# RECORD IMPOUNDED



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3194-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

C.B.,

Defendant-Appellant,

and

C.N.,

Defendant.

———————————————

IN THE MATTER OF THE
GUARDIANSHIP OF
C.N., A.B.-N. and G.B.,
minors.

———————————————

Submitted February 28, 2023 – Decided March 15, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FG-03-0024-21.

Joseph E. Krakora, Public Defender, attorney for appellant (Deric Wu, Assistant Deputy Public Defender, of counsel and on the brief).

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

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Neha Gogate, Assistant Deputy Public Defender, of counsel and on the brief).

PER CURIAM

Following a Title 30 guardianship trial, the family court terminated the parental rights of C.B. (Cynthia) and C.N. (Carl) to their then seventeen-year-old daughter, A.B.-N. (Amy), seven-year-old son, G.B. (Gary), and five-year-old son, C.N. (Curt). Only Cynthia appeals; the New Jersey Division of Child Protection and Permanency (Division) and Law Guardian urge that we uphold the termination.

We reject Cynthia's contentions that the Division failed to meet its statutory burden under the four-prong best interests test, N.J.S.A. 30:4C-15.1(a), by clear and convincing evidence. The Division established Cynthia endangered

her children through evidence of her long history of substance abuse and mental health issues, as well as her constant struggles with relationships, unemployment, and housing instability. The Division's proofs also established Cynthia failed to comply with numerous programs and services offered by the Division to promote reunification with her children, and there were no acceptable alternatives to termination of her parental rights. Therefore, adoption by the resource parents was best for the children. Accordingly, we affirm.

I.

We begin our discussion with the legal framework regarding the termination of parental rights. Parents have a constitutionally protected right to the care, custody, and control of their children. Santosky v. Kramer, 455 U.S. 745, 753 (1982); In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999). That right is not absolute. N.J. Div. of Youth & Fam. Servs. v. R.G., 217 N.J. 527, 553 (2014). At times, a parent's interest must yield to the State's obligation to protect children from harm. N.J. Div. of Youth & Fam. Servs. v. G.M., 198 N.J. 382, 397 (2009); In re Guardianship of J.C., 129 N.J. 1, 10 (1992). To effectuate these concerns, the Legislature created a test for determining when parental rights must be terminated in a child's best interests. N.J.S.A. 30:4C-15.1(a)

requires the Division prove by clear and convincing evidence the following four prongs:

> (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;[1]
>
> (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 [judge] has considered alternatives to termination of parental rights; and
>
> (4) Termination of parental rights will not do more harm than good.

The four prongs are not "discrete and separate," but "relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." K.H.O., 161 N.J. at 348. "The considerations involved in determinations of parental fitness are 'extremely fact sensitive' and require particularized evidence that address the specific circumstances in the given

[1] On July 2, 2021, the Legislature enacted L. 2021 c. 154, deleting the last sentence of N.J.S.A. 30:4C-15.1(a)(2), which read "[s]uch harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child."

case." Ibid. (quoting In re Adoption of Children by L.A.S., 134 N.J. 127, 139 (1993)).

In reviewing a decision by a trial court to terminate parental rights, we give "deference to family court[s'] fact[-]finding" because of "the family courts' special jurisdiction and expertise in family matters." Cesare v. Cesare, 154 N.J. 394, 413 (1998). The judge's findings of fact are not disturbed unless they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. at 412 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). "[T]he conclusions that logically flow from those findings of fact are, likewise, entitled to deferential consideration upon appellate review." N.J. Div. of Youth & Fam. Servs. v. R.L., 388 N.J. Super. 81, 89 (App. Div. 2006).

II.

After several years of the Division's involvement with Cynthia and Carl concerning the care of their children, the family court entered a November 2020 permanency order, approving the Division's plan to terminate their parental rights followed by adoption. By reference, the permanency order incorporated a multipurpose order, which, among other things, required the Division to

explore kinship legal guardianship (KLG) as an alternative permanent placement option. Thereafter, the Division filed a complaint for guardianship.

In May 2022, the four-day guardianship trial was held. On behalf of the Division, Brian S. Eig, Psy.D., testified as an expert in clinical and forensic psychology, and Jenna Scott, a Division caseworker, testified regarding the agency's history with the family. The Law Guardian called Maureen R. Santina, Ph.D., to testify as an expert in clinical and forensic psychology. Cynthia did not testify but presented the testimony of her godmother, Lisa Lucas, and Ingrid Diaz, Ph.D., an expert in clinical and forensic psychology. Following the parties' closing arguments, the judge entered an order terminating Cynthia's and Carl's parental rights for reasons expressed in his oral decision.

Cynthia argues the family judge erred in terminating her parental rights because the Division did not prove by clear and convincing evidence prongs one, two, and three of the best interests test. We are unpersuaded. We agree substantially with the judge's decision because he correctly applied the law based upon substantial credible evidence in the record. To emphasize our reasoning, we add the following remarks.

A.

Because prongs one and two are related, evidence may support both prongs "as part of the comprehensive basis for determining the best interests of the child." In re Guardianship of D.M.H., 161 N.J. 365, 379 (1999). Thus, we address them together.

As to prong one, the Division must prove "[t]he child's safety, health, or development has been or will continue to be endangered by the parental relationship." N.J.S.A. 30:4C-15.1(a)(1). "[T]he relevant inquiry focuses on the cumulative effect, over time, of harms arising from the home life provided by the parent." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 289 (2007).

"Serious and lasting emotional or psychological harm to children as the result of the action or inaction of their biological parents can constitute injury sufficient to authorize the termination of parental rights." In re Guardianship of K.L.F., 129 N.J. 32, 44 (1992) (citing In re Guardianship of J.C., 129 N.J. 1, 18 (1992)). As a result, "courts must consider the potential psychological damage that may result from reunification[,] as the 'potential return of a child to a parent may be so injurious that it would bar such an alternative.'" N.J. Div. of Youth & Fam. Servs. v. L.J.D., 428 N.J. Super. 451, 480-81 (App. Div. 2012) (quoting N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 605 (1986)).

"The absence of physical abuse or neglect is not conclusive." A.W., 103 N.J. at 605 (quoting In re Guardianship of R., 155 N.J. Super. 186, 194 (App. Div. 1977)). "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." D.M.H., 161 N.J. at 379. "Courts need not wait to act until a child is actually irreparably impaired by parental inattention or neglect." Id. at 383.

As to prong two, the Division must prove "[t]he parent is unwilling or unable to eliminate the harm facing the child[ren] or is unable or unwilling to provide a safe and stable home . . . and the delay of permanent placement will add to the harm." N.J.S.A. 30:4C-15.1(a)(2). The Division can establish the second prong by proving a "child will suffer substantially from a lack of stability and a permanent placement[,] and from the disruption of [a] bond" with the resource parents. K.H.O., 161 N.J. at 363.

Cynthia argues the trial judge erred by finding that she was unable or unwilling to eliminate the harm facing the children. She claims her substance abuse is behind her, given that "full [drug] remission is achieved after one year of abstinence," and she has "abstained from drugs for two years." Thus, she has

"successfully addressed the core problem that . . . placed her children at a risk of harm."

Cynthia's argument that her substance abuse is a problem of the past is not supported by the credible evidence in the record. On September 1, 2020, about one year and eight months before the May 17, 2022 guardianship trial, she refused to complete a hair follicle test. On May 25, 2021, less than one year before trial, she tested positive for marijuana. On September 17, 2021, exactly eight months before trial, she refused to complete another hair follicle test. The "missed [drug] screens [were] . . . deemed positive" based on the family judge's previous orders.

