RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3287-20
A-0837-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

E.A. and D.A.,[1]

Defendants-Appellants/
Cross-Respondents.

IN THE MATTER OF
THE GUARDIANSHIP OF
C.A.A. and N.M.A., minors,

Cross-Appellants.

Submitted February 1, 2023 – Decided March 1, 2023

Before Judges Currier, Mayer and Bishop-Thompson.

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[1] We use initials and pseudonyms to protect the parties. R. 1:38-3(d)(12).

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FG-13-0052-20.

Joseph E. Krakora, Public Defender, attorney for appellant E.A. (Amy Vasquez, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, attorney for appellant D.A. (Adrienne Kalosieh, Assistant Deputy Public Defender, on the briefs).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor cross-appellant C.A.A. (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Margo Hirsch, Designated Counsel, on the briefs).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minor cross-appellant N.M.A. (Meredith Alexis Pollock, Deputy Public Defender, of counsel; Todd Wilson, Designated Counsel, on the briefs).

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

PER CURIAM

Defendants E.A. (Eve) and D.A. (Dan) appeal from a June 28, 2021 judgment of guardianship terminating their parental rights to their two youngest children, C.A.A. (Cam) and N.M.A (Nan). The children cross-appeal from the termination decision. We affirm.

We summarize the evidence adduced during the five days of trial

testimony, including voluminous documents reviewed by the judge. We also rely on the transcripts from numerous pre-trial proceedings, highlighting the family's history with the New Jersey Division of Child Protection and Permanency (Division) which led to the termination of parental rights and judgment of guardianship.

Eve is the biological mother and Dan is the biological father of Cam, born in 2007, and Nan, born in 2011. The Division first became involved with the family in November 2016.

In 2017, Dan stipulated to abusing or neglecting an older child who is not involved in this appeal. In that same year, Dan was involuntarily admitted to a psychiatric hospital twice and frequently tested positive for cocaine and alcohol. He enrolled in an intensive outpatient treatment program but was discharged from the program for refusing to attend sessions and missing scheduled appointments.

Thereafter, Dan's visits with the children were supervised and he was ordered to participate in various services, including batterer's intervention and mental health and substance abuse programs. Additionally, he was compelled to undergo periodic screening for drugs and alcohol.

Throughout the Division's involvement with the family, Dan would attend court-ordered programs sporadically or not at all. The treatment programs that Dan did attend discharged him for non-compliance. Dan also frequently tested positive for cocaine when he did appear for scheduled drug screenings.

In 2018, the Division was granted care and custody of the children. Dan and Eve were court-ordered to attend psychological evaluations and follow up with any recommended services.

Dan's visits with the children continued to be supervised. Although Eve knew Dan was not permitted to have unsupervised visits with the children, she allowed Dan to see them alone. Dan's mother,[2] who supervised visits between Dan and the children, also allowed Dan to see the children when she was not at home.

In 2018 through 2019, the Division worked toward the goal of family reunification. Despite the judge granting several extensions of time to achieve reunification, the parents failed to successfully complete the services and programs offered by the Division.

In 2018, while the children lived with Eve, they missed school frequently. Nan risked repeating kindergarten as a result of her school absences. Cam

[2] Dan apparently lived with his mother until 2018 when he relocated to Georgia.

struggled academically. Based on the excessive number of school absences, the Division arranged for intensive in-home services for Eve and the children.

The Division recounted a specific incident with Eve in July 2018. The Division planned to visit the family's home earlier in the day, but Eve was not home. The caseworker returned around the time that Nan was scheduled to return home from the Division's summer day camp program. Eve was still not home when the camp bus arrived with Nan. Eve arrived home about an hour later, acting oddly.

When the caseworker entered Eve's home, she discovered the house was dirty and cluttered. The caseworker also noted Nan appeared unkempt. Eve told the Division caseworker that Dan groomed the children to play tricks on her and the children were trying to poison her. Eve also said that she heard strange noises coming from her phone and sometimes saw Dan in her phone. At one point, Eve disrobed, changed into a bathing suit, applied red lipstick, and resumed speaking to the caseworker.

Based on Eve's statements and behavior, the Division caseworker called the police and requested a mobile mental health screener. Eve was taken to a local hospital for a mental health screening. Upon admission to the hospital, Eve tested negative for illicit substances and Adderall and suboxone. Those

drugs had been prescribed to Eve to address her mental health and substance abuse issues. A few days later, the hospital discharged Eve.

According to the Division, the July 2018 incident involving Eve was a "game-changer" and prompted an emergency removal of the children. Nan and Cam have been in resource homes since July 2018.

The Division attempted to place the children with Dan's siblings in 2018. One of Dan's brothers was unable to care for the children. In mid-July 2018, a different brother agreed to care for the oldest child but not Cam and Nan.[3] When asked about potential relative placements for the children, the brother explained no family members wanted to be involved with Dan and Eve.

The Division also contacted a maternal uncle in North Carolina who refused to take the children. The maternal uncle reported no maternal relatives should have custody of the children because Dan would know where the children were placed and attempt to take physical custody of them.

The Division did not consider Dan's mother to be a suitable placement for the children. The Division had concerns about Dan's mother because "there were multiple reports that she had allowed . . . the children to be unsupervised"

[3] At some point, the brother could no longer care for the oldest child and the child entered a residential treatment facility.

during visits with Dan. Additionally, Dan's mother did not offer to serve as a relative placement for Cam and Nan.

After Cam and Nan were placed in non-residential resource homes and through the time of trial, the parents were allowed only supervised visits with the children. Dan and Eve failed to attend the Division's scheduled supervised visits with any consistency. When Eve reported transportation issues precluding her from visiting the children, the Division offered to provide transportation, but she declined. When their parents failed to visit, Cam and Nan were frustrated and disappointed.

In 2018, the parents left New Jersey. Dan went to work in Georgia and Eve moved to Pennsylvania. The Division provided information about court proceedings and available services to the parents at their last known addresses. After the parents moved out-of-state, the Division also attempted to communicate with the parents by telephone and email. However, the parents frequently failed to respond to the Division's voicemail messages and emails.

During the litigation, the Division made reasonable efforts to provide needed services to the family, even after the parents left New Jersey. Dan and Eve were court-ordered to participate in psychological evaluations and to comply with the recommendations of the evaluators. Eve and Dan missed many

of their scheduled services and evaluations. The services and programs which the parents attended eventually discharged them for failing to comply with the program's requirements, testing positive for alcohol or drugs, or missing appointments entirely, including scheduled drug tests.

In 2019, Eve, Dan, and the children had supervised visits with a reunification therapist, Dr. Madine DeSantis. Some of these visits were better than others. During one particular visit, Dr. DeSantis explained the parents became "very upset" and yelled at the Division caseworker in front of the children.

Based on this incident, Dr. DeSantis had concerns about the children witnessing the tense situation as well as the parents' inability to de-escalate matters and express their issues in an appropriate manner. Because both parents "seemed to incite each other" and increased the "intensity" of their "emotional responses," Dr. DeSantis suggested the parents visit the children separately.

In April 2019, Cam and Nan were removed from the Woodbridge resource home where they lived together. The children were placed in separate resource homes because the Woodbridge parents were leaving for vacation. Cam and Nan were separated, in part, because Cam bullied Nan while they lived together in the Woodbridge resource home. The Division believed the children would

benefit from a break in living together. According to the Division caseworker, the children were happy to have a break from each other, especially Nan.

Cam and Nan did not return to the Woodbridge resource home because the Division determined Cam and Nan were doing better in separate placement homes. Nan remained at her new resource placement through the time of trial. Cam remained in his resource placement until October 30, 2020, when he was moved to a new resource home.

Nan's new resource parents were unable to take custody of Cam based on the size of their home. However, Nan's resource family included Cam in activities as well as birthdays and holidays.

After the Division's efforts to achieve reunification were unsuccessful, the judge approved the Division's request to proceed with the termination of parental rights and adoption for the children. The Division explained that the parents either failed to attend or were discharged from programs and services, including psychological evaluations, batterer's intervention courses, domestic violence counseling, individual therapy, mental health programs, substance abuse services, and reunification therapy.

Throughout the litigation, the Law Guardians for Nan and Cam stated the children wanted to live with their parents.

The Family Part judge tried the guardianship matter over five non-consecutive dates in April and May 2021. The Division presented testimony from two Division employees, Sarah Dewan and Felicia Nichols-Atori, expert testimony from Dr. Alan J. Lee and Dr. DeSantis, and a Pennsylvania police officer, Detective Eric Donaldson.[4]

During the trial, at the request of Nan's Law Guardian, the judge interviewed Nan in camera. Nan's Law Guardian and therapist were present during the interview. After the interview, the judge returned to the courtroom and provided a summary of her recorded conversation with Nan.

Because of their outstanding warrants, the judge allowed Dan and Eve to participate electronically for the trial. On the first day, counsel for both parents reported that Dan and Eve were trying to access the link to the proceeding "but the call [kept] dropping." Thereafter, the parents participated telephonically for the remainder of the day. The parents confirmed their wish to participate remotely for the remainder of trial and waived their right to appear in-person for

[4] The detective testified to the following: both Dan and Eve had active warrants for their arrest arising out of their failure to appear in a Pennsylvania custodial interference case related to their oldest child; Dan had an active warrant arising out of an October 2020 assault case in Pennsylvania; and Eve had two traffic warrants in Pennsylvania.

the trial. However, both parents failed to appear electronically or telephonically for the remainder of trial.

Dr. Lee

Counsel did not object to the qualification of Dr. Lee as an expert in the field of psychology and bonding. The judge found Dr. Lee to be a credible witness.

Dr. Lee testified regarding Eve's psychological evaluation. While acknowledging she went to a psychiatric crisis center following the July 2018 incident, Eve told Dr. Lee she never had "any kind of psychological counseling" and her previous "psychological evaluations . . . found her to be fine." However, Dr. Lee testified there were discrepancies between Eve's account of her psychological status and the records he reviewed for the litigation.

According to Dr. Lee, the results of Eve's psychological tests "did not find any kind of remarkable cognitive or intellectual deficits" but showed Eve had "poor insight" into her own problems and issues and demonstrated "a very consistent effort to portray [her]self in an almost extremely positive light." The doctor diagnosed Eve with a "provisional diagnosis of bipolar disorder with psychotic features" and an "unspecified personality disorder with paranoid dependent and narcissistic traits, and unspecified anxiety disorder."

Dr. Lee testified that Eve exhibited a "number of psychological, emotional and personality traits that adversely impact her ability to accurately and consistently recognize and respond to the needs" of her children. The doctor noted Eve's lack of knowledge and understanding of her parenting skills, mental health issues, maladaptive personality traits, and strong need to defend erroneous perceptions. Based on these findings, Dr. Lee indicated Eve had a poor prognosis for significant or lasting change. Thus, the doctor expressed "significant concerns" about Eve's ability to function as an independent caretaker for the children within the "foreseeable future." If the children were placed in Eve's care, Dr. Lee opined that Nan and Cam would be at "significant risk of additional harm."

Regarding Dan's psychological evaluation, Dr. Lee testified that Dan admitted a prior diagnosis of bipolar disorder and using cocaine. Dan reported receiving substance abuse treatment but did not acknowledge being dismissed from several treatment programs.

Based on the psychological testing results, Dr. Lee found no "general deficits in [Dan's] overall intellectual functioning." However, the results indicated "some propensity towards impulse control problems." Dr. Lee testified Dan had a "significant elevation on defensiveness" but "denie[d]

personal problems," and saw "himself functioning quite effectively." According to Dr. Lee, Dan's personality traits and behaviors led to a "very poor prognosis for . . . making personal changes."

Dr. Lee provisionally diagnosed Dan with "bipolar disorder with psychotic features[,]" an "unspecified personality disorder with narcissistic antisocial paranoid and . . . schizotypal traits" as well an "unspecified other or unknown substance related disorder." Dr. Lee explained Dan's "entrenched and maladaptive personality and character traits" and impaired "perceptions of reality . . . compromise his ability to accurately recognize the needs of the children and this has significant risk of adversely impacting his care to the children." The doctor further explained Dan's personal functioning was unstable. Based on Dan's history of domestic violence, limited parenting skills, poor insight and self-awareness, unstable personal functioning, mental health issues, and entrenched maladaptive personality and character traits, Dr. Lee opined the children "would be at significant risk of harm if placed in his care."

After testing both parents, Dr. Lee testified the children would "be at a significant risk with either parent separately or both parents together." He recommended termination of the parents' rights.

Regarding his psychological evaluation of Cam, Dr. Lee reported he was psychologically and emotionally functioning at a more immature and undeveloped level when compared to other children in his age range. Dr. Lee found Cam to be "emotionally needy" and likely experiencing some low-grade depression. The doctor opined Cam's desire to return to his parents "cannot be entirely supported unless there is demonstrable evidence that the child would be returning to a safe, stable and appropriate environment." Without such evidence from the parents, the doctor explained Cam would face "possible risks of harm."

Regarding his psychological evaluation of Nan, Dr. Lee concluded "she has experienced inconsistent boundaries and chaotic unstructured situations." He found Nan "need[ed] structure, guidance, protection and support" and that the family "chaos and instability . . . prior to her removal" caused Nan to suffer dysthymia, a "chronic low-grade type of depression" involving a "chronic sense of sadness and . . . emotional emptiness and neediness."

Dr. Lee also testified regarding his bonding evaluations for Cam and Nan with Eve and Dan. His evaluations involved observing each child and each parent together for approximately forty-five to fifty minutes.

With respect to Eve and Nan, Dr. Lee observed that Eve had a "good affect" while Nan's affect was "subdued." According to Dr. Lee, although they

both "appeared happy" and "sat and played [with] some different toys together[,]" Nan "did not appear upset" when he asked Eve to leave the room. The doctor also reported Nan failed to "show any kinds of overt joy or excitement" when Eve returned to the room.

Dr. Lee reported Nan was "fairly quiet" with Dan and played with Dan's cell phone during their interaction. Nan was not upset when Dr. Lee asked Dan to leave, nor did Nan appear "excited or happy" when he returned. During the evaluation, Dr. Lee noted Dan became "increasingly disorganized" and "frazzled."

Based on these observations, Dr. Lee concluded that Nan had an "ambivalent and insecure" attachment to both Eve and Dan. He noted the lack of "a significant and positive" bond between the parents and Nan. According to Dr. Lee, Nan would not suffer "severe and enduring harm" if her relationship with either or both parents was terminated.

Lee found a similar "ambivalent relationship and attachment" between Cam and his parents. On the bonding evaluation with Eve, Dr. Lee noted that Cam "did not show any kind of overt joy or excitement" when she entered the room. The doctor explained Eve's speech and mannerisms toward Cam were "childlike" in tone. According to Dr. Lee, Eve sat on Cam's lap for a short time,

which seemed to surprise Cam, who was then age thirteen, and caused him to maintain a "fairly rigid" posture.

In his bonding evaluation with Dan, Dr. Lee observed that Cam appeared "bored" and "disinterested" and had a "fairly neutral" reaction to Dan. Based on his observations during the bonding evaluation, Dr. Lee concluded that there was a "low risk of [Cam] suffering severe and enduring harm if his relationship with" either or both of his parents was terminated.

Dr. Lee also evaluated the bonds between Cam, Nan, and their respective resource parents. He found Nan, who resided with her resource parents since April 2019, showed "good affect and emotion" with her resource mother and was "happy and welcoming" to her resource father. Dr. Lee concluded Nan formed a "significant and positive psychological attachment and bond" with both resource parents, and there was a "significant risk of [Nan] suffering severe and enduring harm" if her relationship with them was severed.

At the time of the bonding evaluation between Cam and his resource parents, Dr. Lee noted that Cam had lived with them for less than six months. Dr. Lee observed that Cam and the resource parents "showed good affect" and Cam appeared "happy." However, given the short time Cam lived with the resource parents, Dr. Lee explained it was "premature to conclude" that Cam

would be "at a significant risk of severe and enduring harm if his relationship" with the resource parents was to be terminated. Nevertheless, Dr. Lee opined that "the current trajectory of" Cam's relationship with his resource parents "would be one that would likely result in him solidifying a significant and positive bond" in the near future and then Cam "would be at a significant risk of suffering severe and enduring harm if" the relationship with the current resource parents ceased.

Dr. Lee also evaluated the bond between Cam and Nan. Dr. Lee noted Cam and Nan sat on a couch together during the evaluation and "chatted about some day-to-day activities." While Dr. Lee noted Cam and Nan were "familiar" and "comfortable" with each other, he opined it was "very unlikely that either child would rely on the other sibling for primary care." Based on the results of the evaluation, Dr. Lee testified "there would be a low risk of either child suffering severe and enduring harm if their relationship ended."

Dr. DeSantis

Dr. DeSantis testified Cam and Nan had a strong sibling bond. She disagreed the relationship between Cam and Nan was based merely on "familiarity." She opined "it would be better if [Cam] and [Nan] were raised together." During the more than two years she treated the family, Dr. DeSantis

testified Cam and Nan became "a lot closer." According to Dr. DeSantis, over time, the relationship between the siblings "greatly improved."

Dr. DeSantis noted that Nan's resource parents were friendly to Cam and included him in various activities with the family. According to Dr. DeSantis, it would be "detrimental" to Nan and "cause her a great deal of emotional distress" if she were not allowed to visit or speak to Cam. However, if the siblings were able to "maintain their relationship with each other," even if they were not living together, Dr. DeSantis testified the result would not be detrimental.

Dr. DeSantis testified the children were "very strongly bonded" with their biological parents and voiced their desire to go home to their parents. However, Dr. DeSantis reported Dan and Eve lacked the ability to be consistent in their children's lives and the situation had not improved in the two years she worked with the family. Dr. DeSantis testified that, "if anything, it's gotten maybe even worse."

Dr. DeSantis reported the parents were inconsistent in their visits with the children both in-person and virtually. Many times, the parents were late for visits with the children or failed to visit at all. While the children refused to say anything negative when the parents missed visits, Dr. DeSantis noted they were

hurt and disappointed by their parents' failures. When the parents did visit with the children, Dr. DeSantis testified they made promises to the children they never kept.

Felica Nichols-Atori

Nichols-Atori, a permanency supervisor with the Division, testified at trial. She recited the numerous services the Division attempted to provide to Dan and Eve. She reported both parents would start programs but failed to complete them or were discharged from the programs for failing to keep appointments, including drug testing. She further testified that Dan frequently tested positive for cocaine. Nichols-Atori explained she took over the handling of the family's case because Dan threatened the assigned caseworker.

Nichols-Atori also described the Division's efforts to place the children with relatives as previously summarized. According to Nichols-Atori, many of the parents' relatives did not return the Division's telephone calls. Those relatives the Division contacted, both maternal and paternal, expressed an unwillingness to care for Nan and Cam.

Sara Dewan

Dewan, a Division case manager, also testified. She recounted the many programs and services offered to Dan and Eve and their failures to complete them. She also explained the Division frequently could not reach Eve and Dan at their contact telephone numbers to follow up regarding attendance at programs and missed appointments.

Dewan testified Dan and Eve would occasionally respond to her text messages. However, the parents expressed their preference to receive information and notifications from the Division by email. According to Dewan, the parents almost never responded to the Division's emails. In addition to the telephone calls, text messages, and emails, the Division sent letters to the parents by regular and certified mail at their last known addresses.

Dewan also explained that the Division arranged transportation for the children to visit with their parents. She further reported the Division provided services for the children, including summer camp, psychological evaluations, and individual therapy.

Dewan testified that Nan and Cam attended school regularly after being placed with their resource families and performed better in school. They also became less distant and more expressive after living with their resource families.

Dewan also testified that, to the "best of [her] knowledge," both resource families were "committed to maintaining th[e] sibling relationship."

Dewan testified that she discussed the possibility of kinship legal guardianship (KLG) versus adoption with the resource parents. According to Dewan, the resource parents understood the difference between KLG and adoption. Neither set of resource parents wanted KLG because each family wanted to adopt the children and were committed to maintaining the sibling relationship after adoption.

Based on the history with the family, the Division's witnesses told the judge that it would be unsafe to return the children to either parent's care at the present time or in the foreseeable future.

Eve and Dan

Eve and Dan declined to testify at trial. In fact, the parents only participated on the first day of trial. The parents did not call any witnesses on their behalf, including expert witnesses.

The Judge's Termination Decision

On June 28, 2021, the judge issued a written decision and order terminating Eve and Dan's parental rights to Cam and Nan, finding the Division proved by clear and convincing evidence all four statutory prongs of the best

interests of the child test, N.J.S.A. 30:4C-15.1(a). The judge determined Eve and Dan had "shown little to no progress in [the] last four years" because they were "consistently inconsistent in their efforts" to engage in services and "failed to recognize their shortcomings and how such has affected" the children.

First prong

Under the first prong of the best interests of the child test, N.J.S.A. 30:4C-15.1(a), the judge found "the Division has proven by clear and convincing evidence that [Cam] and [Nan]'s safety, health, or development have been and would continue to be endangered by the parental relationship." Relying on the testimony provided by a Pennsylvania police detective, which the judge found credible, and the police records marked as evidence, the judge noted both parents had active warrants for their arrest. The judge found "the parents have failed to abide by the law" and Dan "struggle[d] with his anger" based on his pending assault charges.

The judge also found the testimony of Dr. DeSantis credible. The judge explained that Dr. DeSantis had concerns for the health, safety, and development of Cam and Nan. The doctor told the judge about the incident during a therapeutic session where the parents began yelling uncontrollably at a Division caseworker in front of the children. The judge also relied on Dr. DeSantis's

testimony that the parents "had not been consistent in the lives of [Cam] and [Nan]" and the parents' lack of consistency increased to the point where the children became disappointed, frustrated, and angry.

After determining Dr. Lee to be credible, the judge adopted the doctor's trial testimony and the conclusions in his written reports, finding the "safety, health and development" of Cam and Nan "have been and would continue to be endangered by the parental relationship."

Based on the foregoing testimony, the judge concluded the Division satisfied the first prong of the best interests of the child test.

Second prong

Under the second prong of the best interests of the child test, the judge found the Division established that Eve and Dan were "unwilling or unable to eliminate the harm caused to the children" and "delaying permanency would further harm both [Cam] and [Nan]." In reaching this conclusion, the judge relied on the unrebutted testimony of Dr. Lee.

Regarding Dr. Lee's psychological evaluations of Cam and Nan, the judge relied on the doctor's opinion "that both children are emotionally vulnerable and needy and require structure, consistency and stability in their lives." Given Dr. Lee's "opinion that neither parent has the ability to provide such for [Cam] and

[Nan]," the judge found the children "would be at significant risk of harm if placed in the care of either or both parents."

The judge found the Division satisfied the second prong of the best interests of the child test because "the parents have been unable or unwilling to eliminate the harm facing the children and are unable or unwilling to provide a safe and stable home for the children." The judge concluded "[a]ny further delay in permanency will only add to the harm."

Third prong

In reviewing the third prong of the best interests of the child test, the judge found the Division "made reasonable efforts to provide services to the parents to help them correct their circumstances and to consider alternatives to parental termination." In support of her findings under this prong, the judge relied on the unrefuted testimony of Dewan, Nichols-Atori, and Drs. DeSantis and Lee, which we previously summarized.

Fourth prong

Under the fourth prong, the judge evaluated the children's relationships with their biological parents and their resource parents and determined that termination of parental rights would not do more harm than good. Based on the uncontroverted expert testimony, the judge determined it was in the children's

"best interests to be in a stable and safe home where their emotional and physical needs are met and where they can create lasting relationships with family and friends and get involved in school and extracurricular activities." Given the parents' continuing inconsistencies in their children's lives, the judge found "it is highly unlikely that they would be able to resume custody in the near future."

Dan and Eve appealed from the judgment of guardianship. Nan and Cam filed cross-appeals. In a December 6, 2021 order, we consolidated the appeals.

In their appeals, Dan and Eve argue the judge erred in finding the Division established all four statutory prongs of the best interests of the child test under N.J.S.A. 30:4C-15.1(a). Eve separately argues ineffective assistance of counsel because her trial attorney failed to object to the judge's in camera interview with Nan and contends that statements by the judge during the interview demonstrated actual bias, depriving Eve of her constitutional rights. We reject the arguments asserted by Eve and Dan.

In their cross-appeals, Cam and Nan argue that the judge erred in her evaluation of the evidence under prongs three and four of N.J.S.A. 30:4C-15.1(a), asserting the Division failed to adequately consider alternatives to termination, and the judge's finding that termination of parental rights would not do more harm than good. The children wish to be reunited with their biological

parents and object to being adopted by their respective resource parents. Additionally, the children claim adoption by separate resource parents would legally sever their strong sibling bond. We disagree.

Our review of the judge's termination decision is limited. Cesare v. Cesare, 154 N.J. 394, 413 (1998). We defer to the expertise of family part judges because those judges are in a "superior position to judge the credibility of witnesses and weigh the evidence." N.J. Div. of Youth & Fam. Servs. v. J.R.-R, 248 N.J. 353, 368 (2021). We are bound by the judge's factual findings so long as the findings are supported by sufficient credible evidence. N.J. Div. of Child Prot. & Permanency v. A.D., 455 N.J. Super. 144, 155 (App. Div. 2018).

Parents have a constitutionally protected right to raise their biological children. In re Guardianship of J.C., 129 N.J. 1, 9−10 (1992) (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)). The State may protect the welfare of the children where the parent is unfit or the child has been harmed. Id. at 10.

Under the best interests of the child test, N.J.S.A. 30:4C-15.1(a),[5] the Division must prove the following:

[5] The Legislature amended the statute on July 2, 2021, eliminating the second sentence of N.J.S.A. 30:4C-15.1(a)(2). However, the amendment took effect after the judge's June 28, 2021 judgment of guardianship.

> (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. 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;
>
> (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 Division must prove each prong of the test by clear and convincing evidence. N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 611 (1986). The prongs "are not discrete and separate; they relate to and overlap with one another to provide a comprehensive standard that identifies a child's best interests." In re Guardianship of K.H.O., 161 N.J. 337, 348 (1999).

Having reviewed the record, we are satisfied the Division presented sufficient credible evidence under each of the statutory prongs to warrant the

termination of parental rights and the judge's factual findings and legal conclusions are fully supported by the record.

Analysis of the first prong

Our Supreme Court has held that a court's focus on prong one, N.J.S.A. 30:4C-15.1(a)(1), "does not concentrate on a single or isolated harm or past harm as such[,]" but rather "on the effect of harms arising from the parent-child relationship over time on the child's health and development." K.H.O., 161 N.J. at 348 (citing A.W., 103 N.J. at 604–10). "In order to satisfy this prong," the Division "need not 'wait until a child is actually irreparably impaired by parental inattention or neglect[,]'" but must only "demonstrate that the parental relationship has created a harm that 'threatens the child's health and will likely have continuing deleterious effects on the child.'" N.J. Div. of Youth & Fam. Servs. v. L.M., 430 N.J. Super. 428, 444 (App. Div. 2013) (quoting N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 449 (2012)).

Having previously summarized the testimony supporting the first prong, we discern no abuse of discretion in the judge's reliance on the documentary evidence and uncontroverted testimony proffered by the Division regarding the parents' actions before and after the Division's removal of Cam and Nan and the

harmful effects of those actions on the children in concluding the Division met its burden under prong one.

Analysis under the second prong

Under the second prong, N.J.S.A. 30:4C-15.1(a)(2), the judge must determine whether the parents are unwilling or unable to eliminate the harm facing the children or unable or unwilling to provide a safe and stable home for the children and if the delay in permanent placement will add to the harm. K.H.O., 161 N.J. at 348. The question is not only "whether the parent is fit, but also whether he or she can become fit within time to assume the parental role necessary to meet the child's needs." N.J. Div. of Youth & Fam. Servs. v. R.L., 388 N.J. Super. 81, 87 (App. Div. 2006) (citing J.C., 129 N.J. at 10). "Prong two may also be satisfied if 'the child will suffer substantially from a lack of … a permanent placement.'" F.M., 211 N.J. at 451 (quoting K.H.O., 161 N.J. at 363). Evidence that supports satisfaction of the best interests test under the first prong may also support the Division's satisfaction of the test under the second prong. See D.M.H., 161 N.J. at 379. Our Supreme Court has cautioned that "[m]ental illness, alone, does not disqualify a parent from raising a child." F.M., 211 N.J. at 450. "But it is a different matter if a parent refuses to treat his mental illness [and] the mental illness poses a real threat to a child . . . ." Id. at 450-51.

Under this prong, the judge may consider the Division's proofs based on "indications of parental dereliction and irresponsibility, such as the parent's continued or recurrent drug abuse, [and] the inability to provide a stable and protective home." K.H.O., 161 N.J. 353; see also N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104–05 (2008) (upholding termination where the mother repeatedly relapsed into addiction, resulting in homelessness, unemployment, and a prison sentence); N.J. Div. of Youth & Fam. Servs. v. P.P., 180 N.J. 494, 512 (2004) (supporting termination where the drug-addicted parents had not completed treatment and did not have stable housing); N.J. Div. of Youth & Fam. Servs. v. H.R., 431 N.J. Super. 212, 224 (2013) (deeming termination proper where the father enrolled in drug treatment programs but "routinely failed to complete them with positive results").

Here, Dan and Eve refused to participate in, or were discharged from, programs offered by the Division over the course of four years to address their substance abuse, mental health issues, batterer's intervention, and domestic violence. The parents' failure to acknowledge their issues and accept the offered services to address those issues endangered the health, safety, and development of Cam and Nan. There was sufficient evidence in the record based on the testimony from the Division's experts and fact witnesses demonstrating Dan and

Eve were unwilling or unable to eliminate the harm to the children under the second prong.

Contrary to the arguments asserted by Dan and Eve, the judge did not terminate parental rights based solely on mental health concerns. There is sufficient credible evidence supporting the judge's conclusion Dan and Eve were unwilling or unable to eliminate the harm to the children and that further delay in a permanent placement for the children would only add to the harm. Based on this record, the judge did not abuse her discretion in finding the Division sustained its burden under prong two.

Analysis under the third prong

Under the first part of the third prong, N.J.S.A. 30:4C-15.1(a)(3), the Division must demonstrate reasonable efforts to assist the parents in correcting the circumstances that led to the placement of the children outside the home. K.H.O., 161 N.J. at 354. Reasonable efforts depend upon the facts and circumstances of each case. D.M.H., 161 N.J. at 390. "The diligence of [the Division]'s efforts . . . is not measured by their success," id. at 393, particularly where the lack of success is the result of a parent's "failure to cooperate or follow through" with the services provided. N.J. Div. of Youth & Fam. Servs. v. C.S., 367 N.J. Super. 76, 119 (App. Div. 2004).

"[R]easonable efforts" include:

> (1) consultation and cooperation with the parent in developing a plan for appropriate services;
>
> (2) providing services that have been agreed upon, to the family, in order to further the goal of family reunification;
>
> (3) informing the parent at appropriate intervals of the child's progress, development, and health; and
>
> (4) facilitating appropriate visitation.
>
> [N.J.S.A. 30:4C-15.1(c).]

In her findings on the first part of prong three, the judge credited the testimony of the Division's witnesses regarding the Division's repeated efforts to provide services to Dan and Eve. Because "the parents never completed the recommended services necessary to remedy the Division's concerns that caused the children to be removed[,]" the judge determined it would not "be safe to return the children to either parent's care at this time or in the foreseeable future."

Here, the Division continually referred the parents for substance abuse and mental health evaluations and treatments, individual counseling, domestic violence counseling, and batterer's intervention. It also provided a reunification therapist to work with the family until the goal changed from reunification to

termination. The Division also facilitated visits between the children and the parents, including arranging for virtual visits during COVID-19. Based on the Division's efforts detailed in the trial testimony, we discern no abuse of discretion in the judge's determination that the Division met its burden under the first part of prong three of the best interests of the child test.

The second part under prong three requires the judge consider whether there were alternatives to termination of parental rights. The Division has an obligation, under N.J.S.A. 30:4C-12.1(a), to "search for relatives who may be willing and able to provide the care and support required by the child." See N.J. Div. of Youth & Fam. Servs. v. K.L.W., 419 N.J. Super. 568, 578 (App. Div. 2011).

One alternative to termination is KLG. Under the KLG option, a relative may become a child's legal guardian and commit to care for the child until adulthood, without stripping the parents of their rights. P.P., 180 N.J. at 508. The Legislature created KLG, finding "an increasing number of children who cannot safely reside with their parents are in the care of a relative or a family friend who does not wish to adopt the child or children." N.J. Div. of Youth & Fam. Servs. v. L.L., 201 N.J. 210, 222–23 (2010). Dan, Cam, and Nan contend

the judge failed to consider alternatives to termination and did not appropriately evaluate the KLG option.

The judge relied on the testimony of the Division's witnesses regarding efforts to place the children with relatives. She found the Division properly explored alternatives to termination. The judge concluded the relatives contacted by the Division either declined to care for Cam and Nan or were deemed unsuitable. The judge further found the Division's efforts to find relatives who might be willing to care for Nan and Cam were hampered by the parents' failure to provide contact information for any additional relatives. See K.L.W., 419 N.J. Super. at 582 (holding the Division cannot be expected to locate relatives absent contact information from the parents).

