

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2566-16T4

A.P. and G.P.,¹

Plaintiffs-Respondents,

v.

K.P. and J.F.,

Defendants-Appellants.

Argued April 18, 2018 – Decided May 10, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FD-04-1433-16.

Michael Confusione argued the cause for appellants (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the brief).

Michael A. Weinberg argued the cause for respondents (Archer & Greiner, attorneys; Michael A. Weinberg, of counsel; Jennie A. Owens, on the brief).

PER CURIAM

¹ We use initials to protect the identity of the child and the parties' privacy interests.

Defendants K.P. and J.F. (the parents) appeal from a February 17, 2017 order awarding plaintiffs A.P. and G.P. (the maternal grandparents) unsupervised grandparent visitation and therapy sessions with their grandson, A.F., despite the objections lodged by defendants. After a review of the contentions in light of the record and applicable legal principles, we reverse.

I.

We glean the following facts from the record. Plaintiffs are the maternal grandparents of the minor child, A.F., who was born in September 2009. Defendants are A.F.'s parents. The maternal grandparents initially filed an application for grandparent visitation in March 2016, while the child was in the custody of his paternal grandparents, G.P. and J.P. The paternal grandparents were granted temporary custody of the child on November 23, 2015, as the result of an investigation by the Division of Child Protection and Permanency (DCPP) of allegations the parents had neglect A.F.

On March 30, 2016, the maternal grandparents applied for grandparent visitation with A.F. The parents were not parties to that proceeding. The DCPP proceeding was scheduled for a hearing the following day. On March 31, 2016, the trial court granted the maternal grandparents visitation with the child for a minimum of three hours per week, with the schedule of the visits "to be worked

out" between the maternal and paternal grandparents.² There is no indication in the record that the parents received notice of the grandparent visitation application. We note that the application was considered on the day after it was filed. Moreover, there is no indication that the court conducted a grandparent visitation hearing under N.J.S.A. 9:2-7.1 or Moriarty v. Bradt, 177 N.J. 84 (2003) and its progeny.

The paternal grandparents moved to vacate the March 31, 2016 order pursuant to Rule 4:50-1, contending they had not received notice of the maternal grandparents' application. In her supporting certification, the paternal grandmother raised the following concerns. A.F. "is diagnosed with autism, suffers from anxiety and autism-related food aversion, and is extremely sensitive to changes in his schedule." Significant efforts have been expended to get A.F. to eat properly and attend school regularly. A.F. is seen by multiple health providers and participates in several after-school programs until nearly 5:00 p.m. each week day.

The paternal grandmother also alleged the maternal grandparents engaged in "a campaign to have [A.F.'s parents]

² The record does not include a transcript of either the DCPD proceeding or the grandparent visitation proceeding conducted on March 31, 2016.

evicted from the condo in which they were residing, despite the fact that [A.F.'s parents] are going through an extremely difficult time in their lives as they seek to make the adjustments necessary to have [A.F.] returned to their care." She further alleged the maternal grandparents sought custody "in an effort to use their custody application as blackmail to have [A.F.'s parents] removed from the condo." She asserts the maternal grandparents were willing to "drop the custody case" if the parents vacated the residence. The paternal grandmother parent also stated:

[W]e have attempted to set up some larger family visits in the past, where [A.F.] can see his parents and both sets of grandparents; however, the [maternal grandparents] viewed these visits as an opportunity to lambast [A.F.'s parents] for their failures in front of [A.F.], who is already a fragile child. If the [maternal grandparents] cannot even refrain from harassing [A.F.'s parents] during this trying time, in [A.F.'s] presence, then it is simply hard for us to imagine how court-ordered visitation with [the maternal grandparents] would further [A.F.'s] best interests.

The maternal grandparents moved to enforce the March 31, 2016 order. In her supporting certification, A.P. stated the maternal grandparents were not given notice of the hearing in which the paternal grandparents were awarded custody of A.F. in the DCPD proceeding. A.P. further claimed the purported paternal grandfather was not J.F.'s biological father or A.F.'s biological

grandfather. A.P. also claimed the paternal grandparents continued to violate the March 31, 2016 order by refusing to allow plaintiffs to exercise the court-ordered three hours per week visitation with A.F.

The parents cross-moved in opposition to maternal grandparent visitation. In their supporting certification, the parents joined in the objections raised by the paternal grandparents. They further stated:

However, we remain open to making efforts to routinely schedule informal visits where [A.F.] can meet with us, as well as both sets of grandparents. At this time, however, out of concern for [A.F.'s] best interests, we [r]espectfully [r]equest that this [c]ourt not affirmatively grant [the maternal grandparents] the right to such visitation by way of court order.

Custody of A.F. was returned to his parents in the DCPD proceeding. In light of this change in custody, on August 16, 2016, the trial court dismissed the applications filed by both sets of grandparents "without prejudice as moot due to the change of custody arrangement," and vacated the March 31, 2016 order. The trial court further ordered: "[K.P.] shall make reasonable and good faith efforts to renew her and [J.F.'s] relationship with the maternal grandparents and visitation between the maternal grandparents and the child [A.F]."

The DCPD and grandparent visitation matters returned to court on October 27, 2016. Although they had not filed a new complaint or motion for grandparent visitation, the maternal grandparents again sought visitation with A.F. K.P. and J.F. were present in court without counsel as to the grandparent visitation case. After dealing with certain pretrial issues in the DCPD proceeding, the trial court addressed maternal grandparent visitation. The Deputy Attorney General stated K.P. had a very difficult relationship with her family. J.F. objected to visitation by the maternal grandparents. When the court asked why, J.F. stated: "Because of everything that's going on. It's -- They don't even attempt to call us. We'll call them, they don't return the calls so --." K.P. added the maternal grandparents were "more interested in [going to] court" than talking to them like adults. K.P. described the maternal grandparents as "toxic" and stated, "I don't want them in my life." When asked to describe how they were "toxic," K.P. stated:

Because they are -- they're somewhat abusive to me and right now this is a really tough time for me and I can't have that over me right now. I need to focus on being strong for my son. And I -- I mean if you really want me to get into it, I'll get into it, but I don't want my son involved with them right now.

When asked by the trial court whether she would object to A.F. being taken over "to say hello" to the maternal grandparents, K.P. stated: "At this moment, yes." After being prodded by the court, K.P. stated: "Okay, I'll given them a chance." The judge then said he would draft an order indicating A.F.'s father "agrees to communicate with mom's parents" to "see if he can develop some kind of relationship so the child . . . knows [he] has four grandparents and not just two grandparents," but if "there's any toxic comments or statements" A.F.'s father can "stop the relationship." The judge expected A.F.'s father "to make a good faith attempt and see what happens."

The October 27, 2016 order prepared by the court, which stated it was "with the consent of the parties," provided:

1. Plaintiffs' request for visitation with the minor child, [A.F.] . . . and is hereby GRANTED.

2. Judge orders [J.F.] and [K.P.] to make reasonable and good faith attempts to build positive relationships with the maternal grandparents, [A.P. and G.P.].

3. Biological father, [J.F.] agrees to communicate with [the maternal grandparents] for good faith attempt for reasonable visitation with the aforementioned minor child. If a toxic relationship is fostered between the biological parents and the maternal grandparents. Biological parents may end all visitation between the minor child and the maternal grandparents.

4. All provisions in the Court's order dated October 27, 2016 (sic) remain in full force and effect.

In December 2016, the maternal grandparents moved to enforce the August 16, 2016 and October 27, 2016 orders, set a specific schedule for grandparent visitation, and for counsel fees and costs.

On January 4, 2017, the trial court entered an order terminating the DCPD proceeding because the child had returned home, conditions had been remediated, and physical and legal custody was with the parents.

On February 17, 2017, the trial court conducted a testimonial hearing. A.F.'s mother, father, and paternal grandmother testified. The maternal grandparents did not testify, present any witnesses, or introduce any other evidence. No expert testimony was presented, and no expert reports were admitted in evidence. The judge considered it an application by the maternal grandparents to enforce the August 16, 2016 order, and indicated the issue was whether it was not in the child's best interest to have grandparent visitation.