There is no reason to challenge the judge's determination that the testimony by Drs. Eig and Santina was credible. Dr Eig stated Cynthia posed a significant risk of substance abuse relapse and that she was not a minimally adequate parent. He also stated her failure to engage in substance abuse treatment negatively affected the possibility for her full recovery. Citing her troubled upbringing, Dr. Eig diagnosed Cynthia with chronic post-traumatic stress disorder, stimulant use disorder, opioid use disorder, generalized anxiety disorder, and borderline personality disorder.

Dr. Santina's testimony echoed Dr. Eig. Dr Santina opined Cynthia's "risk of relapse remain[ed] very high," because her missed drug screens were a "red flag" that she was still abusing. Dr Santina explained that sustained sobriety required recognizing a problem, taking responsibility for the problem, engaging in substance abuse treatment, and developing a relapse prevention plan. The doctor found no protective measures demonstrating Cynthia's sobriety. She stated Cynthia required "clinical treatment," and the mere fact she was attending church did not qualify as such. Moreover, Dr. Santina testified that, even if Cynthia immediately and fully committed to substance abuse treatment, it would be "at least two years" until reunification was appropriate.

Dr. Diaz's testimony differed. She concluded that Cynthia was in "full remission" from substance abuse and could be "reunified" with her children as long as there were "some safety nets in place." However, Dr. Diaz's testimony was undermined by her admission that Cynthia did not provide her with certain positive drug tests, which the doctor indicated could be cause for concern. Moreover, it was not until she was cross-examined that Dr. Diaz learned Cynthia lied to her regarding compliance with substance abuse treatment. Despite not "formally assess[ing]" Cynthia or reviewing Dr. Eig's assessment, Dr. Diaz

stated during her interactions with Cynthia, there was no indication of borderline personality disorder.

Exercising his "prerogative to evaluate the credibility of the testimony of the competing experts," N.J. Div. of Child Prot. and Permanency v. M.M., 459 N.J. Super. 246, 263 (App. Div. 2019), the family judge had "great difficulty" accepting Dr. Diaz's finding that Cynthia was "a suitable parental figure." Given his credibility findings, the record supports the judge's findings that Cynthia was "unwilling or unable" to eliminate the harm facing her children, and they needed "permanency" because she could not provide them a "stable home[.]" Hence, prongs one and two were satisfied.

B.

As to prong three, there are two requirements to terminate parental rights. It must be shown: (1) the Division "made reasonable efforts to provide services to help the parent correct the circumstances which led to the child's placement outside the home"; and (2) the court "considered alternatives to termination of parental rights." N.J.S.A. 30:4C-15.1(a)(3).

Cynthia does not challenge the judge's determination that the Division offered her services to foster reunification. Rather, she argues the judge failed to consider alternatives to termination by not adequately evaluating KLG as an

option. She asserts the resource parents do not have an "informed, unconditional, unambiguous, and unqualified" preference for adoption; they are uncertain. She claims the Division misinformed the resource parents about the differences between KLG and adoption by inaccurately telling them that "adoption was the most permanent plan" because it provided "full control over decisions," including decisions relating to parental visitation.

Cynthia claims the recent amendment to N.J.S.A. 30:4C-15.1(a)(2) require courts to consider KLG as the preferred permanency choice. She maintains that, contrary to the amendment, the judge failed to consider KLG placement beyond Lucas' testimony that she was willing to be a KLG caregiver for the children. In other words, she states that KLG was possible, but the judge failed to properly consider it. Cynthia further argues her strong relationships with her children dissuade adoption, and Amy does not want to be adopted.

Cynthis's arguments rest on an inaccurate interpretation of the law. In addition, they are not sustained by credible evidence in the record.

