SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2289-21

C.S.,

Plaintiff-Respondent,

v.

J.S.,

Defendant-Appellant.

Submitted September 19, 2022 — Decided January 9, 2023

Before Judges Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FM-20-0386-14.

Law Offices of Lawrence W. Luttrell, attorneys for appellant (David W. Trombadore, of counsel and on the briefs).

DeTorres & DeGeorge, LLC, attorneys for respondent (Kristen E. Blucher and Rosanne S. DeTorres, of counsel and on the brief).

PER CURIAM

Defendant J.S.[1] appeals from Family Part orders dated September 3, 2021, and March 21, 2022, awarding plaintiff C.S. full custody and other relief. Based on our review of the record and applicable legal principles, we reverse and remand for further proceedings.

I.

The parties were married on July 15, 2000, and had three children: Jill, born July 2003; Jane, born May 2005; and Cindy, born July 2008. On October 20, 2014, the parties were divorced and entered into a Marital Settlement Agreement (MSA). The MSA incorporated a parenting plan, which designated defendant as the parent of primary residence and provided plaintiff with regular parenting time.

Despite an agreed upon parenting plan in the MSA, parenting time and custody has been an ongoing and contentious issue involving significant litigation and several appeals. We need not recount the entire history because this appeal stems from a trial court order entered November 12, 2019. The order was entered following a four-day plenary hearing. The trial court[2] in that

[1] We utilize initials and pseudonyms to protect the confidentiality of the parties and their children. R. 1:38-3(d)(3).

[2] A different trial judge entered the September 3, 2021, and March 21, 2022, orders at issue on this appeal.

proceeding noted in its statement of reasons the ongoing custody dispute in this matter is a "tragic mess."

Ultimately, the court entered an order on November 12, 2019, which provided, in part, the parenting plan agreed to by the parties would be enforced and "strictly observed" except as otherwise modified by the order. The order indicated plaintiff's parenting time with the two younger children would continue every other weekend and on Tuesday nights, but Jill should not be present. This provision was entered because of Jill's influence over her younger sisters' relationship with plaintiff. The order further provided during plaintiff's parenting time, defendant "shall have no contact" with the children. The children were also "barred from sequestering themselves in [their] bedroom[s]" and were directed to interact and eat meals with plaintiff and their stepfamily. The order additionally provided plaintiff with parenting time for the entire 2020 summer with Jane and Cindy. This provision was an effort to assist plaintiff in repairing his relationship with the children. Plaintiff was also to be fully informed of Jill's college search.

The November 12, 2019 order required defendant to "do everything in her power to effect the terms and purpose of this order, and actively encourage the girls' relationship with [plaintiff] on a daily basis," that plaintiff should be

involved in all decisions regarding the children, and he should be kept informed of any events involving the children. The order also indicated any decision for further family therapy was in the sole discretion of plaintiff. The order further provided the provisions of the order should be discussed with the children, but not the court's opinion. Finally, the court order provided, "should this order not be strictly observed by all involved, the court can and will consider a full change of custody . . . ."

In August 2020, defendant filed an order to show cause seeking a change in parenting time and other relief, which was converted into a motion. Plaintiff, in turn, filed an application seeking to enforce the November 12, 2019 order based on defendant's alleged failure to comply with its provisions and further requested a change in custody pursuant to the same order. A different judge issued an order dated October 9, 2020, scheduling a "plenary hearing contemplating defendant's attempts to facilitate the children's relationship with plaintiff." Defendant subsequently filed a motion to limit the scope of the hearing to exclude consideration of any change in residential custody, arguing the issue of parenting time was on appeal. As discussed below, the trial court denied defendant's motion to limit the scope of the hearing.

The hearing took place over the course of several days—November 13, 2020, January 21, 2021, February 3, 2021, and February 24, 2021. On January 25, 2021, the court ordered the children to commence reunification therapy with Roy Hirschfeld, MA, EdS.[3] In addition, the court conducted interviews with the younger children on February 12, 2021. However, after the fourth day of the plenary hearing—February 24, 2021—the court indicated it would need more time to review the evidence before rendering a decision. On March 26, 2021, we affirmed the trial court's November 12, 2019 order arising from the prior plenary hearing. C.S. v. J.L-S., No. A-1712-19 (App. Div. Mar. 26, 2021) (slip op at 1, 11).

