RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3266-21
A-3268-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

K.K.K., a/k/a K.K.M., and
C.R.W.,

Defendants-Appellants,

and

S.D.K., a/k/a S.K.,

Defendant.

———————————————

IN THE MATTER OF THE
GUARDIANSHIP OF N.J.K.
and K.S.W., a/k/a K.M., minors.

———————————————

Submitted March 29, 2023 – Decided April 17, 2023

Before Judges Accurso, Vernoia and Natali.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Mercer County, Docket No. FG-11-0056-19.

Joseph E. Krakora, Public Defender, attorney for appellant K.K.K. (Beth Anne Hahn, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant C.R.W. (Louis W. Skinner, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Mary L. Harpster, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor N.J.K. (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Todd Wilson, Designated Counsel, on the brief).

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

PER CURIAM

In these consolidated appeals, defendant K.K.K. (Kara) appeals in A-3266-21 from a guardianship judgment terminating her parental rights to her daughters, N.J.K. (Nancy), who was born in 2007, and K.S.W. (Kate), who was

born in 2014.[1] Defendant C.R.W. (Carl) appeals in A-3268-21 from the guardianship judgment terminating his parental rights to Kate. Nancy's biological father, defendant S.D.K., does not appeal from the guardianship judgment terminating his parental rights and did not participate in this appeal. The respective law guardians for Nancy and Kate join the New Jersey Division of Child Protection and Permanency (the Division) in arguing the guardianship order should be affirmed as to Kara and Carl.

Based on our review of the record, the court's extensive findings of fact and conclusions of law, and the parties' arguments, we are convinced the court correctly determined the Division proved by clear and convincing evidence termination of Kara's parental rights to Nancy and Kate, and Carl's parental rights to Kate, are in the children's best interests. We therefore affirm.

I.

As noted, Kara and S.D.K. are Nancy's biological parents, and Kara and Carl are Kate's biological parents. The Division's permanency plan for Nancy and Kara is termination of Kara's and Carl's parental rights and adoption by R.C.

[1] We employ initials and pseudonyms to identify the parties, the children, and others to protect the children's privacy and because records relating to Division proceedings held pursuant to Rule 5:12 are excluded from public access under Rule 1:38-3(d)(12).

(Rachel), who is the children's maternal aunt. Rachel has served as the children's resource parent, with her husband, since the Division conducted an emergency removal of the children from Kara's care in October 2017. At that time, the court granted the Division care, custody, and supervision of the children because "their basic needs, including but not limited to, education, clothing, and nutrition, were not being met" and due to "concerns of domestic violence in the home" between Kara and Carl to which the children had been exposed.

Following a series of hearings and compliance reviews, in May 2019 the court approved the Division's permanency plan for Nancy and Kate: termination of parental rights followed by adoption. One month later, the Division filed its guardianship complaint.

The trial on the Division's complaint was conducted over the course of eight days before Judge Thomas J. Walls, Jr. The Division presented the testimony of: Karessa Matos, a Division adoption caseworker; Dr. Meryl Udell, an expert in psychology; Dr. James Loving, an expert in forensic psychology and parental bonding and attachment; and Rachel. Kara called Dr. Melissa R. Marano, an expert in neuropsychology and psychology with a specialty in bonding evaluations, as a witness. Carl did not present any witnesses. The

respective law guardians for the children did not present any witnesses at trial, but both urged the judge to grant the relief sought by the Division.

Judge Walls subsequently issued a thorough written decision detailing Kara's and Carl's prior histories with the Division involving Nancy and Kate, and other of Kara's children who are not involved in this proceeding. Judge Walls summarized this matter's procedural history and made detailed findings of fact as to each of the required elements of the best-interests-of-the-child standard set forth in N.J.S.A. 30:4C-15.1(a). Based on those findings, Judge Walls concluded the Division sustained its burden of proving by clear and convincing evidence it was in Nancy's and Kate's respective best interests to terminate Kara's and Carl's parental rights.

The judge accepted the testimony of all the experts, including Kara's expert, Dr. Marano, and concluded Kara's significant cognitive impairments rendered her unable to properly parent the children or provide them with a safe and secure home in the past and foreseeable future. The judge further accepted expert testimony that Kara presented a further risk of harm to the children because she continued to maintain a relationship with Carl, with whom she had a history of being victimized by domestic violence, and she failed to appreciate the potential harm exposure to domestic violence would present to the children.

Judge Walls also found that despite the Division's efforts to provide services directed at addressing the domestic violence history and Kara's parenting deficits resulting from her cognitive impairments, Kara was unwilling to address the domestic violence issues, did not appreciate the potential harm to the children presented by exposure to domestic violence, and was unable to correct the cognitive impairments. Judge Walls determined Kara therefore could not properly parent the children or provide them the safe and secure permanent home to which they are entitled.

The judge also accepted the Division's experts' testimony that termination of Kara's parental rights to the children will not do more harm than good, and that adoption by Rachel is in the children's best interests. Judge Walls rejected Kara's claim that kinship legal guardianship (KLG) was the appropriate alternative to termination of parental rights, finding Rachel was not amenable to KLG and the record was otherwise bereft of a KLG alternative placement for the children. The judge entered a June 12, 2018 judgment of guardianship terminating Kara's parental rights to Nancy and Kate. Kara's appeal from the judgment was docketed under No. A-3266-21.

The judge's written opinion also included detailed findings supporting his decision terminating Carl's parental rights to Kate. The judge found Carl's

parental relationship with Kate has caused the child harm, and will continue to cause the child harm, because Carl demonstrated an inability and unwillingness to provide Kate with a safe and stable home. Judge Walls noted Carl's refusal to participate in Division services and the Division's efforts to plan for Kate's care, his failure to express any interest in providing parental care for the child, and his failure to take any steps required to provide Kate with the permanency to which she is entitled. The judge rejected Carl's claim KLG was available as an alternative to termination of parental rights and adoption, finding no evidence of any available KLG caretakers. The judge further found Dr. Udell's unrefuted testimony that Carl's failure to provide any plan for properly parenting Kate, his lack of interest in doing so, and his lack of any consistent involvement in the child's life supported the conclusion termination of Carl's parental rights would not do more harm than good. The guardianship judgment therefore terminated Carl's parental rights to Kate. Carl's appeal from the judgment was docketed as No. A-3268-21.

On appeal in A-3266-21, Kara presents the following arguments for our consideration.

> THE COURT'S JUDGMENT TERMINATING [KARA]'S PARENTAL RIGHTS WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND SHOULD BE REVERSED.

I. There Was No Clear and Convincing Evidence the Children's Health and Development Had Been or Will Be Endangered by Their Parental Relationship with [Kara] or that She Was Unable or Unwilling to Eliminate any Alleged Harm or Provide the Children a Safe and Stable Home.

A. Out-of-Court Allegations of Domestic Violence Do Not Satisfy Prongs One or Two of the "Best Interests" Test.

B. [Kara]'s Intellectual Limitations do not Preclude Parenting nor Did She Fail to Demonstrate Progress with her Parenting Plan.

II. The Trial Court Applied the Wrong Legal Standards When Considering Alternatives to Terminating [Kara]'s Parental Rights.

III. Termination of Parental Rights Will Do the Children More Harm than Good.

In A-3268-21, Carl offers the following arguments:

I. THE LOWER COURT ERRED IN ITS CONCLUSION THAT TERMINATION OF PARENTAL RIGHTS IS IN THE BEST INTERESTS OF THE CHILD UNDER N.J.S.A. 30:4C-15.1(a).

A. The court below erred in concluding that [Kate] was harmed by [Carl].

B. The court below erred in concluding that [Carl] is unwilling or unable to eliminate the alleged harm to [Kate].

C. The court below erred in concluding that [Division] exercised reasonable efforts to

provide services to help [Carl] to correct the circumstances that led to placement outside the home, and the court failed to consider [Kara] as an obvious available alternative to termination of his parental rights in violation of the law in effect after July 2021.

D. The court's conclusion that termination of parental rights will not do more harm than good is erroneous; the court relied on separation from temporary foster caregiver harm to terminate parental rights in violation of the July 2021 amendments.

II. DR. UDELL'S OPINION IS A NET OPINION AND THUS SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT.

II.

Our review of a trial court's decision to terminate parental rights is limited. N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448-49 (2012). "A Family Part's decision to terminate parental rights will not be disturbed when there is substantial credible evidence in the record to support the court's findings." N.J. Div. of Child Prot. & Permanency v. K.T.D., 439 N.J. Super. 363, 368 (App. Div. 2015) (citing F.M., 211 N.J. at 448). Our Supreme Court has noted in respect to termination of parental rights cases, "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)).

"We accord deference to factfindings of the family court because it has the superior ability to gauge the credibility of the witnesses who testify before it and because it possesses special expertise in matters related to the family." F.M., 211 N.J. at 448. This enhanced deference is particularly appropriate where the court's findings are founded upon the credibility of the witnesses' testimony. N.J. Div. of Youth & Fam. Servs. v. H.B., 375 N.J. Super. 148, 172 (App. Div. 2005) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

"Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark' should an appellate court intervene and make its own findings to ensure that there is not a denial of justice." 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. G.L., 191 N.J. 596, 605 (2007)). No deference is given to the trial court's "interpretation of the law," which we review de novo. D.W. v. R.W., 212 N.J. 232, 245-46 (2012).

A parent has a constitutionally protected right "to enjoy a relationship with his or her child . . . ." In re Guardianship of K.H.O., 161 N.J. 337, 346 (1999).

That right, however, "is not absolute" and is limited "by the State's parens patriae responsibility to protect children whose vulnerable lives or psychological well-being may have been harmed or may be seriously endangered by a neglectful or abusive parent." F.M., 211 N.J. at 447. Thus, a parent's interest must, at times, 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).

When terminating parental rights, the court must consider the "best interests of the child . . . ." K.H.O., 161 N.J. at 347. A petition to terminate parental rights may be granted only if the following four prongs enumerated in N.J.S.A. 30:4C-15.1(a) are established by clear and convincing evidence:

> (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)(1)-(4).]

"The four criteria 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." K.H.O., 161 N.J. at 348. "[T]he cornerstone of the inquiry [under N.J.S.A. 30:4C-15.1(a)] is not whether the biological parents are fit but whether they can cease causing their child harm." In re Guardianship of J.C., 129 N.J. 1, 10 (1992).

Here, Kara and Carl separately argue the court's findings under each prong of the best-interests standard are not supported by sufficient credible evidence. Based on our review of the record, we are not persuaded. Judge Walls made extensive findings of fact and well-reasoned credibility determinations, and he engaged in a comprehensive, fact-sensitive analysis of all the statutory factors as to the termination of Kara's parental rights to Nancy and Kate and Carl's parental rights to Kate. See K.H.O., 161 N.J. at 348. We affirm substantially for the reasons set forth in his thorough and well-reasoned 186-page written opinion, and defendants' claims the court's findings as to each of the statutory factors lack support in sufficient credible evidence are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following comments.

We reject defendants' respective arguments the court erred by failing to consider KLG as an alternative to termination of parental rights. Kara argues that under the 2021 amendments to N.J.S.A. 30:4C-15.1(a)(2), L. 2021, c. 154, § 9, and the KLG statute, N.J.S.A. 3B:12A-6(d)(3), L. 2021, c. 154, § 4, KLG is preferred to termination of parental rights, and that the amendments are inconsistent with giving effect, as Kara contends the court did here, to the resource parent's preference for termination of parental rights and adoption over KLG. Thus, Kara argues, and Carl separately suggests, the court erred by determining termination of their parental rights is in the best interests of Nancy and Kate.

The 2021 amendment to N.J.S.A. 30:4C-15.1(a)(2) deleted the second sentence of the second prong of the best interests standard. Prior to the amendment, the second prong of the standard 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**[.]
>
> [N.J.S.A. 30:4C-15.1(a)(2) (emphasis added).]

The 2021 amendment thus deleted the provision stating, "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 2021 amendments also modified the KLG analysis. L. 2021, c. 154, § 4. Prior to the July 1, 2021 effective date of the amendments, the KLG statute, N.J.S.A. 3B:12A-6(d)(3), required a determination by clear and convincing evidence that adoption was neither feasible nor likely before awarding KLG. In part, the statute provided a court could appoint a caregiver as a KLG, if "based on clear and convincing evidence" a series of express conditions were satisfied, including "adoption of the child is neither feasible nor likely." N.J.S.A. 3B:12A-6(d)(3). The 2021 amendment deleted that condition, making KLG an equally available permanency plan for children in Division custody, like Nancy and Kate. L. 2021, c. 154, § 4; N.J.S.A. 3B:12A-6(d)(3).

In New Jersey Division of Child Protection and Permanency v. D.C.A., we rejected a claim the 2021 amendment to the second prong of the statutory standard under N.J.S.A. 30:4C-15.1(a)(2) barred the court's consideration of "all evidence concerning a child's relationship with [the] resource caregiver[] . . . even in the context of the other prongs of the best-interests

standard." 474 N.J. Super. 11, 25-26 (App. Div. 2022). We explained, "[t]he Legislature did not alter the other components of the best interest standard[,]" and we rejected an interpretation of "the amendments to prong two to mean that such a bond may never be considered within any part of the best interests analysis." Ibid. We further determined "the statute still requires a finding that '[t]ermination of parental rights will not do more harm than good[,]'" id. at 26 (quoting N.J.S.A. 30:4C-15.1(a)(4)), and stated, "[t]he court must make an evidentiary inquiry into the status of children in placement, to determine whether the child[ren] [are] likely to suffer worse harm in foster or adoptive care than from termination of the biological parental bond." Ibid.

We also noted the amendments to the KLG statute were intended "to make it clear . . . that 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 (citation omitted). We explained a court should not limit its focus to "the harm from separation from foster families . . . at the exclusion of other factors." Ibid. (citation omitted). We concluded the modification to N.J.S.A. 30:4C-15.1(a)(2) "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.

Measured against our interpretation of the 2021 amendments in D.C.A., we discern no error in Judge Walls's analysis here. Contrary to Kara's and Carl's claims, the amendments did not require imposition of KLG over termination and adoption under the circumstances presented. As Judge Walls explained, KLG was not acceptable to Rachel, there was no other viable caretaker who sought or was available for KLG, the evidence did not support a finding that a coparenting arrangement between Kara and her adult daughter was feasible or in the children's best interests, and the totality of the circumstances detailed in the judge's painstaking analysis supported his conclusion the Division presented clear and convincing evidence termination of Kara's and Carl's parental rights was appropriate under each prong of the best interests standard.

We also reject Kara's claim the court erred by finding the children were harmed, and were at a risk of harm, by their exposure to domestic violence between Carl and herself. Kara asserts the court's finding was improperly based on the uncorroborated statements of Nancy, as reported to Division caseworkers, that Carl committed acts of physical violence against Kara in the presence of the children. Kara acknowledges out-of-court statements of children are admissible

in guardianship matters, N.J.S.A. 30:4C-15.1a(a), but correctly notes such statements do not support "a determination that termination of parental rights is in the best interests of the child" unless the statement is corroborated, N.J.S.A. 30:4C-15.1a(b).

Contrary to Kara's claim, the children's reports concerning domestic violence visited upon Kara by Carl find corroboration in the evidentiary record. For example, Nancy's statement Carl choked Kara is corroborated by Kara herself. During a team meeting, Kara reported that, "although [Carl] cho[kes] and hits her, she normally does not have bruises on her." Similarly, Kara advised Dr. Udell that Carl "'grabbed' her that one time" during an "argument [they] had" after which Kara "want[ed] to" file a restraining order against Carl but did not do so because she "[did not] know where he [wa]s living" since she "told him to leave the house" following the incident. Kara otherwise advised Dr. Udell she "just want[ed] to keep [Carl] away" and did not "want him to get close to me." Thus, the court properly found there was a history of domestic violence between Kara and Carl based in part on the children's reports, which were corroborated by Kara, N.J. Div. of Child Prot. & Permanency v. A.D., 455 N.J. Super. 144, 161-62 (App. Div. 2018), and, in part, based on Kara's admissions alone.

Moreover, Judge Walls's decision to terminate Kara's parental rights was not founded solely on his concerns and findings about the risks posed by domestic violence and Kara's lack of any recognition or acknowledgement that exposure to domestic violence poses a risk of harm to the children. As the judge explained in great detail, the Division separately established by clear and convincing evidence Kara's parental rights should be terminated because she has been, and continues to be, otherwise wholly incapable of properly parenting the children and providing the children with a permanent safe and secure home.

We also reject Carl's claim, made for the first time on appeal, that the court should have rejected Dr. Udell's testimony that termination of his parental rights would not do more harm than good as an inadmissible net opinion. Carl argues in part Dr. Udell's testimony constituted a net opinion because it was based on his incomplete evaluation by Dr. Udell.

We reject the argument because Dr. Udell offered the opinion at trial without objection, and we generally do not consider arguments for the first time on appeal unless they go to the court's jurisdiction or implicate matters of public concern. State v. Robinson, 200 N.J. 1, 20 (2009). Neither circumstance is present here.

Additionally, the incomplete evaluation on which Dr. Udell's opinion was in part based was the result of Carl's failure to appear to complete the evaluation. In other words, Carl complains Dr. Udell offered an inadmissible net opinion because Carl opted not to participate in an evaluation relevant to the Division's efforts to obtain a guardianship judgment terminating his parental rights.

In any event, Dr. Udell's testimony, even without the completed evaluation, does not constitute an inadmissible net opinion. "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, 53-54 (2015) (alterations in original) (quoting State v. Townsend, 186 N.J. 473, 494 (2006)). Under the rule, "an expert's bare conclusions, unsupported by factual evidence, [are] inadmissible." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014) (alteration in original) (quoting Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)). To avoid a net opinion, the expert must "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Pierre, 221 N.J. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). An expert must "identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the

methodology are reliable." Id. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)).

Based on our review of the record, Dr. Udell's testimony that termination of Carl's parental rights will not do more harm than good is amply supported by her reliance on Carl's words, actions, and failures to act as established in the evidence, as well as the other evidence pertinent to the determination of Kate's best interests in the trial record. For example, Dr. Udell based her opinion testimony in part on Carl's: failure to provide any plan for safely parenting Kate; repeated failures to visit the child; refusal to participate in evaluations or engage in services offered by the Division; and general disinterest in parenting Kate and providing Kate with the permanency to which she is entitled. Thus, Dr. Udell's testimony that termination of Carl's parental rights would not do more harm than good properly included the why and wherefore for that opinion which, we find, was supported by competent evidence in the record. Id. at 54.

Affirmed in A-3266-21 and A-3268-21.