SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2521-15T2
A-1568-16T2

MARK FOX,

Plaintiff-Respondent,

v.

DEBRA FOX, n/k/a
WALDORF,

Defendant-Appellant.

Argued February 28, 2018 – Decided April 20, 2018

Before Judges Fuentes, Manahan and Suter.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Cumberland County, Docket No. FM-06-0042-13.

Adam W. Toraya argued the cause for appellant (The Micklin Law Group, attorneys; Brad M. Micklin, of counsel; Adam W. Toraya, Natalie E. Wentz and Carolyn G. Labin, on the briefs).

Kelli M. Martone argued the cause for respondent (Kearney & Martone, PC, attorneys, Kelli M. Martone, on the brief).

PER CURIAM

In these consolidated appeals, defendant Debra Waldorf appeals from two orders of the Family Part: a January 12, 2016 order which provided that the parties' child, L.F., continue treatment with a therapist; and a November 10, 2016 order naming plaintiff Mark Fox as the parent of primary residence (PPR) and altering the parties' parenting-time schedule without a plenary hearing.[1] We affirm the January 12, 2016 order. We reverse the November 10, 2016 order and remand for a plenary hearing.

I.

The parties were married on January 23, 2000 and divorced on December 3, 2013. During their thirteen-year marriage, two children were born, L.F. in 2004 and A.F. in 2008. At the time of their divorce, the parties entered into a comprehensive Property Settlement Agreement (PSA) that ordered joint legal and physical custody of their children.

II.

We first address A-2521-15 regarding defendant's appeal of the January 12, 2016 order requiring L.F. to continue treatment with a therapist.

In November 2013, prior to the parties' divorce, they consented to the appointment of a parenting coordinator. In March

[1] We use initials for the children to protect their privacy.

2015, with the assistance of the parenting coordinator, L.F. began therapy with Dr. Tiffani Leone-Vespa for treatment of anxiety. In October 2015, both parties signed disclosures allowing the judge to speak with Dr. Leone-Vespa regarding L.F.

Shortly thereafter, motions were filed by both parties requesting a change in custody and parenting time. Pursuant to the parties' authorization, the judge requested that Dr. Leone-Vespa provide him with her opinion whether a modification to the PSA would adversely affect L.F. The doctor complied with the request by orally communicating with the judge.

In November 2015, the judge ordered the parties' shared-custody designation to continue. However, the judge converted the parenting time arrangement to a week on/week off schedule to reduce stress upon the children.

Defendant alleged that she first learned about the communication between the judge and Dr. Leone-Vespa after the judge rendered his decision. Defendant also alleged that she "lost faith" in Dr. Leone-Vespa based upon communication between the doctor and the judge without her consent, and the doctor's communication to plaintiff regarding her intentions. Due to the above, defendant, through her attorney, retracted consent for Dr. Leone-Vespa to treat L.F.

In response, plaintiff filed an order to show cause (OTSC) requesting that L.F. continue therapy and treatment with Dr. Leone-Vespa. A telephone conference was held on December 14, 2015 to discuss whether L.F. should continue treatment with the doctor while the OTSC was pending. Subsequent to the phone conference, the judge ordered that L.F. be permitted to resume therapy with Dr. Leone-Vespa while the OTSC was pending and directed defendant to cooperate and to provide consent.

The OTSC hearing was originally scheduled for late December but was postponed until January 12, 2016. While the hearing was pending, defendant filed an emergent appeal to vacate the December 15, 2015 order, which we denied.

Defendant filed an OTSC in January 2016, requesting, among other things, that the judge suspend counseling between L.F. and Dr. Leone-Vespa. Attached to defendant's OTSC was a neuropsychological evaluation by Dr. Kathryn Arcari and L.F.'s medical records.

On January 12, 2016, after oral argument and review of both OTSCs, the judge ordered L.F. would remain in therapy with Dr. Leone-Vespa. The judge stated his reasons on the record:

> But this is not about me. This is not about you. This is about [L.F.]
>
> And [L.F.] has comfort and has been seeing this woman for a substantial period of

time and she has comfort with this person. This poor little girl has been poked, prodded by every conceivable medical provider known to man. And to make her start all over again, to me, would be disastrous.

I know that you don't like her, Ms. Waldorf. But you know what? I don't care. [L.F.] likes her and it's [L.F.'s] therapist, not your therapist. And she is going to continue to go because like I said, it is for [L.F.]; not for Ms. Waldorf.

And again, to have this child again have to try to gain some rapport and as Dr. Acari [sic] indicated when []he did this, she's tired of this nonsense. [L.F.] is tired of the two of you and the nonsense that you guys go through. She has anxiety because you guys give her anxiety. There's no other explanation other than that.

You are ruining this child. And I feel so sorry for her because she is in the middle of this. She's a very intelligent little girl. It's obvious from what everybody says. She gets it. She knows the two of you hate each other. And she's put in the middle, and she's sick of it. And she's sick by it.

And it's your two [sic] fault. She doesn't need to go to therapy. You two need to go to therapy.

The rest of the applications are denied. She'll continue to go.

This appeal followed.

On appeal, defendant raises the following points:

POINT I

THE TRIAL COURT DID NOT MAKE ADEQUATE FACTUAL FINDINGS OR LEGAL CONCLUSIONS WHEN GRANTING

MR. FOX'S REQUESTED RELIEF IN HIS ORDER TO SHOW CAUSE AND AS A RESULT, THE COURT'S DECISION MUST BE REVERSED.

POINT II

THE COURT ERRED WHEN IT DID NOT HOLD A PLENARY HEARING IN THE MATTER OR, AT A MINIMUM, PERMIT ORAL ARGUMENT REGARDING THE PARTIES' DAUGHTER'S CONTINUED THERAPY WITH DR. LEONE-VESPA.

Our scope of review of Family Part orders is limited, as we accord deference to the family courts due to their "special jurisdiction and expertise" in family law matters. Cesare v. Cesare, 154 N.J. 394, 413 (1998). Therefore, the judge's findings are binding so long as its determinations are "supported by adequate, substantial, credible evidence." Id. at 412 (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

Here, defendant argues that the judge did not make adequate factual findings or legal conclusions when it ordered L.F. to continue therapy with Dr. Leone-Vespa, per Rule 1:7-4. We disagree.

Compliance with Rule 1:7-4 is crucial because "[m]eaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990).

We have firmly established that "[n]aked conclusions are insufficient" and judges "must fully and specifically articulate findings of fact and conclusions of law." Heinl v. Heinl, 287 N.J. Super. 337, 347 (App. Div. 1996) (citing R. 1:7-4). In short, a failure to comply with Rule 1:7-4 ordinarily results in remand. See Strahan v. Strahan, 402 N.J. Super. 298, 310 (App. Div. 2008) (reversing and remanding a trial judge's child support award because it "failed to make the specific findings of fact necessary to sustain its decision regarding the amount" contained in the award).

Here, in reaching the decision to have L.F. continue therapy with Dr. Leone-Vespa, the judge relied, among other factors, upon Dr. Arcari's report which he read into the record. The judge cited to Dr. Arcari's opinion that "[g]iven [L.F.]'s anxiety, important attention should be paid to her stress and worries." The judge also cited to Dr. Arcari's recommendation that "[d]ue to the amount of anxiety and stress [L.F.] is currently under, it is recommended that she continue psychotherapy to further explore her symptoms of anxiety and building coping skills to help her deal with her worries."

Although the judge did not specifically reference his communications with Dr. Leone-Vespa as a factor in his decision, that does not inhibit meaningful review of the decision. It

follows, inferentially, that if the judge had concerns stemming from those communications, he would have addressed them or rendered a different decision. In sum, we are satisfied that the judge made the requisite findings per Rule 1:7-4.

Defendant also argues that the judge should have held a plenary hearing to resolve the issue of L.F.'s continuance of therapy with Dr. Leone-Vespa. Again, we disagree.

Not every factual dispute on a motion requires a plenary hearing. "A party is entitled to a plenary hearing on her motion [only] where the evidence shows the existence of a genuine issue of material fact that she is entitled to relief." Eaton v. Grau, 368 N.J. Super. 215, 222 (App. Div. 2004) (citation omitted). Such relief is "granted sparingly." Ibid. Further, "[g]enuinely disputed issues are those having substance as opposed to insignificance." Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 371 (Law Div. 2002).

The matter in dispute involved a discrete issue concerning a medical decision for L.F. As noted in Hand v. Hand, "Family Part judges are frequently called upon to make difficult and sensitive decisions regarding the safety and well-being of children. Because of their special expertise in family matters, we do not second-guess their findings and the exercise of their sound discretion."

391 N.J. Super. 102, 111 (App. Div. 2007); see also Cesare, 154 N.J. at 413.

Here, the judge considered both parties' arguments in reaching his decision. The judge also relied upon his considerable experience with the parties, with L.F., and the bases for the provision of L.F.'s therapy. In sum, we are satisfied that the decision was appropriately informed and discern no abuse of discretion by the judge in not conducting a plenary hearing.

III.

We next address A-1568-16 regarding defendant's appeal of the November 10, 2016 order, which altered the parties' parenting time and named plaintiff as the PPR.

