RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2996-20

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

T.G. and L.C.C.,

Defendants,

and

E.L.C., III,

Defendant-Appellant.

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IN THE MATTER OF THE GUARDIANSHIP OF E.L.C., IV, and M.G., minors.

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Submitted October 12, 2022 – Decided November 3, 2022

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FG-15-0038-20.

Joseph E. Krakora, Public Defender, attorney for appellant (James D. O'Kelly, Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Alicia Y. Bergman, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor E.L.C., IV (Cory H. Cassar, Designated Counsel, on the brief).

PER CURIAM

Defendant E.L.C., III appeals from a June 4, 2021 Family Part judgment terminating his parental rights to his now six-year-old son, E.L.C., IV (Ethan), born in October 2016.[1] The judgment also terminated the parental rights of: Ethan's biological mother, T.G. (Tara), to Ethan and M.G. (Meg), born in June 2018; and Meg's biological father, L.C.C. (Leonard).[2] Acknowledging his absence from Ethan's life endangered the child, defendant contends the Division

[1] We use initials and pseudonyms to identify the parties and to preserve the confidentiality of these proceedings. R. 1:38-3(d)(12).

[2] Tara, Leonard, and Meg are not parties to this appeal.

of Child Protection and Permanency failed to prove the second, third, and fourth prongs of best interests standard N.J.S.A. 30:4C-15.1(a). The Law Guardian joins the Division in supporting the judgment.

In a cogent oral decision, the trial judge found the Division satisfied the four-prong test by clear and convincing evidence and held that termination was in Ethan's best interests. See In re Guardianship of K.H.O., 161 N.J. 337, 347-48 (1999) (explaining the Division's burden to prove the four prongs of the best interests test). Based on our review of the record and applicable law, we are satisfied the evidence in favor of the guardianship petition supports the termination of defendant's parental rights. See N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007) (holding that a reviewing court should uphold the factual findings regarding the termination of parental rights if they are supported by substantial and credible evidence in the record as a whole). Accordingly, we affirm.

I.

The guardianship trial spanned four days between February and June 2021. The Division presented the testimony of two caseworkers; an expert in clinical and forensic psychology; and the children's resource father, who

confirmed the family's commitment to adopting Ethan and Meg. The Division also moved into evidence numerous documents, including the caseworkers' reports, substance abuse evaluations, psychological evaluations, and bonding evaluations.[3] Defendant did not testify or present any evidence on his behalf.

To place defendant's contentions in context, we set forth in some detail the facts and procedural history from the testimony adduced at trial and the voluminous record before the trial judge. The family first came to the Division's attention in April 2016, two months before Ethan was born. According to the referral, defendant was using and selling heroin from the home he shared with Tara and her biological son, C.C. (Cory), then age seven.[4] Defendant was in the hospital, detoxing from heroin when he was interviewed by the Division. Defendant denied living in Tara's home and using or selling drugs from that residence. But defendant acknowledged he had been arrested for possession of heroin and was awaiting a court date. The Division's background check revealed

[3] Defendant's appendix on appeal includes twenty-seven volumes, which contained more than 5,000 pages of documents, pertaining to all three defendants.

[4] Born in January 2009, Cory is Leonard's biological son. In September 2018, the Delaware family court granted Leonard's mother legal and residential custody of Cory. As such, Cory was not a party to the guardianship complaint.

defendant had been arrested multiple times since 2009, resulting in several drug-related convictions.

Defendant was present at Ethan's birth in June 2016 but has never assumed a caregiving role. The Division offered substance abuse services to defendant; in September 2016, defendant tested positive for narcotics and alcohol. Soon thereafter, the parties executed the Division's safety protection plan, prohibiting defendant from unsupervised contact with Ethan.

Around the same time, the Ocean County Board of Social Services (BOSS) notified the Division that it was assisting Tara and her children with housing. In October 2016, the Family Part granted the Division's complaint for care and supervision of Ethan and Cory based on the family's unstable housing and defendant's lack of involvement with the family. Defendant did not attend the hearing; his whereabouts were unknown.

The ensuing months were marked by defendant's sporadic compliance with an outpatient drug treatment program recommended by the Division, extended absences from the family, failure to contact the Division, and reincarceration. Tara failed to maintain stable housing.

In February 2017, Tara, Ethan, and Cory moved to North Carolina, where they resided with Tara's relatives. Defendant remained in New Jersey, living in

an abandoned building. The Division offered defendant a substance abuse evaluation and referral to BOSS, but he failed to follow up. In April 2017, the Family Part dismissed the litigation; the Division then closed its file.

Tara's move to North Carolina was short lived. Within months, she and her sons returned to New Jersey, but her housing remained unstable. Defendant was living with his brother and was willing to have Ethan live with them, but the Division refused defendant's request in view of his pending criminal charges. With the Division's assistance, Tara and her sons returned to North Carolina to live with family members.

In August 2018, Tara moved back to New Jersey with Ethan and two-month-old Meg. As noted, by that time, Cory had been placed with his paternal grandmother. Defendant was homeless and his last known cell phone number was not in service.

For the next several months, the Division's efforts to assist Tara in the care of her children were made in vain; Tara failed to comply with offered services and was unable to meet her children's basic needs. On February 22, 2019, the Family Part granted the Division's complaint for custody, care, and supervision of Ethan and Meg, who were placed in a non-relative resource home. Defendant, who was incarcerated on a pending charge, was produced from custody and

appeared at the hearing. Thereafter, Tara agreed that the family needed the Division's assistance and the Family Court's oversight. Defendant was not present at the subsequent compliance hearing.

In April 2019, defendant was released from jail and sentenced to Drug Court[5] probation. He moved in with a woman who was involved in an unrelated matter with the Division. Defendant acknowledged the home was not suitable for Ethan. The Division facilitated weekly visitation between defendant and Ethan, but within one month, defendant missed a visit without cancelling. Between April and June 2019, defendant missed three substance abuse evaluations that had been scheduled by the Division. Defendant testified positive for opiates on June 5, 2019. By that time, he was homeless.

In July 2019, defendant overdosed on heroin and was incarcerated on new drug charges. However, defendant was afforded the opportunity to remain in Drug Court provided he completed inpatient substance abuse treatment at Integrity House. In view of the program's rules, defendant was unable to resume visitation with Ethan until October 2019.[6] The Division thereafter facilitated

[5] Effective January 1, 2022, Drug Court was renamed Recovery Court.

[6] During the height of the pandemic, the Division offered daily video chats in lieu of in-person visitation.

weekly visitation between defendant and Ethan and provided transportation for defendant. In December 2019, the children were moved to their present resource home.

Defendant successfully completed the inpatient program in January 2020, transitioned to Oxford House, a sober living home, and was referred for intensive outpatient drug treatment. Children are not permitted to reside at Oxford House. Defendant advised the Division he would save money to rent an apartment so that Ethan could live with him.

During the February 4, 2020 compliance hearing, defense counsel acknowledged defendant wished to reunify with Ethan, and would "strongly consider taking M[eg] but need[ed] to work on himself and do more to get E[than] back." The court granted defendant's application for a three-month extension to facilitate reunification. In March 2020, the Division filed its guardianship complaint against Tara and Leonard, seeking guardianship of Meg.

On April 7, 2020, the Division worker contacted defendant to discuss his progress in view of the upcoming court hearing. Stating he had been released from his inpatient program only three months prior, defendant claimed he could not afford independent housing "because he [wa]s paying too much in child support." The worker acknowledged defendant's progress but explained Ethan

"could not remain in placement forever," and the trial judge was obligated to consider the child's best interests. The worker also advised that in addition to housing, Ethan needed daycare and transportation to daycare. Defendant declined the worker's invitation to seek another three-month extension from the court.

Neither defendant nor Tara proposed any viable relative resources for Ethan. In May 2020, the Division filed an amended guardianship complaint, adding defendant and Ethan as parties.

During the summer of 2020, Dr. David R. Brandwein, Psy.D., conducted a psychological evaluation of defendant; a bonding evaluation between defendant and Ethan; and bonding evaluations among Ethan, Meg, and their resource parents. Dr. Brandwein opined:

> While [defendant] has made some initial and commendable progress in terms of his recovery, with the support of Drug Court, [defendant] is still in the beginning phase of his recovery and has not yet demonstrated the psychological stability or sobriety to care for E[than] for the long-term. Additionally, [defendant] lacks housing suitable for E[than], has never acted as an independent parent for his son, and has no plans for [when] he will secure housing or act as an independent caregiver for his son. Finally, placement of E[than] with [defendant] would both sever E[than]'s secure bond with his resource parents and separate E[than] from his sibling, M[eg], and neither of these options can be clinically supported.

> E[than] is not securely bonded to [defendant] and severing their relationship is unlikely to cause E[than] enduring psychological harm.

Indeed, Dr. Brandwein described the relationship between defendant and Ethan as akin to "familiar playmate[s]." Accordingly, Dr. Brandwein opined "termination of [defendant]'s parental rights to E[than] will not do more harm than good," and "recommend[ed] permanent placement of E[than] in the care of his resource parents."

By the time of trial, defendant had remained sober and gainfully employed. However, he was still serving his probationary Drug Court sentence and living in a sober living home. During cross-examination, Dr. Brandwein commended defendant for his continued sobriety. However, when confronted with the progress defendant had made since his evaluation, Dr. Brandwein explained his opinion remained unchanged in view of defendant's lack of independent housing, "lack of a support system, and the amount of time the children had been in resource care."

Immediately following closing arguments on June 4, 2021, the trial judge issued a well-reasoned oral decision, spanning nearly forty transcript pages. The judge made detailed findings of fact. Pertinent to this appeal, the judge acknowledged defendant's successful drug treatment, but noted he "was given a

three-month extension to facilitate reunification" prior to the pandemic, in February 2020, but "more than fifteen months later, he still remains in Oxford House." Nor had defendant provided the Division any plan for reunification. The judge observed defendant "is remaining sober at this time, while he lives in a sober living house." The judge then made succinct conclusions of law based on the record evidence, addressing each of the prongs of the best-interests standard under N.J.S.A. 30:4C-15.1(a). The judge entered an order terminating defendant's parental rights and awarding guardianship of Ethan to the Division. Defendant appealed.

II.

Our review of a judgment terminating parental rights is limited. N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 552 (2014). We are bound to accept the trial court's findings, as long as they are "supported by adequate, substantial, and credible evidence." Ibid. Additionally, we accord a family court's decision particular deference in view of its "special jurisdiction and expertise in family matters," and because the court is uniquely positioned to evaluate the credibility of the witnesses. Cesare v. Cesare, 154 N.J. 394, 412-13 (1998). We review the trial court's legal interpretations de novo. R.G., 217 N.J. at 552.

Parents have a fundamental right to raise their children, and that right is constitutionally protected. N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007). "[T]erminations should be granted sparingly and with great caution because they irretrievably impair imperative constitutionally-protected liberty interests and scores of centuries of societal family constructs." R.G., 217 N.J. at 553 (quoting M.M., 189 N.J. at 279). But a parent's rights are not absolute. Ibid. "Because of its parens patriae responsibility, the State may terminate parental rights if the child is at risk of serious physical or emotional harm or when necessary to protect the child's best interests." Id. at 553-54; see also N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 599 (1986). At times, a parent's interest must yield to the State's obligation to protect children from harm. N.J. Div. of Youth & Fam. Servs. v. G.M., 198 N.J. 382, 397-98 (2009).

To effectuate these concerns, the Legislature created a test for determining when a parent's rights must be terminated in a child's best interests, requiring the Division to prove by clear and convincing evidence the following four prongs:[7]

[7] The prongs set forth above were in effect when the judgment was entered. Effective July 2, 2021, the Legislature enacted L. 2021 c. 154, amending laws

> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;
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> (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;
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> (3) The [D]ivision 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

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pertaining to the standards for terminating parental rights and the placement of children with relatives or kinship guardians. N.J.S.A. 30:4C-15.1(a)(2) was amended to exclude from consideration of that prong the harm to children caused by removal from their resource parents. Accordingly, the second sentence of prong two was stricken from the revised statute. The amendments also encourage placement with relatives or kinship guardians and eliminate the requirement from N.J.S.A. 3B:12A-6(d)(3) that "adoption of the child is neither feasible nor likely" for a kinship legal guardian to be appointed.

Defendant does not contend the amendment should be applied retroactively here, and we discern no reason to do so. See, e.g., James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014) (recognizing "[s]ettled rules of statutory construction favor prospective rather than retroactive application of new legislation"); see also N.J. Div. of Child Prot. & Permanency v. D.C.A., ___ N.J. Super. ___, ___ (App. Div. 2022) (slip op. at 19-24) (recognizing the bond between children and their resource parents may be considered as part of the totality of the circumstances under N.J.S.A. 30:4C-15.1).

> (4) Termination of parental rights will not do more harm than good.
>
> [N.J.S.A. 30:4C-15.1(a).]

The four prongs are not independent of one another. Rather, they "are interrelated and overlapping[,] . . . designed to identify and assess what may be necessary to promote and protect the best interests of the child." N.J. Div. of Youth & Fam. Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006). Parental fitness is the crucial issue. K.H.O., 161 N.J. at 348. Determinations of parental fitness are very fact sensitive and require specific evidence. Ibid. Ultimately, "the purpose of termination is always to effectuate the best interests of the child, not the punishment of the parent." Id. at 350.

Defendant primarily challenges the sufficiency of the Division's proofs under the third prong of the best interests test. See N.J.S.A. 30:4C-15.1(a)(3). He argues the Division "purposely and negligently . . . failed to make reasonable efforts to assist [him] in correcting the circumstances that led to E[than]'s removal." Citing R.G. and our decision in New Jersey Division of Child Protection & Permanency v. T.D., 454 N.J. Super. 353 (App. Div. 2018), defendant claims the Division failed to obtain any records of his successful drug treatment, enrollment in college, and gainful employment. Defendant also

claims the trial judge's findings on prong three were "terse and vague" contrary to Rule 1:7-4(a). Because defendant's challenges to the sufficiency of the trial judge's findings on prongs two and four are substantially similar to those asserted under the third prong, we focus on prong three.

The third prong requires consideration as to whether the Division "'made reasonable efforts to provide services to help the parent' remedy the circumstances that led to removal of the children from the home." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 452 (2012) (quoting N.J.S.A. 30:4C-15.1(a)(3)). In determining whether the Division has made reasonable efforts at reunification, the court must consider "the parent's active participation in the reunification effort." In re Guardianship of D.M.H., 161 N.J. 365, 390 (1999). The failure or lack of success of the Division's efforts does not mean it failed in the reunification process, particularly where the parent refused to cooperate. Id. at 393; K.H.O., 161 N.J. at 354.

In the present matter, defendant does not dispute he absented himself for the first three years of Ethan's life. But he fails to acknowledge the services provided by the Division prior to the child's removal and his refusal of services thereafter. Those services included efforts to locate defendant "when he went missing"; visitation with Ethan; transportation; substance abuse evaluations; and

family team meetings. Even after Tara and the children moved to North Carolina the first time, the Division offered services to defendant, including a referral to BOSS, but defendant failed to follow up. The Division continued to offer services after the guardianship complaint was filed, obtained a three-month extension from the court to facilitate reunification, and offered to seek an additional extension, but defendant rebuffed the Division's attempt to assist him. Clearly, the reasonableness of the Division's efforts here cannot be measured by the lack of success, particularly in view of defendant's refusal to cooperate. See D.M.H., 161 N.J. at 393.

Moreover, defendant's reliance on R.G. and T.D. is misplaced. In R.G., our Supreme Court found the Division failed to demonstrate it made reasonable efforts to provide services to an incarcerated parent. 217 N.J. at 562. The Division visited the parent once in prison, called him once, completed two psychological evaluations but did not complete a bonding evaluation, did not provide him with his daughter's letters, did not facilitate calls, and never compared his participation in the prison's programs with the content of the Division's programs. Id. at 562-63.

In T.D., we faulted the Division for relying solely on its expert's opinion that the defendant could not parent independently because she suffered from

multiple sclerosis. 454 N.J. Super. at 383. We held the Division should have obtained the defendant's medical records, as it had been ordered to do, so it could determine the full extent of her physical limitations and the supports or services she might need to parent successfully. Ibid.

By contrast, in the present matter, the Division did not dispute that defendant successfully completed inpatient and outpatient drug treatment programs, was gainfully employed, and had been enrolled in school. At trial, Dr. Brandwein expressly acknowledged and commended defendant for his continued sobriety and gainful employment, as did the trial judge. Nonetheless, the expert remained convinced that termination of defendant's parental rights was in Ethan's best interests because defendant had not secured independent housing, did not have a support system, and the child was bonded to his sister and resource parents. We therefore we reject defendant's argument that the Division failed to obtain his records and that they would have impacted the judge's decision.

Nor are we persuaded by defendant's argument that the trial judge failed to comply with Rule 1:7-4(a) (requiring the trial court to "find the facts and state its conclusions of law thereon in all actions tried without a jury"). In the present matter, the trial judge concluded the Division "provided substantial and

significant efforts to assist these parents . . . includ[ing] psychological evaluations, substance abuse evaluations, individual therapy, medication, monitoring, supervised visitation, attempt at in-home services, services for children in placement, bonding evaluations, and assistance with housing applications." The judge further found the caseworker assisted Tara with her housing applications, but defendant failed to submit any documentation indicating his applications had been denied. The judge recognized both the Division's obligation to provide services, and the "personal responsibility of the recipient to become engaged with them and to comply with them," but found that had not occurred here. See D.M.H., 161 N.J. at 393. Having reviewed the record, we are convinced the judge's findings were sufficient and amply supported by the record. See M.M., 189 N.J. at 279.

Although we commend defendant for his efforts to attain sobriety, at the time of trial he was still under the auspices of Drug Court and Oxford House, unable to secure independent housing for himself and Ethan, and lacked a viable support system. Accordingly, defendant was unable to "become fit in time to meet the needs of [Ethan]." N.J. Div. of Youth & Family Servs. v. F.M., 375 N.J. Super. 235, 253 (2005); see also N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 512 (2004) (holding that even when a parent is attempting to

change, a child cannot wait indefinitely). We therefore discern no basis to disturb the trial judge's well-reasoned decision that defendant is unable to parent Ethan and will not be able to do so for the foreseeable future.

To the extent we have not addressed a particular argument, it is because either our disposition makes it unnecessary, or the argument was without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.