On August 26, 2021, the trial court contacted counsel and advised "new information ha[d] come to light[,]" and the court directed the parties to appear for a conference. The court subsequently advised counsel in an email Hirschfeld had "expressed concerns" that would be addressed at a September 3, 2021 conference. At the conference, the court reopened the hearing to question plaintiff regarding issues surrounding Jill's college selection and when he was

[3] As discussed further below, Hirschfeld also served as a therapist for the family earlier in the litigation.

advised about where she was living at college.[4] The court then proceeded to render its decision. The court ultimately found defendant failed to comply with the November 12, 2019 order. The court further analyzed the factors set forth in N.J.S.A. 9:2-4(c) and awarded plaintiff full custody of Jane and Cindy.[5] Subsequently, on March 21, 2022, the court gave defendant supervised therapeutic visitation with Jane and Cindy.[6] This appeal followed.

II.

Defendant raises the following points on appeal:[7]

> POINT I:
>
> THE TRIAL COURT ERRED IN PLACING THE BURDEN OF PROOF ON [DEFENDANT].

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[4] It is not clear the parties had notice further testimony would be taken.

[5] Jill had reached the age of eighteen prior to the court's decision, so the order did not address her.

[6] The court also addressed child support issues in the order.

[7] Defendant's point headings in the table of contents skip Point VI and do not match the point headings in the brief. Moreover, while there are nine point headings in the table of contents, there are only eight in the brief. We have referred to the brief's point headings above.

POINT II:

THE TRIAL COURT ERRED IN HOLDING A PLENARY HEARING ON CUSTODY WHEN THE ISSUE OF PARENTING TIME WAS ON APPEAL.

POINT III:

THE TRIAL COURT ERRED IN REOPENING THE PLENARY HEARING WITHOUT NOTICE TO DEFENDANT.

POINT IV:

THE TRIAL COURT IMPROPERLY PARSED THE FACTORS OF N.J.S.A. 9:2-4.

POINT V:

THE TRIAL COURT ERRED IN FINDING DEFENDANT VIOLATED THE NOVEMBER 12, 2019 ORDER.

POINT VI:

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT UNSUPERVISED PARENTING TIME.

POINT VII:

THE TRIAL COURT ERRED IN GRANTING CHILD SUPPORT TO PLAINTIFF.

POINT VIII:

THE TRIAL COURT WAS BIASED IN PLAINTIFF'S FAVOR.

III.

We ordinarily accord "great deference to discretionary decisions of Family Part judges[,]" in recognition of the "family courts' special jurisdiction and expertise in family matters . . . ." Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (citations omitted); N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 26 (2014) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

IV.

A.

Prior to beginning the plenary hearing on November 13, 2020, the trial court denied plaintiff's motion to exclude consideration of any change of residential custody. Defendant filed the motion because of the pending appeal

and argued the court did not have jurisdiction pursuant to Rule 2:9-1(a).[8] In addressing the motion, the court stated:

> I will consider what the [c]ourt deems appropriate. And I will determine the scope of said considerations. And with what I consider, coupled with what [the prior judge] considered, I don't believe a whole new best interest analysis starting with evaluations [is necessary]. [The analysis by the prior judge is] still quite relevant because not much has changed. The fact that they spent the summer with their dad [as] court ordered, I can include that in my decision, but that doesn't mean I have to start from the beginning.
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> And the fact that the appeal was filed . . . I don't know what the status is . . . . So at this point whether I have the authority to completely change custody I will consider or whether I have, under [Rule] 5:3-7, additional remedies. I can give compensatory time also . . . at this point prior to having a full best interest evaluation.
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> But these are issues the [c]ourt will decide after it hears all of the evidence. So as it was the [c]ourt's

[8] "The ordinary effect of the filing of a notice of appeal is to deprive the trial court of jurisdiction to act further in the matter unless directed to do so by an appellate court, or jurisdiction is otherwise reserved by statute or court rule." Manalapan, 140 N.J. at 376 (citing Rolnick v. Rolnick, 262 N.J. Super. 343, 365-66 (App. Div. 1993)). However, the trial court is not deprived of continuing jurisdiction to enforce its judgments and orders pursuant to Rule 1:10. R. 2:9-1(a). Absent a stay, the trial court was permitted to consider an application to enforce an order. Because we are vacating and remanding for further proceedings, we need not consider whether the court should have entertained an application to change custody because of the pending appeal. The issue will be moot on remand because we have already issued a decision affirming the trial court's November 12, 2019 order.

> request and the burden I am placing on you, [c]ounselor, is to show this [c]ourt what your client has done to . . . promote the relationship of the children with the non-custodial parent.
>
> [Emphasis added.]

The court went on to state:

> So the remedies this [c]ourt has if I do find that she has violated any of these orders and I'm placing the burden on you as I stated at the last hearing to support that she has not continually—well I think [the prior judge] already found that she did. But that she's still violating the order, not only of [the prior judge], but of her Judgment of Divorce as well.
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> [Emphasis added.]

The judge further indicated, in referring to the prior judge's findings, "[h]e said it's one of the worst cases of parental . . . alienation that he has seen."

There are several concerns raised by the court's ruling. First, it is unclear what the parameters of the hearing would be as the court simply stated it would consider what was "appropriate" and "it would determine the scope of said considerations," without advising the parties what issues would be considered by the court. The court further questioned whether it had the authority to completely change custody but noted under Rule 5:3-7 it could award compensatory time. In short, at the commencement of the hearing, defendant did not have clear direction as to what the court would consider or ultimately

determine. Moreover, the court seemed to incorrectly suggest the burden—on plaintiff's motion to enforce the November 12, 2019 order—was on defendant.

Next, the judge's comment the prior court had determined this was one of the "worst cases of parental . . . alienation that [it had] seen" is not clearly reflected in the record. Rather, the prior judge noted, "[w]hile there is no evidence [defendant] set out to alienate the children, there is every indication she has been only too happy to facilitate the estrangement from the [plaintiff] that they clearly feel." The prior court further stated, "[plaintiff] believes his ex-wife has alienated the children. There is no direct or circumstantial evidence that she did so." Accordingly, it appears the court began the new plenary hearing with a preconception that could have impacted its analysis of the evidence and the ultimate outcome of the case. The court also stated, "not much has changed" since the prior court's ruling. Although this could have been an observation there continued to be a dispute between the parties, it could also be perceived as suggesting the court was pre-judging defendant's conduct had not changed.

Viewing the above issues in the cumulative, we conclude defendant is entitled to another hearing. The parties are entitled to have clear direction as to the scope of the proceedings prior to the hearing. Although we recognize the challenges the trial court faced entering this case at a late stage in light of the

significant and acrimonious prior litigation, the procedural infirmities coupled with the court's interpretation of the prior record impacted the parties' right to a fair hearing.

B.

We next address the court's utilization of Hirschfeld's report. Defendant contends the trial court improperly reopened the case to take testimony based on Hirschfeld's report, and the parties were unaware the court contemplated taking additional testimony. Therefore, defendant was not prepared to offer rebuttal evidence. More fundamentally, defendant argues the court failed to comply with Rule 5:3-3 by not providing a copy of Hirschfeld's report to counsel in a timely manner, not permitting a reasonable opportunity to depose Hirschfeld, and not affording defendant an opportunity to cross-examine him.[9]

[9] Defendant also asserts the trial court engaged in ex parte communications with Hirschfeld in violation of Rule 5:3-3(e). The record does not reflect there was ex parte communication. At some point after the court determined it wanted Hirschfeld to serve as a reunification expert, the judge or staff member would have had to communicate with Hirschfeld to make such a request. Accordingly, we do not believe the initial sentence in the doctor's report suggests any improper communication. Defendant next points to Hirschfeld's report wherein he notes, "I had suggested to the court that mom should be in her own individual therapy . . . ." As noted above, Hirschfeld previously served as an expert in this case, and it appears he is referencing his prior recommendations to the court. Regardless, we need not further address this issue because the case is being

Rule 5:3-3 governs the appointment of experts in family cases. When a Family Part judge determines "disposition of an issue will be assisted by expert opinion, . . . the court may order any person under its jurisdiction to be examined by a physician, psychiatrist, psychologist or other health or mental health professional designated by it." R. 5:3-3(a). Rule 5:3-3(f) provides:

> Any finding or report by an expert appointed by the court shall be submitted upon completion to both the court and the parties. At the time of submission of the court's experts' reports, the reports of any other expert may be submitted by either party to the court and the other parties. The parties shall thereafter be permitted a reasonable opportunity to conduct discovery in regard thereto, including, but not limited to, the right to take the deposition of the expert.

Rule 5:3-3(g) states:

> An expert appointed by the court shall be subject to the same examination as a privately retained expert and the court shall not entertain any presumption in favor of the appointed expert's findings. Any finding or report by an expert appointed by the court may be entered into evidence upon the court's own motion or the motion of any party in a manner consistent with the rules of evidence, subject to cross-examination by the parties.

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remanded for consideration by a different judge. Finally, we would note defense counsel did not raise this question during the hearing to give the trial court an opportunity to address this issue.

Although the court indicated it was not relying on Hirschfeld's report, it directly referenced the report and accepted it as accurate. Specifically, the court noted, "[a]ccording to . . . Hirschfeld the girls do not engage in therapy. They remain quiet other than saying plaintiff's personality scares them. They provide no basis for their negative feelings towards plaintiff." The trial court then noted this behavior was present before the prior judge and it "continues."

We note the report was hearsay. Corcoran v. Sears Roebuck & Co., 312 N.J. Super. 117, 126 (App. Div. 1998) (holding expert "reports themselves are hearsay and generally are not admissible"). Moreover, although the court indicated it was not relying on the report, the timing of the September 2020 hearings appears to have been prompted, at least in part, by the concerns raised in Hirschfeld's report as evidenced by the court's communications with counsel. Because Hirschfeld was not called as an expert, defendant was not given an opportunity to cross-examine him. Additionally, the parties were also not given an opportunity to depose Hirschfeld or to produce their own rebuttal reports. See Rente v. Rente, 390 N.J. Super. 487, 495 (App. Div. 2007) (finding procedural and substantive deficiencies that required reversal when trial court failed to comply with Rule 5:3-3, when it admitted an expert report into evidence without providing a copy of the report to defendant or affording defendant an

opportunity to obtain her own expert, and without permitting defendant a reasonable opportunity to depose and cross-examine the expert).

Based on the foregoing, we determine the trial court erred in relying on Hirschfeld's report. Because we reverse the trial court's orders and remand for further proceedings, we need not address the child support or other issues at this juncture. These matters must be addressed anew by the trial court on remand.

V.

Although we vacate the September 3, 2021 and March 21, 2022 orders, we do not, as requested by defendant, reinstate the November 12, 2019 order. Rather, we leave it to the sound discretion of the trial court to fashion a temporary parenting time order pending any further hearings. The trial court would be in a better position to assess the current needs of the children, particularly where it is possible there have been revisions to the March 23, 2021 order while this matter was on appeal.

We are mindful the parties have now had two four-day plenary hearings since 2019, including multiple child interviews. Moreover, Jane will be turning eighteen in May and Cindy will turn fifteen in July. As with any contested custody matters, prior to a plenary hearing, the parties "shall be referred to mediation for resolution in the [children's] best interest." R. 1:40-5; R. 5:8-1.

The mediation shall take place within forty-five days of this opinion. If the mediation is unsuccessful, the court should proceed accordingly.

Finally, we conclude this matter should be heard by a different Family Part judge on remand than the one that presided over the plenary hearing resulting in the September 3, 2021 and March 21, 2022 orders. We do not question the judge's commitment to do what is best for the children. However, due to her extensive prior involvement in the case and having already expressed an opinion on the matter, this case should be heard by a different judge.

Reversed and remanded. We do not retain jurisdiction.