SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2576-16T1

M.A.P.,

Plaintiff-Respondent,

v.

N.E.G.,

Defendant-Appellant.

Submitted November 16, 2017 – Decided December 8, 2017

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket No. FD-18-0229-17.

The Romero Firm, LLC, attorneys for appellant (Pablo Forray, on the brief).

Respondent has not filed a brief.

PER CURIAM

In this non-dissolution matter, defendant appeals from the Family Part's January 24, 2017 order denying her motion for reconsideration of an earlier order that granted plaintiff

residential custody of the parties' two-year-old son, A.C. (Andy).[1] The court entered the custody order on November 29, 2016, after defendant was unable to get to the courthouse in time to participate in the proceeding. Having considered defendant's arguments in light of the record and applicable principles of law, we conclude that the trial court mistakenly exercised its discretion in conducting the custody hearing in defendant's absence.

Up until November 29, 2016, there was no court order establishing custody, parenting time, or child support for the parties' child. Defendant acted as the parent of primary residence, plaintiff had parenting time as agreed upon by the parties, and he periodically paid defendant child support. For the first two years of Andy's life, he and defendant lived with E.C., who was defendant's former boyfriend and the father of her two other children. This arrangement ended shortly before this litigation commenced, and defendant and the three children thereafter lived separately from E.C.

On October 3, 2016, plaintiff filed a complaint alleging he was now taking care of Andy every night and, therefore, he should

[1] We use initials and fictitious names to protect the privacy of the family.

have physical custody of the child instead of defendant. The clerk's office mailed a notice to defendant, stating that the matter would be heard on November 29, 2016.[2]

When the trial judge called the matter at approximately 3:20 p.m. on that date, only plaintiff was present.[3] Plaintiff stated he spoke to defendant during the past week, but did not talk to her about the hearing and did not know whether she was aware that a court proceeding had been scheduled.

The judge then telephoned defendant. Through an interpreter, the judge told defendant that plaintiff had filed an application for custody of Andy and asked if she was "able to participate in this hearing." Defendant replied, "It would be better if I could come personally" and would "come right now if it's possible." The judge asked defendant if she could get to the courthouse by 4:00 p.m. and defendant said, "Of course." Defendant asked the judge if she could bring a witness, but the judge stated, "No, no witnesses here. You just need to come yourself . . . to the Somerset County Courthouse."

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[2] The clerk's office sent the notice by regular mail and by certified mail, return receipt requested.

[3] Court staff advised the judge that the certified mail containing the hearing notice had not been claimed, and the notice sent by regular mail had not been returned.

When defendant did not appear by 4:25 p.m., the judge decided to proceed in her absence. Plaintiff testified that he picked Andy up from defendant's house each night around 6:00 p.m. and the child slept at plaintiff's house overnight. At 7:00 each morning, plaintiff took the child to a babysitter, where he stayed until 1:00. Defendant then picked Andy up from the babysitter and she cared for him until 6:00 p.m. Based upon this schedule, plaintiff asserted he was now the child's primary caretaker and should be the parent of primary residence. Plaintiff also stated that he wanted to have residential custody of Andy because defendant was always trying to collect child support from him.

At the end of the hearing, the judge rendered a brief oral opinion granting the parties joint legal custody of Andy, with plaintiff having residential custody. The judge stated that plaintiff was willing and able to care for the child, had a stable household, and would permit defendant to have reasonable parenting time.

The next morning, defendant filed a motion for reconsideration and for a return of Andy to her physical custody. She then retained an attorney and filed a certification in support

of her motion.[4] In the certification, defendant asserted she never received a copy of plaintiff's complaint or the hearing notice. Instead, she "first learned of [p]laintiff's legal action to obtain custody of" Andy when the judge called her on November 29, 2016. Defendant stated she got her three children ready and attempted to get to the courthouse in time. However, she did not arrive until after it had closed for the day. She returned on November 30, and obtained a copy of the court's order.

Defendant provided a certification from her neighbor concerning the hearing notice. The neighbor stated that the envelope containing the notice was left in her mailbox on October 22, 2016. The neighbor did not know who defendant was and simply held the notice in the hope someone would come and pick it up. The day after defendant filed her motion for reconsideration, defendant's friend asked the neighbor if any of defendant's mail had been delivered to her and she gave him the notice.

Defendant also asserted that plaintiff took little interest in the child after his birth, and only visited him occasionally. She stated that E.C. "has always been the boy's de facto father" and allowed her to give the child his surname. Defendant asserted

[4] The attorney also filed an order to show cause seeking to have custody of the child immediately returned to defendant. The judge denied the motion after determining it was "non-emergent[.]"

that she and plaintiff met with an immigration lawyer in March 2015. After the lawyer advised the parties "that [p]laintiff's immigration case could be reopened if he had a child born in the United States[,]" plaintiff asked for a paternity test that confirmed he was the child's father. According to defendant, plaintiff then began to take more interest in Andy, although he provided little financial support.

Although she was no longer living with E.C., plaintiff certified that E.C. was the one who picked up all three children each night while she went to work. E.C. kept the children overnight and then took them to school or the babysitter the next day. E.C. provided a certification stating that plaintiff played only a limited role in the child's life.

Following oral argument on January 24, 2017, the judge denied defendant's motion for reconsideration. The judge did not address defendant and her neighbor's assertions that the hearing notice was delivered to the wrong apartment. Instead, the judge stated:

> The [c]ourt waited until about 4:30, maybe 4 - - even as late as 4:40 and [defendant] did not appear. Therefore, we proceeded without her. So I do not find that [defendant's lack of] service argument has any merit because not only was she provided with a copy of the papers[,] but this [c]ourt communicated directly with her on the record and she informed the [c]ourt she would be here and she did not appear, without calling the [c]ourt and explaining why.

The judge also denied defendant's request that custody of the child be returned to her because defendant could not demonstrate there had been a change of circumstances after the judge switched residential custody from defendant to plaintiff on November 29, 2016. This appeal followed.

On appeal, defendant argues the judge should not have proceeded on November 29, 2016 in her absence. We agree.

A judge's decision to grant an adjournment to enable a party to participate in a matter rests within its sound discretion. J.D. v. M.D.F., 207 N.J. 458, 480 (2011). The exercise of discretion must be "founded upon the reason and conscience of the judge, to a just result in the light of the particular circumstances of the case." State v. Hayes, 205 N.J. 522, 538 (2011) (quoting Smith v. Smith, 17 N.J. Super. 128, 132 (App. Div. 1951), certif. denied, 9 N.J. 178 (1952)).

The judge should also consider the impact of proceeding without both parents on the best interests of the child. See Luedtke v. Shobert, 342 N.J. Super. 202, 214 (App. Div. 2001) ("[W]here . . . a party is seeking relief which will impact upon a child, who has no independent representation, the court should seldom, if ever, proceed without both parents being represented, or, if they choose not to be, then being entirely satisfied that the child's interests are being adequately protected."). As we

have previously held, "changes in custody are not to be made without a plenary hearing, absent exigent circumstances." Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005).

In this case, the judge was not presented with an emergency situation that warranted a hearing on that date, and proceeding in defendant's absence was not compelled by the interests of the child. We appreciate the judge's concern that defendant stated she could appear by 4:00 p.m. and then did not do so. However, in deciding to conduct the hearing without defendant, the judge did not adequately consider the relative prejudice to the parties, including the child.

The prejudice to defendant of a one-sided presentation of the issues was obvious. See Berkowitz v. Soper, 443 N.J. Super. 391, 407 (App. Div. 2016) (discussing prejudice to a defendant of trial conducted in her absence). The one-sided proceeding also deprived the child of a hearing and best interests determination based on a full presentation of the evidence. As for prejudice to plaintiff, we recognize that he was present, but this matter could have easily been scheduled for another day within a short time period.

Plainly, Andy would have been better served by a determination of his best interests based on a complete presentation of evidence by both parties. Therefore, we conclude that the judge mistakenly

exercised her discretion in proceeding on November 29, 2016 and changing the parties' long-standing custody and parenting time arrangement in the absence of defendant.

We are also satisfied that the judge erred in denying defendant's motion for reconsideration. We review the denial of a motion for reconsideration to determine whether the trial court abused its discretionary authority. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Here, defendant explained in her certification that she never received notice of the hearing and did everything she could after the judge called to get to the courthouse before the matter concluded. Indeed, defendant returned the next morning, obtained the judge's order, and immediately filed a motion for reconsideration. Defendant's neighbor confirmed that defendant did not receive the notice until two days after the hearing. The judge mistakenly did not consider these certifications in denying defendant's motion.

The judge also failed to adequately address defendant and E.C.'s assertions that plaintiff was not taking care of Andy overnight as he alleged. The conflicting factual positions of the parties raised issues of credibility that should not have been resolved without a plenary hearing.

Under these circumstances, we are constrained to reverse the November 29, 2016 and January 24, 2017 orders and remand for a

plenary hearing on the issue of custody. The trial court shall conduct the hearing and render a final decision within thirty days of the date of this opinion. Pending the completion of the remand, the parties shall continue the status quo by sharing joint custody of Andy, with plaintiff maintaining residential custody and defendant having parenting time as agreed upon by the parties.

Nothing within this opinion forecasts any views on the merits of the parties' respective claims. We say no more than that the initial custody determination for this child should not have been made without a plenary hearing with both parties present.

Reversed and remanded. We do not retain jurisdiction.