

To: New Jersey Law Revision Commission
From: Carol Disla-Roa, Legislative Fellow
Re: Termination of Parental Rights: Interpretation of “Best Interests of the Child” Standard
Date: February 5, 2024

MEMORANDUM

Project Summary

N.J.S. 3B:12A-1 to -7 concerns the appointment of a caregiver as a kinship legal guardian (“KLG”). N.J.S. 30:4C-15.1(a) sets forth the standards to be met for the termination of parental rights, often referred to as the “best interests (of the child)” test. Both of these statutes were amended in July of 2021 by the same bill.¹

The “KLG statute was amended to permit a caregiver to become a kinship legal guardian once a child has resided with the caregiver for six consecutive months, or nine of the last fifteen months” and to eliminate the “requirement that the court must find...[that] adoption is neither feasible nor likely before appointing a kinship legal guardian, thus making KLG an equally available permanent plan for children in Division custody.”²

The amendment to N.J.S. 30:4C-15.1(a) eliminated language from the “second prong” of the statutory test relating to harms that the parent is unable or unwilling to eliminate. The amendment removed the following language from the statute: “[s]uch harm may include evidence that separating the child from his resource family parents would cause serious and enduring emotional or psychological harm to the child [.]”³

In *N.J. Div. of Child Prot. & Permanency v. A.S.*, the Division of Child Protection and Permanency (“Division”) appealed from an order “denying termination of parental rights of” the child’s mother, A.S., and “dismissing the Division’s guardianship complaint.”⁴ After numerous instances of abuse and neglect at the hands of his parents, the child, R.T., was placed with his paternal grandmother.⁵ The trial court held that the Division failed to prove that KLG was not a viable alternative to the complete termination of the mother’s parental rights under the third prong of the best interests test, “or [that] a termination of parental rights would not do more harm than good under the fourth prong.”⁶

¹ N.J. STAT. ANN. § 3B:12A-6 (West 2024); N.J. STAT. ANN. § 30:4C-15.1(a) (West 2024); *See* A. 5598/S. 3814 (L. 2021, c. 154).

² *New Jersey Div. of Child Prot. & Permanency v. A.S.*, No. A-0851-21, 2023 WL 1978247, at *9 (N.J. Super. Ct. App. Div. Feb. 14, 2023).

³ *Id.* at 8-9.

⁴ *Id.* at 1.

⁵ *Id.* at 1-2.

⁶ *Id.* at 5-6.

The Appellate Division concluded that even after the recent amendments, “a ‘totality of the circumstances’ approach is supported by the Court’s longstanding interpretation of N.J.S.A. 30:4C-15.1.”⁷ Thus, the Court reversed and remanded the decision stating that “[because] the four best interests prongs are interrelated and overlap, a full re-assessment of the evidence as it relates to all four prongs is necessary.”⁸

Statute Considered

N.J.S. 30:4C-15.1(a) provides:

a. The division shall initiate a petition to terminate parental rights on the grounds of the “best interests of the child” pursuant to subsection (c) of section 15 of P.L.1951, c. 138 (C.30:4C-15) if the following standards are met:

(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 division 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.⁹

Background

The legislative findings underpinning the 2021 amendments to the statute are found at N.J.S. 30:4C-83, and they state, in relevant part:

* * *

b. Kinship care is the preferred resource for children who must be removed from their birth parents because use of kinship care maintains children’s connections with their families. There are many benefits to placing children with relatives or other

⁷ *Id.* at 10, citing *New Jersey Division of Child Protection and Permanency v. D.C.A.*, 474 N.J. Super. 11, 28-29 (App. Div. 2022), *aff’d*, 256 N.J. 4 (2023).

⁸ *Id.* at 12.

⁹ N.J. STAT. ANN. § 30:4C-15.1(a) (West 2024) (emphasis added, deleted language shown in italics and brackets).

kinship caregivers, such as increased stability and safety as well as the ability to maintain family connections and cultural traditions.

* * *

d. Parental rights must be protected and preserved wherever possible.