Regarding the Division's rejection of Dan's mother as a relative placement, the judge cited the Division's testimony that Dan's mother allowed her son to visit with the children unsupervised despite court orders requiring Dan's visits be supervised. The judge also credited the testimony of the Division's witnesses that Dan lived with his mother at various time during the litigation, which rendered Dan's mother an inappropriate relative family placement.

Under the second part of the third prong, the judge found the resource parents for Cam and Nan understood the difference between KLG and adoption. The failure to produce a KLG fact sheet signed by the resource parents does not outweigh the unrefuted and unchallenged testimony proffered by the Division's witnesses concerning the discussions with the resource parents regarding KLG versus adoption.

Here, Dr. Lee and Dewan testified that the resource parents rejected KLG and wished to adopt Cam and Nan. These same witnesses also told the judge that the resource parents encouraged and arranged for Cam and Nan to see each other. Nothing in this record indicated the sibling connection would end if Cam and Nan were adopted by their separate resource families. Importantly, the parents and the children offered no testimony to contradict the judge's finding under this prong.

We reject Cam's argument that the July 2, 2021 amendment to the KLG Act, N.J.S.A. 3B:12A-1 to -7, should be applied retroactively. The amendment removed the language requiring the court to consider KLG as an option only when "adoption is neither feasible nor likely." L. 2021, c. 154, § 4. Under the recent amendment, KLG may be considered when adoption remains an option.

Cam concedes that laws are not applied retroactively unless such intention is clearly expressed in the legislation. See Pisack v. B&C Towing, Inc, 240 N.J. 360, 371 (2020) (quoting Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 48 (2008)) (explaining that an amended statute's immediate effective date "bespeak[s] an intent contrary to, and not supportive of, retroactive application"). The amendment to the KLG Act did not express a retroactive intent because the Legislature stated the amendment was to "take effect immediately." L. 2021, c. 154, § 10. Further, when the Legislature is silent on the matter of retroactivity, as in this case, it is a signal to the judiciary that the Legislature intended a prospective application of the amendment. See Olkusz v. Brown, 401 N.J. Super. 596, 501–02 (App. Div. 2008).

Regardless of whether the amended statute should be applied retroactively, the judge found the resource parents understood the KLG alternative, unequivocally rejected KLG, and wished to adopt the children. We are satisfied that the judge's findings and conclusions are unaffected by the amendment to the KLG Act. Nothing in the amendment changed the guiding principle that judges in guardianship cases must focus on the best interests of the child.

We are satisfied the judge appropriately concluded there were no alternatives to termination, there were no viable family members to care for the children, and the KLG option was explained to the resource parents and rejected. We recognize that Cam and Nan expressed a desire to live with their parents. However, "a child's wishes should be but one factor" in the best interests of the child analysis. E.P., 196 N.J. at 113. While Cam and Nan expressed their wish to be reunited with their parents, they also were happy with their resource families and wanted to remain with their resource families if reunification was not possible.

After reviewing the record, we are satisfied the judge did not abuse her discretion in finding the Division met its burden under the second component of the third prong.

Analysis under the fourth prong

Under the fourth prong, N.J.S.A. 30:4C-15.1(a)(4), the judge must assess whether termination of parental rights will do more harm than good. The overriding consideration under this prong is the child's need for permanency and stability. See K.H.O., 161 N.J. at 357.

Relying on the expert testimony of Drs. Lee and DeSantis, the judge found that the Division had "proven by clear and convincing evidence that termination

of parental rights will not do more harm than good to the children." The judge explained it was in the children's "best interests to be in a stable and safe home where their emotional and physical needs are met and where they can create lasting relationships with family and friends and get involved in school and extracurricular activities." As the judge correctly concluded, the parents' lack of consistency and stability in the children's lives was not in the best interests of Cam and Nan. The judge relied on the testimony of the Division caseworker that the children were doing well in their respective resource homes, and the resource families were committed to adopting the children and maintaining the sibling relationship.

There was sufficient credible evidence in the record to support the judge's finding that termination of parental rights would not do more harm than good.

In light of the uncontradicted evidence presented during the guardianship trial, we are satisfied the judge correctly concluded the Division presented clear and convincing evidence in support of termination of Dan and Eve's parental rights to Cam and Nan under all four prongs of N.J.S.A. 30:4C-15.1(a).

We next consider the additional argument raised by Eve that her trial counsel was ineffective. She claims her counsel's performance was deficient because he failed to object to the judge's in camera interview of Nan, "failed to

secure the transcripts of that interview, and failed to seek to disqualify the judge who displayed egregious biased behavior toward the parents." She also claims her attorney failed to challenge the judge's misapplication of the burden of proof. We reject Eve's arguments on these points.

Nan's Law Guardian asked the judge to speak to Nan about what her parents had or had not done to comply with the court's orders. The judge asked if there was any objection and no one objected.

The judge then had an in camera discussion with Nan, who was ten years old at the time. Also present were Nan's Law Guardian and Nan's therapist. During the discussion, the judge described to Nan the various issues regarding her parents' non-compliance with court orders and the required treatment programs that were designed to reunify the family.

Upon returning to the courtroom after the discussion, the judge stated:

> I think [Nan] wanted some honest answers. . . . I let her know about the bench warrant. I let her know that her parents weren't on the call, and it might be because of the bench warrant, but I didn't know. I said that, you know, they had appeared before. Typically, they did appear, and they seemed healthy and well. I didn't want her to worry about them.
>
> But she's very sweet. She's very conflicted. . . . She wants to be with her family. . . . I think she needed to hear some truth, and hard truth, and cold truth . . . .

Eve also contends that in camera statements made by the judge to Nan were improper and demonstrated the judge's bias.

"[T]he right to counsel in a termination case has constitutional as well as statutory bases." N.J. Div. of Youth & Fam. Servs. v. B.R., 192 N.J. 301, 306 (2007). In that case, the Court applied the test enumerated in Strickland v. Washington, 466 U.S. 668 (1984), and adopted by New Jersey in State v. Fritz, 105 N.J. 42 (1987), in determining the effectiveness of counsel in a parental termination case. Id. at 308–09. Under the two-prong Strickland test, the parent must show trial counsel's performance was deficient and that, but for the deficient performance, the result would have been different. B.R. 192 N.J. at 307-09. Regarding ineffective assistance of counsel claims, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and an assumption that the challenged action was part of counsel's "sound trial strategy." Strickland, 466 U.S. at 689.

We have considered each of Eve's ineffective assistance of counsel claims and are satisfied that Eve failed to demonstrate her counsel was ineffective.

Regarding the failure to object to the judge's interview of Nan, a judge has discretion to interview a child "privately in chambers or under such protective orders as the court may provide." R. 5:12-4(b). Although Eve claims her

attorney should have objected to the in camera interview, she failed to explain why counsel should have done so. Nothing in our review of the record supports a determination that counsel's failure to object to the judge's interview with Nan was professionally deficient or improper.

Nor did Eve demonstrate her counsel was ineffective in failing to order a transcript of the in camera interview. Rule 5:12-4(b) requires a verbatim record to be made of any in-chambers testimony or interview of a child. The judge complied with the rule because she recorded the interview with Nan and provided an on-the-record summary of the interview when she returned to the courtroom. Clearly, Eve's attorney knew there was a recording of the interview based on the judge's summary statement in open court. Because the judge provided a summary of the interview to all counsel and Nan's Law Guardian was present during the judge's interview, it is unlikely counsel required the transcript to advocate effectively on Eve's behalf.

We also reject Eve's claim that her attorney should have filed a recusal motion. Eve failed to explain why a recusal motion, even if such a motion was filed, would have been granted. After reviewing the record, we discern no basis for the judge to have granted a recusal motion. See State v. McCabe, 201 N.J. 34, 45 (2010) (motions for disqualification "are entrusted to the sound discretion

of the judge" presiding over the case) (citing Panitch v. Panitch, 339 N.J. Super. 63, 66, 71 (App. Div. 2001)).

Eve also failed to demonstrate any judicial bias during the trial that constituted a deprivation of her right to due process and a fair trial. Under Rule 1:12-1(g), a motion to disqualify a judge may be made where parties or counsel believe the judicial proceeding or judgment cannot be unbiased. See also Code of Judicial Conduct, Canon 3, Rule 3.6(C) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . ."). It "is unnecessary to prove actual prejudice on the part of the court . . . rather 'the mere appearance of bias may require disqualification' so long as the belief of unfairness is 'objectively reasonable.'" Chandok v. Chandok, 406 N.J. Super. 595, 603–04 (App. Div. 2009) (quoting Panitch, 339 N.J. Super. at 67).

Any party, "on motion made to the judge before trial or argument and stating the reasons therefor, may seek that judge's disqualification." R. 1:12-2. As we previously noted, disqualification motions are left to the discretion of the judge and we review a decision on such motions for abuse of discretion. McCabe, 201 N.J. at 45 (citing Panitch, 339 N.J. Super. at 66, 71).

If such a motion was not made to the trial judge, and the disqualification claim is made for the first time on appeal, we "consider [the] argument within the rubric of the plain error doctrine." State v. Medina, 349 N.J. Super. 108, 129 (App. Div. 2002). Under this doctrine, "[a]ny error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result . . . ." R. 2:10-2.

Here, we discern no error warranting the disqualification of the judge for alleged bias. In the transcript of in camera discussion with Nan, the judge attempted to make the child comfortable and used language that the nine-year-old child could understand. The judge's explanation of the parents' inactions regarding reunification may have been inartful but did not constitute a bias warranting recusal of the judge. In reading the interview transcript, the judge matter-of-factly explained to Nan the reasons why her parents were not present in court. Additionally, the judge's statements to Nan, when read in context, stated what would happen if parental rights were terminated, not that the parents' rights were going to be terminated.

While the judge highlighted the parents' repeated failures to appear in court, the parents' inconsistent visits with the children, and their non-compliance with the Division's offered services to regain custody, the judge did not

improperly shift the burden of proof to the parents. Nor did the judge's statements demonstrate a bias against the parents as argued by Eve. Rather, the judge clearly and properly placed the burden of proof on the Division to prove all four prongs of the best interests test. The judge's fact findings and legal conclusions reflected the Division's satisfaction of its burden in this case.

Based on our review of the record, the judge's statements did not evidence any bias against Eve or Dan. Nor were the judge's statements clearly capable of producing an unjust result. Eve's attorney zealously represented her interest despite Eve's lack of attendance at court proceedings. None of the alleged errors purportedly committed by Eve's counsel demonstrated counsel's performance was objectively deficient or outside the range of professionally competent assistance. Nor did Eve demonstrate the alleged deficiencies of her attorney resulted in prejudice such that the outcome of the guardianship trial would have been different.

In sum, we conclude the judge's decision adhered to our public policy that "[a] child cannot be held prisoner of the rights of others, even those of [the] parents. Children have their own rights, including the right to a permanent, safe and stable placement." C.S., 367 N.J. Super. at 111.

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

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION