

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0851-21
A-1228-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Appellant/
Cross-Respondent,

v.

A.S.,

Defendant-Respondent,

and

G.T. (identified surrender
12-04-20 under FN-20-0061-20),

Defendant.

IN THE MATTER OF THE
GUARDIANSHIP OF G.T., a minor,

Appellant/Cross-Appellant.

Argued January 30, 2023 — Decided February 14, 2023

Before Judges Mawla, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FG-20-0017-21.

Jennifer M. Sullivan, Assistant Deputy Public Defender, argued the cause for appellant/cross-appellant G.T. (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Meredith Alexis Pollock, Deputy Public Defender, of counsel; Jennifer M. Sullivan and David Valentin, Assistant Deputy Public Defender, of counsel and on the briefs).

T. Gary Mitchell, Designated Counsel, argued the cause for respondent A.S. (Joseph E. Krakora, Public Defender, attorney; T. Gary Mitchell, on the brief).

Mary L. Harpster, Deputy Attorney General, argued the cause for appellant/cross-respondent (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Mary L. Harpster and Salima E. Burke, Deputy Attorney General, on the briefs).

PER CURIAM

The Law Guardian, on behalf of its client R.T.,¹ and the Division of Child Protection and Permanency (Division) each appeal from a November 12, 2021 order denying termination of parental rights of R.T.'s mother, A.S., and

¹ We use the parties' initials to protect the identity of a minor child pursuant to R. 1:38-3.

dismissing the Division's guardianship complaint. We reverse and remand for a new trial for the reasons expressed in this opinion.

The facts were adduced at a two-day trial at which the Division called a caseworker from Wayne County Children's Services (WCCS), the Division's Ohio counterpart, where R.T. resided with A.S. and his father G.T. The Division also offered testimony from one of its caseworkers, an adoption caseworker, and an expert psychologist. The Law Guardian called the paternal grandmother D.T. as a witness. G.T. executed an identified surrender of his parental rights to D.T. A.S., who was absent for most of the litigation, failed to appear at trial but was represented by counsel throughout.

According to the trial evidence, R.T. was born in Ohio in 2013. Four months following his birth, WCCS received a referral that he suffered a skull fracture and had multiple brain bleeds. The doctor caring for R.T. concluded "it was non-accidental trauma, that someone had abused him." G.T. and A.S. had custody of R.T. at the time and had a history of domestic violence, which resulted in G.T.'s arrest in September 2013.

As a result, WCCS placed R.T. in a foster home for several weeks, and temporary custody was given to A.S. Custody was then transferred to G.T. due to concerns A.S. abused drugs and was high while caring for R.T. She tested

positive for marijuana, tramadol, methamphetamines, and amphetamines. Substance abuse and domestic violence services were offered to A.S., but she never completed them. G.T. completed domestic violence services, was granted custody of R.T., and planned to move to New Jersey to live with his father and stepmother. In 2016, WCCS contacted the Division citing concerns G.T. might continue abusing R.T.

In August 2018, the Division received a referral that G.T. threw a controller at R.T., bruising the child near an eye. In March 2019, there was a second referral when G.T. threw a bottle at R.T., again bruising the child's eye. The Division opened its case and searched for A.S., who was missing and could not be contacted.

The Division received a third referral in December 2019, when R.T.'s school notified the Division it had serious concerns regarding redness, bruising, and cuts the child had on his back and bottom. G.T. was arrested for child endangerment and stipulated to abuse or neglect of R.T. As a result, the child was removed again, and this time placed with D.T.

In February 2020, A.S.'s mother contacted the Division, advising A.S. wanted to speak with a caseworker. The caseworker, briefly spoke to A.S. who was residing in Louisiana at the time. Because A.S. was using someone else's

cellphone, the caseworker was unable to contact her again. Moreover, because A.S. moved back and forth between Louisiana and Ohio, the Division was unable to schedule virtual visitation with R.T. The Division then lost all contact with A.S. Its only contact was A.S.'s mother, who expressed concerns A.S. was transient and continued to abuse drugs.

Meanwhile, R.T. was attending school in New Jersey and placed under an Individualized Education Program (IEP) due to the severe emotional trauma he experienced in his parents' custody and a diagnosis of attention deficit hyperactivity disorder. The abuse R.T. suffered manifested in his behavior at school. According to the Division caseworker, R.T. "would shutdown[,] . . . have extreme fits, [and] temper tantrums" He would "talk bad about himself[, including saying] . . . I'm stupid, nobody loves me, and stuff like that." The Division provided trauma-focused therapy and worked with the school and D.T. to help him cope with his issues. D.T. attended IEP meetings and put services in place to support R.T. and enrolled the child in activities which provided him with an outlet. The caseworker described D.T.'s contact with the Division as excellent.

G.T.'s identified surrender occurred in December 2020. The adoption caseworker took over the case in January 2021. She testified the Division was

able to locate A.S. in Ohio and serve her with the guardianship complaint. In July 2021, the Division referred A.S. for a substance abuse evaluation, and attempted to reschedule psychological and bonding evaluations. The Division provided A.S. with lodging and fare for transportation to New Jersey. However, A.S. went missing again and could not be located, and despite an extensive search, the Division lost contact with her as of July 2021.

The adoption caseworker explained D.T. meets all of R.T.'s needs, including his emotional, physical, mental, educational, and medical needs. D.T. also has a family friend, who along with other members of the friend's family, helps D.T. with R.T. by transporting him to his activities, attending IEP meetings, and paying for certain expenses such as R.T.'s eyeglasses.

The adoption caseworker explained the Division discussed kinship legal guardianship (KLG) with D.T. beginning in 2020, well before she was assigned to the case, and D.T. wished to adopt. The Division's plan was a termination of parental rights followed by adoption by D.T. because A.S. refused to comply with services, and D.T. "provides all of [R.T.'s] needs, . . . is very safe . . . , and . . . could give [R.T.] the permanency that he deserves."

D.T. testified R.T. was in placement with her for over two years and was "doing much better in school." She stated: "We're working on his low self-

esteem and self-loathing. He's going to a therapist, . . . a pediatric neurologi[st, and occupational therapy]." D.T. explained R.T. resided with her and her adult daughter, and the family friend and her family were involved in R.T.'s life. D.T. testified she adopted G.T. and explained she wished to adopt R.T. so he could live with her permanently. When the judge learned D.T. had only discussed KLG versus adoption with the Division prior to the July 2021 amendments to the KLG statute, N.J.S.A. 3B:12A-1 to -7, he interrupted the testimony to explain the law and the differences between KLG and adoption. The judge repeatedly stated the "only difference" between the two was that contact was permitted under a KLG whereas it was not in the case of adoption. Notwithstanding the judge's explanation, D.T. stated:

I believe . . . adopting my grandson is best for him, because his biological parents have proved to be very unstable. When he was removed, when he was six years old and brought to me, he asked . . . to come to me. His biological parents being able to come back into his life is going to be very, very dangerous for him. He was severely, severely beaten when he was brought to me. He had a gash in his head when he was four months old living in Ohio with [A.S.], who is a heroin addict.

. . . .

If he returns to them[,] it's been proven that he will be mistreated. His safety will not be guarded. . . . [H]is mother is not able to take care of him, because of her substance abuse.

My concern for my grandson is his safety emotionally . . . as well as physically.

. . . .

He had a shunt placed in his head when he was four months old in Ohio, and he was removed from his [parents] when he was four and a half months old. They proved that his safety is not going to work with them.

I think his best place is to be adopted [by] me.

D.T. testified if she adopted R.T. she would not permit contact with his parents if it was not in his best interests. She wanted to adopt because under KLG they could "ask for custody again. And that has proven to severely jeopardize his safety emotionally and physically." An adoption would permit her to move and financially help R.T. "after the age of [eighteen]." Anything other than adoption would "harm [R.T.] further."

The final witness was the Division's expert, whom the judge qualified as an expert in "psychology attachment and bonding." The expert explained the difference between emotional attachment and bonding, and the concept of a psychological parent. She testified it is "extremely important" for a child to have a psychological parent because children need "continuity of care" and "a sense of security. That they know they're wanted and belong to . . . someone that they can look to be reliable." The existence of a psychological parent

"formulates for the child a sense of overall well-being . . . their self-esteem, also how they relate to other people in their life . . . [and] then come to see others . . . as reliable, as persons that they can give [and] receive care from, love, [and] nurturing."

The expert explained the concept of permanency, which she noted included not only a place a child can call home, but also reliability, continuity of care, and a "sense . . . that they matter. That their needs are going to be met, both their basic physical needs of food, clothing, and shelter, on a consistent basis." Permanency includes predictability, organization, structure, "a life pattern" that will "help to establish a sense of well-being internally for the child." The absence of permanency "affects a child in all areas of their life" The expert explained instability at home would lead to instability at school, a lack of self-esteem, and the inability to form secure relationships. "So a lack of permanency for a child does not give them a sense that they are able to have any structure, any patterns in their world. And that as a result of that, they also have a lack of internal structure for themselves."

The expert explained R.T. began experiencing trauma at the age of four months, which had lasting impacts, including that R.T. "display[ed] difficulties with peers. He becomes highly irritable, angry easily, has expressed suicidal

ideation. He [was] hospitalized for two days in January of 2020." D.T. told the expert how at "the mere . . . mentioning [of G.T.'s] name . . . the child begins to . . . experience distress and difficulty The fear of him being removed from her care, and having to be returned to [G.T.], these things continue to pose trauma for him, even though he's not experiencing the actual physical maltreatment."

D.T. also informed the expert although A.S. initially maintained telephone contact with R.T., she had not seen him for several years. The expert opined A.S.'s absence created a lack of continuity in R.T.'s life, as he was removed as an infant, and he was in her care for only two weeks.

The expert opined D.T. provided R.T. with stability. D.T.'s support included her paramour who, in addition to the close family friend and her family, "is another significant person in [R.T.'s] life." These individuals "relate to [R.T.] as someone who is under the umbrella of a family member." D.T. also expressed a desire to adopt R.T. because "[s]he wanted to establish permanency for him[and] was committed to raising him . . . and mak[ing] sure that he was safely cared for." The expert concluded R.T. and D.T. had a positive bond. She

observed them to engage in discussion about whatever they wanted . . . to talk about. There was no off limit . . . conversation. . . . [R.T.] was very much nurtured by [D.T.]. There were intimate periods where she

would just bring him closer to her, and there would be mutual hugging between the two of them.

The expert reviewed photographs of R.T.'s activities with D.T. and the close friend and her family. She characterized R.T. and D.T.'s relationship as "natural and spontaneous." She concluded D.T. "is his primary care giver. She is his psychological parent. He trusts her. . . . He looks to her for assurance, and she provides that. She's reliable[,] . . . [s]omeone who can set limits, but also support him when he is angry, or when he becomes irritable." If R.T. were removed from D.T. "he's going to feel abandoned, rejected, lost, confused[,] . . . overwhelmed[,] . . . [and] betrayed."

The expert opined the only permanency option for R.T. was adoption because it

would give him the stability and permanency that he has come to know and come to expect. . . . He knows that he is not traumatized . . . or with a care giver . . . who is going to cause trauma to him. And because he understands that, he's also able to understand that, if I stay here then that's going to continue to allow me to be safe.

On the other hand, A.S. "is not someone who has shown any ability to provide care for him" The expert cited A.S.'s lack of stability, transience, "lack of visitation and contact, even any kind of verbal communication via

telephone, or engagement with [the Division] to try to engage where [R.T.] is, and to understand what's going on with him."

The expert testified she was aware of the recent amendments to the KLG statute. She opined KLG is appropriate "when you have persons who have some level of involvement with each other[,] . . . they have some communication capacity, they are compatible in terms of what their goals are for the child's well-being[, a]nd they both are able to pour something of value onto the child's life." However, A.S. "has not demonstrated that she's able to provide any kind of wholeness, support, nurturing[, or] care for this child. To have him in a situation of limbo, for him is not to his capacity or need to feel safe." The expert opined it was not foreseeable that A.S. would visit, have contact or a relationship, or "even be able to assume or resume parental care and responsibility" for R.T. "for a very long time"

At this point, the trial judge took over questioning the expert and began examining her regarding the amended KLG statute. The expert explained her understanding of the law and that KLG was a permanency option. However, she stated: "I just don't think in this situation that that's a good plan at all." She explained it would be

cruel and unfair to subject [R.T.] to the possibility that either one of his parents, given their situation, could

even have that occur so that he would be disrupted from the situation that he currently has and stability that he would even have to think that that is an alternative for him, given the kind of trauma that he's experienced in his life.

KLK was not a permanency option for R.T. because re-introducing either parent into the child's life would "recreate[] for the child another level of trauma. . . . [R.T.] still has very real fears that somebody's going to take [him] back, and [he is] going to be reintroduced to the trauma that [he] previously experienced." The expert stated: "So for this particular situation, he needs to have a sense of well-being that, I am permanently in the care of someone who makes all of the decisions, not someone who can arbitrarily come in and out of my life"

The expert concluded adoption would not harm R.T. "in any way. [Instead,] it would shore up the validation for him that he matters, and that it would allow him to continue to feel safe and protected." Removal of R.T. from D.T.'s care would do more harm than good.

The trial judge issued an oral opinion in which he found all the witnesses credible, with a caveat. Even though the judge found the expert an "excellent and capable witness" who "was credible in most of her opinions[,] he concluded her opinion—that adoption rather than KLK was appropriate—was a net opinion. The expert's opinion was "not put forward based upon any objective

science . . . that there's any difference in outcome between termination of parental rights and [KLG] status." He concluded the expert's "opinion was simply her personal subjective view."

The trial judge then stated: "I have not been able to discern any legislative history regarding the new statute. I can only conjecture that the statutory change was suggested by the Department of Child and Families as a rethinking of what had been the law up to the recent passage of the new law." The judge "reflect[ed]" on the legacy of slavery in the United States and stated:

I need not reiterate other parts of the new statute which emphasize that a child can have many meaningful parental-type figures in life. To return to the underside of our history when a child's parents under slavery were separated from their children, it was the extended family and friends that somehow had to try to provide for the safety and health of those children left behind. Unfortunately, since the extended family and friends were not able to guarantee a permanent home either, children suffered. . . . When the new statute states, quote, parental rights are to be preserved and protected whenever possible, I take that as a recognition that termination of parental rights carries with it a stigma, a brand which we can most often do without.

The new statute pertaining to [KLG] status most certainly changes the analysis under prong four, and a part of prong three [of N.J.S.A. 30:4C-15.1(a)] pertaining to termination of parental rights.

The judge then proceeded to analyze the four best interests prongs under N.J.S.A. 30:4C-15.1(a). He concluded the Division met the first prong because it was undisputed R.T.'s "safety, health[,] and development has been endangered by the parental relationship. [A.S.] has been unable to overcome the deficits that obviously interfered with her ability to parent[,] . . . she has not done any services or made any significant long-term efforts to maintain contact with her son." The judge found the Division proved the second best interests prong because A.S. could not provide a safe and stable home for R.T., who "needs a permanent home." The judge found the delay in permanency "will add to the harm to this improving child." The judge found the Division proved it made reasonable efforts to assist A.S. at reunification under the third prong of the best interests standard, but A.S. remained out of contact and "never even attempted" to complete the services offered by the Division.

However, the judge found the Division did not prove that KLG was not a viable alternative to a termination of parental rights under the third prong, or a termination of parental rights would not do more harm than good under the fourth prong. He concluded:

[T]he new statute on [KLG] status . . . openly states that the goal is to maintain family connections and cultural traditions. Parental rights should be preserved whenever possible. This is a case where the child has

been successfully placed with a very close relative, [D.T.].

On the other side of the coin, however, is that [A.S.] hasn't been able to do even the basic services[,] which could lead to her having some relationship with the child. At this point, the child has no consistent relationship with [A.S.], and that has been the case for several years. [KLG] is a permanent placement. Establishing [KLG] with [D.T.] would mean that if there ever were to be . . . the slightest contact between the biological mother and this precious child, it would have to be done upon application to the [c]ourt, and the judge would have to find by clear and convincing evidence that any such contact would be in the best interest of the child. That's a very high standard for a biological parent to meet. It guarantees that there will be no contact unless a [j]udge finds that high standard has been met in the best interest of the child. The new law requires us to preserve parental rights whenever possible. It is certainly possible in this case.

I.

The Law Guardian on behalf of R.T. raises the following arguments:

POINT I

THE TRIAL COURT'S DECISION DENYING THE DIVISION'S PETITION FOR GUARDIANSHIP OF [R.T.] MUST BE REVERSED AND REMANDED FOR ENTRY OF A GUARDIANSHIP ORDER BECAUSE THE COURT IGNORED SETTLED PRINCIPLES OF STATUTORY INTERPRETATION BY INJECTING THE STATEMENTS INTO THE PLAIN LANGUAGE OF N.J.S.A. 30:4C-15.1[(a)(1).]

A. The Trial Court Erred When It Sought To Protect [A.S.] From The "Stigma" Of A Termination Of Parental Rights Decision Instead Of Applying A Fact-Sensitive Analysis To Prongs Three And Four Of The Best Interests Test.

B. The Division Is Not Required To Prove That [KLG] Is Impossible Before Guardianship Is Granted So That [R.T.] Can Be Adopted.

POINT II

THE LOWER COURT MISINTERPRETED THE LEGAL STANDARD FOR PARENTAL VISITATION UNDER KLG AND FAILED TO CONSIDER IMPORTANT DIFFERENCES BETWEEN KLG AND ADOPTION, WHICH CONTRIBUTED TO THE COURT'S CONCLUSION THAT KLG WAS AN AVAILABLE PERMANENCY OUTCOME FOR [R.T.].

POINT III

THE TRIAL COURT'S CONCLUSION THAT PRONGS [THREE] AND [FOUR] WERE NOT MET WAS INFLUENCED BY ITS FLAWED STATUTORY INTERPRETATION AND MUST BE REVERSED AND REMANDED FOR FINDINGS THAT THE DIVISION SATISFIED ITS BURDEN UNDER N.J.S.A. 30:4C-15.1[(a)] AND ISSUANCE OF A JUDGMENT OF GUARDIANSHIP.

A. The Court Failed To Consider Evidence Which Amply Supports That For [R.T.], There Are No Viable Alternatives To Termination Of [A.S.]'s Parental Rights.

B. The Evidence Amply Supports That It Is In [R.T.]'s Best Interests For His Legal Relationship With [A.S.] To Be Completely Severed, And The Trial Court's Decision Is Owed No Deference Because It Was Based On An Erroneous Interpretation Of Prong [Four].

C. The Trial Court Erred When It Excluded [The Expert's] Uncontroverted Expert Opinion That Termination Of [A.S.]'s Parental Rights Will Not Do More Harm Than Good, And Adoption Is The Only Outcome That Supports [R.T.]'s Best Interests.

The Division argues the following points on appeal:

POINT I

THE TRIAL COURT'S JUDGMENT DENYING TERMINATION OF [A.S.]'S PARENTAL RIGHTS SHOULD BE REVERSED AND A JUDGMENT OF GUARDIANSHIP DIRECTED BECAUSE THE COURT'S INTERPRETATION OF RECENT AMENDMENTS IS CONTRARY TO THE OVERRIDING PURPOSE OF THE BEST INTERESTS TEST.

A. The Court's Analysis of the Second Part of Prong Three Was Legally Flawed Because It Assumes that Chapter 154 Creates a Preference for [KLG] Over Termination of Parental Rights.

B. The Court Erred in Analyzing Prong Four Because It Assumed That Terminating [A.S.]'s Parental Rights Would Have No Compensating Benefit for [R.T.].

POINT II

THIS COURT SHOULD DIRECT A JUDGMENT OF GUARDIANSHIP BECAUSE THE DIVISION SATISFIED THE FOUR PRONGS OF THE BEST[] INTERESTS STANDARD UNDER N.J.S.A. 30:4C-15.1[(a)] BY CLEAR AND CONVINCING EVIDENCE.

A. The Division Appropriately Considered Alternatives to Termination.

B. Termination of Parental Rights Will Not Cause [R.T.] More Harm Than Good.

POINT III

ABSENT REVERSAL OF THE TRIAL COURT'S DECISION WITH DISCRETION TO ENTER A JUDGMENT OF GUARDIANSHIP, THIS COURT SHOULD REMAND THE MATTER TO A DIFFERENT JUDGE FOR CASE-SPECIFIC FACTUAL FINDINGS AND DETERMINATION OF THE SECOND PART OF PRONG THREE AND PRONG FOUR USING THE CORRECT LEGAL STANDARD (not raised below).

II.

We typically will uphold the trial judge'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). A trial court's decision will only be reversed if the findings are "so manifestly unsupported by or inconsistent with the competent, relevant[,] and reasonably credible evidence as

to offend the interests of justice" Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)).

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). In regard to statutory law, courts are bound to apply the plain language of a statute as written if the language is clear. Correa v. Grossi, 458 N.J. Super. 571, 579 (App. Div. 2019). If a statute is ambiguous, a court is then guided by the Legislature's intent and "may turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'" DiProspero v. Penn, 183 N.J. 477, 492-93 (2005) (quoting Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004)).

A statute's preamble is generally not considered part of the act it precedes, but "[a] court may turn to [the] . . . preamble as an aid in determining legislative intent." Calabotta v. Phibro Animal Health Corp., 460 N.J. Super. 38, 62 (App. Div. 2019) (first alteration in original) (quoting DiProspero, 183 N.J. at 496). "To the extent that the preamble is at variance with the clear and unambiguous

language of the statute, the preamble must give way." DiProspero, 183 N.J. at 497.

In guardianship proceedings, the court must apply the statutory best interests test, which requires it to consider:

- (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 [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).]

The Division must prove the four prongs by "clear and convincing" evidence. N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 611-12 (1986). The prongs "enumerated in the best interests standard are not discrete and separate; they relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." In re K.H.O.,

161 N.J. 337, 348 (1999). These considerations are fact sensitive and require particularized evidence addressing the specific circumstances. Ibid.

In July 2021, the Legislature amended the second prong of N.J.S.A. 30:4C-15.1(a) to delete its second sentence. The second prong formerly read as follows:

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[.]

The legislative findings, which led to the amendment deleting the second prong and amendments to the KLG, N.J.S.A. 30:4C-83, statute were as follows:

- a. Foster care is intended by existing state and federal statute to be temporary.
- b. Kinship care is the preferred resource for children who must be removed from their birth parents because use of kinship care maintains children's connections with their families. There are many benefits to placing children with relatives or other kinship caregivers, such as increased stability and safety as well as the ability to maintain family connections and cultural traditions.
- c. Federal law permits [KLG] arrangements to be used when the child has been in the care of a relative for a period of six months.

d. Parental rights must be protected and preserved wherever possible.

e. Children are capable of forming healthy attachments with multiple caring adults throughout the course of their childhood, including with birthparents, temporary resource parents, extended family members, and other caring adults.

f. The existence of a healthy attachment between a child and the child's resource family parent does not in and of itself preclude the child from maintaining, forming or repairing relationships with the child's parent or caregiver of origin.

g. It is therefore necessary for the Legislature to amend current laws to strengthen support for kinship caregivers, and ensure focus on parents' fitness and the benefits of preserving the birth parent-child relationship, as opposed to considering the impact of severing the child's relationship with the resource family parents.

[L. 2021, c. 154 § 1.]

As a result, the Legislature amended Title Nine to require the Division to "make reasonable efforts" to place children with suitable relatives or kinship caregivers before placing them elsewhere. L. 2021, c. 154, § 5 (amending N.J.S.A. 9:6-8.30(a)). It also required judges to "first consider" placement with suitable relatives or kinship caregivers before ordering other placements during Title Nine proceedings. L. 2021, c. 154, § 6 and § 7 (amending N.J.S.A. 9:6-8.31(b) and N.J.S.A. 9:6-8.54(a)). It amended Title Thirty to require the

Division to consider placement of children with relatives or kinship caregivers, and to conduct a search for such relatives or kinship caregivers within thirty days of accepting a child into Division custody. L. 2021, c. 154, § 8 (amending N.J.S.A. 30:4C-12.1(a) and (b)).

The KLG statute was amended to permit a caregiver to become a kinship legal guardian once a child has resided with the caregiver for six consecutive months, or nine of the last fifteen months. L. 2021, c. 154, § 2; N.J.S.A. 3B:12A-2 (defining "caregiver").² It also removed the requirement that the court must find, by clear and convincing evidence, adoption is neither feasible nor likely before appointing a kinship legal guardian, thus making KLG an equally available permanent plan for children in Division custody. L. 2021, c. 154, § 4; N.J.S.A. 3B:12A-6(d)(3).

We recently considered the amendments' effects on the best interests standard. See N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 26-27 (App. Div. 2022). In D.C.A., the appellant argued for reversal of a guardianship judgment because the Legislature's deletion of the second sentence of the second prong meant "all evidence concerning a child's relationship with

² Previously, a child was required to reside with a caregiver for twelve consecutive months or fifteen of the last twenty-two months before KLG could be effectuated. See L. 2012, c. 16, § 13 (defining "caregiver").

[the] resource caregiver[was] barred, even in the context of other prongs of the best-interest standard." Id. at 25-26. Writing for the court, Judge Whipple noted with the amendment to prong two "[t]he Legislature did not alter the other components of the best interest standard." Id. at 25. "[T]he text itself[, t]aken as a whole, . . . still requires a finding that '[t]ermination of parental rights will not do more harm than good.'" Id. at 26 (third alteration in original) (quoting N.J.S.A. 30:4C-15.1(a)(4)).

In this regard,

[t]he [trial] court must make an evidentiary inquiry into the status of children in placement, to determine whether the child is likely to suffer worse harm in foster or adoptive care than from termination of the biological parental bond. N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 281 (2007) ("[T]o satisfy the fourth prong, the State should offer testimony of a well-qualified expert who has had full opportunity to make a comprehensive, objective, and informed evaluation of the child's relationship with both the natural parents and the foster parents.").

[Ibid. (emphasis added) (third alteration in original).]

Turning to the issue of KLG, Judge Whipple noted:

The Legislature then went on to make several alterations to the code[based on the legislative findings to Chapter 154], most of which strengthened the position of kinship caregivers. The law was clearly intended to reflect a preference for viable kinship

guardians and fit parents over unrelated foster caregivers. [See L. 2021, c. 154, § 1].

[Id. at 27.]

The legislative history included commentary the amendments were intended to limit the focus on "harm from separation from foster families . . . to make 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 each child" Id. at 28.

We concluded as follows:

This emphasis on a "totality of the circumstances" approach is supported by the Court's longstanding interpretation of N.J.S.A. 30:4C-15.1.[□] And to fully consider the "totality of the circumstances" courts must, at the very least, consider the child's bond to a current placement when evaluating prong four, as discussed above. The legislative history and plain text, therefore, do not support the broad prohibition on this type of evidence, as defendant proposes.

We construe the deletion from prong two more narrowly than defendant urges, in a way that gives greater effect to the alteration, in a manner that remains coherent with prong four. The amended statute, in our view, requires a court to make a finding under prong two that does not include considerations of caregiver bonding, and then 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.

[Id. at 28-29.]

With this as the background, we conclude the trial judge committed reversible error. The judge clearly held a view about the amendments to the KLG statute and best interests prongs that was neither supported by the plain language of either statute nor their legislative histories. As we explained in D.C.A., the amendments were designed to remove the emphasis on the harms done from the severance of the foster care relationship in deciding the termination of parental rights. 474 N.J. Super. at 27.

Moreover, the judge's findings eschewed evidence-based decision making in favor of an unsupported theory of the purpose of the amendments and plainly worded statutory best interests factors. He ignored the totality of the circumstances, including the formidable evidence that showed very little redeeming qualities to the relationship between A.S. and R.T. Indeed, the substantial weight of the evidence pointed to the harmful effects of the parent-child relationship, whether due to A.S.'s substance abuse or her total absence from R.T.'s life. "A parent's withdrawal of . . . solicitude, nurture, and care for an extended period of time is in itself a harm that endangers the health and development of the child." In re DMH, 161 N.J. 365, 379 (1999). We fail to see how KLG was in the child's best interests under the facts presented.

Moreover, the judge misconstrued the differences between KLG and guardianship, which are more than whether a parent can seek contact with a child. Pursuant to N.J.S.A. 3B:12A-6(e):

The court order appointing the kinship legal guardian shall specify, as appropriate, that:

(1) a kinship legal guardian shall have the same rights, responsibilities and authority relating to the child as a birth parent, including, but not limited to: making decisions concerning the child's care and well-being; consenting to routine and emergency medical and mental health needs; arranging and consenting to educational plans for the child; applying for financial assistance and social services for which the child is eligible; applying for a motor vehicle operator's license; applying for admission to college; responsibility for activities necessary to ensure the child's safety, permanency and well-being; and ensuring the maintenance and protection of the child; except that a kinship legal guardian may not consent to the adoption of the child or a name change for the child;

(2) the birth parent of the child retains the authority to consent to the adoption of the child or a name change for the child;

(3) the birth parent of the child retains the obligation to pay child support;

(4) the birth parent of the child retains the right to visitation or parenting time with the child, as determined by the court;

(5) the appointment of a kinship legal guardian does not limit or terminate any rights or benefits derived from

the child's parents, including, but not limited to, those relating to inheritance or eligibility for benefits or insurance; and

(6) [KLG] terminates when the child reaches [eighteen] years of age or when the child is no longer continuously enrolled in a secondary education program, whichever event occurs later, or when [KLG] is otherwise terminated.

See also N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 516 (2004) (discussing the differences between KLG and guardianship) (Wallace, J., concurring in part and dissenting in part). KLG has many characteristics, which set it apart from a termination of parental rights.

III.

Pursuant to N.J.R.E. 703, expert opinion must be premised "on '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 in forming opinions on the same subject.'" State v. Townsend, 186 N.J. 473, 494 (2006) (quoting N.J.R.E. 703). "Evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience." Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002).

"The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Townsend v. Pierre, 221 N.J. 36, 54-55 (2015) (alterations in original) (quoting Townsend, 186 N.J. at 494). To avoid a net opinion, the expert must "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). This avoids speculative testimony. Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013). We review the admission or exclusion of expert testimony for an abuse of discretion. Pierre, 221 N.J. at 52.

The trial judge erred when he concluded the Division's expert offered a net opinion. Contrary to the judge's findings, the expert did not offer a subjective opinion that adoption was appropriate for G.T. as opposed to KLG. The expert explained her findings based on her observations of R.T. and D.T. in a clinical setting and the documentary evidence adduced by the Division related to the parties' history and R.T.'s development. The expert clearly explained why KLG was not in R.T.'s best interests. Her testimony more than met the bar under N.J.R.E. 703.

IV.

The Division urges us to essentially exercise original jurisdiction and enter a directed judgment of guardianship in its favor. Alternatively, in the event of a remand, it urges the matter be tried by a different judge.

We "may exercise . . . original jurisdiction as is necessary to the complete determination of any matter on review." R. 2:10-5. "Despite the utility of the original-jurisdiction authority, it is clear that resort thereto by the appellate court is ordinarily inappropriate when fact-finding or further fact-finding is necessary in order to resolve the matter." Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 2:10-5 (2023) (citing Price v. Himeji, LLC, 214 N.J. 263, 294-95 (2013)).

We decline to exercise original jurisdiction because when the trial judge decided there was virtually no difference between KLG and termination of parental rights and concluded the Division's expert rendered a net opinion, he did not render a full review of all four best interests prongs. His findings under prongs three and four were colored by a misinterpretation of the law. Given that the four best interests prongs are interrelated and overlap, a full re-assessment of the evidence as it relates to all four prongs is necessary.

However, the remand proceedings must be conducted by a different judge because the trial judge was clearly committed to his opinion, and R.T.'s best interests deserve a fresh review of the evidence. See R. 1:12-1(d) (stating a judge "shall not sit in any matter if the judge . . . has given an opinion upon a matter in question in the action").

Finally, although it is not raised on appeal, our review of the trial transcript raises a concern the judge interjected during the presentation of the witness testimony and overtook questioning the witnesses. There is no doubt the trial judge has ultimate control over the mode of interrogation of witnesses and the presentation of evidence, including to: "(1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment." N.J.R.E. 611(a). The scope of cross-examination is also subject to the judge's control. N.J.R.E. 611(b). However, our review of the trial transcripts does not raise any of the concerns enumerated in N.J.R.E. 611(a) in the way the Law Guardian or the Division presented their case to warrant the level of intervention exerted by the trial judge. On remand, subject to the Rules of Evidence, the parties should be permitted to try their case.

Reversed and remanded. We do not retain jurisdiction.