

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1209-21**

M.C.K.,

Plaintiff-Respondent,

v.

A.D.,

Defendant-Appellant.

Argued April 25, 2023 – Decided May 11, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey,
Chancery Division, Camden County, Docket No.
FV-04-1139-22.

Gary L. Borger argued the cause for appellant (Borger
Matez, PA, attorneys; Gary L. Borger, on the briefs).

Ronald A. Graziano argued the cause for respondent
(Graziano & Flynn, PC, attorneys; Ronald A. Graziano
and Karina E. Hehn, on the brief).

PER CURIAM

Defendant A.D.¹ appeals from a final restraining order (FRO) entered in favor of plaintiff M.C.K. pursuant to the Prevention of Domestic Violence Act (the Act), N.J.S.A. 2C:25-17 to -35, which modified custody of the parties' two minor children and established a parenting plan. He also appeals from an order awarding plaintiff counsel fees. Because of a procedural error, including a due process violation, we vacate the FRO and counsel fee award, and remand for a different judge to conduct a new FRO hearing.

We glean the following facts and procedural history from the record. The parties were formally married and are the parents of two minor children, a son who was fourteen years old and a daughter who was eleven years old at the time of the incident. The parties separated in 2009, and were subsequently divorced in Pennsylvania. Since 2019, plaintiff and the children have lived in Haddonfield. Defendant lives in Pennsylvania, where he works as an attorney.

A series of family court proceedings were filed in the Court of Common Pleas of Philadelphia County, Pennsylvania. In 2013, a consent order was entered in Pennsylvania, which granted plaintiff primary physical custody of the children and awarded defendant parenting time on alternate weekends and

¹ We refer to the parties and their children by initials to protect their privacy. R. 1:38-3(d)(10).

holidays. The order also vested plaintiff with broad authority to cancel defendant's parenting time and allowed the children to cancel a visit "for any reason." Also in 2013, after defendant petitioned the Pennsylvania court to modify custody, plaintiff filed a petition for protection from abuse (PFA). A PFA order was denied.

In 2016, defendant again petitioned the Pennsylvania court to modify custody. Shortly thereafter, plaintiff filed another petition for a PFA order. A temporary PFA order was entered. After a two-day hearing, the court denied the PFA petition and vacated the Temporary PFA order. The Pennsylvania court then held a four-day custody trial. The court increased defendant's parenting time, awarding him parenting time from Friday at 6:00 p.m. to Sunday at 5:00 p.m. on alternate weekends, and from Sunday from 10:00 a.m. to 5:00 p.m. on the intervening weekends. The order also eliminated plaintiff's unilateral right to cancel visits.

Plaintiff filed another unsuccessful PFA petition in 2018. Plaintiff then filed a child dependency action in Philadelphia. On March 25, 2019, the court dismissed the petition, finding the child was not a dependent under the Pennsylvania Juvenile Act. The court also ordered that the June 21, 2017 order remained in full force and effect.

An April 4, 2019 order awarded shared legal custody and set the parenting time schedule. Plaintiff was awarded "primary physical custody" of the children, with defendant having "partial physical custody," including dinner during the week and weekend visitation. In 2019, plaintiff moved to New Jersey with the children with defendant's consent. Defendant remained a resident of Philadelphia.

During defendant's parenting time on October 3, 2021, the parties had an incident at their daughter's field hockey game. When plaintiff attempted to leave the game with the children over defendant's objection, defendant allegedly used both his body and his car to block their exit. Immediately following the incident, the parties' son lost control of his bowels, and shortly thereafter, the parties' daughter attempted suicide.

Two days later, plaintiff filed a domestic violence complaint alleging harassment. Plaintiff alleged she relocated to New Jersey in 2019 because defendant is an attorney in Pennsylvania, and she believed she was unable to obtain relief in the courts of Pennsylvania due to defendant's professional relationships. She claimed defendant used his body to threaten and control plaintiff and the children. Plaintiff asserted the children are afraid to speak to her in defendant's presence and that defendant pulled their daughter by her hair

and took her phone because she did so. Plaintiff claimed defendant became enraged and began calling plaintiff names at the field hockey game when their daughter walked towards plaintiff and would not allow plaintiff to assist their daughter put on her field hockey pads. Plaintiff claimed that when their son stated he did not feel well, plaintiff asked defendant for permission to drive their son home. Plaintiff alleged defendant refused and began yelling and screaming, calling plaintiff names, and threatened the children not to move. Plaintiff alleged defendant used his body to block them from moving, and their son had a bowel movement in his pants out of fear. Plaintiff claimed that when she and the children attempted to leave the field hockey field, defendant followed them, pulled alongside plaintiff's car, and blocked traffic. Plaintiff alleged defendant eventually left with the children's Chrome books and cell phones. The complaint also described defendant's alleged prior abuse of the children. A hearing officer granted a temporary restraining order (TRO) On October 5, 2021.

The Family Part judge informed the Pennsylvania judge of the proceedings. On November 8, 2021, the judge interviewed both children in camera simultaneously without notice to defendant. When one child commented about future parenting time with defendant, the judge responded that "for the

time being we don't need to have . . . any contact with your dad at least as long as this [c]ourt has the jurisdiction to decide this case."

The FRO hearing was held the next day. Only plaintiff and defendant testified during the FRO hearing. The court denied defendant's motions to bar evidence of prior domestic violence history and to dismiss the complaint. The court permitted counsel to submit written closing arguments.

On November 16, 2021, the court issued an oral decision. The court found plaintiff to be a more credible witness, that she proved the predicate act of harassment, that there was a prior history of domestic violence, and that plaintiff needed a FRO to protect against future harassment. The court granted a FRO to plaintiff. Among other relief, the FRO barred defendant from having contact with the children. The court directed that the children and defendant meet with a psychiatrist individually, and eventually meet for joint therapy, in hopes of restoring unsupervised visitation. The court also issued three written opinions, one pursuant to Rule 2:5-1(b).²

On December 7, 2021, the trial court granted plaintiff's motion for counsel fees, awarding her \$12,500. This appeal followed.

² The written opinions were issued over the course of three months, from January to March 2022. All were issued months after the FRO was entered.

We denied defendant's motion for summary disposition of the appeal. We also denied plaintiff's motion for an award of appellate counsel fees without prejudice.

Defendant raises the following points for our consideration:

I. STANDARD OF REVIEW.

II. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO ISSUE AN FRO MODIFYING AND DESTROYING DEFENDANT'S RIGHTS UNDER THE PENNSYLVANIA CUSTODY ORDER.

III. THE FRO SHOULD BE VACATED BECAUSE THE TRIAL COURT PREJUDGED THE MATTER.

IV. THE FRO SHOULD BE VACATED BECAUSE THE TRIAL COURT RELIED ON MATERIALS OUTSIDE OF THE RECORD.

V. THE TRIAL COURT'S FINDING OF A "PURPOSE TO HARASS" IS INSUFFICIENTLY SPECIFIC, AND IMPERMISSIBLY IGNORES THE ENTIRE CONTEXT.

VI. THE TRIAL COURT'S FINDING OF HARASSMENT SHOULD BE VACATED BECAUSE THE CONDUCT AT ISSUE IS NOT, BY DEFINITION, "HARASSMENT."

VII. THE FRO SHOULD BE VACATED BECAUSE THE TRIAL COURT'S FINDING OF A "HISTORY OF DOMESTIC VIOLENCE" IS BARRED BY COLLATERAL ESTOPPEL, INSUFFICIENTLY

SPECIFIC, AND NOT SUPPORTED BY CREDIBLE EVIDENCE.

1. The Trial Court's Ruling That There Was a "History of Domestic Violence" is Barred By Collateral Estoppel.
2. Even if Collateral Estoppel is Inapplicable, It Was Still an Abuse of Discretion for the Trial Court to Ignore the Four Previous Pennsylvania Actions Where the Defendant Was Accused of Domestic Violence and Subsequently Absolved Following a Trial.
3. The Trial Court's Finding of a "History of Domestic Violence" is Not Supported by Sufficient, Credible Evidence.

VIII. THE TRIAL COURT'S FINDINGS RELATING TO C.D.'S ALLEGED SUICIDE ATTEMPT ARE UNSUPPORTED BY THE RECORD AND CONSTITUTE A DENIAL OF DUE PROCESS.

1. The Trial Court's Findings Relating to C.D.'s Alleged Suicide Attempt Are Unsupported by the Record.
2. The Trial Court's Reliance on C.D.'S Alleged Suicide Attempt to Grant an FRO Constitutes a Denial of Due Process Requiring This Court to Vacate the FRO.

IX. THE TRIAL COURT VIOLATED DEFENDANT'S DUE PROCESS RIGHTS AND NEW JERSEY'S COURT RULES AND CASE LAW BY FAILING TO PROVIDE NOTICE OF THE IN CAMERA CHILD INTERVIEW AND THEREBY

PRECLUDING DEFENDANT FROM HIS RIGHT TO
SUBMIT PROPOSED QUESTIONS.

X. THE TRIAL COURT'S "HARASSMENT"
FINDINGS ARE WHOLLY UNSUPPORTED BY
THE RECORD AND CONTRAVENE SETTLED
LAW.

1. The Trial Court's Findings Under N.J.S.A.
2C:33-4(a) and (c) are Unsupported.

2. The Trial Court's N.J.S.A. 2C:33-4(b)
Findings are unsupported.

XI. THE CUSTODY-VIOLATING PROVISIONS
OF THE FRO SHOULD BE VACATED BECAUSE
THE COURT ABDICATED ITS DECISION-
MAKING ROLE TO A PSYCHIATRIST.

XII. THE COURT SHOULD VACATE THE ORDER
AWARDING ATTORNEY'S FEES BECAUSE IT
FAILS TO CONFORM TO N.J.S.A. 2C:25-29(B)(4)
AND [RULE] 4:42-9(d).

A.

We "accord substantial deference to Family Part judges, who routinely hear domestic violence cases." C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020) (citing J.D. v. M.D.F., 207 N.J. 458, 482 (2011)). When reviewing "a trial court's order entered following [a] trial in a domestic violence matter, we grant substantial deference to the trial court's findings of fact and the legal conclusions based upon those findings." D.N. v. K.M., 429 N.J. Super. 592, 596 (App. Div.

2013) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). We do not disturb the "factual findings and legal conclusions of the 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." Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Deference is particularly appropriate when the evidence is largely testimonial and involves credibility issues, because the judge who observes the witnesses and hears the testimony has a perspective the reviewing court does not enjoy. Pascale v. Pascale, 113 N.J. 20, 33 (1988) (citing Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)).

The Act defines domestic violence as the commission of a predicate offense enumerated in N.J.S.A. 2C:25-19(a) against a plaintiff who meets the definition of a "victim of domestic violence" set forth in N.J.S.A. 2C:25-19(d). J.D., 207 N.J. at 473. Terroristic threats and harassment are predicate offenses under the Act. N.J.S.A. 2C:25-19(a)(3), (13).

A person commits the petty disorderly persons offense of harassment if, "with purpose to harass another," he or she:

- a. Makes, or causes to be made, one or more communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

- b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
- c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

A communication under subsection a. may be deemed to have been made either at the place where it originated or at the place where it was received.

[N.J.S.A. 2C:33-4.]

In evaluating a defendant's intent, a judge is entitled to use "[c]ommon sense and experience." State v. Hoffman, 149 N.J. 564, 577 (1997). Because direct proof of intent is often absent, "purpose may and often must be inferred from what is said and done and the surrounding circumstances," and "[p]rior conduct and statements may be relevant to and support an inference of purpose." State v. Castagna, 387 N.J. Super. 598, 606 (App. Div. 2006); see also H.E.S. v. J.C.S., 175 N.J. 309, 327 (2003) ("[A] purpose to harass may be inferred from' . . . common sense and experience." (quoting Hoffman, 149 N.J. at 577)).

The entry of a final restraining order requires the trial court to make certain findings and apply a two-prong test. First, the trial court "must determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in N.J.S.A. 2C:25-19[(a)] has

occurred." Silver v. Silver, 387 N.J. Super. 112, 125 (App. Div. 2006). Second, the court also must determine whether a FRO is required to protect the party seeking restraints from future acts or threats of domestic violence. Id. at 126-27. This second determination "is whether a restraining order is necessary . . . to protect the victim from an immediate danger or to prevent further abuse." Id. at 127.

B.

The minor children of the parties are not "victim[s] of domestic violence" as defined by N.J.S.A. 2C:25-19(d). They are less than eighteen years old and are not "emancipated." Nor do they fall within the other definitions of a victim of domestic violence set forth in N.J.S.A. 2C:25-19(d).

When considering whether defendant committed a predicate act of domestic violence, the trial court focused in part on defendant's conduct directed at the minor children. The Act lists nineteen offenses that constitute a predicate act when "inflicted upon a person protected under" the Act. While that conduct may be highly relevant to custody and parenting issues and may be considered when determining whether to include the children as protected persons in an otherwise appropriate TRO or FRO, see N.J.S.A. 2C:25-29(a)(5), -29(b)(3), -29(b)(11), and whether plaintiff has established a need for a FRO to protect

against future abuse, the conduct directed at the children does not constitute a predicate act under the Act.