The paternal grandmother testified A.F. was thriving since being returned to his parent's care. She said "change is very hard" for A.F. She indicated the maternal grandparents do not accept A.F.'s diagnosis of autism spectrum disorder. She testified

that maternal grandparent visitation would be harmful to A.F.'s best interests because "even the slightest change or stress can make him progress backwards." She said A.F. had never asked about his maternal grandparents during the period she had custody or since his parents regained custody.

A.F.'s father testified regarding the history of turmoil with the maternal grandparents. He said the maternal grandparents did not accept or try to account for A.F.'s special needs as an autistic child.

A.F.'s mother testified the maternal grandparents had limited unsupervised contact with A.F. She said her parents encouraged her to leave J.F., which she considered to be their goal. She felt they were trying to drive a wedge between her and J.F., creating an unhealthy environment for A.F., which she feared would affect him. She also testified her parents did not acknowledge A.F. was autistic or respect his special needs. She expressed concern that A.F. would end up being treated the same as she was by her parents, which she described as a rough, emotional childhood.

The judge described the parents' reasons for excluding the maternal grandparents from visitation as being "just wrong." While recognizing the Supreme Court's holding requiring trial courts to consider the fundamental rights of the parents to make decisions,

the judge concluded: "But that's not this case. This case involves grandparents who seem to have a good faith desire to work with this child along with the parent." The judge further stated that what is "important here is the fundamental rights of this child." The judge then indicated "the issue should always be what's in the best interest of this child." The judge concluded A.F. had a relationship with the maternal grandparents and "we need to get them closer together."

The judge expressed the sentiment that a child with A.F.'s "history" needs "to take advantage of the extended family." Notably, the judge did not find the denial of grandparent visitation will result in harm to the child. The order entered by the trial court stated:

[T]he Court finds that visitation with the [p]laintiff maternal grandparents is in the Child's Best Interest. However, the Court recognizes that at the present time there is a significant strain in the relationship between the [p]laintiff maternal grandparents and the [d]efendant parents. Therefore, the Court Orders the parties strictly adhere to the following visitation provisions:

A. The Parties shall arrange for reunification therapy for the minor child [A.F.]. The therapist shall be covered by the child's Health Insurance and any co-pays or uninsured costs shall be paid for by the [p]laintiff grandparents. Counsel for the Parties will contact Chambers on Friday, February 24, 2017 at 1:30 for a conference updating on the progress of setting up the

therapy sessions. The therapist shall conduct individual therapy with the child, parents and maternal grandparents. Furthermore, the therapist shall facilitate joint therapy between the child and the maternal grandparents. The [p]laintiff [maternal] grandparents shall have a minimum of two (2) therapeutic visits with the child [A.F.] within thirty (30) days of the date of this Order.

B. At the recommendation of the child's therapist, the Plaintiff grandparents shall begin unsupervised visitation with [A.F.]. The Plaintiffs are entitled to a total of eight (8) hours per month of visitation with the child. Both Parties shall make reasonable efforts in arranging the visits and the grandparents are entitled to make-up visitation if they do not receive a total of eight (8) hours of visitation a month. Additionally, both the parents and maternal grandparents will ensure that each other is up to date on contact information at all times. In the future, the grandparents may file a motion for additional visitation after the successful implementation of the monthly eight (8) hour visits and additional parenting time is necessary in the Child's Best Interest.

This appeal followed. The parents contend: "The family judge misapplied governing New Jersey and federal law in ordering grandparent visitation with the minor child over the objections of the natural parent defendants."

II.

"Because of the family court's special jurisdiction and expertise in family matters, appellate courts should accord

deference to family court factfinding." Cesare v. Cesare, 154 N.J. 394, 413 (1998). However, the legal determinations of the Family Part are not entitled to any special deference. In re Forfeiture of Personal Weapons of F.M., 225 N.J. 487, 506 (2016). Questions of law are reviewed de novo. Ibid.

Notwithstanding our general deference to Family Part decisions, "we are compelled to reverse when the court does not apply the governing legal standards." Slawinski v. Nicholas, 448 N.J. Super. 25, 32 (App. Div. 2016) (citing Gotlib v. Gotlib, 399 N.J. Super. 295, 309 (App. Div. 2008)).

