SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2590-15T1

K.V.,

Plaintiff-Appellant,

v.

C.Y.,

Defendant-Respondent.

Argued May 23, 2017 – Decided August 4, 2017

Before Judges Yannotti, Gilson and Sapp-Peterson.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FD-09-1122-12.

Stelio G. Papadopoulo argued the cause for appellant (Karen Kirchoff Saminski, LLC, attorneys; Lyan Hummell, of counsel and on the briefs; Stephanie O'Neill, on the briefs).

Geri Landau Squire argued the case for respondent (Cohn Lifland Pearlman Herrmann & Knopf, LLP, attorneys; Ms. Squire, of counsel and on the brief).

PER CURIAM

This is an appeal of the January 12, 2016 Family Part order: (1) granting joint legal custody of B.A.V. (Brian) to plaintiff

K.V. and defendant C.Y.[1] and designating defendant as the parent of primary residential custody; (2) imputing income to plaintiff of $77,000 and recalculating his weekly child support obligation to $470.77, which included payment against $43,288 in arrearages owed to defendant; and (3) awarding $20,000 in counsel fees to defendant. We affirm.

The evidence the trial court considered in reaching its decision was presented during a trial at which six witnesses testified: plaintiff and defendant; their respective mothers; plaintiff's uncle; and Mathias R. Hagovsky, Ph.D., defendant's expert, who performed a best-interest-of-the-child evaluation. Plaintiff did not produce an expert witness.

The evidence revealed the parties entered into a dating relationship in 2008. Defendant discovered she was pregnant in August of that year and Brian was born on April 23, 2009. Shortly after Brian's birth, the parties commenced to cohabitate, but in early 2010, defendant moved to an apartment located a few blocks away because the relationship had become contentious.

For the first couple of years following Brian's birth the parties co-parented without incident. In the fall of 2011,

[1] To protect privacy interests, the parties are identified by their initials and for ease of reference the minor child is referred to as "Brian," a fictitious name.

however, defendant enrolled Brian in daycare, ostensibly to facilitate plaintiff securing full-time employment and to enable Brian to develop socially. After two weeks in daycare on a part-time basis, Brian began to attend daycare on a full-time basis. Plaintiff objected and, in November 2011, filed a complaint seeking joint legal and physical custody. In January 2012, he secured an order reducing Brian's full-time daycare attendance to part-time.

On May 23, 2012, the court entered an order authorizing defendant to retain Dr. Hagovsky to conduct a best-interest evaluation. The order also permitted plaintiff to retain his own expert, which he declined to do. In July 2012, the court entered its first child support order, directing plaintiff to pay $100 per week through the probation department. That amount was increased to $130 per week in September 2013.

In August 2013, plaintiff terminated his relationship with his attorney and became self-represented. He continued to represent himself until July 2014. During this time period plaintiff failed to comply with discovery requests, prompting a motion to dismiss his complaint. By order dated February 27, 2014, the court dismissed plaintiff's complaint without prejudice for non-compliance with discovery demands. The court reinstated the complaint in March 2014, but outstanding discovery demands

remained. The court entered another discovery order on April 15, 2014, related to document requests.

Although trial had commenced on March 26, 2014, and the testimony of one witness was completed on that same date, the court, over defense counsel's objection, entered a July 2, 2014 order permitting an attorney substitution on behalf of plaintiff. After new counsel entered the case, additional discovery between the parties occurred, including the depositions of plaintiff in August 2014, and defendant in October 2014.

The trial consumed fifteen non-consecutive days. On December 14, 2015, the court delivered its decision in a seventy-five page oral opinion. The court initially found that defendant's expressed belief that Brian needed to be prepared for the time he would be away from his parents through daycare, and plaintiff's silence on the issue until defendant enrolled Brian in daycare, were the "beginning[s] of the parties' road to litigation." The court characterized plaintiff as having "an unhurried concept of decisions which need to be made for [Brian]." In contrast, the court characterized defendant as "scheduled and disciplined, recognizing that if decisions weren't made in accordance with deadlines, opportunities for [Brian] would be lost." The court surmised that this dynamic permeated all of the parties' interactions related to Brian's well-being.

The court found defendant's testimony as

> reflective of her personality and her parenting style. She is meticulous. Precise with her dates and finances, detailed with her information for the child. She tries very hard not be judgmental of [plaintiff's] statements, motives, and parenting styles. And, even if she fails, and occasionally she does, she has tried to give [plaintiff] the benefit of the doubt as to what his motives are in doing certain things.

