RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1179-20

J.A.D.,[1]

Plaintiff-Respondent,

v.

M.A.I.,

Defendant-Appellant.

Submitted March 8, 2022 – Decided May 17, 2022

Before Judges Currier and DeAlmeida.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FM-12-1769-14.

LaRocca Hornik Rosen Greenberg & Crupi, LLC, attorneys for appellant (Ronald H. Carlin, of counsel and on the briefs; Elissa A. Perkins, on the briefs).

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[1] We use the parties' initials in order to preserve their anonymity. See R. 1:38-3(d)(12).

Laufer, Dalena, Jensen, Bradley & Doran, LLC, attorneys for respondent (Peter G. Bracuti, of counsel and on the brief).

PER CURIAM

Defendant appeals from the November 25, 2020 order granting plaintiff unsupervised overnight parenting time with the parties' daughter. Defendant contends the court abused its discretion in analyzing the best interests of the child factors under N.J.S.A. 9:2-4(c). Defendant also asserts the trial court erred in ordering defendant to pay plaintiff $30,000 in counsel fees and an additional $15,460 towards plaintiff's supervised visitation fees and expert reports. We affirm.

I.

The parties were married in July 2010, their child was born in July 2011, and the parties divorced on August 21, 2014. The marital settlement agreement (MSA) included an April 21, 2014 consent order (consent order) providing for the child's custody and care. The parties shared joint legal custody of their daughter. Under the consent order, defendant is the parent of primary residence and plaintiff is the parent of alternate residence.

The consent order accorded plaintiff parenting time on one weekday overnight, a Sunday overnight, and Friday afternoons. After the first three

months, the consent order expanded plaintiff's parenting time with additional overnights. The consent order also included a holiday and summer vacation schedule.

In November 2014, defendant informed the Division of Child Protection and Permanency (DCPP) that the child stated plaintiff had touched her inappropriately. DCPP concluded the allegation was "[u]nfounded" and recommended the child see a therapist, which she did.

Seven months later, the child's therapist reported to DCPP that defendant informed her that the child said plaintiff touched the area surrounding her vagina. DCPP concluded that the allegation was "[n]ot [e]stablished."

Around this same time, defendant unilaterally terminated plaintiff's parenting time and access to the child, in violation of the consent order. Motion practice ensued.

In January 2016, the court ordered defendant to comply with the consent order's provision permitting each party to have "reasonable telephone, Facetime or similar access to [the child] when she is in the care of the other parent." The trial court also granted plaintiff's request to resume parenting time but ordered the parenting time to be supervised through the "Peaceful Healing" program at

plaintiff's expense. The program was coordinated by Lori Lynn, L.P.C., C.S.W., N.B.C.C., A.C.S.

The court also granted defendant's request to appoint a forensic psychologist with experience in evaluating pediatric sexual abuse cases. Accordingly, plaintiff was ordered to cooperate with defendant's expert, Susan Cohen Esquilin, Ph. D., ABPP-Clinical, and defendant was ordered to cooperate with plaintiff's expert—Mark Singer, Ed. D. Lynn was permitted to attend the child's therapy sessions and her evaluation meetings with Esquilin and Singer.

On December 22, 2016, the court granted defendant's request to temporarily relocate to Massachusetts with the child, finding it "imperative" that defendant relocate for employment reasons. Plaintiff was granted two supervised visits in late December and supervised parenting time for two weekends every month. And, if plaintiff was "unable to coordinate supervision for his parenting time with Peaceful Healing on [the] two weekends, [d]efendant [was ordered to] make the child available for weekday supervised parenting time with [p]laintiff." As of November 25, 2020, the child continues to reside in Massachusetts with defendant.

Throughout 2016 and 2017, Peaceful Healing attempted to comply with a court order to interview the child to determine whether she felt safe and

comfortable having unsupervised parenting time with plaintiff. However, defendant refused to make the child available for an interview. This resulted in plaintiff missing parenting time in 2017.

In May 2017, plaintiff moved for the court to schedule a plenary hearing regarding defendant's allegations of abuse as well as to further consider defendant's relocation. Plaintiff also requested a block of unsupervised parenting time during the summer of 2017 and for further relief.

For reasons not disclosed in the record, the court did not issue a decision on this motion until October 2017. Therefore, plaintiff's request for parenting time for the summer was moot. The court granted plaintiff's request for a plenary hearing for a determination on the remaining issues. More than two years passed before that plenary hearing began.

After almost three years of supervised visits, plaintiff moved in May 2019 to lift the supervised restriction on his parenting time. While the motion was pending, Lynn reported an incident where she saw the child, while lying next to plaintiff on the couch watching a movie, put her hand inside her pants and start to masturbate. After Lynn repeatedly told the child to please sit up and stop, the child stopped, sat quietly, and continued to watch the movie. During the plenary hearing, Lynn said the entire incident lasted less than ten seconds. Plaintiff

testified he did not know that this incident occurred until after Lynn told him about it and noted it in her report.

Although the court ruled on some aspects of plaintiff's application, it reserved decision on lifting the supervised parenting time requirement. On June 30, 2019, plaintiff ceased using the Peaceful Healing supervision services because the sessions cost approximately $1500 per weekend.[2] As a result, because plaintiff was only permitted to have supervised visits with his daughter, he was no longer able to have in-person visits with her and was only able to maintain contact through electronic communication.

II.

The plenary hearing took place over ten days between February and June 2020. During his testimony, plaintiff reiterated that he stopped using the Peaceful Healing services because of the cost—approximately $36,000 a year.

Plaintiff also testified regarding the effects the abuse allegations and protracted litigation has had on his relationship with his daughter. He said he missed birthdays, holidays, and vacations, as well as other extracurricular activities and milestones.

[2] Defendant paid for 164 supervised visits with his daughter through Peaceful Healing between September 2016 and June 2019.

Plaintiff also outlined the financial hardship he currently faces due to the costs from the litigation and Peaceful Healing services. Plaintiff spent $109,213.09 on Peaceful Healing supervision and evaluations, as well as $19,000 on Dr. Singer's expert evaluations and services. His costs totaled approximately $263,000. Plaintiff testified that part of the cost was due to defendant's refusal to cooperate in the processing of insurance claims. As a result, plaintiff has only received approximately $6000 to $7000 in insurance reimbursements for the Peaceful Healing supervised visits.

Plaintiff expressed his frustration that it took over five years to receive the parenting time he was entitled to under the 2014 consent order. He first requested a plenary hearing in 2017. Although the motion was eventually granted, the hearing did not start until February 2020. In addition, plaintiff testified he had not received all of Lynn's reports prior to the start of the hearing, despite having paid for them.

Defendant's expert, Dr. Esquilin, testified during the plenary hearing that there was no evidence suggesting plaintiff has a sexual interest in children. She stated that plaintiff and the child have a "warm" interaction and enjoyed each other's company. Dr. Esquilin recommended in her 2016 report that the child have daytime unsupervised parenting time with plaintiff. However, given the

fact that Dr. Esquilin's report was four years old by the time of the hearing, she conceded that she could not make any additional recommendations, as her report was based on past observations.[3]

Dr. Singer testified on behalf of plaintiff during the hearing. He prepared a report in December 2018. He stated that in the course of his evaluation and investigation, he did not find any data suggesting plaintiff acted out sexually towards children. He recommended that Peaceful Healing develop a transition plan so plaintiff could have unsupervised visits with the child. Dr. Singer acknowledged plaintiff's obsessive-compulsive disorder, and his "unconventional views" regarding adult, consensual, sexual relationships. But he concluded that "[t]he data does not suggest that . . . unsupervised parent time . . . would create an imminent risk of harm to [the child]." Dr. Singer testified that his report, coupled with the "[u]nfounded" and "[n]ot [e]stablished" allegations against plaintiff, led him to conclude that plaintiff's behavior does not indicate sexual aggression toward his daughter.

[3] Dr. Esquilin's report was written in December 2016. She had no further contact with anyone until just before the plenary hearing in 2020.

Lynn also testified regarding her years-long interaction with plaintiff and the child, providing supervision services, including daytime and overnight stays, from 2016 until 2019.

Lynn described critical incidents and events that occurred during her time supervising the visits. She recalled in December 2015, during her initial meeting with the child, that the child told her that plaintiff touches her between her legs. Also, during this first meeting, defendant told Lynn it was not appropriate for the child to be alone or unsupervised with plaintiff. Lynn said defendant did not consent to unsupervised parenting time with plaintiff at any time from 2015 to 2019. And when Lynn attempted to create a plan to transition plaintiff's parenting time from supervised to unsupervised, defendant continued to refuse to consent to unsupervised time. Therefore, Lynn was unable to perform her role in transitioning plaintiff's parenting time. Lynn testified that defendant "contaminated the process" of evaluating the child and preparing the transition report.

Throughout Lynn's reports, she noted defendant's opposition "as it related to specific activities that occurred during [plaintiff's] [p]arenting [t]ime." She said defendant's "chronic interference" made it difficult to complete the transition report and facilitate her role. Defendant also obstructed Peaceful

Healing from conducting the required interviews with the child. Lynn described the child's first therapist as an "advocate" for defendant in this action.

As stated, Lynn testified about the May 25, 2019 incident. She stated that, at the time of the incident, plaintiff was watching a movie and did not notice the child's sexual behavior. Lynn said she did not discuss the event with plaintiff during or immediately after the incident.

During her testimony, defendant testified regarding the abuse allegations. She said the child told her that "[plaintiff] touches me between my legs." She described the child as having "a lot of anxiety," including separation anxiety when away from defendant. She said the child's therapist reported the second abuse allegation to DCPP after viewing defendant's video of the child stating that plaintiff inappropriately touched her. This video was played at the plenary hearing.

Defendant said she cooperated with the supervised visits but conceded she did not sign the safety guidelines required for Lynn to start a transition plan. Defendant further stated that the child only agrees to spend time with plaintiff because the visits are supervised.

III.

On November 25, 2020, the court issued a thorough well-reasoned written decision and order. The court ordered defendant would continue as the principal residential parent and plaintiff would have supervised parenting time with his daughter until February 2021. Plaintiff was granted specific dates for parenting time in Massachusetts in 2020 as well as for the holidays. When either party was with the child, each was instructed to permit the other to communicate with the child over telephone or other electronic means. The court also ordered the child to continue therapy.

The order accorded plaintiff two overnight unsupervised visits with the child during February 2021, as well as parenting time every other weekend thereafter, alternating between New Jersey and Massachusetts. All visits thereafter would be unsupervised. Plaintiff was also granted four weeks of parenting time during the summer of 2021.

The court ordered defendant to pay plaintiff $10,000 for reimbursement of a portion of past fees for Peaceful Healing's services during supervised visits, and $5460 for the transition report. Defendant was further ordered to pay plaintiff $30,000 for legal fees incurred in this matter.

IV.

On appeal, defendant asserts the court erred in granting plaintiff unsupervised parenting time and in ordering defendant to pay counsel fees and a share of the supervised visitation and transition report fees.

"We review the Family Part judge's findings in accordance with a deferential standard of review, recognizing the court's 'special jurisdiction and expertise in family matters.' Thus, 'findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence.'" Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83 (2016) (internal citations omitted) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12, 413 (1998)).

"We invest the family court with broad discretion because of its specialized knowledge and experience in matters involving parental relationships and the best interests of children." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 427 (2012). We will only disturb a family court's factual findings where 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 v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (internal quotation marks omitted) (quoting Platt v. Platt, 384 N.J. Super. 418, 425 (App. Div. 2006)).

However, our review of the court's legal determinations is de novo. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019).

A.

The linchpin of any custody and parenting time dispute is "the best interest of the child" inquiry. Kinsella v. Kinsella, 150 N.J. 276, 317-18 (1997). This analysis is the "primary and overarching consideration" and is "an expression of the court's special responsibility to safeguard the interests of the child . . . because the child cannot be presumed to be protected by the adversarial process." Ibid.

N.J.S.A. 9:2-4(c) provides factors for a court to use in its analysis of custody and parenting time:

> [(1)] the parents' ability to agree, communicate and cooperate in matters relating to the child; [(2)] the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; [(3)] the interaction and relationship of the child with its parents and siblings; [(4)] the history of domestic violence, if any; [(5)] the safety of the child and the safety of either parent from physical abuse by the other parent; [(6)] the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; [(7)] the needs of the child; [(8)] the stability of the home environment offered; [(9)] the quality and continuity of the child's education; [(10)] the fitness of the parents; [(11)] the geographical proximity of the parents' homes; [(12)] the extent and quality of the time spent

> with the child prior to or subsequent to the separation; [(13)] the parents' employment responsibilities; and [(14)] the age and number of the children.

The court considered each factor. In addressing factor one, the court found the parties did not communicate well and most of the issues resulted from defendant's "intransigence." In contrast, plaintiff had demonstrated "appropriate concern" for the child's welfare and engaged the judicial process to obtain parenting time. The court noted DCPP's investigation of the child sexual abuse allegations resulted in findings of "[u]nfounded" and "[n]ot [e]stablished."

As to factor two, the court found "defendant has regularly obstructed plaintiff's parenting-time rights," based on the "egregious history" of defendant's unwillingness to comply with the agreed-upon and court-ordered parenting time.

In analyzing factor three, the court found the child had a good relationship with both parents. As to factor four, the court stated any reported history of domestic violence was "limited" and "remote," as it occurred before the parties separated. And the sole reported incident involved plaintiff pushing defendant when he caught defendant searching through his wallet.

In considering factor five, the court found that defendant provided a safe environment for the child. The judge stated that "[d]efendant's assertions of sexual abuse and . . . contact with [the child] are exaggerated, unfounded, and

unreliable." The court also found that the May 25, 2019 incident was the result of "momentary inattention" and was not "tantamount to abuse." Both parents are capable of caring for their daughter and the "safety of either parent from physical abuse by the other" was "not an issue."

Regarding factor six, the court found that the child wants to spend time with both parents. In analyzing factor seven, the court found that the child "needs stability" and that she needs both parents for her "healthy development."

Under factor eight, the court acknowledged that both parents can provide an appropriate home environment. Because of the child's age, factor nine was "not a significant issue."

As to factor ten, the court found both parties were physically fit for parenting time. But, the judge reiterated her concern regarding the parties' inability to interact positively with each other. Again, the court acknowledged that defendant's behavior in delaying the litigation and her decisions to unilaterally prevent plaintiff from exercising his parenting time was "deeply troubling."

Under factor eleven, the court noted the distance between plaintiff's residence in New Jersey and defendant's residence in Massachusetts. When addressing factor twelve, the court found that all of plaintiff's interactions with

the child from 2014 to 2019 were supervised and that plaintiff's parenting time included "substantial gaps."

Under factor thirteen, the court found there was no evidence demonstrating that the parties' employment responsibilities precluded either from exercising reasonable parenting time. The judge noted the child was nine years old in addressing factor fourteen.

In addition to the fourteen factors, the court considered the fact that the child had not seen plaintiff in over a year. However, the judge stated that parenting time should not be further delayed "simply because it has been delayed in the past." To accommodate the gap in parenting time, the judge imposed the gradual change from supervised time to unsupervised visits over the first several months of 2021. She commented she had a "substantial concern" regarding defendant's conduct in denying plaintiff parenting time and she was troubled by defendant's inability to put aside her negative feelings about plaintiff.

The judge also acknowledged defendant's concern regarding plaintiff's sexual ideations and fantasies but noted defendant was aware of these behaviors when she executed the joint custody agreement and consent order. Furthermore, there was nothing presented regarding plaintiff's actions to require the court to reduce or limit his parenting time.

In reaching its decision, the court also referred to its February 2019 interview with the child, noting she was a "bright, articulate girl" and "comfortable and mature." The judge stated that the child told her that there was "nothing that she disliked about either parent."

In her extensive opinion, the Family Part judge carefully considered each statutory factor and made additional findings. The judge properly applied the controlling principles of law to her findings. The decision is supported by the "adequate, substantial, and credible evidence" presented at the plenary hearing.

B.

Defendant also challenges the court's order of counsel fees and reimbursement to plaintiff for a portion of the extensive fees incurred for supervised visitation and a transition report.

The assessment of counsel fees in a family action rests within the court's discretion. D.H. v. D.K., 251 N.J. Super. 558, 563 (App. Div. 1991) (citing Williams v. Williams, 59 N.J. 229, 233 (1971)); Eaton v. Grau, 368 N.J. Super. 215, 225 (App. Div. 2004). We "will disturb a trial court's award of counsel fees 'only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)).

An allowance for counsel fees is permitted to any party in a custody and parenting time action under Rule 5:3-5(c), subject to the provisions of Rule 4:42-9. In determining the amount of the fee award, the court should consider:

> (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.
>
> [R. 5:3-5(c).]

Further, a court may order any other "appropriate equitable remedy it sees fit." R. 5:3-7(a).

The court properly analyzed plaintiff's request for counsel fees under Rule 5:3-5(c). The judge made findings on each factor, specifically noting defendant "has been guilty of bad faith in the manner in which she has pursued this litigation," while plaintiff sought the court's assistance in enforcing the parties' consent order regarding parenting time. In addition, the court found the costs for Peaceful Healing's services would have been reduced if defendant had properly disclosed her expert's report, which recommended unsupervised

daytime visits.[4] Furthermore, the court's decision was favorable to plaintiff as it permitted unsupervised parenting time. The court found that plaintiff's legal fees totaled $187,460.93; he had paid $126,928.43.

We discern no reason to disturb the court's award of counsel fees and other costs. The court repeatedly found defendant acted in bad faith in the course of this litigation and its findings are supported by "adequate, substantial, credible evidence." See Thieme, 227 N.J. at 283. Under Rule 5:3-7(a), the court was permitted to apply "any other appropriate equitable remedy," including imposing a share of the costs of the Peaceful Healing services and transition report on defendant.

Affirmed.

[4] Defendant did not disclose the expert's report for more than two years after its receipt.