SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4526-14T3

L.J.L.,

Plaintiff-Appellant,

v.

L.G.,

Defendant-Respondent.

Submitted February 6, 2017 – Decided February 24, 2017

Before Judges Haas and Currier.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FD-02-1250-09.

Rubenstein, Meyerson, Fox, Mancinelli, Conte & Bern, P.A., attorneys for appellant (Anne M. Fox, of counsel; Evelyn F. Nissirios and Brian E. Shea, on the briefs).

Robert T. Corcoran, P.C., attorney for respondent (Mr. Corcoran, of counsel and on the brief; Karen M. Venice, on the brief).

PER CURIAM

Plaintiff L.J.L. appeals from the Family Part's May 19, 2015 order denying her motion for reconsideration of the trial judge's September 14, 2014 decision. In that decision, the

judge vacated a July 23, 2014 ex parte order temporarily granting sole legal custody of the parties' child to plaintiff. We affirm.

Plaintiff and defendant L.G. were involved in a dating relationship that began sometime in 2004 or 2005. In 2006, the parties' child was born. After the parties' relationship ended, they entered into at least three written custody and parenting time agreements that were negotiated by their attorneys. Their most recent agreement, reached on May 2, 2011, provided that the parties would continue to share joint legal and physical custody of the child, with each party having equal parenting time. The parties also agreed that because of the shared parenting time, neither party would have to pay the other child support.

On July 23, 2014, plaintiff filed an ex parte application for an order to show cause ("OTSC") with temporary restraints with a Family Part judge. In the application, plaintiff asserted that defendant had been charged in April 2013 with assaulting his seventy-year-old neighbor during a dispute about the alleged removal of decorative stones from defendant's yard. Following a bench trial in the Law Division,[1] defendant was convicted of third-degree aggravated assault. On July 18, 2014,

[1] Docket No. I-13-660.

the trial judge sentenced defendant to two years of probation, and ordered him to complete an anger management course and submit to a "complete mental health screen and . . . follow any recommendations if there are any."

Plaintiff asserted that this conviction demonstrated that defendant was "conducting himself in an increasingly bizarre and oftentimes unnecessarily violent manner." Plaintiff also provided the trial judge with approximately fifty pages of police incident reports, some dating back as far as 1998, concerning public arguments and disputes defendant allegedly had in the past with neighbors, business owners, and other individuals.[2] Most of these incidents predated the parties' May 2011 parenting time agreement. Plaintiff also asserted that defendant had "a history of domestic violence and anger" while the couple were dating.

Although plaintiff conceded that the parties' child was not involved in any of these incidents, plaintiff asserted that defendant's conviction made him unfit to continue to have unsupervised parenting time with the child. She also claimed that she felt "extremely uncomfortable when [the child] stays

[2] Plaintiff did not provide certifications from any of the individuals named in these alleged incidents.

with [d]efendant, given his history of abuse and his uncontrollable anger."

In addition, plaintiff alleged that she needed to file the application on an ex parte basis because she was "truly afraid of what the defendant might do if he [were] provided notice prior to the relief [she was] requesting being [o]rdered by the [c]ourt." Plaintiff's attorney appeared in court with plaintiff to argue in support of the ex parte application and repeated plaintiff's assertion. The attorney stated, "We're truly afraid of what the defendant might do when he gets served notice of this application." The attorney also added that the parties' child was in defendant's "presence right now . . . and judging from his behavior and his track record, . . . it is simply a matter of . . . ensuring the child's safety. This child's safety is paramount. And we believe that under the circumstances[,] an ex parte application is appropriate."

Based upon plaintiff's representations that it was dangerous to continue to permit defendant to have unsupervised parenting time with the child, the judge found it would be "prudent" to grant plaintiff's request. Therefore, the judge issued an OTSC on July 23, 2014, awarding plaintiff sole legal and physical custody of the child pending the return date with defendant having only supervised parenting time in the interim.

What the trial judge did not know, however, was that on the weekend following defendant's sentencing, and just three days prior to filing her ex parte application, plaintiff contacted defendant to request that he take care of the child for an additional day while she went out of town on business, an action that was hardly consistent with her claim that it was too dangerous for defendant to have unsupervised parenting time and that she feared for the child's safety when the child was in defendant's care. The judge was not aware of plaintiff's request because plaintiff did not include it in her certification in support of her ex parte application.

In his response to the OTSC, however, defendant provided the judge with copies of the text messages he and plaintiff exchanged the weekend after he was sentenced. In the messages, plaintiff reached out to defendant and advised him that she had to go to Dallas, Texas on Sunday night and would not be home until Monday night. Not initially understanding what plaintiff was asking, defendant responded that plaintiff could keep the child on Sunday night and he would keep her on Monday so plaintiff would not "lose two nights" with the child. Plaintiff then clarified that she could not care for the child on either Sunday or Monday night. She also stated that if defendant could not take the child on Sunday, plaintiff would ask her mother to

do so.[3] Defendant responded that he would take the child on Sunday as well as Monday and again explained that he was confused at first and "didn't want [plaintiff] to lose time" with the child. Plaintiff then thanked defendant and the text message exchange ended.

In addition, defendant provided letters from the child's pediatrician, dentist, and therapist attesting to his active involvement in the child's life. All of these medical professionals stated that defendant, rather than plaintiff, almost always brought the child to her appointments. Defendant provided additional letters from a pastor, camp counsellors, a school official, and others asserting that defendant took good care of the child.

Defendant also highlighted some of the Law Division judge's findings at the time of sentencing in the assault case that plaintiff had not fully described in her papers. In determining to impose a probationary sentence, the sentencing judge specifically found a number of mitigating factors.[4] The judge

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[3] Therefore, it appears from the text messages that placing the child in defendant's care was plaintiff's first choice.

[4] The judge found aggravating factors nine, "[t]he need for deterring the defendant and others from violating the law[,]" N.J.S.A. 2C:44-1(a)(9); and twelve, "[t]he defendant committed (continued)

found mitigating factor seven, N.J.S.A. 2C:44-1(b)(7), because defendant did not "have any prior criminal convictions" and there were no "formal complaints against" him "despite what may have been reported[.]" The judge also found mitigating factor nine, N.J.S.A. 2C:44-1(b)(9), because defendant's "character and attitude are such that [he] would not have another criminal offense." In addition, the judge found that defendant would do well on probation, N.J.S.A. 2C:44-1(b)(10), and that the parties' child would suffer "extreme hardship . . . if [defendant] had to spend any significant time in state prison." N.J.S.A. 2C:44-1(b)(11).

On September 2, 2014, the parties appeared before the trial judge on the return date of the OTSC. Having the benefit of defendant's responsive papers, the judge asked plaintiff's attorney whether plaintiff conceded that she contacted defendant to ask that he take additional time with the child just days before asserting that she believed it was too dangerous for him to have any unsupervised contact with the child. At first, plaintiff stated on the record that she did not remember when she contacted defendant. Later, however, plaintiff admitted

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(continued)
the offense against a person who he knew . . . was over [sixty] years of age or older." N.J.S.A. 2C:44-1(a)(12).

that she made the request the weekend after defendant's sentencing.

Based upon the now complete record, the trial judge issued an order on September 12, 2014 vacating his July 23, 2014 order and restoring defendant's parenting time with the child. In an accompanying written decision, the judge explained that

> [a]t the initial proceeding[,] . . . plaintiff represented to this [c]ourt that . . . defendant was and remained a violent man. She established at the moment of her application [that defendant] had [the child]. She argued that she had to proceed without notice to . . . defendant because his violent streak and uncontrollable rage would leave their child . . . at risk.

However, the judge stated that defendant responded to plaintiff's application by submitting numerous letters from "professionals" and "laypersons" and that "each person attested to the fine father that . . . defendant appears to be in their presence."

The trial judge observed that plaintiff disputed the statements made in these letters, noting plaintiff's claim that "defendant could have cajoled or coerced each of the persons mentioned [in the judge's opinion] to write a letter supporting" defendant. In response to this contention, the judge aptly stated:

> But . . . defendant could not have cajoled . . . plaintiff. At the moment in time when . . . plaintiff had her concerns, the day after she ordered the transcript that she would use to present her emergent application, well after, even by her account, she knew of the details of the violent assault visited upon . . . defendant's neighbor by . . . defendant, she asked . . . defendant to take [the child] and watch her because she had to go on a business trip.
>
> Measured against that voluntary act, . . . plaintiff's expressed concern as to the safety of [the child] has to be questioned.

Therefore, the trial judge vacated his prior order "that . . . plaintiff acquired without any notice to . . . defendant," and restored joint custody of the child to both parties, with each having shared parenting time as set forth in their May 2011 agreement. The judge also directed that "any and all other relief sought by either party is to be made part of an application filed in the normal course."

Plaintiff thereafter filed a motion for reconsideration of the trial judge's September 12, 2014 order. In her accompanying papers, plaintiff repeated her claim that defendant was a dangerous individual who could not be trusted with the care of a child, and asked the judge to reconsider his prior decision and grant her sole custody of the child, together with child support, counsel fees, and other relief. Plaintiff again

submitted most of the same documents she provided with her original ex parte application.

Defendant opposed plaintiff's motion. He submitted a letter from the psychiatrist who conducted the "mental health screen" that had been ordered at the time of defendant's sentencing. In the November 18, 2014 letter, the psychiatrist stated that defendant had "successfully completed" his anger management course and "did not present with any symptom of an acute psychiatric disorder. No further treatment was recommended."

Following oral argument, the trial judge rendered another thoughtful written decision and denied plaintiff's motion for reconsideration. The judge found that plaintiff failed to demonstrate that his prior decision was based on a palpably incorrect basis or that he had not considered any pertinent information in vacating his prior order and restoring defendant's parenting time.

The trial judge noted that "[e]very aspect of the relief" that the judge granted in the July 23, 2014 OTSC "was premised" upon plaintiff's allegation that she "genuinely feared that . . . defendant was no longer in control of his actions" based upon his conviction for assaulting his elderly neighbor. However, "at the moment in time when . . . plaintiff [allegedly] had her

concerns, . . . she asked . . . defendant to take [the child] and watch her because she had to go on a business trip." The judge concluded that "[m]easured against that voluntary act, . . . plaintiff's expressed concern as to the safety of [the child] had to be questioned" and the order vacated.

Plaintiff argued that the judge should have conducted a plenary hearing so that she could testify concerning why she sought defendant's assistance in providing child care at the same time she was planning to assert in court that he was too dangerous to even be told of the pending motion. However, the judge stated that he permitted plaintiff's attorney to question her on the return date of the OTSC on the record and plaintiff "had no answer." The judge further explained:

> There is no answer that could ever allow this [c]ourt to believe that . . . plaintiff was truly concerned for [the child's] safety. A mother with such a concern does not do what she did. She does not elect to place her child in the hands of the person whom she believes is not capable of safely caring for her child just because she has to go on a business trip.
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> That ended her emergent application and with it, any collateral relief that she sought.

The trial judge further stated that he reviewed all of the police incident reports plaintiff submitted, but observed that some of them preceded the parties' relationship and the birth of

their child, and most of the other alleged incidents occurred prior to the parties' May 2011 parenting time agreement. With regard to all of the reports, the judge stated:

> Carefully analyzed, what . . . plaintiff presented is a myriad of hearsay statements that, if true, establish that . . . defendant has involved himself in many more arguments and conflicts than most gentlemen would and that he has a history of arguing and impressing his will on others. That is the same disposition that . . . plaintiff alleges he has had since they started dating.
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> The allegations in each of the reports, although hearsay, also demonstrate an absence of any conflict involving [the parties' child].
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> The timeline [of events taken from the reports] establishes no change of circumstances that would entitle . . . plaintiff to modify the custodial arrangement or the parenting plan.

Thus, the trial judge denied plaintiff's motion for reconsideration.[5] This appeal followed.

On appeal, plaintiff presents the following contentions:

> I.
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> The Trial Court's Decision Is Not Supported by Sufficient Credible Evidence.

[5] The judge ordered defendant to provide an updated case information statement to plaintiff "for the purpose of later determining child support[.]"

II.

Plaintiff[] Made a Prima Facie Showing of Changed Circumstances to Warrant a Plenary Hearing.

III.

The Court Was Required to Conduct a Plenary Hearing to Resolve the Disputes of Material Fact.

IV.

The Court Must Consider the Statutory Factors Set Forth in N.J.S.A. 9:2-4 in Making a Custody Award.

V.

The Court Has an Independent Parens Patriae Obligation to Ensure That the Best Interests of the Parties' [Child] Were Appropriately Addressed.

VI.

It Was a Mistake of Law for the Court to Summarily Deny Plaintiff[]'s Substantive Requests for Relief Based Upon a Theory That the Original Application Was Non-Emergent.

VII.

The Court Failed to Make Findings of Fact and Conclusions of Law Regarding Plaintiff[]'s Substantive Requests for Relief.

VIII.

It Was a Mistake of Law for the Court to Accept the Disputed and Contested Certification of [Defendant] as Substantive

Fact Without Conducting a Required Plenary Hearing and Subjecting [Defendant] to the Potential of Cross[-]Examination.

IX.

The Court's Rulings That Evidence Relating to a DCP&P Action is Available to the Plaintiff Is a Mistake of Law.[6]

X.

The Failure to Address Plaintiff[]'s Request for Counsel Fees Is Error.

Established precedents guide our task on appeal. We owe substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Thus, "[a] reviewing court should uphold the factual findings undergirding the trial court's decision if they are supported by adequate,

[6] In her motion for reconsideration, plaintiff sought an order requiring the Division of Child Protection and Permanency to provide her with any reports it prepared concerning an investigation allegedly conducted by the Division of defendant's current girlfriend and the girlfriend's children. After noting that plaintiff already had a police report containing information concerning the girlfriend's family, the trial judge denied plaintiff's request. The judge found that the court "does not need those reports in order to determine whether . . . plaintiff has established entitlement to modify the custodial arrangement or the parenting time arrangement." See N.J.S.A. 9:6-8.10a(b)(b) (permitting the Division to release records to a court when the court finds "that access to such records may be necessary for determination of an issue before it[.]"). Again, nothing in the record indicates that the parties' child was involved in any incident involving defendant's girlfriend's family.

substantial and credible evidence on the record." MacKinnon v. MacKinnon, 191 N.J. 240, 253-54 (2007) (alteration in original) (quoting N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. 261, 279 (2007)).

While we owe no special deference to the judge's legal conclusions, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), "we 'should not disturb the factual findings and legal conclusions of the trial judge unless . . . 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." Parish v. Parish, 412 N.J. Super. 39, 47 (App. Div. 2010) (quoting Cesare, supra, 154 N.J. at 412). We will only reverse the judge's decision when it is necessary to "ensure that there is not a denial of justice because the family court's conclusions are []clearly mistaken or wide of the mark." Id. at 48 (alteration in original) (internal quotations omitted) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)).

Further, we review the denial of a motion for reconsideration to determine whether the trial court abused its discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App.

Div. 1996). Reconsideration should only be granted in "those cases which fall into that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Id. at 384 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02 (Ch. Div. 1990)).

After reviewing the record in light of these principles, we conclude that all of plaintiff's contentions are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We therefore affirm the May 19, 2015 order substantially for the reasons that the trial judge expressed in his comprehensive written opinion. We add the following brief comments.

Here, plaintiff asserted in her application for an OTSC that defendant was a dangerous individual who could not be trusted to care for the parties' child. Therefore, plaintiff claimed that an immediate ex parte order was needed to protect the child. However, the same weekend that she was preparing to make her motion, plaintiff was reaching out to defendant to request that he take care of the child for an additional day so that she could leave the state on a business trip. As the trial

judge correctly found, the disclosure of plaintiff's request completely undermined her contradictory contention that defendant should no longer share custody of the child with her.

While certainly not condoning defendant's assault of his neighbor, the trial judge observed that this incident did not involve plaintiff or the parties' child. Indeed, none of the incidents described in the police reports attached to plaintiff's certification pertained to the child. Finally, plaintiff presented no new arguments in support of her motion for reconsideration and, instead, simply repeated the contentions the judge had previously rejected. Under these circumstances, we discern no basis for disturbing the trial judge's decision denying plaintiff's motion for reconsideration.

Affirmed.