In contrast, the court found plaintiff to be "broad and absolute in his statements and beliefs. [Defendant's] testimony is -- and often the proofs have shown that [plaintiff's] recollections regarding holidays, makeup time, doctors, and school notices and times, are often incorrect."

In addressing these personality differences in the context of the custody dispute before it, the court gave considerable weight to the testimony and opinions expressed by Dr. Hagovsky, whose evaluation the court found to be quite "even-handed," despite being retained by defendant. Drawing from the testimony of Dr. Hagovsky and the opinions expressed in his report, the court stated that Dr. Hagovsky

> put the finger right on this issue. Dr. Hagovsky noted that [plaintiff] is the big-picture guy. He's the concept person. [Defendant] is the detailed, meticulous person. As a result, she is frustrated by [plaintiff's] lack of focus and punctuality. [Plaintiff] takes wronged [affronts] at [defendant's] actions, perceiving them to be

> an undermining of his role as a parent. And, therein lies the problem for this family and the sole versus joint custody of their child.

The court noted its obligation to consider the statutory factors outlined in N.J.S.A. 9:2-4(c) in resolving the disputed issues. It first considered the parties' ability to agree, communicate, and cooperate with regard to matters related to Brian. It found that "this couple's entire dynamic has been a struggle to agree, communicate, and cooperate." Nonetheless, the court concluded that defendant, to her benefit, "is the more communicative, the more conciliatory, and the more cooperative of the two." The court explained further:

> And I'm not saying that to point a finger at either one of you; but, she has tried, as I find, more often, to open things to [plaintiff]. It's his sense of urgency that doesn't make him understand the cooperative effort.
>
> She has offered parenting time on holidays, despite his statement that she has not. She has offered make[-]up time, despite his statement that she has not. She has offered parenting time that she thought was reasonable.

The court concluded its discussion on this factor by finding that defendant "gets the higher marks . . . in [] communication, cooperation, and ability to agree."

The court then focused its analysis upon: (1) the parties' willingness to accept custody; (2) any unwillingness to allow

visitation, unrelated to substantiated abuse; (3) any history of domestic violence; (4) Brian's safety; and (5) his interaction and relationship with each parent. The court was satisfied that both parents would willingly accept custody, would permit visitation, and enjoyed a positive relationship with Brian. The court additionally found no evidence of domestic violence and specifically expressed that Brian "is not unsafe in either household." Further, the court concluded both plaintiff and defendant "are safe from physical abuse," observing that "[a]nything that may have been contentious between them, was exacerbated by their living together, and has long since gone."

Moving to Brian's preference and his needs, the court found that given Brian's age, this factor did not apply in its analysis. With regard to Brian's needs, the court found that the child's needs were being met "admirably by both parents," but defendant had been "ahead of the curve" in understanding Brian's needs. The court referenced Dr. Hagovsky's report where he disclosed his discussions with Brian's teacher. The teacher reported that Brian had benefitted from school full-time, but then regressed after the court ordered part-time daycare. Nonetheless, the court was satisfied that at the time of the trial, based upon Brian's report cards and his parents' testimony, he had become a leader, had

friends, was taking Taekwondo, and otherwise "experiencing things at his time and level."

The court attributed defendant's foresight in understanding what the next step should be for Brian to the fact that plaintiff had not had the time with Brian as had defendant. The court concluded this led to plaintiff focusing upon Brian's time with him rather than Brian's time to be a child.

The court also addressed the question of the fitness of the parents. The court determined that both parents were fit and noted they lived within blocks of each other. The court concluded they were "certainly in a geographically good position for any form of a shared parenting schedule."

The next factor addressed by the court was the extent and quality of the time each parent spent with Brian. While acknowledging earlier in its finding that in order to save money on housing and daycare, the parties decided that plaintiff would move in and take care of Brian while defendant worked, the court noted that this arrangement "quickly proved unmanageable." The court found that once plaintiff moved out of defendant's apartment in January 2010, plaintiff "has had one overnight every other week, and four after school times." The court found that it was "obvious that [defendant] has been the parent of primary residence from the child's early years. . . . She has been the person who

has been most charged and is most attuned with [Brian's] upbringing."

Addressing each parent's employment responsibilities, the court found that defendant worked full-time, had a responsible job, and assured herself that Brian's well-being was being met through his enrollment in daycare and being with plaintiff. As for plaintiff, the court expressed uncertainty about what plaintiff actually did for a living and how much he earned. The court, however, was convinced that plaintiff, having more education than most, for the sake of his child, was not working enough.

After considering the above factors, the court found that "these parties can jointly parent their child with joint legal custody. [The court does] find that [defendant] is the parent of primary residence," and endorsed Dr. Hagovsky's findings. Dr. Hagovsky testified that he believed that defendant was "responsible for the child's schedule, responsible for his evening routines pretty much every day, shopping, purchasing of clothes, doctor's appointments, activities . . . that he had to do or where he had to be . . . ."

The court granted plaintiff and defendant joint legal custody and designated defendant as the parent of primary residential custody. It modified plaintiff's parenting time by increasing the

number of days Brian spends with him. As for child support, the court recalculated plaintiff's child support obligation, after concluding that plaintiff, based upon his advanced degrees and employment background, was underemployed. The court imputed an income of $77,000 to him, which was $17,000 more than what plaintiff conceded was his earning capacity. The court based this figure upon plaintiff's potential to be employed as a training and development specialist given his background. It reached this amount by referencing figures published by the Department of Labor for this type of occupation. The court found that as of the time of trial defendant's annual salary was $125,000.

Based on these numbers, utilizing the guidelines under our court rules, the court concluded that plaintiff's child support obligation should be $258 per week. After deducting the amount plaintiff had paid for Brian's daycare, the court determined that plaintiff owed $43,288 in child support payments to defendant. Further, after crediting plaintiff with "110 overnight visits, $46 is what he gets back on variable expense per week[,]" the court ordered that plaintiff's "support obligation is $234 a week from this point forward." The court then added to the weekly obligation an additional $100 to "liquidate" plaintiff's arrearages.

Finally, the court addressed defendant's request for counsel fees, totaling $173,423. The court expressed that "neither party

was reasonable in their positions." Nonetheless the court found that part of the reason why the matter was not settled years earlier was "because [plaintiff] couldn't figure out his time schedules when he was representing himself." The court expressed further: "[Plaintiff] needs to start looking at things in a timely fashion. He did not look at what he needed to do for this litigation in a timely fashion." The court also noted plaintiff's complaint had been dismissed and reinstated, followed by a "painstaking explanation from [the court] to [plaintiff] as to how and when he should be doing things."

Based upon its consideration of these factors, the court concluded that plaintiff should pay a portion of defendant's outstanding counsel fees. It ordered plaintiff to pay $20,000 towards the $173,423 in counsel fees defendant had incurred. The court memorialized its decision by order dated January 12, 2016. The present appeal followed.

On appeal, plaintiff asserts the court erred when it failed to award joint physical custody to both parents and that the decision to designate defendant as the parent of primary residential custody does not correlate with the court's findings regarding the custody factors. In addition, plaintiff urges that in imputing $77,000 in income to him, the court failed to analyze whether there was just cause for his underemployment. Finally,

plaintiff contends the court incorrectly applied N.J.S.A. 5:3-5(c) in awarding counsel fees to defendant.

We reject all of the contentions advanced by plaintiff. In our review of the record, we are satisfied the trial judge's oral decision reflects a thoughtful and thorough analysis of each of the issues before the court. The court's factual findings are supported by the record and the court applied the correct legal standards in reaching its decision on custody, child support, and counsel fees. We affirm substantially for the reasons expressed by Judge Sogluizzo in her cogent and thorough oral decision of December 14, 2015. We add the following comments.

Our "review of a trial court's fact-finding function 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 412 (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974)). This is particularly true in matters emanating from the Family Part, because of its special expertise. Ibid. Consequently, we will not set aside the factual findings and legal conclusions reached by the Family Part 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 . . . we determine the court has palpably abused its discretion." Parish v. Parish, 412 N.J. Super. 39, 47 (App. Div. 2010) (quoting Cesare, supra, 154 N.J. at 412). However, we owe no special deference to the trial court's conclusions of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"The touchstone for all custody determinations has always been 'the best interest[s] of the child.'" Faucett v. Vasquez, 411 N.J. Super. 108, 118 (App. Div. 2009) (alteration in original) (quoting Kinsella v. Kinsella, 150 N.J. 276, 317 (1997)), certif. denied, 203 N.J. 435 (2010). "Custody issues are resolved using a best interests analysis that gives weight to the factors set forth in N.J.S.A. 9:2-4(c)." Ibid. (quoting Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007)). When making "any custody arrangement not agreed to by both parents," the "court shall specifically place on the record the factors which justify" its order. N.J.S.A. 9:2-4(f). The enumerated factors include:

> [T]he parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when

> of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to subsequent to the separation; the parents' employment responsibilities; and the age and number of the children.
>
> [N.J.S.A. 9:2-4(c).]

"[T]he decision concerning the type of custody arrangement [is left] to the sound discretion of the trial court[.]" Nufrio v. Nufrio, 341 N.J. Super. 548, 555 (App. Div. 2001) (second and third alteration in original) (quoting Pasacle v. Pascale, 140 N.J. 583, 611 (1995)). Therefore, on appeal, "the opinion of the trial judge in child custody matters is given great weight." Terry v. Terry, 270 N.J. Super. 105, 118 (App. Div. 1994).

In the present matter, the trial judge, utilizing the factors set forth under N.J.S.A. 9:2-4(c), made detailed factual findings. In awarding physical custody to defendant, it is clear that the court found that defendant had been the parent of primary residential custody once plaintiff moved out of defendant's apartment in January 2010. From that point going forward the court noted that plaintiff "has had one overnight every other week, and four after school times. . . . But, certainly, if we have to have a parent of primary residence, there is zero doubt

in my mind, as there was in Dr. Hagovsky's, that [defendant] is the parent of primary residence."

In reaching this finding, the judge did not discount plaintiff's time spent with Brian after his birth and noted that plaintiff had been Brian's primary caretaker until Brian commenced daycare in 2011. It is apparent from the record that the judge, however, considered more than plaintiff's physical presence with Brian as his caretaker. The judge concluded that it was defendant who was most attuned to Brian's needs and who addressed those needs. Substantial credible evidence in the record supports the trial judge's findings, which are entitled to our deference.

Turning to imputation of an additional $17,000 of income over the $60,000 plaintiff conceded should be imputed to him, the trial judge first found that plaintiff was "underemployed for his capabilities, for his education and for his responsibility to his son." The record revealed that plaintiff held an advanced degree in educational technology and earned doctoral credits. He had been involved in a number of employment experiences, including conducting research on children and internet learning, hosting television shows, and at the time of trial, implementing one of his educational projects into an elementary and secondary school program. The judge found his testimony regarding the nature of his employment vague and his testimony regarding his income from

employment lacking in credibility. Plaintiff offered no competent testimony that his underemployment was justified. Hence, the finding that he was underemployed was supported by the record.

Moreover, in arriving at the $77,000, the record demonstrates that the judge considered the appropriate factors as detailed in the Child Support Guidelines under court rules. See Child Support Guidelines (Guidelines), Pressler & Verniero, Current N.J. Court Rules, comment 12 on Appendix IX-A to R. 5:6A at www.gannlaw.com (2017). While the judge found, the Guideline factors include consideration of the parent's prior work history, occupational qualifications, educational background, and average earnings reported by the Department of Labor. Ibid.

Once again, substantial credible evidence in the record supports the trial judge's determination to impute an annual income to plaintiff of $77,000. We discern no basis in this record to disturb those findings.

Finally, we are satisfied that the trial judge did not abuse her discretion by awarding defendant $20,000 of the $173,000 she sought. The award of counsel fees and costs in a matter in the Family Part is committed to the sound discretion of the trial court. Eaton v. Grau, 368 N.J. Super. 215, 225 (App. Div. 2004). We will not disturb an award of counsel fees unless it is shown to be an abuse of discretion. Chestone v. Chestone, 285 N.J.

Super. 453, 468 (App. Div. 1995) (citing Fid. Union Tr. Co. v. Berenblum, 91 N.J. Super. 551, 561 (App. Div. 1960), certif. denied, 48 N.J. 138 (1966)).

Here, the trial judge expressed that in reaching her decision to award counsel fees, she reviewed the certification submitted by defendant's attorney and the "legislative factors." She noted that defendant did not prevail on her claim for sole legal and physical custody, but prevailed in being designated as the parent of primary residential custody. While she found that both parties took unreasonable positions on certain issues, she concluded that it was plaintiff's unreasonable conduct that caused the litigation to span almost five years. The judge found that plaintiff "couldn't figure out his time schedules when he was representing himself;" plaintiff's finances could not be allocated because plaintiff "was extremely vague and ambivalent regarding what his income was[;]" the complaint was dismissed due to plaintiff's discovery violations; and even after being reinstated, another judge had to painstakingly direct plaintiff as to "how and when he should be doing things." We are therefore convinced that there is sufficient credible evidence in the record to support the award of counsel fess.

Affirmed.