SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3063-20

S.B. AND V.B.,

Plaintiffs-Respondents,

v.

D.B.,

Defendant-Appellant.

Argued May 3, 2022 – Decided May 25, 2022

Before Judges Hoffman, Whipple and Geiger.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FD-03-0159-16.

Kathleen Pasquarello Stockton argued the cause for appellant (Stockton Family Law, LLC, attorneys; Kathleen Pasquarello Stockton and Jessica A. Beardsley, on the briefs).

Michael S. Rothmel argued the cause for respondents.

PER CURIAM

Defendant D.B.[1] appeals from a May 15, 2021 order[2] denying her motion for custody of her minor child J.M., who is currently in the custody of J.M.'s maternal grandparents, plaintiffs S.B. and V.B., and granting D.B. parenting time with J.M. for alternating Fridays and Sundays. We reverse and remand.

D.B. was diagnosed with fetal drug exposure and depression during her pregnancy. In April 2014, she gave birth to J.M. K.M. is J.M.'s father. Plaintiffs S.B. and V.B. are D.B.'s parents and J.M.'s grandparents. D.B. continued to suffer from substance use and mental health issues. In 2015, she was admitted to an emergency room for the same. Ultimately her difficulties resulted in J.M. coming under the care of her grandparents, S.B. and V.B.

The Family Part entered an order on August 26, 2015 under the FD docket, which provided:

> 1) [S.B. and V.B.] shall be granted primary residential custody of their granddaughter [J.M.]. [K.M.] shall retain secondary custody without change. [D.B.] may apply for primary residential custody upon completion of a drug rehabilitation program, the [Division of Child Protection and Permanency (Division)] safety program and approval from [the Division]. Otherwise,

[1] We use initials for the parties to protect their privacy and preserve the confidentiality of these proceedings. R. 1:38-3(d)(13).

[2] Defendant's Notice of Appeal incorrectly identifies the date of the order under appeal as May 17, 2021.

> plaintiffs [S.B. and V.B.] shall retain custody as stated in this order.
>
> 2) [The court] shall freeze child support payments from [K.M.] to [D.B.] pending application by [K.M.] to amend payee.

Subsequently, D.B. moved to Florida and occasionally visited with J.M. in Florida and New Jersey. On January 19, 2016, the court entered a consent order granting primary residential custody of J.M. to S.B. and V.B., granting S.B. and V.B. the authority to make all medical decisions for J.M., and maintaining all provisions in the August 26, 2015[3] order.

In December 2020, D.B., her husband C.K., and their younger daughter moved in with S.B. and V.B. in New Jersey and a few weeks later, moved into their own apartment.

On January 30, 2021, D.B. filed a pro se application for modification to establish custody and visitation and parenting time with J.M. D.B. submitted a letter with her application, explaining that she recently moved back to New Jersey from Florida with her husband and their daughter, was "willing and ready" to care for J.M., would allow J.M. to visit with her grandparents, had completed a drug rehabilitation program, and had been sober for four years.

[3] The January 19, 2016 order listed 2016 as the year for the August 26 order. We presume this is a typographical error.

On March 2, 2021, represented by counsel, D.B. filed a supplemental certification with various exhibits, including photos with J.M. to demonstrate she had spent time with J.M. and a letter from her Alcoholics Anonymous sponsor regarding her progress towards sobriety. On March 7, 2021, S.B. and V.B. filed an extensive certification, disputing D.B.'s version of the facts, such as her claims that she is sober and has had regular contact with J.M.

K.M. filed a certification supporting D.B.'s application for custody and challenging S.B. and V.B.'s allegations regarding D.B. C.K. also filed a certification challenging S.B. and V.B.'s allegations and alleging S.B. and V.B. drank excessively. The record also includes various certifications from a neighbor, C.K.'s mother, and V.B.'s sister.

The court conducted a hearing via Zoom on D.B.'s application for custody. K.M. appeared to support D.B.'s application. D.B. asked the court to consider J.M.'s best interest and requested a plenary hearing to demonstrate that it is in J.M.'s best interest to be in her custody; she also asked for parenting time pending the custody trial. K.M. has parenting time on Wednesdays and alternating Saturdays.

S.B. and V.B. argued that the present matter came to the court because the parties could not agree on a parenting time schedule and that D.B.'s

relocation from Florida to New Jersey is only a change of circumstances with respect to visitation, but not custody. They asserted they are J.M.'s psychological parents because they cared for J.M. her whole life.

The court noted that pursuant to the earlier court order and consent order, a change of custody requires Division approval, but the court could act with respect to the parenting time issues. Thus, with the parties' consent, the court ordered that, until parenting time is resolved via mediation, D.B. would have parenting time on alternating Fridays and Sundays, and K.M. would continue Wednesday dinners and alternating Saturdays. If the matter was not resolved at mediation, the parties would return to court. On March 17, 2021, the court entered an order memorializing its findings:

> The [c]ourt conducted a [Zoom] hearing with all parties and counsel. . . . This matter will be referred to mediation for parenting time issues. In the interim, [d]efendant [m]other is to have parenting time on alternating Fridays 4:00 [p.m. to] 7:30 [p.m.] and Sundays 12:00 [p.m. to] 4:30 [p.m.], the [first] and [third] of every month. Defendant [m]other is responsible for all transportation. Per the August 26, 2015 order, [d]efendant must have approval from [Division] for any change in custody. That order is enforced and [d]efendant [m]other is instructed to contact [Division] prior to next hearing.

Mediation was unsuccessful.

By letter dated March 23, 2021, defendant's counsel sought the Division's position regarding transfer of custody to D.B. and enclosed copies of the August 26, 2015 order and the March 17, 2021 order. She did not receive an answer. By letter dated April 8, 2021, defendant's counsel served a subpoena duces tecum on the Division for its file and for its appearance at a custody and parenting time hearing on April 22, 2021.

On April 22, the court conducted a second hearing via Zoom. The court first noted it previously advised D.B. she was required to obtain Division approval for any change in custody. Defendant's counsel explained that D.B. contacted the Division who told her the "matter was closed and they don't have anything else to submit or do." Defendant's counsel had sent the Division a letter and a subpoena for a case worker to appear at the hearing. Defendant's counsel reported that she was advised by the Deputy Attorney General to file a motion and that a Division paralegal told her "everything's been submitted" to the judge.

In response to defendant's counsel's recitation of her efforts the judge replied, "supplying records is not what the order said. It said, '[d]efendant

must have approval from [the Division] for any change in custody. Defendant must contact [the Division] prior to next hearing.'"[4]

Defendant argued that there was a change of circumstances warranting a plenary hearing and asked for additional parenting time. Specifically, D.B. sought full weekends from Friday through Sunday on the first and third weekend of the month. Defendant's counsel also requested a case management conference, a custody expert, and discovery. Finally, because the parenting issues were not resolved via mediation, the court did not change the parenting time for D.B. and K.M.

The court entered another order on May 15, 2021.

> The [c]ourt conducted a [Zoom] hearing with both parties and counsel. . . . Maternal [g]randmother was given custody of [J.M.] by Order entered [August 26, 2015], when minor was sixteen months old. The [August 26, 2015] Order states [d]efendant must have approval from [the Division] for any change of custody. Defendant [m]other has been living in [Florida] but has now recently moved to [New Jersey]. The [c]ourt finds that there has not been a substantial and permanent change of circumstances and as such no change of custody is warranted at this time. As to parenting time, [g]randparents have not withheld parenting time, but seek to go slow. Pursuant to previous consent of the parties, [d]efendant [f]ather has been having parenting time on alternating

[4] The court is purportedly both quoting and paraphrasing its March 17, 2021 order, which was entered "[p]er the August 26, 2015 order . . . ."

> Saturdays from 12 [p.m. to] 6 [p.m.] on [second] and [fourth] weekends and Wednesday dinners from 4 [p.m. to] 6:45 [p.m.]. Defendant [f]ather's application for increased parenting time is denied as there has been no change of circumstances warranting such. Grandparents agreed on [March 15, 2021] for parenting time for [d]efendant [m]other to be alternating Fridays from 4 [p.m. to] 7:30 [p.m.] and Sundays from 12 [p.m. to] 4:30 [p.m.] on [the first] and [third] weekend of every month. Grandparents may change [d]efendant [m]other's alternating Fridays [and] Sundays from the [first and third] weekends to the [second and fourth] weekends at their discretion. Any party may refile upon establishing a change of circumstances. At this time, the [c]ourt orders [d]efendant [m]other shall undergo a ten . . . panel hair follicle test on or before the close of business on Friday May 28 2021. . . . [The Division] shall be provided with a copy of this Order.

Defendant appealed and challenged the order.

Our review of a trial judge's factual findings is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, [we] should accord deference to family court fact[-]finding." Id. at 413. Such deference is particularly proper "when the evidence is largely testimonial and involves

questions of credibility." Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). We will not defer to factual findings that were "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]" Rova Farms, 65 N.J. at 484 (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). We do not defer to the trial court's legal conclusions; we review questions of law de novo. See Smith v. Millville Rescue Squad, 225 N.J. 373, 387 (2016) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Here, defendant asks us to find that the court abused its discretion in ruling there was no substantial change in circumstances warranting a change in custody, in failing to hold a plenary hearing to address the material facts in dispute, and in failing to address the custody factors. We address these after first finding we must reverse because the court relied on a precondition that is facially invalid.

While neither party raised the facial invalidity of the August 26, 2015 order before the trial judge in the May 2021 orders, we address it because requiring approval from the Division in a case in which the Division is not a party is an issue that substantially implicates the public interest. Zaman v.

Felton, 219 N.J. 199, 226-27 (2014) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Moreover, to act otherwise would mean the court would enforce a legally invalid condition, which we cannot do and consequently instruct the trial court that it cannot do.

The August 2015 order is facially invalid because it requires the Division to provide services and approval for a change in custody in a matter where it is not a party, does not have an open investigation, expresses no interest in participating, and has not exercised its jurisdiction. Based on our review of the record, the Division did not file a complaint, R. 5:4-2; or enter an appearance, R. 5:3-4; or engage in its proceedings under Rule 5:12. The record is not even clear that the Division knew of the August 2015 order's existence even though it had a file regarding D.B. Nothing in the record suggests it agreed to be vested with the discretion assigned by the consent order.

The invalidity is not resolved by the subsequent January 19, 2016 consent order, wherein the parties agreed to enforce the provisions in the previous order. Consent orders are only binding on the parties, which are only S.B., V.B., and D.B.

> The court may enter a consent judgment or order without the signatures of all counsel of record and

> parties pro se who have filed a responsive pleading or who have otherwise entered an appearance in the action, provided the form of judgment or order contains the recital that all parties have in fact consented to the entry of the judgment or order in the form submitted. If any party to be bound by the consent judgment has not filed a responsive pleading or entered an appearance in the action, the consent judgment must bear the signature of each such party or such party's attorney, indicating consent to the form and entry of the judgment.
>
> [R. 4:42-1(d).]

The Division never filed, appeared, or signed the January 2016 consent order enforcing the August 2015 order. Thus, it was not a party who consented to the January 2016 order. The trial court abused its discretion by requiring the defendant to comply with a precondition that defendant had no power to enforce.

We next address whether defendant proffered a prima facie case of changed circumstances entitling her to a hearing. A party seeking to modify custody must demonstrate changed circumstances that affect the welfare of the child. Sheehan v. Sheehan, 51 N.J. Super. 276, 287 (App. Div. 1958). "A plenary hearing is required when the submissions show . . . a genuine and substantial factual dispute regarding the [child's welfare], and the trial judge

determines that a plenary hearing is necessary to resolve [that] factual dispute." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007).

D.B. presented evidence of her personal circumstances and growth that at least raised a "genuine and substantial factual dispute" regarding the child's welfare in having a change in custody. Moreover, plaintiffs raised factual assertions that doubt defendant's recovery. The court made no findings to resolve the factual issues. Thus, defendant is entitled to a plenary hearing where the court will consider whether the changed circumstances means a change in custody is in the child's best interest. The judge may not rely on the precondition or refuse to hear the case pending the Division's involvement.

We also note the court granted D.B. limited parenting time without making findings of fact or conclusions of law. Thus, we include this issue in the remand for further proceedings.

Reversed and remanded. We do not retain jurisdiction.