When determining whether defendant committed a predicate act of domestic violence, the court should have limited its consideration to the conduct directed at plaintiff. Absent adequate proof of a predicate act "inflicted upon" plaintiff, a court must dismiss the complaint and TRO and lacks jurisdiction to impose a parenting plan and modify a previously entered custody or parenting time order in the domestic violence case.

Additionally, while domestic violence proceedings are summary actions, "[t]he conduct of the domestic violence hearing itself must accord with at least minimal requirements of due process, including the right of defendant to conduct cross-examination." Pressler & Verniero, Current N.J. Court Rules, cmt. 4.3 on R. 5:7A (2023) (citing J.D., 207 N.J. at 481-82; Peterson v. Peterson, 374 N.J. Super. 116, 125 (App. Div. 2005); Franklin v. Sloskey, 385 N.J. Super. 534, 543 (App. Div. 2006)). Defendant argues that the trial court violated his right to due process by improperly conducting an in camera interview of the children without notice to defendant and without affording defendant the opportunity to submit questions to the court to be used during the interviews. We agree.

"The minimum requirements of due process . . . are notice and the opportunity to be heard." Jamgochian v. N.J. State Parole Bd., 196 N.J. 222, 240 (2008) (omission in original) (quoting Doe v. Poritz, 142 N.J. 1, 106 (1995)). Prior to conducting the child interview regarding custody or parenting time, the court was required to "afford counsel the opportunity to submit questions for the court's use during the interview and shall place on the record its reasons for not asking any question thus submitted." R. 5:8-6; see also Pressler & Verniero, cmt. 1.4.3 on R. 5:8-6; D.A. v. R.C., 438 N.J. Super. 431, 456-59 (App. Div. 2014). It did not do so. Conducting the child interviews without notice violated defendant's right to be heard and to submit questions.

The court exercised emergency jurisdiction and interviewed the children in camera before the FRO hearing. Conducting the child interviews before the FRO hearing was unnecessary. The TRO granted plaintiff temporary custody of the children and provided defendant with "[n]o parenting time/visitation until further ordered." We are mindful of the daughter's actions after the field hockey incident. The Division of Child Protection and Permanency (DCPP) was already involved with this family. The court could have made a referral to relay those circumstances to the DCPP.

Procedurally, the in camera interview of the children should have occurred after a FRO was entered, not before it. If a FRO is denied, the court lacks jurisdiction to modify custody or parenting time as part of the domestic violence case. In that scenario, the court could direct plaintiff to file a custody/parenting time application under a different case type and docket number.

In addition, conducting the interview of both children simultaneously was questionable. The interview was not lengthy. It lasted only nineteen minutes. The children were old enough to not need the assistance or encouragement of the other sibling to answer the court's questions. The better practice would be to interview the children separately, outside of each other's presence. In that fashion, the court could compare the children's versions of the same events, to determine if they corroborated each other or materially differed.

Because of these procedural errors, we are constrained to vacate the FRO and remand for a new FRO hearing, without reaching the issue of whether plaintiff proved by a preponderance of the evidence that defendant harassed her, as defined by N.J.S.A. 2C:33-4. On remand, the FRO hearing shall be conducted by a different judge due to the extensive factual findings and credibility determinations made by the trial judge. See Freedman v. Freedman, 474 N.J. Super. 291, 308 (App. Div. 2023) (citing P.T. v. M.S., 325 N.J. Super. 193, 220-

21 (App. Div. 1999); J.L. v. J.F., 317 N.J. Super. 418, 438 (App. Div. 1999)). Until the FRO rehearing, which shall be held within forty-five days, the TRO is reactivated and shall remain in full force and effect, subject to modification by subsequent court order.


Aside from the new FRO hearing on remand, either party may file a separate Family Part application to modify custody or parenting time issues under an FM docket number. Such applications shall be filed in accordance with the procedural and jurisdictional requirements of the New Jersey Uniform Child Custody Jurisdiction and Enforcement Act, N.J.S.A. 2A:34-53 to -95.

C.

Defendant also challenges the counsel fee award. The Act authorizes an award of "reasonable attorney's fees" as "monetary compensation for losses suffered as a direct result of the act of domestic violence." N.J.S.A. 2C:25-29(b)(4). The award of attorney's fees is in the discretion of the trial judge. McGowan v. O'Rourke, 391 N.J. Super. 502, 508 (App. Div. 2007). Because we vacate the FRO, we also vacate the counsel fee award without prejudice to either party applying for a counsel fee award on remand.

Reversed and remanded for a new FRO hearing to be held within forty-five days. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION

A-1209-21