

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2824-21

S. E. F.,

Plaintiff-Appellant,

v.

K.D.L.,

Defendant-Respondent.

Submitted March 22, 2023 – Decided June 2, 2023

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Ocean County,
Docket No. FD-15-0064-22.

Horn Law Group, LLC, attorneys for appellant (Jeff J.
Horn and Jessica R. Carosiello, on the brief).

Respondent has not filed a brief.

PER CURIAM

In this one-sided appeal, plaintiff S.E.F. (Sam) challenges the April 6, 2022 vacatur of an October 28, 2021 order finding he "made a prima facie

showing of psychological parentage" for his grandchildren, L.F. (Leo) and K.F. (Kim).¹ We affirm.

I.

Leo, age seven, and Kim, age three, have been in the physical custody of their mother, defendant K.D.L. (Kali), since they were born. Their father, M.E. (Mark), passed away in June 2021. Mark was Sam's son.

Mark and Kali never married, but they lived together, at times, during their relationship. After Leo was born, the couple struggled with issues of substance abuse and domestic violence. In November 2018, a judge presiding over a parenting time dispute between Mark and Kali referred the case to the Division of Child Protection and Permanency (Division) and directed the parties to cooperate with the Division.

By February 2019, Kali and Mark had reconciled and were living with Leo in a home owned by Sam. According to Kali, the couple was concerned the Division might remove Leo from their custody, so they entered into a consent order to address that possibility. The consent order provided, in part, "should any emergent circumstances arise[,] including . . . [Leo's] need to be

¹ We use initials and pseudonyms to preserve the confidentiality of these proceedings. R. 1:38-3(13).

placed with someone other than his parents, [Leo] shall . . . live with, and be cared for" by Sam. Further, the consent order provided Mark, Kali and Sam would share joint legal custody of Leo, and Leo's parents would have "liberal access to [Leo] on an unsupervised basis." Additionally, the consent order stated, "given the close proximity of [Sam's] home" to Mark and Kali's home, "it is contemplated . . . [Sam] will have frequent contact with [Leo]." However, the order did not include a fixed visitation schedule for Sam.²

After Kim was born in July 2019, Kali and the baby tested positive for illicit substances. The Division filed for care and supervision of Leo and Kim (FN action), naming Kali, Mark and Sam as defendants in the case. While the FN action was pending, Leo and Kim remained in Kali's physical custody. Because Mark was restricted to supervised visits with the children, Sam and his wife supervised Mark's visits in their home. In April 2021, the FN action ended with the entry of an order stating the litigation terminated because "the children remain in the home [and] conditions have been remediated."

In August 2021, Sam filed an FD complaint against Kali, seeking joint legal custody and physical custody of Leo and Kim, subject to supervised

² Once Kim was born, a similar consent order was drafted to include provisions for her, but it was not executed by Kali's counsel or the trial court.

parenting time for Kali. He contended Kali was "not stable and not able to properly care for the[] children." He also certified he had "cared for the children since birth," having "provided them with a roof over their head[s]," paid for some dental work for Leo, and "changed diapers and fed the children time and time again through their lives."

Kali opposed the application, contending Sam "never served as a primary caretaker for the children" and there was no basis for the children to be transferred to his custody. She also highlighted the fact that the FN action concluded with her retaining custody of the children, evincing her fitness as a parent. She also stated that throughout "the pendency of the [FN] litigation, [Sam] and [Mark] were non-compliant with services requested and ordered by the Division." Further, Kali certified that shortly prior to Mark's death, he assaulted her, so she secured a temporary restraining order against him and relocated with the children to a safe house. She alleged Sam's "entire . . . family [was] enmeshed in a generational cycle of domestic violence" and she did "not want [Leo and Kim] exposed to further violence in [Sam's] household." Finally, Kali asked the court to refrain from ruling on the parties' applications until the judge familiarized herself with the case by reviewing the Division's file in camera.

Following argument on Sam's custody application on October 26, 2021, the judge issued an oral opinion, stating she "need[ed] to find out the extent of [Sam's] involvement or lack of involvement" with his grandchildren. Accordingly, the judge directed the Division to produce its file for the court's in camera review. Additionally, the judge stated she was "not certain whether the certifications . . . prove[d] [Sam's] psychological parentage" but there "seem[ed] to be enough in [Sam's] certifications . . . to allude to a prima facie showing of a psychological parent." Accordingly, the judge found a plenary hearing should be scheduled "to flesh out some of these issues a little more."

Further, the judge found no reason to "overrule" the finding in the FN litigation that Kali should remain the children's "residential custodial parent." However, she directed the parties to "attend parenting time mediation" and try to agree on a schedule for Sam to visit Leo and Kim pending the plenary hearing. The judge entered a conforming order on October 28, 2021.

Based on the judge's October 26 oral decision, counsel for the parties negotiated a visitation schedule for Sam that day. The agreement was memorialized in a supplemental order, also dated October 28, 2021 (supplemental order).

Kali promptly moved for reconsideration of the initial October 28 order, arguing the court mistakenly found Sam made out a prima facie case of psychological parentage. She also contended that but for the judge's determinations on October 26, she would not have agreed to a visitation schedule for Sam as set forth in the October 28 supplemental order. Sam cross-moved to enforce the initial and supplemental orders.

Following argument on March 3, 2022, the judge agreed the initial October 28 order should be reconsidered because it was entered without the court engaging in the appropriate legal analysis to determine whether Sam established a prima facie case of psychological parentage. She explained that for Sam to make out "a prima facie case of psychological parentage," he would have to satisfy "the four prongs that are set forth in the V.C.³ case." The judge further stated

[o]ne of those prongs is that the third party must have lived with the child. Here, it is clear . . . the minor children did not live with [Sam]. . . . [T]he plain language of "lived with the child," [under this prong] has not been met in this instance. So, therefore, that prong of the four-prong test has not been satisfied, which would indicate that a prima facie case of psychological parentage has not been established.

³ V.C. v. M.J.B., 163 N.J. 200 (2000).

The judge further clarified that "at no time did [she] make a final determination that [Sam] served as or was deemed a psychological parent. Rather, [her] intent . . . was to fl[e]sh that out more by having the plenary hearing." Lastly, she reserved on Sam's cross-motion to enforce the supplemental order from October 28 and directed the parties' attorneys to provide additional briefing on whether that order should stand, considering her vacatur of the initial October 28 order.

Following additional argument on April 6, 2022, the judge vacated the October 28 supplemental order, finding that

but for the court's initial order [from October 28] that the plaintiff . . . established a prima facie showing of psychological parentage, . . . that [supplemental] consent order would not have existed under those particular circumstances. Because the psychological parentage order was reconsidered and was vacated, the court does find . . . it is appropriate to vacate the visitation order that resulted [from] . . . the initial ruling regarding psychological parentage.

II.

On appeal, Sam argues "the trial court abused its discretion by narrowly applying the psychological parentage factors of V.C. v. M.J.B." We disagree.

"Appellate courts accord particular deference to the Family Part because of its 'special jurisdiction and expertise' in family matters." Harte v. Hand, 433

N.J. Super. 457, 461 (App. Div. 2013) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). "Generally, 'findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence.'" Elrom v. Elrom, 439 N.J. Super. 424, 433 (App. Div. 2015) (quoting Cesare, 154 N.J. at 411-12). "Reversal is warranted only when a mistake must have been made because the trial court's factual findings are 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Ibid. (citation omitted). "Deference is appropriately accorded to factfinding; however, the trial judge's legal conclusions, and the application of those conclusions to the facts, are subject to our plenary review." Ibid. (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

"The right to rear one's children is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Moriarty v. Bradt, 177 N.J. 84, 101 (2003) (citation omitted). "Therefore, in an action between a fit parent and a third party, a presumption of parental autonomy exists in favor of the parent."

Tortorice v. Vanartsdalen, 422 N.J. Super. 242, 248 (App. Div. 2011) (citation omitted).

Still, "a parent's right to custody is not absolute. That parental right must, at times, give way to the State's *parens patriae* obligation to ensure that children will be properly protected from serious physical or psychological harm." Watkins v. Nelson, 163 N.J. 235, 246 (2000). Accordingly, a third party can overcome the presumption in favor of the natural parent by presenting clear and convincing evidence of parental unfitness, abandonment, gross misconduct, or the existence of "exceptional circumstances" affecting the welfare of the child. Id. at 244-45.

If either the statutory parental termination standard or the "exceptional circumstances" prong is satisfied, the . . . the court [next] decide[s] whether awarding custody to the third party would promote the best interests of the child. . . . [T]he point to be emphasized is that the best interest of the child cannot validly ground an award of custody to a third party over the objection of a fit parent without an initial court finding that the standard for termination of the rights of a non-consenting parent or the "exceptional circumstances" prong has been satisfied.

[Id. at 254-55.]

Proof that a third party has become a child's psychological parent will suffice to establish exceptional circumstances. Id. at 254; V.C. 163 N.J. at

219. Such proof will place the third party "in parity" with the legal parent, so that "[c]ustody and visitation issues between them are to be determined on a best interests standard[,] giving weight to the factors set forth in N.J.S.A. 9:2-4[(c)]." Id. at 227-28, 230. To establish the existence of a psychological parentage, the third party

must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the [third party's] formation and establishment of a parent-like relationship with the child; (2) that the [third party] and the child lived together in the same household; (3) that the [third party] assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation . . . ; and (4) that the [third party] has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

[Id. at 223.]

"At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them." Id. at 221. "That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life." Ibid.

(emphasis added) (citing Smith v. Org. of Foster Fam. for Equal. and Reform, 431 U.S. 816, 844 (1977)).

Applying these standards, we are persuaded there is no basis for reversal. Here, Sam admits Leo and Kim never lived with him. Moreover, he points to no authority to support his position that the judge should have deviated from the plain language of the test established in V.C. to find his contact with Leo under the February 2019 order or with Kim after her birth was akin to living in the same household with them. Also, there is nothing in the record to suggest Kali, who never lost residential custody of her children and never agreed to a visitation schedule for Sam until after the judge mistakenly concluded he established a prima facie case of psychological parentage, allowed Sam "to function as a parent in the day-to-day life" of Leo and Kim, thereby "invit[ing him] . . . into the otherwise inviolable realm of [her] family['s] privacy." Id. at 227.

In sum, the record supports the judge's finding that Sam failed to demonstrate exceptional circumstances existed to overcome the presumption the children should remain in Kali's custody, given his failure to fully satisfy the requisite prongs of the psychological parentage test enunciated in V.C. Thus, there is no basis to disturb the April 6, 2022 order.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION