

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0545-22

NEW JERSEY DIVISION OF  
CHILD PROTECTION AND  
PERMANENCY,

Plaintiff-Respondent,

v.

K.R.,

Defendant-Appellant,

and

R.R.,

Defendant.

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

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Submitted August 15, 2023 – Decided August 24, 2023

Before Judges Mawla and Enright.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Family Part, Bergen County,  
Docket No. FG-02-0034-22.

Joseph E. Krakora, Public Defender, attorney for  
appellant (Mark E. Kleiman, Designated Counsel, on  
the briefs).

Matthew J. Platkin, Attorney General, attorney for  
respondent (Sookie Bae-Park, 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; Jennifer M. Sullivan,  
Assistant Deputy Public Defender, of counsel and on  
the brief).

#### PER CURIAM

Defendant K.R. (Kim)<sup>1</sup> appeals from a September 28, 2022 guardianship  
judgment terminating her parental rights to her daughter, B.R. (Bree).<sup>2</sup> We  
affirm.

#### I.

The facts are fully detailed in the trial court's thirty-one-page opinion, so

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

<sup>2</sup> Bree's father, R.R., surrendered his parental rights in August 2022 and is not  
involved in this appeal.

we need only summarize them here. Bree and Kim tested positive for benzodiazepines, cocaine, and opiates when Bree was born in March 2021. The infant also was diagnosed with Neonatal Abstinence Syndrome (NAS).

Following a referral to the Division of Child Protection and Permanency (Division), a caseworker interviewed Kim and she admitted to "us[ing] drugs [two] days before giving birth." In the three weeks following Bree's birth, Kim tested positive on multiple occasions for heroin, fentanyl, benzodiazepines, opiates, and cocaine.

The Division referred Kim for a substance abuse evaluation. She reported abusing drugs as a teenager, starting with marijuana at age fourteen and escalating to heroin and cocaine by age sixteen. She was diagnosed with "Severe Opiate Use Disorder," "Severe Xanax Use Disorder," and "Severe Cocaine Use Disorder" and was recommended for inpatient treatment.

Kim entered an inpatient treatment program in March 2021, but discharged herself from the program several days later. From the time she left this program until the guardianship trial concluded, Kim attended several more treatment programs, none of which led to a sustained period of sobriety.

Bree was discharged from the hospital on March 24, 2021, and immediately placed with her maternal great aunt, B.S. (Barbara). A few months

later, Bree's maternal grandmother, D.R. (Donna), moved in with Barbara. The Division explored and ruled out other family members following Bree's removal, so the child remained with both caregivers through the guardianship trial.

Although Donna and Barbara initially allowed Kim to have supervised visits with Bree, by July 2021, the relationship between Kim and the resource parents became strained and they stopped hosting the visits. The same month, Kim was incarcerated for violating probation. The Division provided her with virtual visits until she was released from jail three months later. It then offered her transportation for supervised visits but ceased transporting Kim in June 2022, based on her "erratic and aggressive" behavior toward Division staff. Thereafter, the Division provided her with bus and train passes for visits and other recommended services. According to the Division, Kim positively interacted with Bree during her supervised visits.

In March 2022, the Division filed a guardianship complaint. Sybelle Velarde, a Division Family Services Specialist, was assigned to work with Kim and asked her to submit to random drug screens. Kim refused these requests and asked for a different case worker. Velarde also referred Kim for substance abuse evaluations, but Kim failed to attend the two scheduled evaluations.

At the Division's request, Barry Katz, Ph.D., conducted bonding evaluations between Bree and Donna and Barbara in July 2022. Although the Division scheduled psychological and comparative bonding evaluations for Kim with Dr. Katz, she did not attend either evaluation.

The guardianship trial commenced on August 17, 2022. The Division called two witnesses, Dr. Katz and Velarde. The Law Guardian called no witnesses but supported the Division's plan for termination of parental rights, followed by adoption.

At the beginning of the hearing, Kim contacted the court by phone and testified she could not physically appear for the proceeding because she was transferred to the New Hope substance abuse program the day before and had no means of getting to the courthouse. The judge briefly recessed and called New Hope to determine Kim's status. He learned from "the head of adult services" that Kim was neither admitted to the program nor on New Hope's waiting list. Thus, the judge directed the trial to proceed.

Kim's attorney and the Law Guardian stipulated to Dr. Katz testifying as an expert in "psychology, bonding and parental fitness." The doctor confirmed he conducted psychological and bonding evaluations with Donna and Barbara. He also testified he unsuccessfully "attempted to perform psychological and

bonding evaluations" with Bree's biological parents. Dr. Katz stated that his review of records revealed "a history of substance use disorder and non-compliance with treatment and with court orders by the biological parents." Additionally, he testified he was "presented [with] no data that [Bree] . . . had the opportunity to develop any type of relationship or bond with either biological parent," but he understood Kim's "visits [with Bree] went well and without incident."

Dr. Katz opined: Bree showed "classic signs of bonding and attachment to both resource parents . . . as primary nurturing figures"; it was in Bree's "best interest to remain with [Donna and Barbara] for the foreseeable future"; and neither biological parent should be reunified with Bree.

Velarde testified on the second day of trial.<sup>3</sup> She detailed Kim's history of noncompliance with recommended services, including mental health and substance abuse treatments. Velarde also testified Kim was "not able . . . to stay sober for a long period of time," did not "have the security of a stable job . . . to provide [for Bree]," and did not "have . . . stable housing of her own."

Additionally, Velarde testified Bree's resource parents were "committed" to the child, took "care of all her needs and desires and wants," and it was in

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<sup>3</sup> The judge granted Kim's request to appear virtually for the second day of trial.

Bree's "best interest . . . to remain where she[ was] right now." Velarde further stated that "throughout the case," the Division discussed the differences between adoption and Kinship Legal Guardianship (KLG)<sup>4</sup> with Donna and Barbara, and they consistently stated they wanted to adopt Bree. According to Velarde, the resource parents explained "they wanted to make sure . . . [Bree] received their care until she [was] an adult[,]" as "[t]hey believe[d] in their heart[s] that [was] the best thing for [Bree]."

When Velarde's testimony concluded, the judge noted Kim stopped virtually participating in the hearing, and he closed the record. Although he subsequently granted Kim's application to reopen the record so she could testify, she later declined to testify or present any witnesses.

## II.

On September 28, 2022, the judge entered a guardianship judgment terminating Kim's parental rights. In his accompanying written opinion, the judge credited the testimony of Dr. Katz and Velarde, and found the Division satisfied each prong of the best interests test, N.J.S.A. 30:4C-15.1, by clear and

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<sup>4</sup> KLG is an alternative to the termination of parental rights, allowing a caregiver to become a child's legal guardian until the child reaches adulthood while "retain[ing] the birth parents' right to consent to adoption, the obligation to pay child support, and the parents' right to have some ongoing contact with the child . . . ." N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 508 (2004).

convincing evidence.

As to prong one, the judge concluded: Bree's "safety, health and development . . . was endangered at the time of [her] removal and continue[d] to be endangered because both parents . . . failed to remediate their parental deficits." He found Bree and Kim tested positive for illicit drugs when Bree was born; Bree was diagnosed with NAS; Kim "test[ed] positive for multiple illicit substances on numerous occasions and continuously fail[ed] to address [her] substance abuse and mental health concerns[,] despite early identification of these issues"; and she "was substantiated for [substance] abuse . . . ."

The judge further observed Kim had "periods of involvement with drugs, [a] lack of housing stability and [lack of] reliable employment, and criminal activity . . . ." After concluding Kim "present[ed] a current and future risk of harm to" Bree, the judge found "the Division demonstrated by clear and convincing evidence that [Bree was] harmed as a result of [her] parental relationship with" Kim.

Regarding prong two, the judge determined Kim was "unable to continue a parental relationship without recurrent harm to the child" and unable or unwilling "to provide a safe and stable home" for Bree. Additionally, he stated a "delay in securing permanency" would "add[] to the child's harm."



Turning to the third prong, the judge found:

[t]he Division offered . . . substance abuse evaluations; recommended inpatient substance abuse treatment[,], mental health treatment services[, and] mental health evaluations; and facilitated visitation. Despite the Division's extensive and continuous efforts, [Kim] never participated meaningfully in any offered services, save for visitation with [Bree] . . . .

[Kim] remained unwilling to enter the court[-]ordered level of substance abuse treatment and in fact[,], misrepresented to the [c]ourt her engagement in substance abuse treatment during the course of the trial.

. . . .

