

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0700-23

NEW JERSEY DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Plaintiff-Respondent,

v.

E.C.,

Defendant-Appellant,

and

T.F. and W.C.,

Defendants-Respondents,

and

R.L.,

Defendant.

IN THE MATTER OF N.F., N.C.
and L.C., minors.

Argued December 3, 2024 – Decided January 6, 2025

Before Judges Smith, Chase and Vanek.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FN-04-0119-22.

David A. Gies, Designated Counsel, argued the cause
for appellant (Jennifer Nicole Sellitti, Public Defender,
attorney; David A. Gies, on the briefs).

Mary L. Harpster, Deputy Attorney General, argued the
cause for respondent New Jersey Division of Child
Protection and Permanency (Matthew J. Platkin,
Attorney General, attorney; Sookie Bae-Park, Assistant
Attorney General, of counsel; Mary L. Harpster, on the
brief).

Beth Ann Hahn, Designated Counsel, argued the cause
for respondent T.F. (Jennifer Nicole Sellitti, Public
Defender, attorney; Beth Ann Hahn, on the brief).

Amy M. Williams, Designated Counsel, argued the
cause for respondent W.C. (Jennifer Nicole Sellitti,
Public Defender, attorney; Amy M. Williams, on the
brief).

Melissa R. Vance, Assistant Deputy Public Defender,
argued the cause for minor N.F. (Jennifer Nicole
Sellitti, Public Defender, Law Guardian, attorney;
Meredith A. Pollock, Deputy Public Defender, of
counsel; Melissa R. Vance, of counsel and on the brief).

Cory H. Cassar, Designated Counsel, argued the cause
for minor L.C. (Jennifer Nicole Sellitti, Public
Defender, Law Guardian, attorney; Meredith A.

Pollock, Deputy Public Defender, of counsel; Cory H. Cassar, on the brief).

Jennifer Nicole Sellitti, Public Defender, Law Guardian, attorney for minor N.C. (Meredith A. Pollock, Deputy Public Defender, of counsel; Todd S. Wilson, Designated Counsel, on the brief).

PER CURIAM

Appellant, E.M. ("Emma"),¹ appeals from the September 21, 2023 Family Part order granting her joint legal custody of her three minor children with their respective fathers, but retaining the fathers as the parent of primary residence ("PPR"). We affirm.

I.

Emma is the mother to three minor children: N.F. ("Nick"), born in 2011; N.C. ("Nancy"), born in 2016; and L.C. ("Lucy"), born in 2018. T.F. ("Tommy") is the father of Nick, and W.C. ("Walter") is the father of Nancy and Lucy. Prior to the incident which led to this appeal, under an FD docket, Emma and Tommy shared joint legal custody of Nick, with Emma named as the PPR. Under an FM

¹ We employ initials and pseudonyms to identify the children and others to protect the children's privacy, and because the records relating to DCPD proceedings held under Rule 5:12 are excluded from public access under Rule 1:38-3(d)(12).

docket, Emma shared joint legal custody with Walter and was the PPR to Nancy and Lucy.²

In September 2021, the Division of Child Protection and Permanency ("DCPP") received a referral stating that R.L.³ ("Ryan"), Emma's boyfriend, had hit three-year-old Lucy in the face causing bruising, a black eye, and a bloody nose. Nick and Emma were not home when the alleged incident occurred.

The local police interviewed Lucy and Nancy, subsequently charging Ryan with assaulting Lucy. Following an investigation, DCPP substantiated the allegation, finding Ryan committed physical abuse. As a result of their involvement, DCPP implemented a family intake agreement to coordinate the placement of the children with their respective fathers.

Emma then went to DCPP and asked for the children to be returned to her. As a result of their interviews with Emma, DCPP determined that Emma could not supervise the children overnight with Ryan in the house. As a result, DCPP

² FD dockets "consist[] of child custody, visitation, child support, paternity, medical support, and spousal support in non-divorce matters;" FM dockets "consist[] of divorce, marriage nullity, and separation maintenance matters[;]" and FN dockets "consist[] of abuse and neglect matters" N.J. Div. of Youth & Fam. Servs v. I.S., 214 N.J. 8, 22 n. 3 (2013).

³ Ryan is not a party to this appeal.

created a safety protection plan ("SPP"), under which the children would remain with their respective fathers and Emma's parenting time had to be supervised.

A few weeks later, Emma informed DCPD she no longer wanted to follow the SPP, and instead wanted DCPD to remove the children from her custody. As such, DCPD filed a verified complaint and order to show cause ("OSC"). The court granted the OSC and ordered DCPD to assume care and supervision of the children, transferring legal and physical custody of them to their respective fathers.

The court then held numerous case management conferences ("CMC") with all parties. At one CMC, the court executed a consent order lifting supervised contact for Emma. At the parties' request, the court agreed to hold a Title 30 hearing. At subsequent CMC, the parties advised the court that Emma was possibly moving into her parents' house soon and would no longer be residing with Ryan. In August 2022, the court issued another consent order, directing the respective fathers to remain as PPR for the children, with Emma permitted to have overnight visits with the children.

In September, the court held a two-day Title 9 hearing. The court found Ryan did not abuse or neglect Lucy and dismissed the case. However, the court

retained jurisdiction under Title 30 after finding it was in the best interests of the children for the family to receive further services.

In December, the court held a hearing to terminate the FN litigation. The court rejected Emma's request to return to pre-litigation custody status and continued physical and legal custody with the fathers. The court terminated the litigation and directed that all further applications to change the custody arrangements for Lucy and Nancy be filed under the FM docket; for Nick they were directed to do so under the FD docket.

Emma appealed the December order terminating litigation, alleging that her due process rights were violated because the trial court did not determine the best interests of the children when it left custody of the children to their fathers. During the appeal, Emma, with the consent of all parties, submitted a motion to remand to "allow the trial court to conduct a final disposition hearing regarding custody of the minor children." We granted the motion. DCPP v. E.M., T.F., W.C., and R.L. I/M/O N.F., N.C., and L.C., Motion No. M-5874-22 (N.J. Super. July 17, 2023).

In accordance with our remand, the court reopened the FN litigation and confirmed with Emma that she wanted to hold "a final dispositional hearing regarding custody of the children." The court then ensured all parties completed

paperwork and had their attorneys reinstated. After a failed attempt at mediation, the trial court held a best interests hearing for the three minor children. Testimony was given by Emma, Tommy and Walter and all were subject to cross-examination.

On September 21, 2023, the court delivered an oral decision. First the court recited the facts that were not in dispute, and then it took judicial notice of prior orders. The court then made credibility findings. Finally, the court found it was in the best interests of the children for Emma to return to her previous arrangement of having joint custody with each respective father. Regarding parenting time, the court ordered Walter and Tommy to remain the PPR for their respective children.

The court found Emma not credible, with the court: noting her "poor demeanor on the witness stand" during cross-examination; citing her contradictions with respect to the supervision of Ryan; and finding it hard to believe: "she's interested in having coherent adult conversations with the fathers of her children." Moreover, the court found Emma "egocentric"; that she was not proactive when it came to Nick's educational needs; that she did not seem interested in changing jobs; and that she was more likely to prioritize Ryan than

the best interests of her children because it was unlikely she would "put her personal interests aside."

In contrast, the court found both Tommy and Walter to be credible. It specifically noted that Tommy's demeanor during testimony was open minded, and that he wanted Nick to have a good relationship with Emma and his sisters. For Walter, the court found his demeanor was also calm, and some of his testimony "poignant" as to the extending invitations to Emma for dance recitals. The court also noted that while Walter admitted he did not behave well in the video, it found Emma's behavior to be worse. The court also found Walter was consistent and reasonable.

The court then applied the facts to the factors under N.J.S.A. 9:2-4. The court found the following factors in equipoise: two, willingness to accept custody; three, the interaction with the children and their parents and siblings; five, the safety of the children; seven, the needs of the children are met; eight, each has stable home environment; ten, all parties are fit; eleven, geographic proximity; and twelve, the extent and quality of time spent prior to this separation. The court found factor four, domestic violence, did not apply.

The court found factors one, six, nine, and thirteen weighed against Emma. For factor one, the ability to communicate, the court explained that with

her credibility findings she found it more likely for Walter and Tommy to be open to communication. For factor six, preference of the child when of sufficient age and capacity to reason to form an intelligent decision, weighed against Emma particularly when it came to Nick noting he was twelve years old, and had a best friend and was comfortable at the school he attended. Further, although the girls desired an even split, it wasn't practical because the parents do not live in the same school district. The court did state, as argued by Emma, that what is in the best interests of the children today was "two years ago, a completely different story" because the children were now older. The court stated it had to look at the schooling and found that what was in the best interests right now weighed against Emma.

As to factor nine, the quality and continuity of the children's education, it weighed heavily in favor of the children staying at their current school district, as stated above. Last, as to factor thirteen, the employment responsibilities of the parents, the court noted how both Walter and Tommy had jobs that were conducive to the children's schedules, but that Emma's did not. Based upon the credibility findings and weighing of the factors, the court decided it was in the best interests of the children for the parents to share joint legal custody, with the respective fathers remaining the PPR.

On appeal, Emma argues that: the trial judge did not ensure her substantive due process rights were protected when it bypassed the first step of the changed circumstance analysis; and the trial judge's best interests conclusion was "not reasonably supported by sufficient credible evidence."

II.

We "accord[s] deference to fact[-]findings of the family court because it has the superior ability to gauge the credibility of the witnesses who testify before it and because it possesses special expertise in matters related to the family." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448 (2012); Cesare v. Cesare, 154 N.J. 394, 413 (1998), see also Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83 (2016). This enhanced deference is particularly appropriate where the court's findings are founded upon the credibility of the witnesses' testimony. N.J. Div. of Youth & Fam. Servs. v. H.B., 375 N.J. Super. 148, 172 (App. Div. 2005) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

"Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark' should an appellate court intervene and make its own findings to ensure that there is not a denial of justice." N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Fam. Servs. v. G.L.,

191 N.J. 596, 605 (2007)). No deference is given to the trial court's "interpretation of the law," which this court reviews de novo. D.W. v. R.W., 212 N.J. 232, 245-46 (2012).

III.

A.

Emma argues that termination of Title 30 litigation requires the "noncustodial parent [to establish] a change of circumstances inimical to the child's best interests" before a child can be placed with a parent, who did not have custody prior to the onset of litigation. To support this argument, Emma relies on I.S., 214 N.J. at 40-41. Emma argues that only after the change of circumstances burden is met can the court consider whether it is the best interests of the child to modify the current custody order. Emma contends neither father nor DCPD offered any proof that there was a "change of circumstances inimical to the children's best interests," nor did the trial judge articulate such a finding. Emma posits the trial judge improperly relied solely on a best interests of the child analysis.

Where there is no consent, and "custody issues become intertwined with child-protection actions, then dispositional questions that lie at the intersection of the two matters become complicated by a parent's delay in achieving

circumstances that make it safe for the child to return to the former custodial parent." Id. at 41. Even if it is safe to return the child, "a noncustodial parent who obtains full-time care of a child after the initiation of child-protection proceedings 'may always initiate a request for a change in custody,' which involves a changed-circumstances inquiry and, ultimately, becomes a best-interests analysis." Id. at 40 (quoting N.J. Div. of Youth & Fam. Servs. v. G.M., 198 N.J. 382, 402 n.3 (2009)).

The parent to whom custody was temporarily transferred during the child-protection litigation has the burden of proving placement with them under the best-interests standard. Id. at 40-41. Even if this process is not followed "precisely," placement with the parent to whom custody was temporarily assigned is suitable if returning the child to the parent from whom she was removed "would not have been consistent with the court's continued responsibility to act in the best interests of [the children]" Id. at 41.

So too may a parent seeking the return of his or her child ask for a hearing. In that case, the parent making the application bears the burden to prove a change in circumstances warranting the child's return to that parent's custody. Id. at 39-41; see also G.M., 198 N.J. at 387-88, 402 (addressing a dispositional hearing held at the end of a Title 9 action to determine whether the child "may

safely be released to the custody of [the offending parent], who was responsible for [his or her] care at the time of the filing of the complaint, or whether, consistent with N.J.S.A. 9:6-8.51, some other disposition is appropriate.").

Our Supreme Court in I.S. held that: "[the father] should have been required to show that [the child's] placement with him was in her best interests after filing a changed circumstances application" I.S., 214 N.J. at 40-41. Nevertheless, the Court stressed "it would require blinders for this Court not to recognize that granting custody to [the father] was an appropriate disposition to end the Title 30 proceedings." Id. at 41. For that reason, and because the family court ultimately "applied a best-interests test," the Supreme Court in I.S. had "no difficulty deferring to the factual findings and conclusions the court reached on this record." Ibid. Additionally, the Court averred that "[a]lthough it is preferable for the court to ensure that there occurs separate and distinct proceedings at which Title 30 actions are adjudicated to disposition and FM custody matters are adjudicated, this case shows that procedure may not always prevail." Ibid. The Court also stated that "the consolidated procedure followed by the court did not result in any cognizable harm to [the mother]." Ibid.

In September of 2023, at the final dispositional hearing, all parties were represented by counsel and testified. Emma's counsel argued the best interests

standard at closing, contending that Emma serving as PPR was in the best interests of the child. This case involved the intertwining of a child-protection action with a custody action. Although both parents had filed either FD or FM applications for custody with the court, this was prior to the dispositional hearing in September 2023.

The court held a best interests hearing, that Emma requested, and all parties consented to, so Emma was not deprived of her due process rights. Additionally, the court made sure all parties were represented. Emma was not cognizably harmed, as she went back to joint custody of her children. Additionally, Emma originally requested court involvement and then waited six months to move out of Ryan's house. Therefore, under the present circumstances the court was correct in conducting the best-interests analysis.

Even if Emma could prove there was a substantial deviation from I.S., "[t]he doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error.'" N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 340 (2007) (quoting Brett v. Great Am. Recreation Inc., 144 N.J. 479, 503 (1996)). "The doctrine of invited error 'is based on considerations of fairness and preservation

of the integrity of the litigation process." Ibid. "[A] defendant cannot beseech and request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought . . . claiming it to be error and prejudicial." Ibid. (quoting State v. Jenkins, 178 N.J. 347, 358 (2004)).

Here, Emma requested the dispositional hearing. Further, all parties consented to the proceeding, and the judge stated multiple times during the CMC's that the hearing would be a best interests of the child hearing, to which no objections were made. Additionally, as stated in M.C. III, "we are convinced that this case presents no fundamental injustice that would warrant relaxing the invited error doctrine." Id. at 342. Here, although Emma is not the PPR, she had joint custody of the children returned. As such, the doctrine of invited error applies, which precludes Emma from now arguing the trial court erred by failing to conduct a changed circumstances analysis.

B.

Emma next argues the trial judge's finding were not reasonably based on sufficient credible evidence. To support her assertion, Emma argues the inference that her testimony lacked credibility because it was "egocentric," and

"self-absorbed," was "not reasonably reached based on sufficient credible evidence in the record."

It is well settled that in custody cases, the primary consideration is the best interests of the child. Kinsella v. Kinsella, 150 N.J. 276, 317 (1997). The court must focus on the "safety, happiness, physical, mental and moral welfare of the child." Fantony v. Fantony, 21 N.J. 525, 536 (1956); see P.T. v. M.S., 325 N.J. Super. 193, 215 (App. Div. 1999).

Custody issues are resolved using a "best interests" analysis that gives weight to factors set forth in N.J.S.A. 9:2-4(c). V.C. v. M.J.B., 163 N.J. 200, 227-28 (2000). The statutorily enumerated factors are:

the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children.

[N.J.S.A. 9:2-4(c).]

Under the statute, the court must make a record of its reasons for its custody decision and "must reference the pertinent statutory criteria with some specificity." Kinsella, 150 N.J. at 317 (quoting Terry v. Terry, 270 N.J. Super. 105, 119 (App. Div. 1994)). The court must not lose sight of the "primary and overarching consideration" of what is in the best interests of the child. Ibid.

Here, the court methodically considered each of the N.J.S.A. 9:2-4 factors. Each factor was addressed chronologically, and detailed reasons for the weight given to each factor were discussed. Ultimately, the court found the fact that the children would have to relocate to different school districts if Emma was made the PPR, was a major factor that weighed against her. This was especially true for Nick, who was twelve years old at the time of the dispositional hearing and was happy at the school he was attending. Tommy was seemingly very involved with Nick's school situation. Tommy testified that Nick was having some trouble with math, but that he had a meeting as to whether an Individualized Education Program ("IEP") would be helpful. Tommy went into detail about how Nick was now in the "mainstream classes," and that Nick was able to work independently without extra help. On the other hand, per her own admission, Emma felt she was "ill-informed and uninvolved." Emma was

unsure as to whether Nick had an IEP, although she was aware he was in the school's general population, and that Nick was not currently involved in any extracurriculars.

Further, Tommy's work schedule was more conducive to Nick's schedule, as he was able to get him on the bus in the morning and was home for him in the afternoon when school let out. It was undoubtedly in the best interests of Nick to remain with his father as the PPR. The court did not abuse its discretion, this finding was supported by substantial, credible evidence.

As to Nancy and Lucy, the school argument was not as compelling due to their young age, however, the court did not abuse its discretion in finding it was also in their best interests to have Walter remain as the PPR. As it was pointed out during Walter's testimony, Nancy was a little behind when she changed schools after being removed from Emma as the PPR. Nancy overcame the differences in the curriculum between her old school and new school. Further, Nancy was shy but was able to develop friendships. Both girls liked their school, were doing "wonderful" and no behavioral issues were reported. Moreover, Walter's work schedule was more conducive to the girl's school schedule, and he was able to get them on and off the bus. The court did not abuse its discretion as the findings were supported by substantial, credible evidence.

To the extent we have not specifically addressed them, defendant's remaining arguments, including her contention that the trial court was biased against her, lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION