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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3235-20

YUBYAYNY NICUDEMUS,

Plaintiff-Respondent,

v.

DENISE NICUDEMUS,

Defendant-Appellant.

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Submitted March 30, 2022 – Decided April 19, 2022

Before Judges Hoffman, Whipple, and Geiger.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FM-16-1024-18.

Gallo & Gallo, attorneys for appellant (Kenneth T. Gallo, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant Denise Nicudemus appeals the July 2, 2021 Family Part order enforcing the parties' Property Settlement Agreement (PSA) regarding parenting time for plaintiff Yubyayny Nicudemus.

The parties married on March 4, 2002, and had a daughter born in July 2009. They divorced on September 25, 2019, entering into a PSA, which provided for joint legal custody with defendant as the parent of primary residence. Plaintiff is active in the United States military and is currently stationed in Belgium.

On May 27, 2021, plaintiff moved to enforce portions of the PSA. Defendant was served with the motion papers via the United States Postal Service (USPS) on June 1, 2021, at 4:55 p.m., but asserts she did not receive the motion until June 6 or 7. She hired counsel on Saturday, June 19, then filed an untimely opposition. Thus, the court treated the motion as unopposed and on July 2, the court granted plaintiff's motion without argument and without considering defendant's opposition. The order stated that it "enforce[d] the parties' [PSA], specifically Article II: The Child, paragraph 2.9. Regular Parenting Time Schedule, allowing the [p]laintiff to have summer parenting time in Belgium beginning immediately." The PSA as enforced entitled plaintiff to forty-two days of makeup parenting time from 2020, which would be arranged

by agreement of the parties; to exercise holiday parenting time at his residence; to makeup holiday parenting time for 2020 and 2021; and to FaceTime with the child for at least three times per week. The court also ordered the parties to comply with their Marital Settlement Agreement, and specifically with the provisions requiring defendant to co-parent, communicate about major decisions, and provide documents. The court ordered defendant to provide the child's passport or renew it, to stop parent alienation, and to contribute to plaintiff's counsel fees.

On July 6, 2021, defendant's counsel emailed the court asking for relaxation of court rules to consider the opposition. The same day, the court's clerk indicated that the court was not inclined to consider opposition because the court already entered an order when the motion was unopposed. The next day, on July 7, defense counsel emailed the court stating that the opposition was publicly filed before the return date and should have been considered. Counsel requested to file a motion on short notice. The clerk responded that day stating that the opposition was not considered because it was untimely under Rule 5:5-4(c), and that motions on short notice are routinely denied; the clerk explained that the judge was on vacation so the clerk would let counsel know about the motion. The next day, on July 8, defense counsel emailed the court stating that

defendant had not been served timely because she was served on July 6 with the motion and requested to file a motion on short notice because of due process and the child's well-being.

On July 12, defense counsel submitted a letter to the court affirming that defendant lived in a multifamily house and did not receive the motion in a timely manner. Counsel again requested the right to file a motion on short notice. Counsel asserted that passport offices were closed and not taking appointments; that the child was recently sick; that plaintiff would not communicate exactly where the child would be spending the parenting time; and that the lack of being heard was unfair. The court denied the motion on short notice, but the parties were free to file a new motion or an order to show cause.

On July 14, defense counsel moved for a stay of the July 2 order with a short notice return, and the court allowed a motion that day but without a short return. On July 14, defense counsel also filed this appeal. The motion to stay was returnable on August 27, 2021.

On July 21, defense counsel filed an order to show cause (OTSC) for emergent relief to stay the July 2 order. Defendant asserted that she received the motion on June 6 or 7 but likely June 7 because she gets mail on Mondays. Defendant asserted plaintiff had not had overnights with his daughter since 2019

because he is stationed in Belgium with the military; that the Centers for Disease Control and Prevention (CDC) advised against traveling to Belgium, especially without a vaccination, and that the child was not vaccinated; that the child has expressed fear, anxiety, and a lack of desire of wanting to go to a foreign place with her father; and that the child does not want to speak to her father.

Defense counsel included a letter brief in support of the OTSC asserting the same facts and arguing that they satisfied the standard for preliminary injunctive relief adopted in Crowe v. DeGoia, 90 N.J. 126, 132-34 (1986). Counsel asserted due process violations for untimely service and for the inability to oppose before the return date, and that it was more likely than not the court would overturn the order after hearing the defendant. Finally, counsel argued the hardship weighed in favor of a stay because plaintiff can visit in New Jersey and can FaceTime without interruption, but the child would experience harm and risk of COVID-19 by leaving the country while the order "gets decided on the merits down the road."

The court denied defendant's OTSC, because defendant "failed in its burden to allege sufficient facts that would rise to the threshold of substantial, immediate, and irreparable harm . . . to the child on the grounds stated in Crowe . . . ." In its attached statement of reasons, the court elaborated that plaintiff's

application was only to enforce the parenting schedule agreed to in the PSA and that defendant's motion was only to stay the order, i.e., the PSA would still be in effect even with a stay of the July 2 order. Defendant did not ask to suspend or modify the PSA. Further, defendant did not include the referenced CDC guidelines about Belgium or other evidence of increased risk of COVID-19 in Belgium. The court did not find evidence that plaintiff had willfully or intentionally refused to see the child before; rather, COVID-19 and the breakdown of communication between the parties contributed to the missed time.

Pursuant to Rule 2:5-1(b), on July 30, the court issued a thorough written opinion with findings of facts and conclusions of law after defendant filed this appeal. The court further elaborated on the procedural history. Pursuant to Rule 5:5-4(c), plaintiff's motion was returnable on June 25 with opposition or cross-motion due on June 10, but defendant hired counsel on June 19 and filed an opposition on June 22. The court entered an order on July 2 and emailed it to plaintiff's counsel. On July 6, the court received a courtesy copy of defendant's opposition, asking to be considered, which the court denied because it already entered the unopposed motion, but that defendant could file a new motion or OTSC. The court rejected defendant's argument that opposition should be heard

before a motion is returnable but after the fifteen days to motion or oppose under Rule 5:5-4(c). Defendant requested a notice of motion on short notice to consider the opposition, which the court denied as not provided for in the court rules.

The court continued with the following pertinent findings of facts as to the PSA: the parties shall consult and discuss decisions for important matters and have access to records regarding the same; the parties shall not act to alienate the child or color the child's attitude to the other party; the parties shall have reasonable telephone contact with the child; the parties agreed to a unique and detailed parenting schedule, which entitled plaintiff to thirty-five days of parenting time in odd summers and forty-two days of parenting time in even summers and to have parenting time outside of New Jersey and which included an agreement to remain flexible overall, with holidays, and with plaintiff's duty locations; and the parties agreed that the defaulting party shall pay necessary and reasonable court costs to enforce said provisions.

The court also elaborated on the following conclusions of law. Defendant's opposition was filed after the fifteen days permitted in Rule 5:5-4(c), thus it was untimely and the court need not consider it. Defendant's due process rights were not violated because plaintiff's counsel certified he mailed a

copy on May 27; defendant did not dispute the mailing address; Rule 1:5-4(b) considers service complete on the day of mailing; and the USPS tracking number showed delivery on June 1, 2021, at 4:55 p.m.

Further, the court reiterated that: plaintiff applied only to enforce provisions; neither party filed to substantially modify or suspend the PSA; and the July 2 order only enforced specific provisions. The court found no reason to not enforce the provisions: the parties agreed to co-parent and communicate; one-and-a-half hours of FaceTime per week was "reasonable"; the PSA allowed for parenting time outside of New Jersey; there was no proof of increased COVID-19 risk in Belgium; plaintiff would arrange and pay for half the transportation for this time outside New Jersey; the agreed-to parenting time had not happened in the summer and holidays in 2020 due to COVID-19 with no proof the lack of time occurred because plaintiff willfully or intentionally refused to exercise his time; and plaintiff was entitled to makeup parenting time.

The court noted that "[t]he specificity of their parenting time arrangement suggests that the parties acknowledged and understood the nature of [p]laintiff's career and the need for flexibility, which puts them, and not the [c]ourt, in the best position to establish a mutually agreed upon plan to makeup [p]laintiff's parenting time." The court concluded the schedule was silent as to where

holiday parenting time should occur, so the court, sua sponte, modified the PSA to reflect time at plaintiff's residence rather than New Jersey specifically. The court also ordered defendant to pay $1,475.90 towards plaintiff's counsel fees.

Defendant's motion to stay the order was still returnable on August 27. Plaintiff filed a cross-motion at some point thereafter. The court substantively denied the motion to stay the July 2 order for the same reason it denied the OTSC because defendant provided the same reasons, and the court procedurally denied the motion to stay because defendant already filed an appeal of the July 2 order, and the appeal was still pending. The court further denied plaintiff's cross-motion without prejudice pending the outcome of the appeal and denied all other requested relief.

On appeal, defendant argues that the court erred by not considering her opposition, not speaking to the child, not considering the strained parental relationship, and not considering the dangers of traveling to Belgium. She asserts a plain error standard of review under Rule 2:10-2 for the court's failure to consider the opposition and the best interests of the child.

"The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of

Am., 65 N.J. 474, 484 (1974)). Consequently, we "should not disturb the factual findings and legal conclusions of the trial judge unless . . . [we are] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice" or when we determine the court has palpably abused its discretion. Id. at 412 (internal quotations omitted); see also Parish v. Parish, 412 N.J. Super. 39, 47 (App. Div. 2010).

Defendant's arguments miss the mark. First, because defendant did not timely oppose the July 2 order, defendant is effectively raising an issue not presented to the trial court. Generally, we cannot consider issues not presented to the trial judge. See Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div. 2002).

Second, defendant cannot show a due process violation for lack of notice or opportunity to be heard. "Fundamental to due process is providing a defendant with notice of a lawsuit and an opportunity to be heard." Franzblau Dratch, PC v. Martin, 452 N.J. Super. 486, 492 (App. Div. 2017). The court was exceedingly clear throughout its correspondence and in its amplification of reasons that defendant failed to oppose plaintiff's motion within fifteen days pursuant to Rule 5:5-4(c) and that the court relied on the service of process to

determine defendant's time of notice. Moreover, defendant was ultimately "heard" on the issues through the court's subsequent consideration of her motion to stay and OTSC.

Regardless of defendant's arguments, the court's written opinion from July 30 raised concern about the child's best interests under the PSA, so we exercise our parens patriae jurisdiction. See Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 562 (App. Div. 2007) (discussing parens patraie powers over a minor's estate). The court engaged in the following sua sponte analysis:

> Paragraph 2.10 established the parties' holiday parenting time schedule; however, it is silent as to where said parenting time shall occur. Accordingly, the [c]ourt modified this paragraph to allow [p]laintiff the opportunity to spend his holiday parenting time with his child at his residence, rather than being forced to spend holidays in New Jersey. The phrase 'at his residence' also accounts for any of [p]laintiff's future duty stations/residences and allows for flexibility that the parties' agreed to attempt to maintain with respect to holidays and birthdays with their child.
>
> [(emphasis added).]

Neither party asked for the trial court to modify the PSA nor appealed the court's modification without a best interests analysis. "Settlement agreements in matrimonial matters, being 'essentially consensual and voluntary in character, . . . [are] entitled to considerable weight with respect to their validity and

enforceability' in equity, provided they are fair and just." Dolce v. Dolce, 383 N.J. Super. 11, 20 (App. Div. 2006) (alterations in original) (quoting Petersen v. Petersen, 85 N.J. 638, 642 (1981)). As such, a parent seeking to modify parenting time must show changed circumstances and that the modification is in the best interests of the child. Finamore v. Aronson, 382 N.J. Super. 514, 522-23 (App. Div. 2006).

Although the court asserted this was an order enforcing the PSA, the sua sponte modification takes it beyond enforcement under the circumstances presented. Even though raised sua sponte, the court made no finding that this was in the best interest of the child. While the record may not ultimately support a modification, we exercise our parens patriae jurisdiction to remand for an evidentiary hearing, which should include an interview with the child and a discussion of the child's best interests in light of current circumstances.

Reversed and remanded. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION