

RECORD IMPOUNDED

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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0780-15T4
A-0067-16T4

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

J.S.,

Defendant,

and

R.W.,

Defendant-Appellant.

IN THE MATTER OF M.W.,

Minor.

Argued September 25, 2017 – Decided October 16, 2017

Before Judges Sabatino, Whipple, and Rose.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Cape May
County, Docket Nos. FN-05-0035-15 and FG-05-
0003-16.

Clara S. Licata, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Licata, on the briefs).

Jennifer Russo-Belles, Deputy Attorney General argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Russo-Belles, on the brief).

Melissa R. Vance, Assistant Deputy Public Defender argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Ms. Vance, of counsel and on the brief).

PER CURIAM

In these consolidated appeals, defendant R.W. (Robert¹) appeals from a July 15, 2015 permanency order terminating him from an FN litigation.² Robert also appeals from a June 28, 2016 order denying his motion to vacate a separate order terminating

¹ All names used herein are pseudonyms for ease of reference, and to protect the confidentiality of the parties and their child.

² There are eleven separate and distinct docket types in the Family Part, each pertaining to a different aspect of family life that requires action. The FN docket contains cases where the Division of Child Protection and Permanency (the Division) has filed a complaint to assume care, custody, or supervision of a child to protect him or her from harm. The FG docket involves cases where the Division has filed a complaint to terminate parental rights and assume guardianship. The FD, or non-dissolution docket, involves cases concerning non-divorce family relationships where custody, visitation, parenting, child support, and paternity are addressed.

litigation under the FG docket, and to intervene in the same FG litigation. For the reasons that follow, we affirm.

Our review of the record reveals the following relevant history. Robert and J.S. (Jenny) were involved in a long-term and sometimes tumultuous relationship, which involved periods of estrangement, an engagement, drug and alcohol abuse, and incidents of domestic violence. M.W. (Maggie) was born in March 2013, and although both Jenny and Robert expressed doubts about whether Robert was Maggie's biological father, he was listed on her birth certificate. Thereafter, he accepted the role of father and the three functioned as a family unit until she was removed from their care and placed into Division custody.

On July 25, 2014, the Division received a referral regarding a July 16, 2014 incident where Maggie had been present while Jenny and Robert were partying with neighbors, and drugs and alcohol were being used. At some point during the evening, Jenny and Robert became involved in a physical and verbal altercation. From approximately 10:45 p.m. to 1:35 a.m., Robert locked himself in their apartment with Maggie, not allowing police to enter. He was eventually persuaded to leave the apartment and release Maggie, and was arrested and charged with child endangerment, kidnapping, simple assault, terroristic threats, and assault on a police officer.

On July 24, 2014, Jenny secured a restraining order against Robert, which prohibited contact with her and Maggie and ordered inpatient counseling. On August 21, 2014, the restraining order was amended to allow Robert supervised visits with Maggie.

On September 18, 2014, the Division received a report that stated Robert was arrested for violating the restraining order by having unsupervised contact with both Maggie and Jenny. The Division later learned Jenny had ceased taking her medication and had a breakdown. The police transported her to the hospital, and she was kept overnight and released.

On September 24, 2014, the Division executed an emergency removal, and Maggie was placed with her maternal grandmother. On September 26, 2014, the Division filed a verified complaint for custody under the FN docket. At the hearing, the Family Part judge determined removal was necessary because of the ongoing substance abuse and domestic violence allegations involving Jenny and Robert.

During a hearing on October 8, 2014, the court ordered, among other things, Robert to undergo paternity testing. On January 7, 2015, Robert and Jenny stipulated to being a family in need of services under N.J.S.A. 30:4C-12. At that time, Robert was still facing criminal charges from the July 16, 2014 incident, and Jenny intermittently resided in substance abuse treatment centers,

domestic violence shelters, and with other family members. The court continued Division custody of Maggie, granted supervised visitation rights for both Jenny and Robert, imposed random drug testing, substance abuse treatment, and domestic violence counseling for both Jenny and Robert, and required psychiatric evaluations for Jenny.

From October 2014 through April 2015, Robert attended weekly one-hour-long visitations with Maggie but in May 2015 was incarcerated for the child endangerment charges.³ Jenny and Robert had separate visitation schedules with Maggie. The Division reported Robert's visits were generally positive.

On July 15, 2015, the parties attended a permanency hearing. The Division reported the paternity test ruled out Robert as Maggie's biological father. The Division, without objection from Jenny and the Law Guardian, moved for Robert to be dismissed from the FN litigation based on the results of the paternity test. Robert objected, arguing for a bonding evaluation. The court declined to dismiss Robert as a party at that time but denied Robert a bonding evaluation, declined to order visitation, and accepted the Division's plan for termination of Jenny's parental rights followed by relative adoption concurrent to reunification

³ The other criminal charges were apparently dismissed.

with Jenny. The judge offered to consider any legal arguments submitted by the parties pertaining to whether Robert should remain in the litigation as a parent. Despite the judge's invitation, there is no indication in the record that any party submitted legal memoranda concerning Robert's legal status as a parent.

On August 26, 2015, the Division renewed its request that Robert should be dismissed from the litigation. Robert argued the FN litigation should not be dismissed, and if it were, he asked that he be named in the guardianship proceeding under the FG docket. Further, he asserted he was entitled to weekly visits with Maggie following his release from incarceration, and he sought a stay on any interruptions to his visitation rights.

The judge acknowledged the Division guardianship complaint, in the FG docket, would exclude Robert, thus it effectively dismissed him from the litigation, stating Robert had "always held himself out to be [Maggie's] father, and . . . acted as her father" but "there has been domestic violence between him and [Jenny]." The judge then stated, "[Robert's] devotion to the child has been a constant throughout the case" but, under Title 9,

there's a broad definition, and maybe not of parent, but who gets to stay in the case and who's out of the case . . . [but in] a termination of parental rights case, it's a very narrow definition, and specifically, . . . New Jersey Division of Youth and Family

Services v. J.C.,^[4] and the Appellate Division has indicated that the definition of a parent is construed narrowly, to mean only a biological or adoptive parent, and does not include an individual who has been in the position of a parent.

The court terminated the FN litigation, Robert's court appointed lawyer was relieved, and the court reconvened almost immediately under the FG docket. Thereafter, the Office of Parental Representation appointed new counsel for Robert and prepared a motion for leave to intervene in the guardianship proceeding.

On October 9, 2015, Robert filed an appeal of the permanency order and the order terminating the FN litigation. On April 5, 2016, we stayed the appeal to allow Robert to move to intervene at the trial level in the FG proceeding. However, earlier, on November 18, 2015, the Family Part had entered a Guardianship Multipurpose Order acknowledging V.R. (Vincent) as Maggie's biological father.

On February 5, 2016, Robert underwent an evaluation with Dr. Jesse Whitehead, Jr., Psy.D.⁵ Dr. Whitehead assessed Robert's parenting and caretaking capabilities, and whether he met the criteria necessary to qualify as a psychological parent. At this

⁴ 346 N.J. Super. 277 (App. Div. 2002).

⁵ Neither Maggie nor Jenny participated in the evaluation.

evaluation, Robert gave a detailed description of his relationships with Jenny and Maggie. He was present at her birth, tended to her when she was sick, she called him "Da," and he has been the only father present from her birth until her removal from Jenny. Dr. Whitehead opined Robert was physically, psychologically, and financially capable of parenting, and that he had satisfied the criteria of being a psychological parent.

On March 23, 2016, Vincent appeared at an FG case management hearing. The Division represented it had no child protection concerns about Vincent and that Vincent was amenable to a joint custody arrangement, with the maternal grandmother currently caring for Maggie, in order not to disrupt her life. The Division no longer wished to pursue guardianship. On April 6, 2016, the guardianship litigation was terminated, and custody of Maggie was transferred to her maternal grandmother jointly with Vincent, with the filing of an order under the non-dissolution FD docket. Robert had not yet moved to intervene.

On April 25, 2016, Robert moved to vacate the dismissal of the guardianship litigation so that he would be able to intervene there. On June 28, 2016, the court heard argument and denied the motion, concluding "the application is moot because there's no FG litigation pending and Robert had an adequate avenue to seek his remedy in the FD docket."

On August 18, 2016, the court issued an order denying the motion for the reasons placed on the record on June 28, 2016, from which Robert appealed. We granted his subsequent motion to consolidate the two appeals.

In our review, we note our usual deference to the special expertise of the family court, New Jersey Division of Youth and Family Services v. E.P., 196 N.J. 88, 104 (2008), is inapplicable because the issues before us involve "[a] trial court's interpretation of the law and the legal consequences that flow from established facts[.]" Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We owe no deference to a trial court when it makes such determinations. Ibid.

Robert argues he was Maggie's legal father, and therefore it was an error for the trial court to dismiss him from the litigation without an order establishing parentage. He argues he meets the definition of a presumptively biological parent under Rule 9:17-43(a)(4)-(5), because he acted as Maggie's father, held her out as his daughter, and was on her birth certificate. He further argues these presumptions can only be rebutted in a parentage action by clear and convincing evidence with a court order terminating his paternal rights or establishing those of another man. We agree Robert may assert those arguments but he may not

pursue such a remedy under either the FN or FG dockets in the discrete context of this matter.

It is important to note Robert acknowledges Vincent is the biological father, and is not seeking custody. Instead, Robert asserts he is the psychological parent of Maggie, and requests the right to continue to visit and remain part of her life. It is for this reason that the proper forum to address his request is not to re-open either Division litigation, but for Robert to seek intervention in the FD docket if he chooses to do so.

The purpose of the FN docket is to ensure the protection of the child, and "[i]n any case in which family reunification is not the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner and to complete the steps necessary to finalize the permanent placement of the child." N.J.S.A. 9:6-8.8. As reunification and parental custody is not Robert's goal, the FN docket holds no remedy for him because it does not adjudicate matters of custody between parents when the Division no longer has concerns about the child's safety. In the same vein, the FG docket also holds no remedy for him as it involves the termination of parental rights for the limited purpose of freeing a child for the goal of adoption.

Even if reunification and parental custody were Robert's goal, he bears the high burden of demonstrating he should be

awarded custody over a fit parent. In Faucett v. Vasquez, 411 N.J. Super. 108, 119 (App. Div. 2009), we said, "a legal parent has a fundamental right to the care, custody and nurturance of his or her child." V.C. v. M.J.B., 163 N.J. 200, 218, cert. denied, 531 U.S. 926, 121 S. Ct. 302, 148 L. Ed. 2d 243 (2000). N.J.S.A. 9:2-4 specifically provides that "[i]n any proceeding involving the custody of a minor child, the rights of both parents shall be equal[.]"

Thus, "when the dispute is between a fit parent and a third party, only the fit parent is presumed to be entitled to custody," and "only a showing of unfitness, abandonment, gross misconduct, or exceptional circumstances will overcome this presumption." Faucett, supra, 411 N.J. Super. at 119-20 (citations omitted). Consequently, "the best interest of the child cannot validly ground an award of custody to a third party over the objection of a fit parent" without rebutting this presumption through "an initial court finding that the standard for termination of the rights of a non-consenting parent" or a "finding of exceptional circumstances[,] such as the third party ha[ving] become a psychological parent to the child." Id. at 120 (quoting Watkins, 163 N.J. 235, 255 (2000)).

Furthermore, even if Robert were to prevail in establishing status as a psychological parent and create a finding of those

exceptional circumstances, neither an FN order nor an FG order would provide him prospective enforceable relief because of the confidential and limited nature of such orders.

Here, the biological parents, at least one of whom was fit, consented to leave custody of Maggie with her grandmother under an arrangement in the FD docket. Roberts's assertion of the right to continue a relationship with Maggie is no longer a dispute with the Division, and as the Family Part judge correctly noted, may only be addressed with those parties through intervention in the FD docket.

Robert also argues he had ineffective representation because his lawyer did not make a formal motion to the Family Part to engage an expert to document Robert's status as a psychological parent, did not submit a legal memorandum discussing Robert's legal status as a parent and his standing to participate in the FG litigation, and did not ask Robert for evidence of the bond between him and Maggie. We do not address whether the actions of Robert's trial counsel were deficient because Robert has not established that but for his counsel's insufficient performance, the outcome would have been different. The New Jersey Supreme Court in New Jersey Division of Youth & Family Services v. B.R., 192 N.J. 301, 306 (2007), held a parent's right to counsel is grounded in both the constitution and the statutory framework for

termination cases and that counsel must be effective. Therefore, in termination cases, to determine whether counsel was ineffective, the test developed in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Court in State v. Fritz, 105 N.J. 42, 58 (1987), is applied. B.R., supra, 192 N.J. at 307. Even if Robert's lawyer had submitted timely legal arguments in the FG docket in support of his status as a legal or psychological parent, the result would not have been different but for his trial counsel's performance. Because the FG litigation was dismissed against all parties, it is moot, and Robert is not without recourse but instead is able to pursue relief under the FD docket.

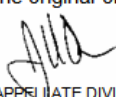
Robert argues he will be prejudiced by being forced to file under the FD docket because he will lose the benefit of Public Defender counsel and funding. It is true that "temporary loss or permanent termination of an indigent parent's rights to his or her child in a judicial proceeding is a consequence of magnitude requiring the assignment of counsel." Pasqua v. Council, 186 N.J. 127, 148 (2006) (citing Crist v. N.J. Div. of Youth & Family Servs., 135 N.J. Super. 573, 575 (App. Div. 1975)). However, this constitutional guarantee is necessary due to the drastic and permanent nature of the loss in a parental termination proceeding. B.R., supra, 192 N.J. at 301. Here, the loss to Robert is not of

the same nature, and the situation here is not of the same magnitude. He does not seek custody of Maggie, but rather visitation rights, and neither he nor the other parties are entitled to state-funded counsel for that narrow litigative purpose. In such an application, Robert is free to tender Dr. Whitehead's report, and any opposing parties are free to argue it is inadmissible or inconsequential, or to present evidence from a different expert.

Any additional arguments introduced by Robert are without 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