SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4261-15T4

D.A.G.,

Plaintiff-Appellant,

v.

W.C.B.,

Defendant-Respondent.

Submitted December 5, 2017 – Decided December 26, 2017

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Cumberland County, Docket No. FM-06-0226-15.

Helmer, Conley & Kasselman, PA, attorneys for appellant (Patricia B. Quelch, of counsel and on the briefs).

Law Offices of Andrew N. Yurick, attorneys for respondent (Andrew N. Yurick and Nicholas J. Yurick, on the brief).

PER CURIAM

In this post-judgment matrimonial matter, plaintiff D.A.G. appeals from the May 20, 2016 Family Part order denying her application for a change in the custody and parenting time

arrangements for her two children, who presently reside with their father, defendant W.C.B.[1] We affirm substantially for the reasons stated by Judge Harold U. Johnson in his comprehensive written opinion that accompanied the May 20, 2016 order.

I.

Plaintiff and defendant are the parents of O.B. (Oaklee), born in 2003, and W.B. (Walter), born in 2005. By all accounts, the parties' relationship has been contentious. In April 2012, defendant obtained a temporary restraining order (TRO) against plaintiff pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, based on an allegation that plaintiff threw a brick at defendant's head, causing him injury. The parties then agreed on a temporary parenting time arrangement, pending the final hearing. A final restraining order (FRO) was entered against plaintiff on May 21, 2012, which awarded defendant temporary custody of the children. Plaintiff was ordered to comply with an anger management evaluation before her parenting time with the children could be modified.

The parties' marriage ended in a judgment of divorce (JOD) on January 8, 2013. The court simultaneously entered an order providing, among other things, that the children were to begin

[1] We use initials and pseudonyms to maintain the confidentiality of the parties and their children.

therapy with Dr. Joseph Racite, and defendant was to submit to random drug screening.

The court entered a supplemental judgment of divorce (SJOD) on March 25, 2013, which incorporated a stipulation of settlement entered into between the parties. In the SJOD, the parties agreed to share legal custody of the children, with defendant to exercise sole physical custody. Plaintiff was to have parenting time with the children in accordance with the existing parenting schedule. Notably, Paragraph [Six] of the settlement agreement provided, in relevant part:

> Plaintiff agrees, at her expense, to obtain a psychiatric report within thirty (30) days which shall opine as to whether [p]laintiff is a threat to herself or her children. Counsel for . . . [d]efendant shall have the right to send a letter to the psychiatrist expressing [d]efendant's concerns and issues that he believes the psychiatrist should know. Plaintiff agrees to promptly provide the name and address of said psychiatrist. Plaintiff agrees to fully cooperate in the preparation of this report and said report shall be provided simultaneously to all counsel. If [p]laintiff does not provide said report within thirty (30) days, [p]laintiff's time sharing with the parties' children shall cease. If said report opines that [p]laintiff is a potential threat to herself or her children, then [p]laintiff's time with her children shall be supervised by either her mother . . . or her sister . . . .

Around this time, plaintiff filed numerous reports with the Division of Child Protection and Permanency (Division), alleging

defendant was physically abusing the children and not properly caring for them. The Division investigated and determined these reports were unfounded. Additionally, the parties filed a series of motions relating to plaintiff's mental condition, her evaluation, and issues of custody and parenting time.

Initially, the motions were heard by Judge Timothy W. Chell. On April 19, 2013, Judge Chell denied defendant's request to terminate plaintiff's parenting time. The judge ordered plaintiff to retain Dr. Leon Rosenberg to prepare a supplemental psychiatric report and provide it within thirty days. If plaintiff failed to comply, or the report indicated she was a threat to herself or the children, then plaintiff's parenting time was to be immediately suspended on defendant's further application. The judge also awarded $600 in counsel fees to defendant, based on his finding that plaintiff was "in clear violation of prior [c]ourt [o]rders related to the psychiatric report" and other financial provisions.

On January 24, 2014, Judge Chell denied plaintiff's motion to take the children to a new therapist, finding she failed to show a change in circumstances that would warrant modification of the January 8, 2013 order that appointed Dr. Racite as the children's therapist. The judge granted defendant's cross-motion to hold plaintiff in contempt for violating custody and parenting time, and ordered her to pay $1000 toward defendant's counsel

fees. The judge also granted defendant's request that the court review the Division's file relating to all allegations of abuse and neglect made against defendant, and ordered both parties to comply with any recommendations made by the Division.

