

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3537-21

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

K.W.,

Defendant-Appellant,

and

J.W.,

Defendant.

IN THE MATTER OF THE
GUARDIANSHIP OF W.W.,
a minor.

Submitted May 10, 2023 – Decided June 1, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Bergen County,
Docket No. FG-02-0030-22.

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appellant (Daniel A. DiLella, Designated Counsel, on
the briefs).

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

PER CURIAM

In this appeal, defendant K.W. (Kelly), challenges a guardianship judgment terminating her parental rights to her son, W.W. (Wes), who was born in 2009.¹ Wes's biological father, defendant J.W. (Joel), does not contest the guardianship judgment terminating his parental rights and has not participated in this appeal. Wes's Law Guardian joins the New Jersey Division of Child

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).

Protection and Permanency (the Division) in arguing the guardianship order should be affirmed.

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 Kelly's parental rights to Wes was in his best interests. We therefore affirm.

I.

Kelly and Joel are the biological parents of Wes and his older sister, C.W. (Carly). From October 2008 to June 2016, the Division received seventeen referrals concerning the family, which related to neglect, physical abuse, behavioral and hygienic issues, Kelly's and Carly's mental health, and Joel's substance abuse. Kelly and Joel divorced in 2011, when Wes was three years old.

The Division's removal of Wes from Kelly's custody has its genesis in a November 2017 incident when Carly's school reported to the Division Carly had arrived at school with a black eye and, a few days later, with a burn on her thumb. The school also expressed concern Carly was not taking her prescribed medication.

After several unsuccessful attempts to contact Kelly, and further delays due to Kelly giving birth to her son, J.W. (Joey), a Division caseworker, Ericka Frank, visited the family home several weeks after Carly's school reported its concerns. Frank observed a "strong odor of rotten food," "clutter piled on cabinets," "minimal walking room," "flies covering the living room and kitchen ceilings as well as the walls," "flies on the refrigerator and cabinets," "old food . . . hardened into the stove," "dishes and food piled throughout," holes in the children's bedroom door, and "broken furniture."

The Division implemented a safety protection plan which required the children "not to reside in the home until it could be cleaned and deemed safe." The following day, the Division visited Kelly's home and observed Carly caring for Joey in a dangerous manner. As a result, the Division amended the safety protection plan to prohibit Kelly's unsupervised contact with the children. Her sister-in-law, N.O. (Nancy), agreed to supervise and assist in caring for Wes and Joey.

In December 2017 the court granted the Division custody of Carly along with care and supervision of Joey and Wes. Kelly was permitted unsupervised contact with her children, except if Carly and Joey were together, when supervised contact was required. Kelly was later evicted from her home due to

non-payment of rent and Kelly, Wes, and Joey moved in with her brother, B.O. (Bobby) and his wife, Nancy. In June 2018, after several confrontations between Kelly and Bobby, and despite the Division's intervention, Bobby asked Kelly and the children to leave his home. After Kelly failed to provide the Division with a housing plan, the court granted the Division custody of the children and placed Wes and Joey together in an unrelated resource home.

In May 2019, the court approved the Division's plan for termination of Kelly's parental rights to Carly and Wes, noting it was unsafe to return the children to Kelly's custody due to her mental health issues, lack of parenting capacity, and housing instability. In November 2019, Bobby passed away, and Wes's resource parent requested his removal resulting in Nancy agreeing to accept Wes back into her home.

Approximately five months later, Nancy agreed to become a placement for Wes and that Kinship Legal Guardianship (KLG) was the appropriate permanency plan. The court thereafter approved the Division's permanency plan for KLG with Nancy.

In January 2021, however, Nancy reported to the Division she was reconsidering KLG because she was concerned about Kelly's growing hostility towards her, among other issues. A month later, she informed the Division "she

did not want [Wes] to leave her home but . . . she was not committed to KLG," stating she was concerned Wes might become "like his mother and . . . sister."

Nancy restated to the Division she was not committed to KLG in March and May of that year. Further, in June and July, Nancy emphasized she would "never" commit to either adoption or KLG. Instead, she expressed a request for Wes to stay in her home without a permanency plan. The Division informed Nancy such a proposal was unacceptable as Wes needed a permanency plan. Nancy nevertheless continued to refuse to commit to KLG or adoption.

On August 2, 2021, the Division moved Wes to an unrelated resource home because Nancy was going on vacation and Wes was not able to attend due to issues with his passport. The vacation placement was Wes's fifth placement while in the Division's custody. Shortly after being placed, Wes reported to the Division he wanted his new resource parents, O.P. (Olivia) and J.P. (John), to adopt him.

Despite Wes's wishes, the Division informed Nancy its goal was still "to see how [it] could support her in a way that she would be agreeable to KLG of [Wes]." Nancy stated, however, "she was still not agreeable to committing to KLG or adoption."

The court later issued a relocation order permitting Wes to move temporarily to Arizona with Olivia and John. The court thereafter approved the Division's plan of termination of parental rights followed by adoption by Olivia and John, after considering Wes's request to be adopted by his resource parents, and subject to Wes residing in the resource home for six months.

On September 3, 2021, the Division changed Wes's permanency plan from KLG to adoption, noting Wes's "relatives were ruled out." The contact sheet from that decision specifically detailed the Division's prolonged efforts to implement KLG with Nancy, including Nancy's issues with respect to Wes's behavior, facilitating visitation with Kelly and his siblings, and adhering to the Division's travel guidelines. It also stated Nancy "was not committed at all" to permanent placement prior to Wes being placed with his resource parents.

The Division also noted, however, "[Nancy] is aware that [Wes] is now placed in this new home[;] [h]owever, she is asking for him t[o] be returned and will now commit to KLG." Despite Nancy's statement she would commit to KLG, the Division nevertheless decided to rule out Nancy as a potential placement for Wes. Nancy did not file an administrative appeal of the Division's rule out decision.

The trial on the Division's complaint was conducted over the course of four days. The Division presented the testimony of: Priscilla Melendez, a Division adoption caseworker, and Dr. Frank J. Dyer, an expert in psychology. Wes, who was nearly thirteen-years old at the time of trial, also testified in camera and unequivocally stated his desire to be adopted by Olivia and John. Kelly also testified but presented no other evidence. The Law Guardian for Wes did not present any witnesses at trial, but as noted, urged the court to terminate Kelly's parental rights.

At the trial's conclusion, the court issued a written decision, which included 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, the court concluded the Division sustained its burden of proving by clear and convincing evidence it was in Wes's best interests to terminate Kelly and Joel's parental rights.

The court reasoned "[b]oth [Joel] and [Kelly] have failed or been unwilling to remedy their housing instability and their respective mental health issues which have placed [Wes] in danger," noting "[o]f particular concern . . . [was] [Kelly]'s failure to even acknowledge her mental health issues." The court also noted, "[d]espite extensive assistance from the Division, [Kelly] has not

been able to secure proper and stable housing for her and her family," and did not complete mental health treatment programs recommended to her by the Division. Additionally, the court credited Dr. Dyer's opinion "that [Kelly] will not be in position to care for [Wes] in the foreseeable future" and Wes "would be placed at a high risk of harm if returned to [Kelly] due to her parental deficiencies."

The court also considered Wes's testimony and his need for permanency, finding "delay of permanent placement will only add to the harm to this child." It again relied on Dr. Dyer's un rebutted opinion "the programs that [Kelly] completed would not correct the issues that [Kelly] presently ha[d] and . . . it would take a long period of time for [Kelly] to correct those issues," and found Kelly was "unwilling to engage in services to help mitigate the potential harm she pose[d] to [Wes]" or "acknowledge the need for such services." Further, the court determined the testimony established Wes did not have a significant attachment to Kelly and instead viewed his resource parents "as his biological parents."

The court also found Melendez credibly testified as to the Division's extensive efforts to support reunification, specifically noting transportation to court hearings, provision of "psychological evaluations, psychiatric

evaluations[,] and referrals to numerous mental health treatment services," facilitating visitation, and "extensive assistance in [locating] housing." It then determined there were "no alternatives to [TPR] in this matter." The court noted the Division attempted to place Wes with several family members, and specifically observed the Division's attempts to implement KLG with Nancy failed because Nancy "did not commit to [Wes] for long term placement in any fashion" and "rejected both KLG and adoption."

With respect to reunification, the court concluded Kelly's "continuing inability . . . to achieve relief from her mental health issues, lack of stable and suitable housing and her inability to experience continued parenting with the child support[ed] Dr. Dyer's opinion that the prognosis for adequate parenting and long-term stability in the foreseeable future was unlikely." It also noted Wes "is now thriving in the care of his [r]esource [p]arents, who have expressed a commitment to provide the child a permanent home through adoption." The court therefore determined Wes "deserve[d] the benefits of permanency through adoption."

The court entered a June 29, 2022 conforming order terminating Joel's and Kelly's parental rights of Wes. As noted, only Kelly appeals and presents the following arguments for our consideration:

POINT I

K.W. IS ENTITLED TO A REVERSAL BECAUSE THE TRIAL COURT ERRED IN DECIDING THAT K.W. IS UNWILLING OR UNABLE TO ELIMINATE THE HARM FACING W.W. OR IS UNABLE OR UNWILLING TO PROVIDE A SAFE AND STABLE HOME OR THAT THE DELAY OF PERMANENT PLACEMENT WILL ADD TO THE HARM. (PRONGS ONE AND TWO)

POINT II

JUDGMENT TERMINATING K.W.'S PARENTAL RIGHTS SHOULD BE REVERSED AS THE TRIAL COURT FAILED TO FOLLOW THE LAW REGARDING CONCLUSIONS AS TO ALTERNATIVES TO TERMINATION OF PARENTAL RIGHTS AND THE REASONABLE EFFORTS AIMED AT PRESERVING THE FAMILY UNIT

POINT III

THE TRIAL COURT ERRED IN CONCLUDING THAT DCPD DEMONSTRATED BY CLEAR AND CONVINCING EVIDENCE THAT THE TERMINATION OF K.W.'S PARENTAL RIGHTS WOULD NOT DO MORE HARM THAN GOOD TO W.W.

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).

A. Prongs one and two

Kelly does not challenge the court's findings that she has been unable to remedy her housing instability, presents a current and future risk of harm to Wes, and failed to engage in services to mitigate the harm to Wes, or its conclusion a delay in permanency will be harmful to Wes. Instead, she argues "[b]oth prongs one and two would be cured by KLG with [Nancy]." She further

explains permitting KLG with Nancy addresses the court's concerns with respect to Wes's need for stable housing and permanency. In essence, the crux of Kelly's contentions under prongs one and two is that the court failed to consider KLG with Nancy as an alternative to TPR.

We first note Kelly's arguments are best addressed as challenges to the court's factual findings and legal conclusions under prong three. See N.J.S.A. 30:4C-15.1(a)(1)-(3); K.H.O., 161 N.J. at 352 (explaining the first prong relates to harm caused by the parental relationship and the second prong "focuses on the parent's ability to overcome the harm to the child"). In any event, we are satisfied the court's findings of past and future harm to Wes under prongs one and two were amply supported by "substantial credible evidence in the record" and therefore need not be disturbed on appeal. See K.T.D., 439 N.J. Super. at 368. The court carefully described and considered the circumstances that resulted in the Division's removal of Wes from Kelly's custody and its continued custody of him. Particularly, the court observed Kelly has failed to remedy her housing instability or sufficiently acknowledge and address her need for mental health services. The court's conclusions were also supported by Melendez's testimony, the testimony and reports of Dr. Dyer, and Kelly's own statements

she was not in a position to provide stable and permanent housing for Wes at the time of the guardianship proceedings.

B. Prong three

Turning to Kelly's challenges to the court's prong three findings, she contends the court misapplied the correct legal standard with respect to KLG and, as a result, failed to consider Nancy as an alternative to terminating her parental rights to Wes. On this point, she stresses Nancy was willing to commit to KLG and the court placed inordinate emphasis on Wes's requests to be adopted as he was "a troubled child who has lived a very difficult life," and now living "with a family that appears to have a better economic lifestyle" She further maintains Wes's relationships with his siblings should have militated in favor of KLG. We have closely considered all of these arguments and disagree they support reversal of the court's termination order.

In July 2021, the Legislature enacted amendments to various sections of Title 9, governing acts of child abuse and neglect, Title 30, governing TPR proceedings, and Title 3B, governing KLG proceedings. L. 2021, c. 154. The amendments, which strengthened the position of kinship caregivers, altered the KLG analysis. See id.; N.J. Div. of Child Prot. & Permanency v. D.C.A., 474 N.J. Super. 11, 27 (App. Div. 2022).

Prior to the amendments, 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. The 2021 amendment deleted that condition, making KLG an equally available permanency plan for children in Division custody, like *Wes.*, L. 2021, c. 154, § 4; N.J.S.A. 3B:12A-6(d)(3).

Here, we agree with Kelly that the court erroneously cited to N.J.S.A. 3B:12A-6(d)(3)(b) for the proposition "[t]he statutory prerequisite for [KLG] [is] the circumstances where adoption is 'neither feasible nor likely.'" We are satisfied, however, that the court's error does not warrant reversal, as we review orders and judgments, not opinions, Hayes v. Delamotte, 231 N.J. 373, 387 (2018) (it is "well settled . . . appeals are taken from orders and judgments" and not a court's oral or written decisions), and the court clearly concluded KLG with Nancy was not a viable alternative to TPR because the Division ruled her out due to her failure to commit as a permanent placement for *Wes.* Thus, despite the court's erroneous citation to the earlier iteration of N.J.S.A. 3B:12A-6(d)(3), it clearly based its decision on Nancy's failure to commit to a long-term placement option for *Wes.*, a finding amply supported by the record.

On this point, the record reveals the Division repeatedly attempted to implement a KLG arrangement with Nancy and *Wes.* and actually sought and

received court approval for that permanency option until Nancy changed her mind. Even after Nancy's decommitment, the Division still advocated for KLG between Wes and Nancy and requested Nancy reconsider her position and assured her the Division would remain a resource even after the KLG arrangement was finalized. Despite these efforts and promises, between January and September 2001, Nancy unequivocally refused to agree to a permanency plan for Wes noting her concerns regarding the anticipated conflict between Kelly and her family and Nancy's concerns regarding Wes's potential behavioral issues.

To support her contention that Nancy had committed to KLG, Kelly relies on the September 3, 2021 contact sheet in which Melendez and her supervisor noted Nancy was then willing to commit to KLG, but nevertheless decided to rule her out as a permanent placement. We note that the contact sheet was contradicted by Melendez's trial testimony, which the court deemed credible, in which she stated Nancy was not consistently committed to a permanency plan of KLG. That Nancy apparently changed her mind once again was well considered by the Division and properly rejected under the circumstances.

We are satisfied the court considered all the trial evidence, including Melendez's testimony, and correctly concluded the Division considered all

permanency options before ruling Nancy out. Stated differently, the Division clearly considered KLG as an alternative to terminating Kelly's parental rights. We deem the court's erroneous citation to the outdated language of N.J.S.A. 3B:12A-6(d)(3) harmless, as the record fully supports the court's finding that Nancy was not a viable candidate for KLG based on her repeated refusal to serve as a placement for Wes, despite her statement to the Division in September 2021, which followed nearly nine months of Nancy vacillating between agreeing to a KLG relationship and outright rejecting it. K.T.D., 439 N.J. Super. at 368.

C. Prong four

With respect to the court's prong four findings and related legal conclusions, Kelly argues the Division failed to demonstrate by clear and convincing evidence TPR would not do more harm than good in light of the availability of KLG with Nancy as an alternative placement. On this point, she maintains KLG would benefit Wes's relationship with Kelly, the court afforded disproportionate weight to the impact of severing Wes's relationship with his resource parents, and Dr. Dyer improperly considered the condition of Kelly's apartment when first observed by the Division in this matter in December 2017. Again, we disagree.

As detailed previously, the court appropriately focused its prong four analysis on Wes's need for permanency and, in light of Kelly's poor prognosis to safely parent him in the foreseeable future, concluded termination of Kelly's parental rights followed by adoption by the resource parents was the only available option to afford Wes the permanency he deserves. In reaching that conclusion, the court again relied on the un rebutted documentary evidence and testimony of Dr. Dyer that Kelly's prognosis for developing the capacity to parent Wes was poor, Wes did not have a significant attachment to Kelly, and terminating his parental relationship with Kelly was in Wes's best interests.

We also reject Kelly's contention the court improperly considered Wes's bond to his resource parents. Kelly again relies on the 2021 statutory amendments, which removed the provision from N.J.S.A. 30:4C-15.1(a)(2) that harm to the child "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) (amended 2021).

In 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. at 25-26. 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 '[TPR] 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) (emphasis 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.

The court properly addressed Wes's bond with his resource parents only within the totality of the circumstances, considering how that bond could satisfy his need for permanency. See ibid. Further, while we acknowledge the significance and value of "restoring and sustaining sibling relationships," N.J. Div. of Youth and Family Services v. S.S., 187 N.J. 556, 561 (2006), Dr. Dyer provided un rebutted, credible and competent testimony upon which the court relied, concluding it was in Wes's best interests to be adopted by his resource parents.

We are satisfied there is sufficient credible evidence in the record to support the trial court's determination the Division established all four prongs of N.J.S.A. 30:4C-15.1(a) with clear and convincing evidence. Wes is now nearly fourteen-years old and as he eloquently told the court, seeks a permanent home with Olivia and John. As Dr. Dyer stressed, the benefits attendant to Wes's adoption by Olivia and John "outweigh any conceivable harm." The court also did not err in failing to consider KLG with Nancy as an alternative to TPR within its prong four analysis because, as noted, Kelly did not establish Nancy was a viable candidate for KLG.

To the extent we have not specifically addressed any of defendant's arguments it is because we have concluded they are of insufficient merit to warrant extended 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