RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2386-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

C.M. and D.S.,

Defendants,

and

R.B.,

Defendant-Appellant.

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IN THE MATTER OF THE
GUARDIANSHIP OF
D.W.S. and I.M.S., minors.

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Argued February 8, 2023 – Decided March 15, 2023

Before Judges Accurso, Firko and Natali.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FG-12-0050-21.

Ryan T. Clark, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ryan T. Clark, on the briefs).

Wesley Hanna, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Sookie Bae, Assistant Attorney General, of counsel; Wesley Hanna, on the brief).

Jennifer M. Sullivan, Assistant Deputy Public Defender, argued the cause for minor D.W.S. (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Meredith Alexis Pollock, Deputy Public Defender, of counsel; Jennifer M. Sullivan, of counsel and on the brief).

PER CURIAM

Defendant R.B. appeals from a final judgment terminating his parental rights to his son, Donald,[1] now three years old. He contends the Division of Child Protection and Permanency failed to prove the four prongs of the best interests standard of N.J.S.A. 30:4C-15.1(a)(1) to (4) by clear and convincing evidence. The Law Guardian joins with the Division in urging we affirm the judgment. Having considered defendant's arguments in light of the record and controlling law, we affirm the termination of his parental rights.

[1] This name is fictitious to protect the child's identity. See R. 1:38-3(d)(12).

The Division was alerted to concerns about Donald shortly after his birth in November 2019 by a call defendant made to the Division's hotline. Defendant reported Donald's mother and her boyfriend, who signed Donald's birth certificate, were abusing drugs. An investigation confirmed defendant's report, and Donald was removed from his mother's care when he was three weeks old.

Donald's mother and her boyfriend already had two children in the Division's care and custody, and it attempted to place Donald with the same resource parent caring for his brothers. The resource parent could not assume Donald's care, but recommended a friend, another licensed resource parent, whom she thought might be available to care for him. The Division placed Donald with that resource parent, Ms. H., and he remains in her care.

When defendant made his call to the hotline, he also advised he might be Donald's father. Defendant wasn't sure whether to accept the Division's offer for a paternity test shortly after Donald's removal in early December, however, explaining he could not care for the baby as he was homeless and slept in his car. Defendant told the worker the Division should return Donald to his

mother as she was a good mother, expressing his belief that everything would be okay if the baby were returned to her.[2]

Defendant did not undergo a paternity test until the end of January 2020. After he was confirmed as Donald's father in mid-February, the Division arranged therapeutic visitation between defendant and his son, and eventually a parenting assessment with Karen D. Wells, Psy.D.[3] Dr. Wells reported her testing revealed defendant has an IQ of 66, placing his overall functioning in the extremely low range. Defendant could not tell Dr. Wells how old he was, putting his age somewhere between fifty and sixty (defendant was fifty-seven at the time). Defendant reported he'd lived all his life in New Jersey, worked maintenance at ShopRite since just after graduating from high school, and although never married, had a seventeen-year-old daughter who lived with her

[2] The Division did not return Donald to his mother, C.M., who was reported to have mental health as well as substance abuse issues. She never once visited Donald and did not engage in services or participate in the litigation. C.M.'s rights were also terminated in this action, not only to Donald but also to his younger sister, I.S. C.M. has not appealed. Because I.S. is not defendant's child, we mention her here only in passing.

[3] The onset of the COVID-19 pandemic in March 2020 curtailed in-person visitation for several months, and likewise disrupted the scheduling of assessments and the availability of in-person services.

mother in a nearby town. He also told Dr. Wells, as well as his own expert, that he'd attended a "foster school," which neither had ever heard of.

Defendant told Dr. Wells things had "gone against him in life," and he was often "confused and mixed up." Although acknowledging he sometimes felt "alone in the world, rejected, and very sad," defendant reported he'd recently moved in with his friends George and Linda after living in his truck for nearly a year. Defendant also expressed a strong desire to care for Donald, reporting his happiness at the recent resumption of in-person visitation allowing him to hold his son again.

When asked about his plans for caring for the boy, defendant reported he planned "to raise him and do the right thing in his life and make each day count." Defendant told Dr. Wells he planned to enroll Donald in daycare, and that George and Linda, as well as his daughter and twin brother, could help him care for his son. As for his long-term living arrangements, defendant claimed living with George and Linda was what he wanted at present. While reporting he didn't plan on staying there, as he wished "to get on with the rest of [his] life," he claimed "[f]or now, it's a start in the right direction."

As a result of her assessment, Dr. Wells rated defendant's prognosis of serving as an effective parent for Donald as "very poor." Dr. Wells found

defendant "is not capable of adequately following a sequence of events presented verbal[ly], is not adequately alert to his surroundings, has difficulty remembering facts, including his own age," and lacks the skills to form a plan and execute it. She found defendant's "significant deficits" in "abstract reasoning, judgment, academic learning, and learning from experience," limit significantly his "ability to independently support himself," and concluded his "cognitive limitations seriously impair his ability to supervise, protect, and care for a child." She did not believe there were services that could correct defendant's cognitive deficiencies, advising the Division to assess the persons defendant identified as resources to assist him raising his son. Dr. Wells also recommended the Division continue to provide defendant supportive services and supervised visits with Donald.

The Division continued defendant's weekly therapeutic visitation with Donald through a Catholic Charities program that included a parenting skills component. The Division also referred defendant to the Rutgers University Behavioral Health Care CARRI (Children at Risk Resources and Intervention) program for parenting education. Defendant participated faithfully in both programs and was consistently reported to be caring and attentive to Donald during his weekly visits and becoming appropriately more confident in caring

for his son. He reported over one hundred positive visits with Donald. Defendant's parenting skills improved, and visitation was a good experience for both father and son.[4]

The Division contacted defendant's brother and sister near the end of 2020, but both declined to assist defendant in caring for Donald or to act as a placement resource for him. At the same time, defendant began to have problems with George, whom defendant claimed was bipolar. In late December, Donald's mother and her boyfriend had another child. The Division removed that baby at birth and placed her with Donald's resource parent where she also remains.

In March 2021, defendant advised the Division his problems with George had intensified and defendant needed to find a new place to live. The Division referred him to an emergency housing provider as well as to the

[4] Defendant's counsel highlights reports that the CARRI program scored defendant "in the low-average to average range" on the Adult Adolescent Parenting Inventory-2 (AAPI-2), a measure of parenting attitudes, at the beginning of his sessions, and that his score improved to the average to above-average range after only a few months in the program. Dr. Wells, however, expressed her understanding that a number of the elements scored in that inventory were elements, such as empathy for a child, that defendant "was able to reach pre and post. So even though he received the training, those weren't concerns in the beginning based on that test instrument. It's almost like you start at five, then you have training and you're still at five."

Division of Developmental Disabilities and The Arc of Somerset County. Although defendant contacted the housing referral, he was unwilling to participate in services with either DDD or The Arc. Defendant insisted he works every day, repairs his own car and builds fishing pole holders, none of which he would be able to do if he suffered from cognitive problems. He told the caseworker the only thing he was ever diagnosed with was dyslexia when he was eight or nine years old, which afflicted his twin brother as well. Defendant, however, had difficulty following up with emergency housing services, despite assistance from both the Division caseworker and an outside service provider.

In April, the court approved the Division's plan for termination, with the Division thereafter dismissing its protective services case and filing a complaint for guardianship. By July, defendant was again homeless, reporting he was sleeping in his car. He was unable to find an apartment he could afford and had not submitted the forms he needed to complete his application to the "Coming Home Program." He told Dr. Wells he was going to look at an apartment he'd heard about in Newark, which he believed was in Middlesex County. The Division provided him funds for temporary emergency housing at a hotel in East Brunswick from August through November.

Defendant did not testify at the guardianship trial. The caseworker testified the Division had abandoned its plan for reunification because it was "at the same place we were two years ago when we became involved with [defendant]." He was again homeless, having never established "a stable place to live," had "never moved past having supervised visitation," and the Division remained concerned defendant would never be able to meet Donald's needs.

The worker related that Dr. Wells had recently recommended Donald have a neurological evaluation after observing him during the bonding evaluations. The worker testified "the resource parent called about fifteen different places to see if they would accept the insurance" before being able to secure an appointment for Donald, an example of something the Division believed defendant would not be capable of doing for his son, especially as he was without family or others he could draw on for help.

The caseworker testified both Donald and his little sister were doing very well living with Ms. H. The children were happy. Ms. H. had an extensive support network, and the children visited regularly with Donald's brothers, who were in the care of Ms. H.'s good friend. The case worker testified the children were well cared for, and Ms. H. wished to adopt both Donald and his sister, rejecting the option of kinship legal guardianship.

Both Dr. Wells and Gerald Figurelli, Ph.D., who testified for defendant, agreed Donald enjoyed a secure reciprocal bond with Ms. H., whom he viewed as his psychological parent. They differed, however, on the quality of the attachment between Donald and his father. Dr. Wells, while conceding defendant was attached to his son, found Donald was not attached to his father, and thus the two did not have a reciprocal bond. She thus concluded Donald was not at risk of any "emotional distress or psychological damage if that relationship were to be severed."

Dr. Figurelli acknowledged the bond between defendant and his son was not of the same quality as the one between Donald and Ms. H., Donald's daily caretaker. Nevertheless, Dr. Figurelli opined defendant and Donald "were developing a signature positive emotional attachment . . . consistent with . . . the therapeutic visitation reports."

Both Dr. Wells and Dr. Figurelli agreed defendant had cognitive limitations. Dr. Figurelli opined defendant's IQ was 70, only slightly higher than Dr. Wells' assessed score of 66.[5] While Dr. Wells described defendant's

[5] Dr. Figurelli agreed these scores would place defendant on the borderline of classification formerly referred to as "mildly retarded." See N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 615 n.13 (1986) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 n.9 (1985)).

intellectual functioning as below average with "moderate deficiencies," Dr. Figurelli described defendant's functioning as "low borderline to mild intellectually disabled range" with dyslexia. The difference in their opinions was not so much based on the extent of defendant's disability, which both agreed was significant, as its effect on his ability to safely parent Donald.

Dr. Wells found defendant's circumstances at the time of trial, which she described as more unstable than when she initially assessed him in 2020, confirmed his lack of "daily day-to-day capacity to assume responsibility for [his] own needs," making clear he could not safely take on the additional burden of independent responsibility for Donald. Besides defendant's more precarious housing situation, Dr. Wells pointed to defendant's poor judgment in inviting Donald's mother to stay with him in the hotel room the Division was providing, despite it jeopardizing his cherished goal to have his son placed in his care.

Acknowledging defendant's kind-heartedness in assisting Donald's mother, who was again pregnant and homeless, Dr. Wells testified it didn't "go to his intention not to see a pregnant woman out on the street homeless, but . . . to jeopardizing what's in your best interests and having the kind of judgment to say I cannot do this because this is going to impact some other area of my

life." She concluded there were "no services and supports at this point . . . available for [defendant] that would remediate the cognitive difficulties, [and] would give [him] better insight and judgment."

Dr. Figurelli, on the other hand, believed defendant had clearly benefitted from the parenting instruction he'd been provided, demonstrating his capacity "to further enhance his parenting skills" if allowed some additional time to do so. He acknowledged defendant had already been accorded "nearly a year-and-a-half of therapeutic visitation, parenting support skills and wraparound skills to try to put himself in a position" to gain custody of Donald, and that there was only an affectionate relationship between him and his son, not a secure bond. Notwithstanding, Dr. Figurelli testified "given the progress [defendant] has made," and "that he's capable of making more progress," terminating his parental rights would do Donald "more harm than good" if defendant could do "what I indicated he needs to do, which is obvious, [obtain] a stable and adequate living arrangement and consistent and adequate sources of financial" and social support.

Pressed on cross-examination, Dr. Figurelli admitted defendant was not in a position to parent Donald at the time of trial based on his lack of financial stability, notwithstanding he'd worked full-time at ShopRite for the last thirty-

three years. He also conceded defendant was without alternate caretaking arrangements or any social supports to assist him with raising Donald. Finally, the doctor admitted defendant not only lacked stable housing but also "a plan of how he was going to get it." Nevertheless, Dr. Figurelli opined in light of the "developing . . . affectionate relationship" between defendant and Donald and defendant's "developing . . . parenting skills," he should be permitted another six months of services to allow him to establish those necessary supports and demonstrate he'd both benefitted from additional parenting instruction and could achieve stable housing and adequate financial resources to allow his son to be transitioned to his care.

Asked what should happen were defendant unable in six months to secure stable housing and consistent and adequate sources of financial and social support, Dr. Figurelli testified "at that point when we talk about relative harm versus good, the issue of the child's needs for permanency becomes paramount. And it does the child more harm than good to remain in a state of impermanence psychologically speaking." In other words, "the fulcrum of concern shifts to the child's permanency needs at that point in time and the need to establish the child's permanent placement."

After hearing the testimony and reviewing the evidence, the judge concluded the Division proved all four prongs of the best interests standard by clear and convincing evidence. See In re Guardianship of J.C., 129 N.J. 1, 10 (1992) (explaining the strict standards necessary "to protect the statutory and constitutional rights of the natural parents"). He found defendant, although morally blameless, harmed his son by essentially being unable to provide for his basic needs for financial support and housing due to his underlying cognitive deficits. See In re Guardianship of R., 155 N.J. Super. 186, 194-95 (App. Div. 1977) (noting the moral blamelessness of parents, while certainly a factor, is not dispositive on the issue of the child's best interests).

The judge further found that despite substantial services, guidance and support on the part of the Division and its service providers, defendant, although "willing, is incapable of consistent, appropriate, long-term parenting" for Donald, rendering him unable to eliminate the harm that has endangered his son. See N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 451 (2012) (explaining the focus of the second prong "centers on whether the parent is able to remove the danger facing the child"). In finding defendant failed to provide support for his son despite adequate opportunity "and there is no realistic likelihood" defendant "would be capable of caring for [Donald] in

the near future," the judge rejected Dr. Figurelli's suggestion that defendant should be allowed more time to demonstrate his capacity to care for his son.

Although finding both experts credible, the judge noted Dr. Figurelli never testified he was convinced there was a realistic likelihood of defendant demonstrating he could independently care for Donald, only that he should be allowed more time to try and do so. Having considered the extensive record of the services the Division had already provided defendant and the agreement of both experts that defendant could not safely parent his son at the time of trial, the judge was persuaded by Dr. Wells' opinion that additional time would not change that. See A.W., 103 N.J. at 608 (cautioning courts that when adults, meaning "courts, social workers, and therapists — delay the permanent decision, they lose sight of the child's concept of time").

The judge found the record replete with proof of the Division's efforts to provide services geared to allowing defendant to remediate the harm.[6] See

[6] In his briefs to this court, defendant contends the Division violated trial court's orders to assist him with locating stable housing, and "needlessly waste[d] resources by providing the resource mother with cash compensation, clothing checks, and paying for full-time daycare services" as well as "DCPP-funded babysitting" throughout the litigation. He argues that had the Division made the same resources it provided to the resource parent, who like defendant was employed full-time, available to him, "he could work full-time and be a father to Donald in the same capacity as the resource caregiver." We are not

In re Guardianship of D.M.H., 161 N.J. 365, 393 (1999) (observing the Division's diligence in providing services to a parent in aid of reunification "is not measured by their success"). The judge also found the Division "explored all reasonable alternatives to . . . termination," defendant's two siblings having removed themselves from consideration, and Ms. H. was committed to adopting Donald.

Finally, the judge found termination of defendant's rights would not do more harm than good as defendant could not safely and appropriately care for Donald at the time of trial and, despite "ample support and time," there was no realistic likelihood of him doing so in the foreseeable future. See In re Guardianship of K.H.O., 161 N.J. 337, 357 (1999) (explaining "courts must consider the child's age, her overall health and development, and the realistic likelihood that the parent will be capable of caring for the child in the near future"). Based on Dr. Wells' testimony, the judge also found that terminating defendant's rights will not cause Donald any appreciable harm.

Defendant appeals, raising the following issues:

> THE TRIAL COURT'S FINDINGS WERE INCOMPLETE AND INADEQUATE TO SUSTAIN A JUDGMENT TERMINATING [DEFENDANT'S]

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insensitive to the argument, but it is beyond our ability to consider here as it was not developed in the trial court.

PARENTAL RIGHTS BY CLEAR AND CONVINCING EVIDENCE AS REQUIRED BY N.J.S.A. 30:4C-15 AND 30:4C-15.1.

I. The trial court erred in finding that DCPP demonstrated by clear and convincing evidence that Donald's health and development had been or will continue to be endangered by the parental relationship under the first prong.

II. The trial court erred in finding that DCPP demonstrated by clear and convincing evidence that [defendant] was unwilling or unable to eliminate the alleged harm facing Donald or is unable or unwilling to provide a safe and stable home for him and the delay of permanent placement will add to the harm under the second prong.

A. DCPP's own third-party service provider, Rutgers University, proved that [defendant] can reunify with Donald. By the time of trial, Rutgers University opined that [defendant] has "average to above-average" parenting abilities.

B. [Defendant] is employed full-time, is caring, has a bond with Donald, and DCPP did not note any concerns during over one-hundred father-son visits.

III. DCPP failed to prove prong three was met where it failed to provide services that were reasonable under all the circumstances here to facilitate family reunification.

IV. The trial court erred in finding that DCPP demonstrated by clear and convincing evidence that termination of [defendant's] parental rights will not do more harm than good.

V. An adoption plan derived from hearsay testimony of DCPP's own agents and the lack of testimony by resource parents to verify an alleged "commitment to adoption" does not constitute clear and convincing evidence that a child will gain a compensating benefit from terminating parental rights.

Our review of a trial court's decision to terminate parental rights is limited. F.M., 211 N.J. at 448-49. We generally "defer to the factual findings of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a 'feel of the case' that can never be realized by a review of the cold record." N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 293 (2007)). As our Supreme Court has reminded in respect of termination of parental rights, "a trial court's factual findings 'should not be disturbed unless they are so wholly unsupportable as to result in a denial of justice.'" N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 511 (2004) (quoting In re Guardianship of J.N.H., 172 N.J. 440, 472 (2002)).

Our review of this record convinces us the judge's findings are amply supported by the trial testimony and the Division's records admitted in evidence. Each of defendant's arguments, with the exception of the last, which was never raised to the trial court, reduce to quarrels with the judge's fact-

finding we are simply in no position to reject, and thus require no discussion here.[7] R. 2:11-3(e)(1)(E); see F.M., 211 N.J. at 448-49 (explaining "[i]t is not our place to second-guess or substitute our judgment for that of the family court," when "the record contains substantial and credible evidence to support the decision to terminate parental rights").

[7] The caseworker, whom the judge found a credible witness, testified unequivocally that she explained the difference between KLG and adoption to Ms. H., who never wavered in her commitment to adoption. There is nothing we noted in the record to suggest to the contrary. Thus, this case is readily distinguishable from N.J. Division of Child Protection & Permanency v. M.M., 459 N.J. Super. 246, 265, 273 (App. Div. 2019) on which defendant relies. (remanding for development of "muddy" record based on "bits of hearsay" as to whether resource parents, who did not testify, were committed unambiguously to adoption, notwithstanding the possible alternative of KLG). There is, of course, no requirement the resource parents testify at a guardianship trial. Id. at 266, 275. Moreover, defendant did not object to the caseworker's testimony of her conversations with the resource parent on KLG and adoption, thus effectively consenting to the admission of the hearsay statements, N.J. Div. of Child Prot. & Permanency v. N.T., 445 N.J. Super. 478, 503 (App. Div. 2016), and depriving the Division of the opportunity to overcome any objection by calling the resource parent as a witness; see N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 341 (2010). Thus, even were we convinced there was a question about the resource parent's commitment to adoption, which we are not, we would reject the argument based on the invited error. See id. at 340.

As Justice O'Hern explained nearly forty years ago, there are no victors in a guardianship case and "given the need for continuity, the child's sense of time, and the limits of our ability to make long-term predictions, [the best interests of the child] are more realistically expressed as the least harmful or least detrimental alternative." A.W., 103 N.J. at 616 (quoting Albert J. Solnit, Psychological Dimensions in Child Placement Conflicts, 12 N.Y.U. Rev. Law & Soc. Change 495, 499 (1983-84)).

Defendant has steadfastly advocated for the right to raise his son, and we have no doubt he loves Donald. But we are also satisfied the evidence supports the trial court's finding that defendant has difficulty meeting his own needs, and his cognitive difficulties, manifested in his inability to establish stable housing and adequate and consistent sources of financial and social supports, render him unable to independently parent Donald now or in the foreseeable future. We are thus satisfied Donald's need for permanency and the promise of a secure and stable home make termination of defendant's parental rights in his son's best interests in accordance with N.J.S.A. 30:4C-15.1(a)(1) to (4).

Affirmed.