The Division also considered alternatives to the termination of [Kim's] parental rights . . . . However, there are no alternatives to termination of parental rights . . . due to the fact that [KLG] is not a viable plan . . . . The [r]esource [p]arents . . . are committed to adoption after the termination of [Kim's] parental rights . . . .

Several relatives were assessed as potential placements for [Bree] and all were ruled out except for [Donna and Barbara] . . . .

[T]he Division provided the [r]esource [p]arents with information and education regarding [KLG] and [a]doption. After providing that education, on numerous occasions, the Division assessed the [r]esource [p]arents' position regarding KLG and [a]doption and . . . [they] were very clear that they only wanted to adopt [Bree] and had no interest in KLG . . . .

The statutory prerequisite for [KLG] [are] circumstances where adoption is "neither feasible nor likely." . . . This [c]ourt finds that adoption is feasible, likely, and necessary to promote the wellbeing and safety of the child in this case.

[(Emphasis added).]

Accordingly, the judge determined the Division met its burden in proving it "made reasonable efforts to provide services to help [Kim] . . . correct the circumstances which led to [Bree's] placement . . . outside the home . . . ." Further, he stated he "considered alternatives to termination of [Kim's] parental rights."

Finally, the judge concluded the Division satisfied its burden under prong four in demonstrating termination of Kim's parental rights would not do more harm than good. He stated she "was given the opportunity to participate in psychological and comparative bonding evaluations" and "failed to engage in these evaluations." The judge also accepted Dr. Katz's "uncontroverted and credible" opinion that Bree had "a stable bond and attachment" with her resource parents. Additionally, the judge found:

[Bree] does not know [Kim] as a reliable parental figure . . . . [Bree] sees her [r]esource [p]arents as her primary psychological parents . . . . The [r]esource [p]arents are providing her with a warm, loving and stable environment and are attentive to her needs.

. . . .

[Bree] is now thriving in the care of her [r]esource [p]arents . . . . Termination would not do more harm than good because the testimony and reports clearly and convincingly established that [Bree has] a significant attachment bond with the [r]esource [p]arents . . . . Thus, terminating the parental rights of [Kim] will afford the child the permanency and stability she needs and deserves and will provide her with the best opportunity to develop into an emotionally healthy and productive adolescent and adult . . . .

This [c]ourt finds that [Bree] deserves the chance to establish permanency with . . . competent, nurturing caretakers who can provide her with a safe and stable home. The [r]esource [p]arents are in a position to do that as demonstrated by the care they have provided since [Bree] was placed with them.

The judge further concluded Kim was "not fit to parent" Bree "currently, and in the foreseeable future"; she was "unwilling or unable to remove the harm that befell [Bree] due to her abuse of substances . . . [and] lack of insight into her issues"; Bree's placement with Donna and Barbara was "the only placement [Bree] ha[d] ever known"; and considering Bree had "bonded to her present [r]esource [p]arents[.]" "[t]he effects of terminating [Kim's] parental rights [would] be of minimal effect."

### III.

On appeal, Kim argues "the trial court failed to properly consider [KLG]

as an alternative to termination of [her] parental rights under the third prong of the 'best interests test'" and the judge "cited the wrong legal standard in assessing . . . alternatives" to termination. Further, she contends "the trial court erred in finding . . . [the Division] demonstrated by clear and convincing evidence that termination of [her] parental rights will not do more harm than good under the fourth prong" of this test, even though she maintained a "loving and nurturing relationship" with Bree.<sup>5</sup> These arguments are unavailing.

Our scope of review of an order terminating parental rights is limited. N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007) (citing In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)). A reviewing court will uphold a trial court's factual findings 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) (citing N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). We "accord deference to fact[-]findings 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

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<sup>5</sup> Because Kim neither contests the judge's rulings under prongs one and two of N.J.S.A. 30:4C-15.1(a), nor his determinations under the "reasonable efforts" section of this statute, any challenges to same are deemed waived. See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("[A]n issue not briefed is deemed waived.").

the family." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448 (2012) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)). However, we review a trial court's legal conclusions de novo. N.J. Div. of Youth & Fam. Servs. v. I.S., 202 N.J. 145, 183 (2010) (citation omitted).

Parents have a constitutionally protected right to raise their children. N.J. Dep't of Child. v. A.L., 213 N.J. 1, 17-18 (2013); N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 599 (1986). But that right is not absolute. R.G., 217 N.J. at 553 (citing In re Guardianship of K.H.O., 161 N.J. 337, 347 (1999)). Parental rights are "tempered by the State's *parens patriae* responsibility to protect the welfare of children." K.H.O., 161 N.J. at 347 (citation omitted).

As the trial judge noted, under N.J.S.A. 30:4C-15.1(a), the Division must establish the following prongs by clear and convincing evidence before a parent's rights can be terminated:

- (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;<sup>6</sup>

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<sup>6</sup> On July 2, 2021, the Legislature enacted L. 2021, c. 154, deleting the last sentence of N.J.S.A. 30:4C-15.1(a)(2), which read, "[s]uch harm may include

(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

(4) Termination of parental rights will not do more harm than good.

[N.J.S.A. 30:4C-15.1(a)(1) to (4).]

The four prongs are not "discrete and separate" but "relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." K.H.O., 161 N.J. at 348.

The second part of prong three requires the court to "consider[] alternatives to termination of parental rights . . . ." N.J.S.A. 30:4C-15.1(a)(3). Those alternatives may include the establishment of a KLG. N.J. Div. of Youth & Fam. Servs. v. L.L., 201 N.J. 210, 222 (2010). And the fourth prong of the statute requires the court to determine termination "will not do more harm than good." N.J.S.A. 30:4C-15.1(a)(4). The latter prong serves as a "'fail-safe' inquiry guarding against an inappropriate or premature termination of parental rights." F.M., 211 N.J. at 453 (citation omitted).

"The crux of the fourth [prong] is the child's need for a permanent and

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evidence that separating the child from [the child's] resource family parents would cause serious and enduring emotional or psychological harm to the child."

stable home, along with a defined parent-child relationship." N.J. Div. of Youth & Fam. Servs. v. H.R., 431 N.J. Super. 212, 226 (App. Div. 2013) (citation omitted). Prong four typically requires expert testimony based on a comparison of bonding evaluations, N.J. Div. of Youth & Fam. Servs. v. A.R., 405 N.J. Super. 418, 436-37 (App. Div. 2009), but they are not required where termination "[is] not predicated upon bonding, but rather reflect[s] [the child's] need for permanency and [the parent's] inability to care for [the child] in the foreseeable future," N.J. Div. of Youth & Fam. Servs. v. B.G.S., 291 N.J. Super. 582, 593 (App. Div. 1996). That is the case here.

In July 2021, the Legislature enacted amendments to various sections of Titles 9, 30, and 3B, governing acts of child abuse and neglect, termination of parental rights proceedings, and KLG proceedings, respectively. L. 2021, c. 154. The amendments "strengthened the position of kinship caregivers" and altered the KLG analysis "to reflect a preference for viable kinship guardians and fit parents over unrelated foster caretakers." N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 27 (App. Div. 2022).

Prior to the amendments, N.J.S.A. 3B:12A-6(d)(3) required a determination by clear and convincing evidence that adoption was neither feasible nor likely before awarding KLG. The 2021 amendment deleted that

condition, making KLG an equally available permanency plan for children in the Division's custody. L. 2021, c. 154, § 4; N.J.S.A. 3B:12A-6(d)(3).

However, nothing in the amendments implies KLG by relative resource parents is the preferred outcome over adoption. Nor is a trial court required to impose KLG where the caregiver has decided against it in favor of adoption, and the judge finds — after considering the totality of the circumstances — adoption is in the child's best interests. See D.C.A., 474 N.J. Super. at 28. Indeed, the recent statutory amendment to the second prong of N.J.S.A. 30:4C-15.1 "make[s] it clear . . . the judge should be considering the totality of the circumstances in every case in evaluating facts and making a particularized decision based on the best interests of the child." Ibid. (citation omitted).

In short, the statutory amendments we have referenced did not alter the guiding principle of child-guardianship cases — courts must decide cases based on the best interests of the child. See F.M., 211 N.J. at 447. Therefore, the amended KLG statute simply ensures a resource parent's willingness to adopt no longer forecloses KLG. The fact the Legislature did not delete paragraph (d)(4) of the KLG statute, which requires a trial court to find "awarding [KLG] is in the child's best interest," N.J.S.A. 3B:12A-6(d)(4), before it can order KLG, supports this conclusion.



Thus, while we agree with Kim that the trial court erred in finding KLG was not "feasible or likely" based on the willingness of Bree's resource parents to adopt her, we also are convinced this error does not warrant reversal of the guardianship judgment. See Hayes v. Delamotte, 231 N.J. 373, 387 (2018) (noting it is "well-settled . . . appeals are taken from orders and judgments," and not a court's oral or written decisions).

We reach this determination, recognizing the judge correctly cited the updated version of the statutory best interests prongs when finding: Bree's caregivers "were very clear that they only wanted to adopt [Bree] and had no interest in KLG" once the Division explained the differences between the two options; the Division considered and ruled out other relative placements; "there [were] no alternative[s] to the termination of [Kim's] parental rights"; adoption was "necessary to promote the wellbeing and safety of the child"; and it was in Bree's "best interests to remain with the [r]esource [p]arents." Moreover, these findings were amply supported by the credible evidence in the record. Therefore, we decline to conclude the judge erred in finding the Division met its burden under prong three or that he mistakenly determined KLG was not a viable alternative for Bree.

We also disagree with Kim's contention that the judge erred under prong

four in finding the termination of her parental rights "would not do more harm than good," N.J.S.A. 30:4C-15.1(a)(4). As our Supreme Court has instructed:

the fourth prong of the best interests standard cannot require a showing that no harm will befall the child as a result of the severing of biological ties. The question to be addressed under that 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] relationship with [the child's] foster parents.

[K.H.O., 161 N.J. at 355.]

A determination on the fourth prong cannot be made simply by showing "the child has bonded with foster parents who have provided a nurturing and safe home," or that terminating parental rights "likely will not do more harm than good" because it would provide the child with the benefit of a "permanent placement with a loving family . . . ." E.P., 196 N.J. at 108 (citations omitted). Nor can it be made simply upon finding the bond with a resource parent is stronger than the bond with the biological parent, because that is an expected result of an early or lengthy removal. G.L., 191 N.J. at 608-09. Termination is only appropriate when the absence of permanency will cause harm to the child, and the biological parent is unlikely in the reasonably foreseeable future to become capable of primary caregiving for the child. N.J. Div. of Youth & Fam.

Servs. v. L.J.D., 428 N.J. Super. 451, 483-87 (App. Div. 2012).

In assessing what is in the best interest of a child under prong four, courts are required to consider the "totality of the circumstances," which means they "must, at the very least, consider the child's bond to a current placement when evaluating prong four . . . ." D.C.A., 474 N.J. Super. at 28. And while we recognize N.J.S.A. 30:4C-15.1(a)(2) was amended in 2021 to remove the provision: "[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," the Legislature "did not alter the other components of the best interest standard." Id. at 25. Accordingly, "the deletion from prong two [of N.J.S.A. 30:4C-15.1] . . . [is to be construed] narrowly" so that it "remains coherent with prong four." Id. at 29. Thus,

[t]he amended statute . . . requires a court to make a finding under prong two that does not include considerations of caregiver bonding, and then [to] weigh that finding against all the evidence that may be considered under prong four — including the harm that would result from disrupting whatever bonds the child has formed.

[Ibid.]


Guided by these principles, we perceive no basis to second-guess the judge's findings on the fourth prong. As the judge noted, Kim "was given every

opp[or]tunity to attend . . . [a comparative bonding] evaluation and she failed to cooperate." Further, he found she was unable to "achieve relief from her substance abuse" and "failed to attain any significant period of sobriety." The judge also concluded Kim lacked "stable and suitable housing," and her ability to "achiev[e] long-term stability in the foreseeable future was unlikely," causing her to be unable to properly care for Bree.

Moreover, he found "termination of [Kim's] parental rights [would] be of minimal effect," given that Bree was in the care of her resource parents shortly after her birth, they "provide[d] for the child's daily needs" as well as her "safety and security," and Dr. Katz's uncontroverted expert opinion was that Bree viewed her caregivers "as her primary psychological parents." Additionally, he concluded terminating Kim's parental rights would "afford [Bree] the permanency and stability she need[ed] and deserve[d]." These findings are amply supported by credible evidence in the record.

In sum, because the judge correctly found the Division established, by clear and convincing evidence, all four prongs of the best interests test under N.J.S.A. 30:4C-15.1(a), we have no reason to disturb the September 28, 2022 guardianship judgment.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.  
  
CLERK OF THE APPELLATE DIVISION