By the time the trial court entered the February 17, 2017 order, defendants had regained full legal and physical custody of A.F. Accordingly, the well-settled governing legal standard for grandparent visitation applies. Pursuant to N.J.S.A. 9:2-7.1, a grandparent may seek an order for visitation notwithstanding the objection of the child's parents. N.J.S.A. 9:2-7.1 requires the grandparents to prove by a preponderance of the evidence that the proposed grandparent visitation is in the best interests of the child, considering the following factors:

- (1) The relationship between the child and the applicant;
- (2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;

- (3) The time which has elapsed since the child last had contact with the applicant;
- (4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
- (5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;
- (6) The good faith of the applicant in filing the application;
- (7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and
- (8) Any other factor relevant to the best interests of the child.

Because of a parent's fundamental interest to direct the care, control, and custody of their child, the petitioning grandparent is required to make a threshold showing before the trial court applies a best interests standard. Moriarty, 177 N.J. at 114-15. As we discussed in Slawinski:

We recognize that a parent's fundamental right to raise a child as he or she sees fit encompasses the authority to determine visitation by third parties, including grandparents. Yet, that autonomy gives way to the need to protect the child from harm. Thus, grandparents seeking visitation . . . must prove by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child. If the court agrees that the potential for harm has been shown, the presumption in favor of parental decision making will be deemed overcome.

Still, proof of harm involves a greater showing than simply the best interests of the child. The harm to the grandchild must be a particular identifiable harm, specific to the child. It generally rests on the existence of an unusually close relationship between the grandparent and the child, or on traumatic circumstances such as a parent's death. By contrast, missed opportunities for creating happy memories do not suffice. Only after the grandparent vaults the proof-of-harm threshold will the court apply a best-interests analysis to resolve disputes over visitation details.

[448 N.J. Super. at 33-34 (citations omitted).]

However, "nothing about a parent's right to autonomy warrants allowing a parent to unilaterally modify or terminate a consent order on grandparent visitation." Id. at 34. "Similarly, a grandparent visitation order entered after an adjudication is 'subject to modification at any time on showing of changed circumstances.'" Id. at 33 (quoting Mimkon v. Ford, 66 N.J. 426, 437-38 (1975)). In either of those circumstances, the parent "must meet the burden of showing changed circumstances and that the agreement is now not in the best interests of a child." Ibid. (quoting Abouzahr v. Matera-Abouzahr, 361 N.J. Super. 135, 152 (App. Div. 2003)).

We do not consider the October 27, 2016 grandparent visitation order to be a consent order for grandparent visitation. The order was entered after the parents voiced repeated objection to the

grandparent visitation and considerable prodding of the parents who were then unrepresented. Moreover, the terms of the order went considerably beyond what the parents had agreed to. Additionally, the contact it allowed was limited, requiring only that J.F. "agrees to communicate with [the maternal grandparents] for good faith attempt for reasonable visitation." It did not set a visitation schedule. It further stated: "If a toxic relationship is fostered between the biological parents and the maternal grandparents[,] [b]iological parents may end all visitation between the minor child and the maternal grandparents."

Nor had there been a prior adjudication based on the governing legal principles. At no point during the prior proceedings or the February 17, 2017 testimonial hearing did the maternal grandparents prove that the denial of visitation would result in harm to A.F. Therefore, defendants were not required to show changed circumstances.

Additionally, when the trial court conducted the testimonial hearing, it applied a best interest standard rather than requiring the maternal grandparents to meet the threshold of proving by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child. Only then would the presumption in favor of parental decision-making be overcome and the best interest standard apply. Moriarty, 177 N.J. at 117.

The trial court did not apply this governing legal standard. Instead, the trial court ostensibly treated plaintiffs' application as a motion to enforce the grandparent visitation order and employed a best interest standard rather than requiring plaintiffs to prove by a preponderance of the evidence that denial of their grandparent visitation would result in harm to the child. Accordingly, we are compelled to reverse and remand for further proceedings in accordance with this opinion. On remand, the trial court shall determine if a plenary hearing is necessary on the threshold issue of whether the denial of maternal grandparent visitation would result in harm to the child.

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION