RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1321-21
A-1588-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Appellant/
Cross-Respondent,

v.

N.D.,

Defendant-Respondent,

and

T.A., a/k/a B.F.,

Defendant.

IN THE MATTER OF THE
GUARDIANSHIP OF J.D., a minor,

Appellant/Cross-Appellant.

Argued May 8, 2023 – Decided May 25, 2023

Before Judges Whipple, Mawla and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FG-20-0024-20.

Julie B. Colonna, Deputy Attorney General, argued the cause for appellant/cross-respondent Division of Child Protection and Permanency (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel; Julie B. Colonna and Salima E. Burke, Deputy Attorneys General, on the briefs).

Adrienne Kalosieh, Assistant Deputy Public Defender, argued the cause for respondent N.D. (Joseph E. Krakora, Public Defender, attorney; Adrienne Kalosieh, on the brief).

Neha Gogate, Assistant Deputy Public Defender, argued the cause for minor appellant/cross-appellant (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Meredith Alexis Pollock, Deputy Public Defender, of counsel; Neha Gogate and Noel C. Devlin, Assistant Deputy Public Defenders, of counsel and on the briefs).

PER CURIAM

These consolidated appeals are brought by the Division of Child Protection and Permanency (Division) and the minor child, J.D.,[1] from a

[1] We use initials to protect the parties' privacy and preserve the confidentiality of these proceedings. R. 1:38-3(d)(17).

December 16, 2021 Family Part order after a guardianship trial. We reverse and remand as we explain herein.

Our decision is buoyed by the relevant uncontested facts from both the documents admitted in evidence and the guardianship trial testimony. N.D. is the biological mother of J.D., born in January 2019. She named T.A. or B.F. as potential biological fathers of the child. The Division's diligent efforts to locate either were unsuccessful.

The Division's involvement with N.D. began in December 2016. N.D. has a history of bipolar disorder, schizophrenia, anxiety, and panic disorder. She requires assistance in daily functioning due to an intellectual delay.

In November 2018, N.D. contacted the Division and requested a worker come to Community Access Unlimited (Community Access)—a supervised group home where she was staying at the time—to take her to another placement, as she was having conflicts with staff members and other residents. N.D. reported the staff was trying to kill her and her unborn baby by poisoning her water. She had been psychiatrically screened several times and was also taken to the hospital because she "punched herself in the stomach."

Community Access staff informed the Division N.D. had not taken her medication for the past six months, and she was eight months pregnant. The

Division asked N.D. to identify any relative supports and referred her for another psychiatric screening, as well as a psychological evaluation. The Division assessed N.D.'s aunt, who lived in Virginia, as a potential placement resource but ultimately ruled her out due to a substantiated history of physical abuse.

As her mental health continued to deteriorate, N.D. was admitted to the hospital for approximately two weeks for paranoid delusions. Among other symptoms, she believed her hospital food was poisoned. She was prescribed Haldol. She initially told the Division she could care for the baby, but then said she wanted the baby to be adopted "temporarily" and planned to leave the baby at the hospital. The Division noted while N.D. had "stabilized" since taking Haldol as prescribed and being discharged from the hospital, concerns remained about her ability to care for the baby independently.

Three days after J.D.'s birth, the Division filed a verified complaint for custody, care, and supervision of J.D. The complaint detailed N.D.'s involvement with Community Access, her cognitive limitations, ongoing mental health issues, and numerous psychiatric hospitalizations. The following day, the court granted the Division custody of J.D. upon finding N.D. had significant mental health issues that prevented her from safely

parenting her child.

The Division initially placed J.D. in a non-relative resource home and subsequently placed her with T.C. on February 25, 2019, where she remains at present. Due to the COVID-19 pandemic, the court held virtual case management and permanency hearings via Zoom conference throughout 2020 and 2021.

The guardianship trial took place on December 15 and 16, 2021, also via Zoom. Four witnesses, including one expert, testified on behalf of the Division: Marie Francois, Division permanency case worker; Towanna Stanley, Division adoption case worker; T.C., the child's caregiver who is N.D.'s first cousin; and Dr. Robert Kanen, Psy.D. N.D. neither testified nor called any witnesses. She appeared only on December 15 but was represented by counsel on both trial dates.

On December 16, 2021, the court denied the Division's request for a judgment terminating N.D.'s parental rights and issued an oral decision. The court emphasized its ultimate ruling was dictated by its interpretation of L. 2021, c. 154, which amended certain aspects of N.J.S.A. 30:4C-15.1(a) and the Kinship Legal Guardianship Act (KLG Act), N.J.S.A. 3B:12A-1 to -7.

The extensive record clearly establishes N.D. has an history of

psychiatric, psychological, and intellectual deficits that have rendered her incapable of parenting her child, as the court correctly found. In its oral decision, the court concluded the Division had easily proven by more than clear and convincing evidence that prong one and prong two of the termination statute, N.J.S.A. 30:4C-15.1, were met as J.D.'s safety, health, and development has been and would continue to be endangered by maintaining the parental relationship with N.D. It also found N.D. unable to provide a safe and stable home for the child, and any delay of a permanent placement would certainly harm J.D.

The court found N.D. has, and continues to have, significant mental health issues over the course of her life. It found when N.D. stopped taking her psychiatric medication, she began hallucinating and displayed manic behavior that required psychiatric hospitalization.

The court credited Dr. Kanen's extensive testimony about N.D.'s limitations, which he found to be very profound as cognitive testing revealed she was very low functioning. It also gave weight to Dr. Kanen's opinion N.D. will likely never be able to safely raise the child, as she is very disabled, has chronic problems, and has very poor judgment. It recognized the doctor's observation during the bonding evaluations that N.D. does not have the ability

to understand a child's needs, or how to interact with the child, and J.D. is not attached to N.D.

Additionally, as to the Division's reasonable efforts, the court found the first part of prong three of N.J.S.A. 30:4C-15.1 was easily satisfied by the evidence, as the Division immediately instituted services for N.D. in hopes of the possibility she would be able to safely raise the child. It cited the Division's efforts to arrange psychological and bonding evaluations, therapeutic visitation, supervised visitation at T.C.'s home (including transportation to and from the home), parenting skills training and other services through Community Access, and team meetings. It concluded, however that N.D.'s very real and profound limitations still exist and are extremely unlikely to change, despite her use of these programs.[2]

Regarding placement with T.C., the court considered T.C.'s testimony credible, finding "not . . . one shred of evidence that the placement has been anything but terrific" for J.D. It found credible Dr. Kanen's opinion J.D. should have a permanent home with T.C., as the two share a very close bond.

The court concluded the evidence demands the child permanently be kept in the home of the resource mother, and agreed with the Division that

[2] The court also found the Division's efforts to locate potential biological fathers were "reasonable."

contentious visits would not be helpful for the child. It credited Dr. Kanen's opinion regarding the conflict between the resource relative parent and the biological mother having a negative impact on the child, and any visitation for N.D. would need supervision.

However, the court concluded the Division had not satisfied the last part of prong three, which mandates consideration of alternatives to parental rights or prong four, which requires a finding that termination of parental rights will not do more harm than good. The judge reasoned: "That is where the new statute comes into play." The court disagreed with the Division's contention that the new legislation made no significant changes to the best-interests analysis under N.J.S.A. 30:4C-15.1.

Instead, the court reasoned the new legislation significantly changes prior law, including existing case law. Citing the preamble to L. 2021, c. 154, the court found "[t]he goal of the new law is to, 'maintain family connections and cultural conditions.'" It interpreted subsection (d) of the preamble, which states "[p]arental rights must be protected and preserved whenever possible[,]" to mean the following:

> Another way of stating that specific language is that . . . . another form of permanent placement is impossible. Let me repeat that. Analogous to the phrase parental rights must be protected and preserved

> whenever possible is analogous to it's impossible to do anything else. It is not impossible to do anything else.

Emphasizing subsection (d), the court found "[t]his child can and will have a primary home under kinship legal guardianship status." In support of its analysis, the court cited other language from the preamble, stating: (1) "children are capable of forming healthy attachments with multiple . . . caring adults"; (2) "[t]he existence of a healthy attachment between a child and the resource parent does not preclude maintaining or repairing the relationship with a parent"; and (3) "the legislature amends current law to strengthen the support for kinship legal guardianship and preserving the birth parent and child relationship." The court concluded "[k]inship legal guardianship . . . could be ordered in this case to a loving resource parent is not some second class status. The new statutory amendments are clear about that."

Continuing to focus on the new legislation, the court noted it "specifically eliminates the prior language [from the KLG Act] that kinship legal guardianship is only to be used when 'adoption of the child is neither feasible nor likely'" and that it "further eliminates the prior statutory language [from prong two of the statutory best interests test] that included 'such harm may include evidence of separating the child from the resource home.'" While the court remarked it "d[id] not have a legislative history behind the statutory

change that took place in July of 2021," the judge reasoned it could interpret "the plain language of the statutory changes that were made".

Additionally, the court found Dr. Kanen's testimony regarding kinship care versus adoption for J.D. was an impermissible net opinion and rejected what it considered to be Dr. Kanen's personal opinion about the differences between the two permanency options. The court called it an "erroneous" belief that N.D. would continue to have the absolute right to visitation under a kinship arrangement. "[A]ny contact between the biological mother and . . . her child would only occur if some judge in the future found by clear and convincing evidence that the contact was in the best interest of the child at some later date."

The court found the Division's explanation to T.C. about the differences between kinship legal guardianship and adoption largely "took place before the new statute was put into effect" and the Division failed to prove that it updated the fact sheet it provides to caregivers after the new legislation had been implemented. The court concluded T.C. misunderstood what kinship legal guardianship meant, and observed she did not seem to understand how limited N.D.'s rights would be in a permanent kinship placement.

The court added "the new statute makes no reference to the desires of the

resource parent" and while those desires were "relevant . . . they are not dispositive." It further found T.C. "would not give up this child if termination followed by adoption is denied . . . . [T.C.] has long demonstrated her concern and love for this child." Ultimately, the court denied the Division's application to terminate N.D.'s parental rights, with the anticipation the child will be permanently placed with her present resource family. These consolidated appeals followed.

I.

"Parents have a constitutionally protected right to maintain a relationship with their children." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007). "Parental rights are not absolute, however." Ibid. "The statutory best-interests-of-the-child standard aims to achieve the appropriate balance between parental rights and the State's parens patriae responsibility" to protect the welfare of children. Id. at 280. That statutory standard, codified at N.J.S.A. 30:4C-15.1(a), states:

> a. The [D]ivision shall initiate a petition to terminate parental rights on the grounds of the "best interests of the child" . . . if the following standards are met:
>
> (1) The child's safety, health, or development has been or will continue to be endangered by the parental relationship;

> (2) The parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm;
>
> (3) The [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.

"The four statutory factors '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.'" N.J. Div. of Child Prot. & Permanency v. R.L.M., 236 N.J. 123, 145 (2018) (quoting N.J. Div. of Youth & Fam. Servs. v. K.H.O., 161 N.J. 337, 348 (1999)). "The question ultimately is not whether a biological mother or father is a worthy parent, but whether a child's interest will best be served by completely terminating the child's relationship with that parent." N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 26 (App. Div. 2022) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 107 (2008)), certif. granted, __ N.J. __ (2023). "[P]arental fitness is the key to determining the best interests of the child." N.J. Div. of Youth & Fam. Servs. v. I.S., 202 N.J. 145, 170 (2010) (quoting K.H.O., 161 N.J. at

348).

Because the court's decision in this case was dictated by its interpretation of L. 2021, c. 154, "[a]n Act concerning child protective services and amending and supplementing various parts of the statutory law[,]" effective July 2, 2021, we briefly summarize the legislation and explain how it amended N.J.S.A. 30:4C-15.1(a). The court relied heavily upon the enactment's preamble, which provides:

> The Legislature finds and declares:
>
> 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 kinship legal guardianship 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 whenever possible.
>
> e. Children are capable of forming healthy attachments with multiple caring adults throughout the course of their childhood, including with birth parents,

> 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.
>
> [Ibid.]

In keeping with those goals, the legislation amended certain statutes to: (1) require the Division and the court to first consider relative or kinship care placements over foster care placements; (2) expedite kinship legal guardianship by eliminating two key prerequisites; and (3) eliminate consideration of the harm that could befall children if separated from their resource parents under prong two of the best interests test. See ibid.

Specifically, the legislation 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 courts 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)). Similarly, the legislation 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)).

In addition, the legislation amended the KLG Act 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 last fifteen months. L. 2021, c. 154, § 2 (amending N.J.S.A. 3B:12A-2) (defining "caregiver").[3] It also removed the requirement the court must find, by clear and convincing evidence, that adoption is neither feasible nor likely before appointing a kinship legal guardian, thus making that option an equally available permanent plan for children in Division custody. L. 2021, c. 154, § 4 (amending N.J.S.A. 3B:12A-6(d)(3)).

Finally, the legislation removed the last sentence from prong two of the

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

best interests test, which reads: "Such harm may include evidence that separating the child from [their] resource family parents would cause serious and enduring emotional or psychological harm." L. 2021, c. 154, § 9 (amending N.J.S.A. 30:4C-15.1(a)(2)). A review of prior related amendments to prong two provides additional context for this legislative act.

The statutory best interests test was initially codified in 1991 in response to our Supreme Court's decision in New Jersey Division of Youth & Family Services v. A.W., 103 N.J. 591, 599, 602-03 (1986). L. 1991, c. 275, § 7. The 1991 version of the statutory best interests test read:

> The [D]ivision shall initiate a petition to terminate parental rights on the grounds of the "best interest[s] of the child" . . . if the following standards are met:
>
> [1]. The child's health and development have 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 diligent 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.
>
> [Ibid.]

In 1995, the Legislature amended N.J.S.A. 30:4C-15.1(b), commonly known as prong two, by adding a new sentence advising the court to consider what harms "may" occur by removing a child from a placement:

> [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 foster parents would cause serious and enduring emotional or psychological harm to the child.
>
> [L. 1995, c. 416, § 3 (emphasis added).]

The 1995 amendment followed two Supreme Court cases which held the "harm" under prong two included the psychological harm that may befall a child who is removed from a foster care placement. See In re Guardianship of K.L.F., 129 N.J. 32, 41-42 (1992); see also In re Guardianship of J.C., 129 N.J. 1, 19 (1992).

The 2021 amendments undo the changes made in 1995 to prong two by removing the last sentence that had permitted the court to consider "evidence that separating the child from his foster parents would cause serious and

enduring emotional or psychological harm to the child . . . ." L. 2021, c. 154, § 9. Consequently, the current version of the statutory best interests test now closely resembles the 1991 version adopted in response to A.W., 103 N.J. at 602-03.

Recently, we evaluated the significance of the 2021 amendment to prong two in D.C.A., 474 N.J. Super. at 26, and held "prong two as amended emphasizes consideration of whether a parent is able to overcome harm to the child as well as whether the parent can cease causing future harm." Ibid. We also emphasized "[t]he Legislature did not alter the other components of the best interest standard" and found "[t]aken as a whole, the statute still requires a finding that '[t]ermination of parental rights will not do more harm than good.'" Ibid. (quoting N.J.S.A. 30:4C-15.1(a)(4)).

Here, the Division and J.D. argue the court's analysis of the part of prong three (regarding alternatives to termination of parental rights) and prong four misinterpreted the statutory best interests test codified at N.J.S.A. 30:4C-15.1(a) based upon a mistaken belief that the new legislation's preamble prohibited terminating N.D.'s rights because J.D. was placed with a relative eligible to become J.D.'s kinship legal guardian. The Division also contends the court allowed its personal beliefs regarding the legacy of slavery to

influence its analysis, its misunderstanding of a parent's legal right to visitation under a kinship legal guardianship arrangement clouded its judgment, and the court erroneously excluded part of Dr. Kanen's testimony on grounds it was a net opinion.

"[G]reater deference is owed to a denial of an application to terminate parental rights than to a grant of an application because a termination of parental rights is final and cannot be re-visited by the court." N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 553 (2014). We will uphold a trial judge's "factual findings . . . when supported by adequate, substantial, and credible evidence" and "defer to the trial court's credibility determinations." Id. at 552. This deference recognizes the trial judge "has a 'feel of the case' that can never be realized by a review of the cold record." E.P., 196 N.J. at 104 (quoting M.M., 189 N.J. at 293).

However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." R.G., 217 N.J. at 552-53 (quoting Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995)). As such, we review issues involving statutory interpretation de novo. N.J. Div. of Child Prot. & Permanency v. J.R.-R., 248 N.J. 353, 368 (2021).

There is no challenge to the court's conclusion the Division established prongs one and two, as well as the first part of prong three regarding reasonable efforts by clear and convincing evidence. Our focus is on the second part of prong three and prong four, which require "the court has considered alternatives to termination of parental rights" and that "[t]ermination of parental rights will not do more harm than good." N.J.S.A. 30:4C-15.1(a).

Under the second part of prong three, kinship legal guardianship is considered an alternative to termination of parental rights that offers permanency and stability to a child residing with a relative or kinship caregiver. See N.J. Div. of Youth & Fam. Servs. v. L.L, 201 N.J. 210, 222-25 (2010) (discussing the KLG Act and its intent). Thus, the court appropriately considered kinship legal guardianship as part of its analysis. However, neither the new legislation, nor our case law support the court's conclusion that termination of parental rights is prohibited when a child resides in a permanent placement with a relative or kinship caregiver.

"The fourth prong of the best interests of the child standard requires a determination that termination of parental rights will not do more harm than good to the child." K.H.O., 161 N.J. at 354-55. It "serves as a fail-safe against

termination even where the remaining standards have been met." N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 609 (2007). "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 her natural parents than from the permanent disruption of her relationship with her foster parents." K.H.O., 161 N.J. at 355. "[T]he 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." M.M., 189 N.J. at 281.

Here, when discussing the part of prong three pertaining to consideration of alternatives to termination, and prong four's requirement "termination of parental rights will not do more harm than good[,]" the court declared: "That is where the new statute comes into play." However, L. 2021, c. 154 only amended prong two of the best interests test. The court erred by considering L. 2021, c. 154 as part of its analysis of prong three and prong four, because the new legislation did not amend N.J.S.A. 30:4C-15.1(a)(3) or (4). Grounded in its mistaken reliance upon the new legislation, the trial court's analysis of part of prong three and prong four cannot stand.

II.

Statutory interpretation "begins with the plain language of the statute." DiProspero v. Penn, 183 N.J. 477, 493 (2005). "The Legislature's intent is the paramount goal when interpreting a statute and, . . . generally, the best indicator of that intent is the statutory language." Id. at 492. Courts "ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole . . . ." Ibid. (internal citations omitted). A reviewing court cannot "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment . . . ." Ibid.

A "preamble . . . cannot be used to discern the legislature's intent if no doubt exists as to a statute's meaning." Burnett v. Cnty. of Bergen, 198 N.J. 408, 443 (2009) (quoting Norman J. Singer, 1A Sutherland Statutory Construction § 20.3 (6th ed. 2002)). "[S]tatements regarding scope or purpose of the act that appear in the preamble may aid the construction of doubtful clauses, but they cannot control the substantive provisions of the statute." Ibid. (alteration in original) (quoting 1A Sutherland Statutory Construction at § 20.3). "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.

From our perspective, the court placed undue emphasis on the new legislation's preamble and permitted it to improperly control the analysis of the clear and unambiguous substantive provisions of the statutory best interests test at N.J.S.A. 30:4C-15.1(a). The preamble cannot be interpreted to substantively alter the text of N.J.S.A. 30:4C-15.1(a)(3). The plain language of prong three does not mandate the preservation of parental rights via an alternative to termination of parental rights, e.g., a kinship arrangement, whenever the child is placed with a relative. On the contrary, "[t]he relevant considerations" under each of the four prongs "are extremely 'fact sensitive' and require particularized evidence that [addresses] the specific circumstances in [a] given case." R.L.M., 236 N.J. at 145-46 (first alteration in original) (quoting K.H.O., 161 N.J. at 348).

Furthermore, "[t]he Legislature is presumed to be aware of the interplay between its statutes." State v. Galicia, 210 N.J. 364, 382 (2012). The new legislation's plain language makes clear the Legislature intentionally left intact a relative or kinship caregiver's ability to adopt, notwithstanding its efforts to make kinship legal guardianship and adoption equally available by removing the statutory preference for adoption.

For instance, while the new legislation amended N.J.S.A. 30:4C-12.1(a)

and (b) to require the Division to consider placement with relatives or kinship caregivers and to expeditiously search for those individuals, it did not amend N.J.S.A. 30:4C-12.1(c), which provides the Division "may decide to pursue the termination of parental rights if [it] determines that termination of parental rights is in the child's best interests." L. 2021, c. 154, § 8. Thus, termination of parental rights remains a viable permanency plan—even when a child is placed with a relative or kinship caregiver—and cannot be categorically excluded by the court under the second part of prong three.

Moreover, the court procedurally erred when it attempted to mandate kinship legal guardianship over adoption—even though a petition for legal guardianship was not before it—by concluding "[t]his child can and will have a primary home under kinship legal guardianship status." The KLG Act requires the kinship caregiver to petition the court for appointment as kinship legal guardian following the Division's completion of a kinship caregiver assessment. N.J.S.A. 3B:12A-5. Nothing in the record indicates the Division completed such an assessment or that T.C. had any intention of filing a kinship legal guardian petition. Nonetheless, the court presumed T.C. "would not give up this child if termination followed by adoption is denied" because "she did not testify that she would" and "has long demonstrated her concern and love

for this child."

Our Supreme Court has previously endorsed the view "[w]hen a child is placed with a relative, termination is both unnecessary and unwise unless the relative wishes to adopt the child or is unwilling to provide long-term care." N.J. Div. of Youth & Fam. Servs. v. L.L. 201 N.J. 210, 222 (2010) (emphasis added) (quoting A.W., 103 N.J. at 609). Undoubtedly, there will be matters in which a relative does not wish to adopt a child because adoption requires the termination of a parent's rights—but this is not one of those cases.

Here, T.C. has repeatedly and unequivocally expressed her desire to adopt J.D. Her willingness to adopt is a relevant factor for the court to assess when it considers alternatives to termination, so long as she was "fully informed of the potential benefits and burdens of [kinship legal guardianship] before deciding whether . . . she wishes to adopt." N.J. Div. of Child Prot. & Permanency v. M.M., 459 N.J. Super. 246, 262-63 (App. Div. 2019). "Once [the caretaker] is provided with th[e] comparative information, the caretaker's preference between the two alternatives [of KLG and adoption] should matter." Ibid.

The record reflects the Division explained the differences between kinship guardianship and adoption to T.C. several times. T.C. testified at trial

regarding her preference for adoption and why she came to that conclusion. While her testimony reflects some minor confusion over her legal authority to make medical decisions for the child without seeking N.D.'s consent, her understanding of N.D.'s legal right to visitation under a kinship arrangement—her major concern—was accurate.

The court's mistaken conclusion the new legislation's preamble prohibited termination of parental rights whenever any other permanent placement option was "not impossible" also improperly colored its interpretation of prong four. In D.C.A., 474 N.J. Super. at 28, we examined the new legislation and its impact, if any, on prong four of the best interests test. We reasoned "courts must, at the very least, consider the child's bond to a current placement when evaluating prong four" and explained:

> 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 29.]

Here, the trial court's conclusion it had "no persuasive evidence" that termination of parental rights will not do more harm than good is belied by the

uncontested factual record. The court found Dr. Kanen very credibly concluded and testified that J.D. shared no bond with N.D., but was securely bonded to T.C., whom she viewed as her mother. It was error to ignore these important findings when analyzing prong four.

Additionally, the court overlooked numerous other relevant factual findings it made based upon the uncontested factual record. J.D. has never lived with N.D., and has instead lived with T.C. since she was approximately one month old. J.D. is thriving in T.C.'s care. N.D., on the other hand, can neither support herself independently, nor provide a safe and stable home for J.D., and her longstanding mental health issues render it highly unlikely she will ever be able to provide a safe and stable environment for J.D. Finally, T.C. is willing to adopt J.D., but has a volatile relationship with N.D., which has included contentious exchanges during visitation and repeated threats by N.D. to take T.C. to court over J.D.'s custody. This situation presents a risk of harm to J.D., and is not, as argued on appeal, a mere matter of co-parenting.

While the court alluded to concerns that, historically, termination of parental rights has severed children's cultural connections to their birth families' traditions, that concern is not a factor in this case. Here, adoption by T.C. allows for preservation of cultural traditions and for close connections to

be forged between J.D. and other family members, including T.C.'s children who view J.D. as their sibling.

III.

When permanency for a child is achieved via appointment of a kinship legal guardian, the biological parents "retain the right to visitation." N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 508 (2004). The KLG Act, at N.J.S.A. 3B:12A-4(a)(4), provides "[t]he birth parent of the child shall retain the right to visitation or parenting time with the child, as determined by the court." "By reserving to parents visitation rights, the Legislature codified its intent that the permanent and self-sustaining nature of KLG is not intended to supplant the right of parents to maintain 'some ongoing contact with the child[.]'" N.J. Div. of Youth & Fam. Servs. v. T.M., 399 N.J. Super. 453, 465 (App. Div. 2008) (alteration in original) (quoting N.J.S.A. 3B:12A-1(b)).

Here, contrary to well-established law, the court claimed during trial "[t]he only time a biological parent can have any form of visitation with a child . . . under kinship/legal guardianship status" is if the "parent makes an application to the [c]ourt and proves by clear and convincing evidence that the biological parent should still have any form of parenting time or custody. That's the law."

Not so. The biological parent need not make an application to the court for visitation. As noted, the court must set a parenting time schedule when it appoints a kinship legal guardian.

The court then relied upon this misstatement of the law to discredit the legitimate concerns credibly expressed by T.C., Stanley, and Dr. Kanen during trial that ongoing visitation with N.D. could present a risk of harm to J.D. given N.D.'s volatile relationship with T.C. and her propensity to discontinue her psychiatric medication. In particular, the court noted what it perceived as Stanley's "significant misunderstanding" that N.D. "will have absolute rights to visit the child" under a kinship legal guardian arrangement and labeled it as "false." It also highlighted Dr. Kanen's allegedly "erroneous[] belie[f]" that N.D. "would continue to have the absolute right to visitation" under a kinship legal guardian arrangement.

We conclude a misapplication of the law concerning a biological parent's right to visitation under a kinship legal guardianship arrangement tainted its analysis of part of prong three and prong four.

IV.

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52

(2015). "N.J.R.E. 703 addresses the foundation for expert testimony." Id. at 53. Under that rule, 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).

"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.'" Pierre, 221 N.J. at 54-55 (alteration in original) (quoting Townsend, 186 N.J. at 494). Accordingly, an 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)).

The trial court found Dr. Kanen offered "his personal opinions" regarding the differences between adoption and kinship legal guardianship, including his understanding that N.D. "would continue to have the absolute right to visitation" with J.D. It concluded that said testimony was an impermissible net opinion and explained although Dr. Kanen "was concerned about the child . . . being exposed to incidents between the permanent guardian

and the biological mother[,]" that concern "assumes that there would be any contact between the biological mother and the child." The court also found Dr. Kanen was unaware of any literature "discussing outcome differences between" adoption versus kinship legal guardianship and cited his "misunderstanding about the permanent nature of a kinship legal guardianship".

Dr. Kanen's opinions regarding kinship legal guardianship versus adoption were supported by facts contained in the record and gathered during his evaluations of N.D. and T.C. He adequately explained the basis for his opinions. When asked to address the differences between kinship placement and adoption, he explained "with [kinship legal guardianship], the mother maintains legal rights to the child. With termination, she no longer has legal rights to the child." When questioned further by the court, he replied: "She can have visitation. She can participate in some decisions, I believe." We discern nothing inaccurate or conclusory about any of these statements. While he added that a kinship arrangement "could leave a child in a state of uncertainty and insecurity[,]" he admitted he did not know how J.D. "is going to develop going forward."

Dr. Kanen further testified his biggest concern is how unstable N.D. is,

and whether there will be altercations between her and T.C. that could expose J.D. to intense conflict. Because the record reflects Dr. Kanen sufficiently explained his methodology, as well as the factual basis for his opinions, including his concerns about N.D.'s right to visitation under a kinship arrangement and the risks it would present to the child that the court found credible, the court erred by excluding his testimony as a net opinion.

We determine the remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In conclusion, we vacate the December 16, 2021, order denying the Division's request to terminate N.D.'s parental rights. We remand for expeditious (within thirty days) reconsideration of the second part of prong three and prong four while leaving the court's undisputed factual findings and legal conclusions intact with respect to prong one and prong two. We leave the determination of whether additional testimony is warranted to the sound discretion of the remand judge.

Reversed, vacated, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.