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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-5183-14T3

S.R.,

Plaintiff-Respondent,

v.

D.P.,

Defendant-Appellant.

Argued December 7, 2016 – Decided April 26, 2017

Before Judges Accurso and Manahan.¹

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Monmouth
County, Docket No. FD-13-0383-09.

Michael S. Harwin argued the cause for
appellant.

¹ Hon. Carol E. Higbee was a member of the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal remains one that shall be decided by two judges.

Matthew A. Smuro argued the cause for respondent (Chamlin, Rosen, Uliano & Witherington, P.A., attorneys; Mr. Smuro, on the brief).

PER CURIAM

Defendant D.P. (Derek) appeals from an order of June 25, 2015, denying his request for joint legal custody of his daughter, J.S. (Jennie).² Although Derek filed the application seeking to change his custody status, stating in his motion that he "would like joint legal custody" as it would "allow [him] . . . to be more involved" and provide him enhanced rights, he subsequently took the position that he already shared joint legal custody with plaintiff S.R. (Sue) and her husband M.R. (Matt), and merely sought "documentation" of that fact. Because we agree with the trial court that the order of August 9, 2010, entered after a custody trial, vested sole legal custody of Jennie in Sue and Matt, we affirm.³

² We use the same fictitious names we employed in our prior opinion involving the same parties, N.J. Div. of Youth & Family Servs. v. A.S. & D.P., No. A-1666-10 (App. Div. May 28) (slip op. at 3), certif. denied, 219 N.J. 630 (2014). Although that appeal was from the August 9, 2010 custody order central to this appeal, neither party advised us of that prior related matter in their case information statements as required by Rule 2:5-1(a) and (f)(2).

³ Defendant appealed another provision of the June 25, 2015 order denying him increased summer parenting time. That aspect of the
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The history of the long-running litigation between these parties is set forth in our prior opinion and need not be repeated here. Suffice it to say that in the custody dispute between Derek, Jennie's natural father, and Sue and Matt, her maternal aunt and uncle, with whom she has resided for most of her life, we affirmed the trial court's finding, following a protracted trial, that Sue and Matt had become Jennie's psychological parents, and that Jennie's best interests were served by an order vesting them with her continued physical and legal custody and permitting Derek only "reasonable and liberal" visitation. N.J. Div. of Youth & Family Servs. v. A.S. & D.P., No. A-1666-10 (App. Div. May 28) (slip op. at 20, 30), certif. denied, 219 N.J. 630 (2014).

Although acknowledging that Derek "ha[d] never explicitly consented to the creation of a parent-child relationship" between Sue and Matt and Jennie, we found "Derek's diminished parental role is due in part to his own limited aspirations." Id. at 25. Derek did not appeal from a December 2006 order granting temporary residential custody to Sue, which allowed him unsupervised visitation but no overnights. Ibid. He has never

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case has been settled under the auspices of the Civil Appeals Settlement Program and is thus not addressed here.

taken Jennie to the doctor or to school activities. Id. at 26. As we noted, "[t]hrough the years, it fell to Sue and Matt to comfort Jennie when she was hurt, prepare her meals, put her to bed, discipline her when necessary, and to set the parameters of her daily life." Id. at 26-27.

During the custody trial, Derek made no secret of his intent, were he awarded custody, to phase Sue and Matt out of Jennie's life, notwithstanding the expert testimony that she would suffer a grievous loss were she separated from them. Id. at 17, 27. We found that Derek "appears committed to a course designed to enhance his own standing as parent with little regard for the toll that would be paid by Jennie." Id. at 28.

Heeding the Supreme Court's caution that "courts must consider the prejudice and foreseeable harm to a child when a legal challenge jeopardizes that child's well-settled home environment," A.B. v. S.E.W., 175 N.J. 588, 594 (2003), we concluded that not only had the presumption in favor of Derek been overcome by exceptional circumstances, requiring custody to be determined by the best interests test of N.J.S.A. 9:2-4c, see Watkins v. Nelson, 163 N.J. 235, 254 (2000), but also that the trial court was correct in finding it was in Jennie's best interests that Sue and Matt retain legal and physical custody of her. A.S. & D.P., supra, slip op. at 29. Derek's petition to

the Supreme Court to review that decision was denied. N.J. Div. of Youth & Family Servs. v. A.S., 219 N.J. 630 (2014).

Our decision has, unfortunately, not ended the conflict between the parties. Derek has continued to seek increased time with Jennie and legal custody. Although his motion papers make clear he was seeking greater rights in the form of legal custody, he subsequently took the position he already had those rights, as the August 9, 2010 order vesting legally and physical custody in Sue and Matt "never said that they were given sole legal and physical custody." He thus maintained before the trial court that he only sought "documentation" that he shared joint legal custody with Sue and Matt. The judge rejected that argument, as do we.

Having reviewed this entire record, it is abundantly clear that the court in 2010 awarded sole legal and physical custody to Sue and Matt and limited Derek, as the court stated on the record in rendering its decision, to "reasonable access visitation and parenting time to his daughter." Derek's argument that he retained legal custody of Jennie because the judge failed to designate Sue and Matt's legal and physical custody of the child as either "sole" or "joint" borders on the frivolous.

As the Supreme Court acknowledged in Watkins, "[a]lthough an award of custody to a third party does not involve a termination of all parental rights, 'such an award destroys any pretense of a normal parent-child relationship and eliminates nearly all of the natural incidents of parenthood including everyday care and nurturing which are part and parcel of the bond between a parent and child.'" 163 N.J. at 253-54 (quoting Zack v. Fiebert, 235 N.J. Super. 424, 432 (App. Div. 1989)).

Derek lost custody of Jennie to Sue and Matt in 2010. While he retains sufficient parental rights to entitle him to parenting time as provided in the order of August 9, 2010, those rights do not extend to joint legal custody of Jennie with Sue and Matt. His arguments to the contrary are without sufficient merit to warrant discussion in a written opinion. See 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