* * *

f. The existence of a healthy attachment between a child and the child's resource family parent does not in and of itself preclude the child from maintaining, forming or repairing relationships with the child's parent or caregiver of origin.

g. It is therefore necessary for the Legislature to amend current laws to strengthen support for kinship caregivers, and ensure focus on parents' fitness and the benefits of preserving the birth parent-child relationship, as opposed to considering the impact of severing the child's relationship with the resource family parents.¹⁰

According to the evidence adduced at trial, R.T. was born in Ohio to parents A.S. and G.T. in 2013.¹¹ He suffered a non-accidental skull fracture and other injuries at the hands of his parents, and was transferred back and forth between them.¹² A.S. had substance abuse issues and G.T. posed ongoing abuse concerns and had a history of domestic violence.¹³ In 2019, following instances of abuse that resulted in G.T.'s arrest, the Division placed R.T. with D.T., his paternal grandmother.¹⁴ In 2020 and 2021, the Division was unable to locate A.S. and G.T. voluntarily surrendered his parental rights.¹⁵

Under the care of his grandmother, R.T., received various therapies and support to address emotional trauma, behavioral issues, and ADHD.¹⁶ The Division's expert witness, qualified in "psychology attachment and bonding," opined that it would be in R.T.'s best interests to terminate the parental rights of A.S., and allow D.T. to adopt him.¹⁷ Witnesses testified that R.T. had fears that he would have to go back to his parents and endure further abuse, and the expert opined that KLG was not suitable, but that adoption, which requires termination of parental rights, was in R.T.'s best interests.¹⁸

¹⁰ *New Jersey Div. of Child Prot. & Permanency v. A.S.*, at 8, citing N.J. STAT. ANN. § 30:4C-83 (West 2024); L. 2021, c. 154 § 1 (emphasis added).

¹¹ *Id.* at 1.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 4.

In its examination of the best interests test, the trial court stated, “[t]he new statute pertaining to [KLG] status most certainly changes the analysis under prong four, and a part of prong three [of N.J.S.A. 30:4C-15.1(a)] pertaining to termination of parental rights.”¹⁹ The court reasoned that “[t]he new law requires....preserv[ation of] parental rights whenever possible[,]” and that “the Division did not prove that KLG was not a viable alternative to a termination of parental rights under the third prong, or that a termination of parental rights would not do more harm than good under the fourth prong.”²⁰

Analysis

The Appellate Division in *A.S.* examined the effect of the 2021 amendments as well as its earlier decision in *New Jersey Div. of Child Prot. & Permanency v. D.C.A.*²¹ The Court described the four “best interests of the child” prongs as overlapping with one another.²² Relying on the analysis in the *D.C.A.* case, the *A.S.* Court found that notwithstanding the amendment to prong two, under a “totality of the circumstances” approach, a court must still consider the child’s bond with their current family under prong four of the best interests test.²³

After the Appellate Division decision in *A.S.*, the New Jersey Supreme Court reviewed the *D.C.A.* case and affirmed the Appellate Division’s holding, emphasizing that “the 2021 Amendment precludes a court from considering the bond between a child and resource parents under the second prong of the best interests standard but does not bar such evidence when the court addresses that standard’s fourth prong.”²⁴

*N.J. Div. of Child Prot. & Permanency v. D.C.A.*²⁵

In *D.C.A.*, the Defendant appealed the judgment of a trial court terminating her parental rights to four of her children.²⁶ The Defendant argued that “the trial court improperly considered evidence of the children’s relationship with their foster parents in violation of prong two of the best interest test.”²⁷

The Supreme Court examined the history of the best interests test starting with its original version enacted in 1991.²⁸ The Court noted that though the 1991 version of the test “did not expressly direct courts to evaluate the child’s relationship with the resource family as part of the

¹⁹ *Id.*

²⁰ *Id.* at 6.

²¹ *Id.* at 8-10.

²² *Id.* citing *In re Guardianship of K.H.O.*, 161 N.J. 337, 348 (1999).

²³ *Id.* at 9-10.

²⁴ *New Jersey Div. of Child Prot. & Permanency v. D.C.A.*, 256 N.J. 4, 28 (2023) (citing to *D.C.A.*, 474 N.J. Super. at 29) (emphasis added).

²⁵ *D.C.A.*, 474 N.J. Super. 11 at 28-29.

²⁶ *Id.* at 15.

²⁷ *Id.* at 25.

²⁸ *D.C.A.*, 256 N.J. at 21.

best interests analysis,” the decision in *In re Guardianship of J.C.* confirmed that relationships with resource families were indeed a factor.²⁹ The 1995 version of the statute added language to “address[] harm due to a child's separation from the resource family to the second prong of the best interests test.”³⁰ Following this amendment, the Court “confirmed the relevance of that [resource family] relationship to the court's assessment of the evidence under the fourth prong, notwithstanding the absence of a specific reference to the child’s relationship with the resource family.”³¹ “[B]y the time the Legislature amended N.J.S.A. 30:4C-15.1(a) in 2021, [New Jersey] courts had long considered a child's relationship with a resource family to be relevant not only when they assessed the evidence under the second prong of the best interests test, but also when they applied the fourth prong.”³²

The Appellate Division in *D.C.A.* noted that the July 2021 amendments mostly strengthened the position of kinship caregivers, stating that “[t]he law was clearly intended to reflect a preference for viable kinship guardians and fit parents over unrelated foster caretakers.”³³ The court cited a transcript from an Assembly Health Committee meeting on the day the bill was released quoting legislative aide Francesco Ferrantelli explaining, with regard to the removal of language from the second prong of the “best interests of the child” test, that:

the intention of removing that language is because leading practice tends to focus on the harm from separation from foster families, sometimes at the exclusion of other factors. And we just want to make it clear in the statute 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.... We just want to make it clear in terms of the guidance that we give judges going forward, and litigants, that they are considering all harm and not focusing on one particular type, so they make decisions tailored to each individual child.³⁴

N.J. Div. of Child Prot. & Permanency v. C.S.R.

In the recent case of *N.J. Div. of Child Prot. & Permanency v. C.S.R.*, the Appellate Division reviewed Defendant C.S.R.’s appeal from an order terminating her parental rights to the child S.C.R.³⁵ Relying on the 2021 amendments, C.S.R. contended that the trial court had not fully considered KLG as a viable alternative under prong three and instead allowed termination of her parental right mainly because the “resource parents desired adoption.”³⁶ C.S.R. further argued that

²⁹ *Id.* citing *In re Guardianship of J.C.*, 129 N.J. 1, 19 (1992); L. 1991, c. 275, § 7.

³⁰ *Id.* at 22; L. 1995, c. 416.

³¹ *Id.* citing *K.H.O.*, 161 N.J. at 353-55.

³² *Id.* at 23.

³³ *D.C.A.*, 474 N.J. Super. 11 at 28; L. 2021, c. 154 § 1.

³⁴ *Id.* citing *Assembly Health Committee Meeting*, (Monday, March 8, 2021) (<https://njleg.state.nj.us/archived-media/2020/AHE-meeting-list>) at 44:35.

³⁵ *New Jersey Div. of Child Prot. & Permanency v. C.S.R.*, No. A-2300-22, 2024 WL 277675, at *1 (N.J. Super. Ct. App. Div. Jan. 25, 2024).

³⁶ *Id.* at 6.

under prong four, the trial judge failed to consider S.C.R.'s relationships with his biological family members, which could be preserved under KLG.³⁷

The Court noted that prong three requires a court to consider alternatives to the termination of parental rights, and that such “alternatives may include placement of the child with a relative caretaker.... or the establishment of a KLG.”³⁸ The Court stated, however, that:

Although kinship care is the preferred resource for children removed from their biological parents, the amendments do not override the clear statutory text in cases involving the [termination of parental rights (“TPR”)]. Prongs three and four of N.J.S.A. 30:4C-15.1(a) were unaltered by the 2021 amendments. Notwithstanding the Legislature's declaration that “[p]arental rights must be protected and preserved whenever possible [,]”.... this language cannot be used to substantively alter the otherwise clear directive set forth in prong three that the Division “prove by clear and convincing evidence that ‘alternatives to [TPR]’ have been appropriately considered.”³⁹

Pending Bills

There are no pending bills addressing the issue considered by the Court in *A.S.* as described above.

Conclusion

Staff seeks authorization to engage in additional research and outreach to determine whether N.J.S. 30:4C-15.1(a) would benefit from modification to reflect the determinations of the courts in *N.J. Div. of Child Prot. & Permanency v. A.S.*, and *N.J. Div. of Child Prot. & Permanency v. D.C.A.*

³⁷ *Id.* at 5.

³⁸ *Id.* at 7 citing *N.J. Div. of Youth & Fam. Servs. v. L.L.*, 201 N.J. 210, 222 (2010).

³⁹ *Id.* at 8.