On March 14, 2014, Judge Chell denied plaintiff's motion to reconsider the January 24, 2014 order. The judge also denied defendant's application for counsel fees, and reserved decision on defendant's request that plaintiff's parenting time be suspended pending the results of the psychological evaluations. The judge noted the children were scheduled to be evaluated by Dr. Meryl Udell on March 18, 2014. Accordingly, the judge relisted the matter for further hearing in two weeks.

On March 28, 2014, Judge Chell reviewed Dr. Udell's reports and evaluations of the children. Based on that review, the judge: (1) designated defendant as sole custodian of the children until further order; (2) ordered that plaintiff's visitation and contact with the children be supervised by the Division; and (3) directed the parties to comply with all requests and recommendations of the Division.

On May 9, 2014, Judge Chell entered an order to show cause granting defendant's application to temporarily suspend plaintiff's parenting time. On the June 4, 2014 return date, the judge continued the suspension of plaintiff's parenting time, to

which she consented. The judge noted that he considered the psychological evaluation reports prepared by Dr. Janet Cahill dated April 29, 2014, and "[found] Dr. Cahill's reports as to the emotional well[-]being and mental stability of the children concerning." The judge found "[o]f even greater concern is . . . [p]laintiff's own mental state and well-being," and "[h]er repeated allegations and continuous coercion of the children in hopes of depicting . . . [d]efendant as an abusive parent, suggest [she] is in need of some professional help." It was for this reason the judge denied defendant's request for additional counsel fees, although he again directed plaintiff to pay the $1000 counsel fee he previously ordered on January 24, 2014. Finally, the judge denied plaintiff's request for recusal.

In October 2014, plaintiff again moved to recuse Judge Chell. On October 14, 2014, the judge granted the application, explaining it was recently brought to his attention that he previously served as a local mayor and in that capacity was involved in litigation concerning plaintiff's parents. The judge elaborated he was previously unaware of this connection, could not recall having ever met plaintiff's parents, and that he had remained neutral and unbiased at all times throughout the litigation.

After the matter was reassigned to a second judge, plaintiff also sought to have that judge recused, and to change venue.

Plaintiff contended the second judge's relationship with Judge Chell, and defendant's attorney's perceived influence in Gloucester County, precluded her from receiving a fair hearing there. Although the judge found plaintiff's claims of bias unfounded, to avoid any possible conflict he granted the motion and transferred venue to Cumberland County.

Judge Johnson conducted a case management conference on December 17, 2014, and entered a case management order (CMO) on January 5, 2015. The CMO set deadlines for discovery, and provided:

> This matter shall be scheduled for a plenary hearing as soon as possible after discovery is complete. Plaintiff will have the burden of proof to demonstrate a significant change in circumstances in order to modify the present custody and parenting time arrangement; however, [p]laintiff's attorney reserves the right[] to argue that a threshold showing of a significant change in circumstances is not necessary.

The CMO further provided that all Division records regarding the children be submitted to the court for in camera review. The parties also consented to have Judge Johnson review the reports of Dr. Rosenberg, Dr. Racite, Dr. Udell, and Dr. Cahill prior to the hearing.

The plenary hearing began on July 1, 2015. Defendant moved to preclude plaintiff from using or admitting an evaluation report

prepared by Dr. Linet that was dated May 25, 2015, but not served on defense counsel until the day before the hearing. The court granted the motion and ruled the report inadmissible.

The hearing continued on July 20, September 1, and September 9, 2015. Judge Johnson then terminated the plenary hearing after the fourth day of testimony. The judge granted defendant's oral applications to dismiss plaintiff's motion to modify Judge Chell's orders. Plaintiff was permitted to file a new motion for parenting time and/or custody after she substantially complied with Dr. Cahill's recommendations and submitted an evaluation report from a fully informed psychiatrist attesting she is not a danger to herself or the children. On May 20, 2016, the judge entered an order accompanied by a comprehensive forty-one page written opinion in which he explained "the rare nature of this decision — dismissing an action mid-plenary hearing . . . . "

Judge Johnson began by outlining the procedural history of the matter, as set forth above. The judge noted plaintiff sought modification of prior orders entered by Judge Chell on May 9, 2014, and June 4, 2014, which suspended her parenting time, consistent with Dr. Cahill's April 29, 2014 evaluation report. The judge also explained the reason he initially authorized a plenary hearing:

> The court, concerned that [plaintiff] seemed to convey a belief in a sense of unfairness as to what had occurred as described above in Gloucester County and recognizing the rare occurrence of a parent being denied any contact with his or her children, determined that a plenary hearing should be held as to the situation. That being ordered, the court felt that it should honor the previous, not-appealed orders of Judge Chell and required that in order for this court to modify those orders, that [plaintiff] must show a substantial change of circumstances to do so. This being the standard to be satisfied, the court determined that [plaintiff] had the burden of proof and allowed her to present her case first.

The judge recounted in detail the extensive testimony of plaintiff and the other witnesses she called to testify at the hearing to date. Those witnesses included various members of defendant's family; Dr. Rosenberg; an employee at a business that provided archery instruction to the children; Oaklee's third-grade teacher; and the children's school principal.

Judge Johnson found plaintiff

> was . . . not straightforward with her answers and was evasive and argumentative on cross-examination. Her vehement and zealous belief in her positions in direct contravention to the overwhelming evidence provided by a doctor, psychiatrists, a psychologist, various [Division] workers, education providers and her own children cause this court to sense exactly what the experts in this case opine - there is some question as to her mental health or deportment that need be addressed by a mental health professional. Her testimony, as evidenced by her body

> language, facial expressions and demeanor and words was simply at times incredible.
>
> Her [a]ffect and conduct in the court was often odd and disturbing. She usually had a strange, distant look and appearance. Her reactions were often exaggerated or blown out of proportion.
>
> . . . .
>
> The court cannot stress how odd and disturbing her appearance, demeanor and reactions through this trial were. The court believes, even discounting for the arguable desperation of a [mother] who had been totally separated from her children, that the psychiatric exam ordered by this determination is both necessary and proper. The court places little credibility on her testimony.

The judge gave no weight to Dr. Rosenberg's expert opinion. He explained:

> The problem is that Dr. Rosenberg reached his opinion without reviewing very important documentation in this matter, especially Dr. Racite's report(s), Dr. Lind's reports, Dr. Cahill's reports, [Division] records[,] or the school records of the children. He never spoke to the children. He never did or has spoken to [defendant] or his counsel to obtain "the other side of the story" in this situation. He relied for his opinion solely and exclusively on the information provided by [plaintiff] - nothing else.
>
> More importantly, Dr. Rosenberg drafted his initial report in direct contravention of [Paragraph Six of the SJOD].

Called as a witness by plaintiff, Oaklee's third-grade teacher testified that, in school, Oaklee "broke down and said Mom

made her lie." The judge "place[d] strong weight on [the teacher's] testimony," and found it supported the conclusions of Doctors Racite, Udell, and Cahill, and the Division's case workers.

The judge noted that plaintiff intended to call seven more witnesses, including Doctors Racite, Udell, Lind, and Cahill, and three Division workers. Although concededly these witnesses had not yet been cross-examined, the judge observed they had all taken positions adverse to plaintiff. Plaintiff thus faced the "monumental" task of establishing "they are either lying or otherwise totally incorrect in their conclusions in reports now entered into evidence without objection from [plaintiff's] counsel." The judge further noted that plaintiff wished to subpoena the doctors to testify as fact witnesses, without compensation for their time and effort as experts.[2]

Judge Johnson determined "[t]he testimony before the court to this point does not rise to near the level of showing a substantial change of circumstances so as to justify modification" of Judge Chell's orders suspending plaintiff's parenting time. Ultimately, the judge concluded

> that the personal, emotional [and] psychological cost to the family; the

[2] We agree with the judge that his decision to terminate the hearing and dismiss plaintiff's application without prejudice rendered moot the issue of whether the doctors should be compelled to testify without compensation.

> financial burden placed on the family by the situation and the reasonable use of judicial resources under the circumstances here presented justify the action the court is taking today. [Plaintiff] needs to meet with a psychiatrist with full knowledge of the situation once and for all and now as compared to years from now. This is why the court does today what it does.

The judge added, "this resolution at this time allows to [plaintiff] the most expeditious procedure to return to contact with the children while considering their best interests and health[,] safety[,] and welfare."

II.

Plaintiff appeals the May 20, 2016 order. She argues: (1) the court erred by "modifying" her parenting time based on the reports of experts whom she was not allowed to cross-examine; (2) the judge erred by requiring her to show a significant change of circumstances; (3) the court's order is not supported by sufficient competent evidence; (4) the court abused its discretion by excluding Dr. Linet's report; and (5) the court erred by imposing attorney's fees.

We have considered plaintiff's contentions in light of the record and applicable legal principles and conclude they are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). Under the particular facts of this case, we are satisfied that Judge Johnson properly

dismissed plaintiff's application after considering testimony and evidence that firmly supported his determination that plaintiff failed to establish sufficient changed circumstances to warrant modification of the prior orders and that any such modification at this juncture would not be in the children's best interests. We therefore affirm substantially for the reasons expressed in Judge Johnson's comprehensive written opinion. We add the following comments.

"Generally, the special jurisdiction and expertise of the family court requires that we defer to factual determinations if they are supported by adequate, substantial, and credible evidence in the record." Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)). We owe "particular deference" to the family courts because of their "special jurisdiction and expertise in family matters." Ibid. (quoting Cesare, 154 N.J. at 413).

"[I]n reviewing the factual findings and conclusions of a trial judge, we are obliged to accord deference to the trial court's credibility determination[s] and the judge's 'feel of the case' based upon his or her opportunity to see and hear the witnesses." N.J. Div. of Youth & Family Servs. v. R.L., 388 N.J. Super. 81, 88 (App. Div. 2006) (citing Cesare, 154 N.J. at 411-13). Such deference will be "disturbed only upon a showing that the findings

are 'manifestly unsupported by or inconsistent with the competent, relevant[,] and reasonably credible evidence' to ensure there is no denial of justice." Milne, 428 N.J. Super. at 197 (quoting Platt v. Platt, 384 N.J. Super. 418, 425 (App. Div. 2006)).

"The Family Court possesses broad equitable powers to accomplish substantial justice." Finger v. Zenn, 335 N.J. Super. 438, 446 (App. Div. 2000) (citing Weitzman v. Weitzman, 228 N.J. Super. 346, 358 (App. Div. 1988)). We "accord great deference to discretionary decisions of Family Part judges." Milne, 428 N.J. Super. at 197. Such discretion "takes into account the law and the particular circumstances of the case before the court." Ibid. (quoting Hand v. Hand, 391 N.J. Super. 102, 111 (App. Div. 2007)).

This court, however, will not defer to a family court's decision where the court abused its discretion. See, e.g., State ex rel. J.A., 195 N.J. 324, 340 (2008). "An abuse of discretion 'arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."'" Milne, 428 N.J. Super. at 197 (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (citation omitted)). The family judge's legal decisions are subject to our plenary review. Crespo v. Crespo, 395 N.J. Super. 190, 194 (App. Div. 2007).

In any custody or parenting time determination, "the primary and overarching consideration is the best interest of the child." Kinsella v. Kinsella, 150 N.J. 276, 317 (1997). The court's focus must be "on the 'safety, happiness, physical, mental and moral welfare' of the" child. Hand, 391 N.J. Super. at 105 (quoting Fantony v. Fantony, 21 N.J. 525, 536 (1956)).

A judge must consider a request for custody modification in accordance with the procedural framework established in Lepis v. Lepis, 83 N.J. 139, 157-59 (1980). To establish a prima facie case for modification of a custody arrangement, the moving party must show a substantial change in circumstances and that the changed circumstances affect the welfare of the child such that his or her best interests would best be served by modifying custody or parenting time. Hand, 391 N.J. Super. at 105.

In evaluating whether the requisite changed circumstances exist, the court must consider the circumstances that existed at the time the current custody order was entered. Sheehan v. Sheehan, 51 N.J. Super. 276, 287-88 (App. Div. 1958). After considering those facts, the court can then "ascertain what motivated the original judgment and determine whether there has been any change in circumstances[.]" Id. at 288. A decision concerning custody is committed to the sound discretion of the judge. See Randazzo v. Randazzo, 184 N.J. 101, 113 (2005).

Regarding requests for a plenary hearing, the determining factor is "whether the movant has made a prima facie showing that a plenary hearing is necessary." Hand, 391 N.J. Super. at 106. This rule was crafted with an eye to judicial economy, given that "practically every dispute in the matrimonial motion practice involves a factual dispute of some nature . . . ." Klipstein v. Zalewski, 230 N.J. Super. 567, 576 (Ch. Div. 1988). "An inflexible rule requiring a plenary hearing" on every matrimonial application "would impede the sound administration of justice, impose an intolerable burden upon our trial judges, and place an undue financial burden upon the litigants." Shaw v. Shaw, 138 N.J. Super. 436, 440 (App. Div. 1976).

Here, Judge Johnson scheduled a plenary hearing based on plaintiff's continued insistence she had been treated unfairly in Gloucester County. However, after affording plaintiff the opportunity to present numerous witnesses at the plenary hearing, and after reviewing the doctors' reports with the parties' consent, the judge concluded that "overwhelming evidence" "point[ed] to the conclusion reached by Judge Chell and the recommendations of Dr. Cahill being what is best here."

We are satisfied that plaintiff failed to surmount the threshold of a prima facie demonstration of changed circumstances sufficient to warrant modification of Judge Chell's orders

suspending her parenting time. Notably, Judge Johnson also found that Dr. Rosenberg's initial report was drafted in direct contravention of Paragraph Six of the SJOD, and ultimately the judge discounted Dr. Rosenberg's opinion because he relied solely on information provided by plaintiff.

The record also supports Judge Johnson's decision to terminate the plenary hearing after plaintiff failed to show changed circumstances. The judge acknowledged the "rare nature" of his decision to do so. Normally, we would be loath to sanction to such procedure, especially where a party has not been afforded the opportunity to cross-examine adverse witnesses. However, our review of the record convinces us this is the exceptional case where such action was warranted.

While plaintiff now complains Judge Johnson required her to comply with Dr. Cahill's recommendations without any testimony from the doctor at the hearing, the judge was merely following the prior orders entered by Judge Chell. Plaintiff never appealed those orders and therefore Judge Johnson did not err by relying on them. Although Judge Chell later recused himself, that did not require vacation of his prior orders.

In the end, the judge essentially found it would be in the children's best interests to dismiss plaintiff's application without prejudice, subject to the conditions imposed. We share

the judge's opinion that no further proceedings of a more intrusive, more time-consuming, and expensive nature were required. Accordingly, we discern no basis to disturb the judge's well-reasoned conclusions.

Insofar as plaintiff now claims the children should have been interviewed in camera, this position is contrary to her testimony at the hearing, where she expressed concern with regard to the court interviewing the children. While Rule 5:8-6 grants Family Part judges the discretion to conduct such interviews, generally interviews should not be granted in cases where the movant's proofs fall short of the applicable changed circumstances standard. See Mackowski v. Mackowski, 317 N.J. Super. 8, 15 (App. Div. 1998) (Kestin, J. concurring).

Plaintiff further contends the judge erred by precluding her from belatedly presenting Dr. Linet's report, which purportedly supports her contention that she is fit to parent the children. Generally, "the disposition of discovery issues is left to the sound discretion of the trial court. Its determination of these issues [is] entitled to deference in the absence of a mistaken exercise of discretion." Medford v. Duggan, 323 N.J. Super. 127, 133 (App. Div. 1999) (citing Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997)). Here, plaintiff failed to comply with the discovery schedule established in the CMO, and attempted to serve

her expert report on the eve of trial. Since plaintiff failed to provide the report in a timely manner, we cannot conclude the trial court's decision to bar the report constituted an abuse of discretion.

Finally, we reject plaintiff's contention that the court erred by repeatedly awarding defendant counsel fees. We note plaintiff only appeals from the May 20, 2016 order, in which no attorney's fees were imposed. Plaintiff's notice of appeal does not include the prior orders that assessed counsel fees. It is well-settled that we review "only the judgment or orders designated in the notice of appeal . . . ." 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) (citing Sikes v. Twp. of Rockaway, 269 N.J. Super. 463, 465-66 (App. Div.), aff'd o.b., 138 N.J. 41 (1994)). See also R. 2:5-1(f)(3)(A). Stated differently, any arguments raised by plaintiff that fall outside the four corners of the notice of appeal are not within the scope of our appellate jurisdiction in this case, and are therefore not reviewable as a matter of law.

Affirmed.