Prior to July 2, 2021, KLG was permitted only when "adoption of [a] child [was] neither feasible nor likely." See L. 2021, c. 154, § 4; see also N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 513 (2004) ("[W]hen the permanency provided by adoption is available, [KLG] cannot be used as a defense to

termination of parental rights."). Thereafter, an amendment to the Kinship Legal Guardianship Act (the KLG act), N.J.S.A. 3B:12A-1 to -7, took effect, which included removal of language from N.J.S.A. 3B:12A-6(d)(3) requiring the family judge only consider KLG as an option when "adoption of the child is neither feasible nor likely." Compare L. 2006, c. 47, §32 with L. 2021, c. 154, §4.[2]

Removing the KLG Act's requirement that a judge find adoption "neither feasible nor likely" before granting KLG is a factor to be considered when determining whether KLG is an appropriate permanency option. Such a determination has no place in a termination of parental rights trial. The amendment now ensures that a resource parent's willingness to adopt no longer forecloses the possibility of KLG at the time the permanency plan is selected by the court. The amended law does not make KLG the preferred permanency outcome over adoption simply because it removed the requirement that adoption be unfeasible or unlikely. See N.J. Div. of Child Prot. and Permanency v. D.C.A., 474 N.J. Super. 11, 27 (App. Div. 2022) (holding L. 2021, c. 154, "was clearly intended to reflect a preference for viable kinship guardians and fit parents over unrelated foster caretakers"). Nevertheless, KLG can be a valid

[2] See also n.2.

defense to the termination of parental rights, even when adoption is available as an option.

The judge weighed KLG and found it was not viable based on the totality of circumstances. He determined Lucas' offer to be a KLG caregiver was, in essence, too little, too late. The judge reasoned:

> []Lucas has been the godmother for [Cynthia] based on her testimony all her life. []Lucas testified that she was like a mother to [Cynthia]. [Cynthia] over the last almost thirty years has suffered unabated substance abuse, unstable relationships, chronic homelessness, has had her children removed from her custody three times. . . . The court does not doubt []Lucas' . . . good intentions. . . . But, the question remains that while [] Lucas was the mother figure to [Cynthia ] what type of intervention, assistance, guidance was provided to [Cynthia] over that thirty year period? [Cynthia's] life has been for lack of a better word off the rails unfortunately almost since the day she was born as a result of her treatment as a child[] and her inability to address or unwillingness to address her mental health and substance abuse issues. [Defense counsel] would suggest that now at the eleventh hour that []Lucas should serve as the [KLG] parent for the three minor children, finding out yesterday that [Cynthia] would then no longer be allowed to live with her. And, let me imagine what happens when children go in and [Cynthia] goes out. [Cynthia] is homeless and all of . . . [Cynthia's] other [issues] remain untreated . . . .
>
> . . . .
>
> [The court] simply does not have the confidence that [] Lucas would serve as an appropriate parent . . . or

> parent figure under [KLG] with these children, as in essence she has had two or three decades to effectively intervene and has not done so. It also is awful precedent to set that at the conclusion of an FG trial that one pulls a card out of their back pocket and says oh by the way we have somebody here to be assessed for [KLG]. Everybody knew [about KLG] in September of 2020.

Cynthia's argument that the resource parents' preference for adoption was not "informed, unconditional, unambiguous, and unqualified," was not raised before the family judge, and therefore, we are under no obligation to consider it. See Ricci v. Ricci, 448 N.J. Super. 546, 567 (2017) ("[I]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation [was] available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.") (first alteration in original) (quoting Zaman v. Felton, 219 N.J. 199, 226-27 (2014)); see also R. 2:10-2 ("[An] appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial [court]."). That said, we will address the argument.

In accordance with the permanency order, the Division was directed to consider potential KLG placements along with adoption. The Division saw that

the resource parents for Gary and Curt, and the resource parents for Amy[3], were fully aware of the KLG option, but despite apprehension they were willing to adopt. Paternal grandparents who had taken care of the children at various times were considered, but after they moved to out of the country, they were not in a position to care for or adopt them. Moreover, the Division contacted numerous potential caregivers for the children: Cynthia's mother, sisters, in-laws, stepfather, and best friend, and Lucas' sister. However, they all declined. Hence, prong three was satisfied.

To the extent we have not addressed any remaining arguments raised by Cynthia, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.



[3] Amy, who becomes eighteen years old in August 2023, was advised about the differences between KLG and adoption, and expressed a preference for adoption.