The final judgment of divorce provided for compliance with the PSA, which ordered shared joint legal and physical custody of the children with both parties acting as PPR. Article IV, section 1 of the PSA outlined the custody and the parenting time schedule as follows:

> [T]he parties agree they shall exercise parenting time with [defendant] enjoying every Monday and Tuesday overnight from after school until the children are returned to school the next day and every other weekend from Friday night after school through Monday morning when the children are returned to school. [Plaintiff] shall enjoy parenting time every Wednesday and Thursday overnight from after school until the children are returned to school the next day and every other weekend

> from Friday after school through Monday morning when the children are returned to school.

Additionally, regarding "Joint Decision Making" under section 9, the PSA provided: "Neither party shall be permitted to make any medical decisions, including scheduling doctor's appointments, providing prescription medications, or making any other major medical decisions absent notification and consent of the other party." A parent coordinator was appointed to assist the parties with decisions about the children.

Since their divorce, the parties have engaged in a pattern of acrimonious motion practice concerning medical, educational, and social decisions for the children. Both parties filed motions in September 2015, requesting a modification of the parenting time schedule and a request to obtain primary residential custody. Having the parties' signed authorization that permitted discussion with the therapist, the judge contacted Dr. Leone-Vespa regarding his proposed modification of parenting time. In November 2015, in accordance with this discussion, the judge ordered the parties to continue the shared-custody designation with parenting time to continue on a week on/week off schedule.

In September 2016, Dr. Leone-Vespa had an emergency phone session with L.F. regarding an incident that occurred at school. L.F. told her guidance counselor that she wanted to hurt herself

and "would do so by taking a pill." Dr. Leone-Vespa noted that L.F. was feeling constantly stressed and was "suffering internally." A few days later, L.F. suffered a breakdown and was taken to the emergency room by defendant.

Soon after L.F.'s discharge from the hospital, defendant filed an OTSC requesting L.F. acquire services provided by the mobile crisis unit in the area. In response, the judge conducted conferences with L.F. and counsel to discuss concerns regarding the joint custodial relationship of the parties and its impact upon the children.

In October 2016, plaintiff filed a notice of motion for sole custody and for his designation as the decision-making authority. Two weeks later, a notice of cross-motion was filed by defendant requesting, among other relief, to deny plaintiff's motion and designate defendant as the PPR for all medical decisions.

Oral argument was heard on October 28, 2016. The judge, in a written memorandum dated November 10, 2016, concluded "[L.F.] fe[lt] directly in the middle of the dispute[,]" and further stated,

> [s]he agonizes over the simplest of decisions because every action or decision she makes is agonized over by her parents. This child has been poked and prodded by every conceivable health care provider, and her mental health continues to deteriorate. The war that is

> being waged by her parents has significantly caused [L.F.]'s distress.

The judge also held that "[b]oth parents acknowledge and request this court to appoint one of them as the 'decision-making parent[,'] to hopefully end this battle and ease [L.F.]'s distress." The judge further explained his reasons for appointing plaintiff as the decision-making parent, finding plaintiff could provide the most comfort to L.F. and could be more available due to the parties' employment responsibilities. The judge specified that both parties would continue to share joint custody of the children and that plaintiff would be the PPR. As to the parenting time schedule, the judge held:

> During the school year, [plaintiff] shall have the children after school on Monday to Friday when he drops them off at school. [Defendant] will have the children Friday after school to Monday morning when she will be responsible for getting the children to school. Additionally, for the months of September through May, [plaintiff] will have the children on the third Saturday of the month starting at 2 p.m. and he will be responsible for getting them to school on Monday. On Tuesday following this weekend, [defendant] will have the children after school until Wednesday morning when she will be responsible for dropping them off at school.
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> During the summer/school recess, [defendant] will have the children from Monday morning to Saturday at 6 p.m. on the first full week the children are off school, then to Saturday at 10 a.m. the next week. This

> shall rotate every week thereafter until school begins again. [Plaintiff] shall have the remaining time.

The judge found that "due to [plaintiff's] availability before and after school, this schedule limits the time the children spend with [c]aregivers as opposed to their parents. Moreover, this schedule will provide consistency during the school year which will benefit the children as well." This appeal followed.

On appeal, defendant raises the following points:

> POINT I
>
> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DID NOT ENGAGE IN ANY LEGAL ANALYSIS OR MAKE FACTUAL FINDINGS SUPPORTING ITS DECISION CHANGING THE PARTIES' PHYSICAL CUSTODY ARRANGEMENT.
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> POINT II
>
> MR. FOX DID NOT PRESENT CHANGED CIRCUMSTANCES PERMITTING HIS REQUEST TO CHANGE THE PARTIES' PARENTING TIME TO PROCEED.
>
> POINT III
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> EVEN IF THE COURT FINDS MR. FOX PRESENTED CHANGED CIRCUMSTANCES WARRANTING A REVIEW OF THE PARTIES' PARENTING TIME PLAN, THE COURT COMMITTED REVERSIBLE ERROR WHEN IT CHANGED THE PARTIES' CUSTODY ARRANGEMENT WITHOUT ORDERING A PLENARY HEARING IN THIS MATTER.
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> POINT IV
>
> THE TRIAL COURT'S DESIGNATION OF MR. FOX AS THE PARENT OF PRIMARY RESIDENCE HAVING ALL DECISION-MAKING AUTHORITY IN EFFECT GAVE MR. FOX SOLE LEGAL CUSTODY OF THE CHILDREN AND

SUCH WAS ERRONEOUS AS THE COURT FAILED TO FIND CHANGED CIRCUMSTANCES EXISTED WARRANTING A CHANGE, FAILED TO HAVE A HEARING AND FAILED TO MAKE THE REQUISITE FACTUAL FINDINGS AND LEGAL CONCLUSIONS.

POINT V

THE TRIAL COURT'S DECISION ASSIGNING MR. FOX AS THE DECISION-MAKING PARENT MUST BE REVERSED AS DISPUTED ISSUES OF MATERIAL FACT EXISTED AS TO WHO WOULD BETTER SERVE IN THE ROLE AS THE DECISION-MAKING PARENT.

In essence, defendant argues that a plenary hearing was required before altering the parties' parenting plan. Defendant argues there are several disputed material facts regarding the parties' ability to cooperate and communicate, and L.F.'s preferences and needs.

Scheduling parenting time based upon a determination of children's best interests is a matter of sound judicial discretion. See Abouzahr v. Matera-Abouzahr, 361 N.J. Super. 135, 157 (App. Div. 2003). After a party makes a showing of changed circumstances relating to parenting time, the trial judge must determine if a plenary hearing is required. Hand, 391 N.J. Super. at 105 (citing Shaw v. Shaw, 138 N.J. Super. 436, 440 (App. Div. 1976)). The judge has the power "to hear and decide motions or orders to show cause exclusively upon affidavits." Shaw, 138 N.J. Super. at 440.

"It is only where the affidavits show that there is a genuine issue as to a material fact, and that the trial judge determines

that a plenary hearing would be helpful in deciding such factual issues, that a plenary hearing is required." Ibid.; see also Lepis v. Lepis, 83 N.J. 139, 159 (1980) (holding the moving party "must clearly demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary" because without such a standard, courts would impracticably be obligated to hold hearings for every requested modification). "[W]here the need for a plenary hearing is not so obvious, the threshold issue is whether the movant has made a prima facie showing that a plenary hearing is necessary." Hand, 391 N.J. Super. at 106. We review a court's decision whether a plenary hearing is required for an abuse of discretion. Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015).

Parental rights to custody and visitation are held "in high esteem" and are guaranteed judicial protection. Wilke v. Culp, 196 N.J. Super. 487, 496 (App. Div. 1984). Our courts are committed to the principle that "children of separated parents should be imbued with love and respect for both parents, and where children are in [the] custody of one parent, the court should endeavor to effect this facet of the children's welfare by conferring reasonable rights of visitation on the other parent." Ibid.

"[T]he matter of visitation is so important, especially during the formative years of a child, that if a plenary hearing

will better enable a court to fashion a plan of visitation more commensurate with a child's welfare, nonetheless it should require it." Wagner v. Wagner, 165 N.J. Super. 553, 555 (App. Div. 1979). Further, where the parties' certifications are conflicting, a plenary hearing before reducing parenting time will usually be required. See ibid.

The record here consisted of the parties' conflicting certifications. The certifications were replete with disputed facts, cross accusations, and allegations about improper motivations. In her certification, defendant alleged, among other things, that plaintiff would not cooperate or agree to certain parenting decisions. In his certification, plaintiff alleged, among other things, that defendant's work schedule and her inability to cooperate caused stress in the children.

We conclude that these conflicting certifications presented material issues in dispute on significant parent-child matters that were not amenable to resolution in a summary proceeding. Notwithstanding the judge's considerable experience with the family and the myriad of matters in conflict over parenting by the parties, the resolution of these important issues should have abided a plenary hearing.

Finally, in reaching our determination that a plenary hearing is required, we express no view on the outcome of that hearing.

We add that any parenting time schedule pursuant to a legal joint custody arrangement requires "at least minimal parental cooperation . . . ." Beck v. Beck, 86 N.J. 480, 499 (1981). We also add that in a determination of the parenting time schedule, the judge should consider the mutual goals of fostering the parent-child relationship and safeguarding the children's best interests. Again, inherent to that determination is an evaluation of the parents' ability to cooperate and to set aside their conflicts. Id. at 498-99.

Affirmed in part, reversed in part. The matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.