asserts the services the Division provided were "minimal, patently unreasonable, and without any realistic potential to succeed under the . . . circumstances." Specifically, she claims that her ability to obtain housing was impeded by the COVID-19 pandemic, and the Division's efforts to assist her were insufficient. Second, Tiffany argues the Division did not adequately facilitate visitation. She claims the Division refused to extend her visits from two hours in duration to four hours, as authorized by court order, and ignored her request to attend a "[M]ommy and [M]e" program. Further she argues the Division failed to

alleviate obstacles caused by the COVID-19 pandemic by increasing the frequency of her virtual visitation or offering restorative visitation once in-person visitation resumed. We are not persuaded by these arguments.

Under the third prong of the best-interests standard, the Division must prove that it "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." N.J.S.A. 30:4C-15.1(a)(3). Pursuant to the statute, the Division must: (1) work with parents to develop a plan for services; (2) provide the necessary services; (3) facilitate visitation; and (4) notify parents of the children's progress during an out-of-home placement. N.J.S.A. 30:4C-15.1(c).

This prong "contemplates efforts that focus on reunification of the parent with the child and assistance to the parent to correct and overcome those circumstances that necessitated the placement of the child into foster care." K.H.O., 161 N.J. at 354. Reasonable efforts depend upon the facts and circumstances of each case. D.M.H., 161 N.J. at 390. The services provided to meet the child's need for permanency and the parent's right to reunification must be "coordinated" and must have a "realistic potential" to succeed. N.J. Div. of Youth and Family Servs. v. J.Y., 352 N.J. Super. 245, 267 n.10 (App. Div. 2002)

(quoting N.J.A.C. 10:133-1.3). However, "[t]he diligence of [the Division]'s efforts . . . is not measured by their success," but rather "against the standard of adequacy in light of all the circumstances." D.M.H., 161 N.J. at 393.

Here, the competent evidence in the record fully supports the court's finding that the Division made adequate efforts to effectuate reunification. The Division repeatedly referred Tiffany to substance abuse and mental health evaluations and treatments, individual counseling, and parenting and visitation programs. It also facilitated visitation, assisted with Tiffany's housing search, and provided transportation.

Tiffany's arguments to the contrary are without merit. The Division repeatedly advised her on how to obtain housing and put her in contact with a local housing agency, but, by several accounts, she failed to meaningfully participate. Indeed, Tiffany repeatedly failed to fill out or return paperwork, allowed her benefits to lapse, and indicated that she was not making efforts to obtain housing.

The Division's efforts to facilitate visitation were also adequate. Tiffany had weekly visitation with Miles and the Division referred her to multiple visitation programs including a parenting class that allowed for extended visitation. The Division also arranged for virtual visitation during the

unprecedented COVID-19 shutdown in a manner that was deemed appropriate for Miles considering his age. Finally, Tiffany was still testing positive for PCP at the times she requested longer visitation and to be enrolled in a "Mommy and Me" program, and as such, the Division appropriately denied those requests.

C. Prong Four

With regard to prong four, Tiffany argues the court erred in relying on Dr. Lee's testimony in finding that termination of Tiffany's parental rights would not do more harm than good. She again argues that the court should not have credited Dr. Lee's testimony because it was based on incomplete information as he did not review documents regarding Tiffany's visitation with Miles, parenting class, or completion of her substance abuse and mental health program. Further, she claims he did not consider the effect of COVID-19 on Miles's bonds with her and his resource parents. Again, we are not persuaded.

Under the fourth prong of the best-interests standard, the Division must prove that "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). The overriding consideration is the child's need for permanency and stability. See K.H.O., 161 N.J. at 357. "The question to be addressed under [the fourth] prong is whether, after considering and balancing the two relationships, the child will suffer a greater harm from the termination

of ties with [the child's] natural parents than from the permanent disruption of [the child's] relationship with [the child's] foster parents." Id. at 355.

Here, the court had ample bases to conclude that termination of Tiffany's parental rights was more beneficial than harmful to Miles. Indeed, its analysis appropriately focused on Miles's need for permanency and concluded that only Miles's resource parents could provide him "the permanency he deserves." In reaching that conclusion, the court properly relied on the un rebutted testimony of Dr. Lee, who it found credible. The court also provided additional support for its conclusion based on facts that Miles had thrived in the care of his resource parents, and that Tiffany never served as Miles's caretaker.

We disagree with Tiffany's arguments to the contrary. First, as noted, Dr. Lee properly based his conclusions on his first-hand observations and pertinent documentary evidence. Second, Tiffany's virtual visitation with Miles during the COVID-19 pandemic seemingly did not have a meaningful impact on Miles's bonding to her, as Dr. Lee reached similar conclusions before and after the virtual visitation period.

#### IV.

In her final point, Tiffany argues that her counsel was constitutionally ineffective, relying on New Jersey Division of Child Protection and Permanency



v. S.K., 456 N.J. Super. 245 (App. Div. 2018). Specifically, she claims that her counsel's performance was deficient because counsel failed to make any objections, even when Anderson's testimony misconstrued the record. She also claims her counsel's performance prejudiced her because there was a lack of competent evidence that Tiffany harmed Miles and failed to remediate the harm, and had counsel objected, the Division would not have satisfied its burden of proof.

We review claims of ineffective assistance of counsel under a two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), as adopted by State v. Fritz, 105 N.J. 42, 58 (1987). N.J. Div. of Youth & Family Servs. v. B.R., 192 N.J. at 307-09. To succeed, a parent must show that "(1) counsel's performance [was] objectively deficient—i.e., it [fell] outside the broad range of professionally acceptable performance; and (2) counsel's deficient performance must prejudice the defense—i.e., there must be 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. at 307 (quoting Strickland, 466 U.S. at 694).

We indulge "'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Id. at 307-08 (quoting Strickland, 466 U.S. at 689). Thus, when an appellant claims ineffective assistance of counsel, he or she "must provide a detailed exposition of how the trial lawyer fell short and a statement regarding why the result would have been different had the lawyer's performance not been deficient." Id. at 311.

We are satisfied, based on our independent review and consideration of the entire trial record, that Tiffany has not established either the performance or prejudice prong of the Strickland test. As to the first prong, we note Tiffany's counsel consulted with her before the Division began presenting evidence and before the opportunity to cross-examine Anderson. Counsel also conferred with Tiffany to ensure she did not wish to testify. Further, counsel submitted a thorough written summation arguing the Division failed to establish each prong of N.J.S.A. 30:4C-15.1(a), displaying command of the applicable law and facts of Tiffany's case. Finally, although not presented at trial, counsel arranged for a second expert to evaluate Tiffany. As such, we are satisfied based on the record that counsel was engaged and prepared for trial, and conclude Tiffany's contention regarding counsel's failure to object does not overcome the "strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 307 (quoting Strickland, 466 U.S. at 689).

Further, we are convinced that counsel's failure to object to the court's admission of any hearsay evidence and Anderson's "counterfactual testimony" did not prejudice Tiffany. We reach this conclusion because the voluminous record of competent proofs provided more than adequate proof to establish each prong of N.J.S.A. 30:4C-15.1(a), and, as such, exclusion of those portions of the record sought by Tiffany would not have altered the trial's outcome. Second, had defendant successfully challenged the admission of any of the Division's evidence, it could have clearly produced additional witnesses through whom the evidence would have been admitted, and Tiffany does not contend otherwise on appeal.

Finally, Tiffany has not identified any specific evidence counsel should have admitted that would have reasonably affected the outcome of the trial. See Fritz, 105 N.J. at 64 ("[P]urely speculative deficiencies in representation are insufficient to justify reversal" of a conviction.); State v. Petrozelli, 351 N.J. Super. 14, 23 (App. Div. 2002) ("[A] defendant 'must do more than make bald assertions that he was denied the effective assistance of counsel.'" (quoting State v. Cummings, 321 N.J. Super. 154, 170 (App. Div. 1999))). Simply put, in light

of the volume and trustworthiness of the Division's proofs, it is unlikely that even the most zealous representation could have produced a different outcome.

Tiffany's reliance on S.K. is misplaced, as that case is distinguishable. 456 N.J. Super. 245. There, the court found counsel rendered ineffective assistance based primarily on counsel's apparent "utter unfamiliar[ity]" with the relevant case law, as well as his failure to call a central witness and "argue that the Division's case . . . was based entirely on hearsay evidence." Id. at 273-74. Here, as noted, counsel's summation displayed a clear understanding of the applicable law and Tiffany's case. Further, the Division's case primarily relied on admissible Division records, and Tiffany has not identified evidence counsel should have admitted.

To the extent we have not addressed any of Tiffany's remaining arguments, it is because we have concluded they are of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION