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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3114-19

NEW JERSEY DIVISION
OF CHILD PROTECTION
AND PERMANENCY,

Plaintiff-Respondent,

v.

S.M.,

Defendant-Appellant,

and

W.C., deceased,

Defendant,

and

L.C.,

Intervenor-Respondent.

IN THE MATTER OF A.C.,
a minor.

Argued March 16, 2022 – Decided May 2, 2022

Before Judges Hoffman, Geiger, and Susswein.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket Nos. FN-18-0106-17 and FD-18-0113-18.

Clara S. Licata, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Robyn A. Veasey, Deputy Public Defender, of counsel; Clara S. Licata, on the briefs).

Lea C. DeGuilo, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Acting Attorney General, attorney; Lea C. DeGuilo, on the brief).

Noel C. Devlin, Assistant Deputy Public Defender, argued the cause for minor (Joseph E. Krakora, Public Defender, Law Guardian, attorney; Meredith Alexis Pollock, Deputy Attorney General, of counsel; Noel C. Devlin, of counsel and on the brief).

Lisa Chapland argued the cause for intervenor-respondent (Law Offices of Jeffrey S. Mandel, LLC, attorneys; Jeffrey S. Mandel, of counsel and on the brief).

PER CURIAM

This appeal involves a Title 30 matter filed under the FN docket and a custody dispute filed as an FD¹ matter, which we consolidated for the purposes of this opinion. Defendant S.M. appeals from the Family Part orders that placed her daughter A.C. (Amy)² in the physical custody of Amy's paternal aunt, L.C. (Lucy), after the court determined, following a plenary hearing, that Lucy was Amy's psychological parent and stood in parity with defendant.

On appeal, defendant challenges Family Part rulings: 1) permitting Lucy to intervene in the FN matter; 2) concurrently hearing the FN action under Title 30 and the best-interests custody matter under the FD docket; 3) finding Lucy was Amy's psychological parent; and 4) awarding physical custody of Amy to Lucy, along with shared legal custody. Defendant also asserts the trial court proceedings denied her procedural due process. After careful review, we discern no basis to disturb any trial court rulings. We further conclude the record contains substantial evidence that supports the finding that it was in Amy's best

¹ The FD docket in the Family Part "consists of child custody, visitation, child support, paternity, medical support, and spousal support in non-divorce matters." B.C. v. N.J. Div. of Child Prot. & Permanency, 450 N.J. Super. 197, 205 (App. Div. 2017).

² Pursuant to Rule 1:38-3(d)(13), we use initials and pseudonyms to preserve the confidentiality of the family.

interests for the court to award primary physical custody of Amy to Lucy and for defendant and Lucy to share legal custody. We therefore affirm the orders under review.

I.

In August 2014, defendant gave birth to Amy. In July 2017, Amy's father, W.C. (Ward), passed away. Since 2016, defendant has been involved with a new paramour, R.H. (Ronald), who lives with her and her mother (MGM) in Somerset County. Defendant had two other children: a son, M.P. (Michael), born in 1991 (primarily raised until adulthood by MGM) and a son born in 1998 (given up for adoption).

The Division's Involvement with Defendant

1999

The predecessor of the New Jersey Division of Child Protection and Permanency (the Division)³ first became involved with defendant regarding her care of M.P., who was visiting defendant when she had a relapse that resulted in her admission to the hospital with a .214 blood alcohol reading. On June 8, 1999, defendant's therapist contacted the Division, concerned that Michael was

³ The Division of Child Protection and Permanency was formerly known as the Division of Youth and Family Services. The name change became effective June 29, 2012. L. 2012, c. 16.

at risk due to defendant's depression and history of drug abuse. The Division closed its file in February 2001, after confirming that "MGM now has custody" of Michael.

2016

On May 29, 2016, the Division received a report that police had arrested Ward for possession of heroin and that defendant was unfit to parent Amy and used medications without a valid prescription. The following day, the Division received a report that defendant had been arrested due to a warrant related to a traffic ticket.

Thereafter, defendant and Ward completed substance abuse evaluations. For her part, defendant admitted to using drugs, beginning at age sixteen, and alcohol, beginning at age fifteen; however, she denied current drug use and claimed she only drank socially. Defendant recounted that she was charged with driving under the influence in approximately 2006. The evaluator recommended that defendant attend "Level 1" outpatient substance abuse treatment.

On May 31, 2016, defendant provided a negative urine screen, whereas Ward tested positive for opiates. During the Division's investigation, the caseworker observed that defendant had diapers and food, Amy slept in her crib

and appeared healthy, and that the home was safe. Ultimately, the Division concluded that neglect was not established.

However, by June 2016, Ward was incarcerated; then, on June 28, 2016, defendant's urine screen tested positive for alcohol, causing the Division to institute a safety plan. Pursuant to the plan, Lucy and defendant's sister, M.M., would care for Amy and defendant's contact with Amy would be supervised.

On July 11, 2016, Amy was evaluated at St. Peter's University Hospital due to Lucy's concerns that Amy was experiencing breathing problems. Amy's treating physician referred her to a pediatric neurologist due to concerns of seizure activity.

On July 18, 2016, the Division executed a Dodd removal⁴ of Amy and placed her with Lucy due to defendant's urine screen testing positive for alcohol and defendant's unwillingness to abide by the Division's safety plan on a long-term basis. At the time, Ward remained incarcerated.

On July 20, 2016, the Division filed a verified complaint and order to show cause (OTSC), seeking temporary custody of Amy under FN-18-106-17

⁴ A Dodd removal is an emergency removal of a child without a court order pursuant to N.J.S.A. 9:6-8.21 to -8.82 (the Dodd Act). N.J. Div. of Youth & Fam. Servs. v. P.W.R., 205 N.J. 17, 26 n.11 (2011).

(the FN docket number). The Division filed the action pursuant to N.J.S.A. 9:6-8.21, N.J.S.A. 30:4C-12, and Rule 5:12-1.

On the return date of the OTSC, the court granted the Division custody, care, and supervision of Amy, after finding that Ward's incarceration and defendant's alcohol use constituted a risk of harm to Amy. Defendant consented to Amy's placement with Lucy, admitted to using alcohol, and acknowledged that Amy had a "potential health issue." The court provided defendant with supervised visitation and ordered her to comply with services. The court further ordered that no smoking shall occur around Amy and continued defendant's supervised visitation schedule and compliance with services.

On November 30, 2016, the court made summary findings, pursuant to N.J.S.A. 30:4C-12, that Amy required the continued care, custody, and supervision of the Division. The court found the need for court intervention and Division supervision remained due to defendant's substance abuse issues and her need for mental health treatment and continued urine screenings.

That same day, the court also conducted a dispositional hearing. The court suspended defendant's unsupervised parenting time for thirty days after the Division reported that two of defendant's urine screenings tested positive for opiates and screenings were diluted. The court ordered defendant to participate

in additional services, including substance abuse counseling, Alcoholics Anonymous (AA) meetings, and parenting skills classes; in addition, the court ordered defendant to undergo hair follicle testing.

2017

On January 23, 2017, defendant submitted a diluted urine screen to the Division. Shortly thereafter, defendant showed Rosa Rios, a family services specialist with the Division, a list of the prescriptions that she was taking.

On June 6, 2017, defendant started weekly unsupervised parenting time with Amy, pursuant to a consent order. On June 21, 2017, Preferred Behavioral Health closed defendant's file because defendant did not engage in her recommended level-one outpatient services. A short time later, on June 29, 2017, Catholic Charities reported to the Division that defendant had been actively participating in her substance abuse treatment program. At a hearing, the court heard testimony from Catholic Charities employees about defendant's progress in counseling, including her completion of her treatment goals.

On July 25, 2017, the court signed another summary finding order under the FN docket number, pursuant to N.J.S.A. 30:4C-12, and determined that the court's intervention was necessary because defendant was part of a family in need of services. That same day, the court also entered a compliance review

order under the FN docket number. The order allowed defendant's unsupervised parenting time to continue and expanded the time to include one overnight visit. Ronald was required to submit to drug screenings; less than two weeks later, Ronald had a positive urine screen on August 4, 2017. On August 16, 2017, Catholic Charities reported that defendant successfully completed her sessions and demonstrated positive parenting skills.

2018

On January 11, 2018, defendant's drug screen tested positive for opiates; however, her hair follicle test, administered on February 22, 2018, was reported as negative. On March 5, 2018, during a permanency hearing, the Division reported that the allegations that led to Amy's removal were "not established." Further, the Division reported that defendant had completed substance abuse counseling and parenting skills classes, and also attended weekly counseling. As for the positive drug screening dated January 11, 2018, the Division explained that the opiate level was low enough that it could have resulted from defendant's ingestion of a poppy seed bagel. Nevertheless, the court rejected the Division's plan of reunification. The court explained that defendant had not completed all required services, the Division had not clearly or concisely

specified how reunification would be achieved, and the Division had not submitted a formal updated report prior to the hearing.

In April 2018, Heidi Zorde, the Division's permanency supervisor assigned to defendant's case, reported that the Division had concerns that Amy smelled like smoke after visitation with defendant. During permanency hearings in April and May 2018, the Division stated that its goal for Amy was reunification with defendant. According to the Division, defendant had completed substance abuse treatment, parenting skills training, submitted to urine screenings and hair follicle testing, and attended therapy. For her part, Lucy hoped that she and defendant could mediate the issues between them to find the best care situation for Amy, but absent that, she wanted a best-interests hearing. The Law Guardian also sought a best-interests hearing because defendant refused to attend an evaluation with a parental-fitness expert.

In December 2018, Laura Williams, a family services specialist with the Division, spoke with defendant about Ronald living with her. Defendant and Ronald had failed to disclose their cohabitation to the Division. Pursuant to multiple court orders, Ronald was not to have any contact with Amy. Shortly thereafter, in December 2018, Ronald agreed to move out. By this time,

defendant was involved in individual therapy, was employed on a full-time basis, and was participating in twice-weekly urine screenings.

FD Action Filed by Lucy

On July 13, 2017, Lucy filed a verified complaint under FD-18-0113-18 (the FD docket number) seeking an order naming her as a psychological parent of Amy and granting her joint legal custody and sole residential custody of Amy. On July 24, 2017, Lucy filed a verified complaint and OTSC under the FD docket number and sought custody of Amy. The application was opposed by the Division and defendant.

On August 7, 2017, the court denied Lucy's OTSC, finding it non-emergent; however, the court ruled that "a plenary hearing to determine [Amy's] best interests need[ed] to be decided in lockstep and in a parallel fashion with the FN proceeding." The court set a date to hear oral argument regarding the management of the FD and FN dockets, pursuant to B.C. v. Div. of Child Prot. & Permanency, 450 N.J. Super. 197 (2017). On August 11, 2017, the court entered an order under the FD docket that stated the FD action would occur "in conjunction with and in lockstep" with the FN action. The court found that Lucy had met the "minimum threshold" to have a hearing to determine whether she

could be considered a psychological parent to Amy and to "address best interest."

On August 23, 2017, Lucy filed a motion to intervene in the FN action, pursuant to Rule 4:33-1 and Rule 4:33-2. On September 18, 2017, the court allowed Lucy to intervene in the FN action, as of right, under Rule 4:33-1. Explaining there was a "common thread" between the FN and FD actions, as both pertained to Amy's best interests, the court stated it would schedule a hearing to determine whether Lucy was Amy's psychological parent. On the same date, September 18, 2017, the court held a compliance review hearing and entered an order under the FN docket. The court instructed defendant to continue with her services and visitation and ordered that Ronald could have no contact with Amy. The court then adjourned the permanency hearing until after the best-interests hearing.

On October 4, 2017, the court signed a compliance review order that confirmed the granting of Lucy's motion to intervene in the FN action. The court further ruled that a permanency hearing, a parental fitness determination, a psychological parent determination, and a best-interests hearing would occur contemporaneously. Recognizing the need for expert evaluations before the hearing could take place, the court ordered the parties to obtain best interests

evaluations for the purposes of "a psychological[-]parent / best-interest[s] hearing." The court continued Amy's out-of-home placement, ordered defendant to continue with services, and allowed her visitation, with the stipulation that continued to bar Ronald from any contact with Amy.

On March 5, 2018, the court signed a case management review order under both the FN and FD docket numbers. The order continued Amy's placement with Lucy, allowed for defendant's visitation, and prohibited Ronald's contact with Amy. The order also adjourned the previously scheduled best-interests hearing in the FD matter because of outstanding discovery and expert availability issues.

On May 25, 2018, the court signed an order under the combined FN and FD docket numbers and cited to the court's hearings on April 30, and May 4, 2018. The court rejected the Division's plan of reunification as unacceptable due to disputed factual issues that required testimony to resolve.

On July 10, 2018, the court held another permanency hearing. The court approved the concurrent plans of Amy's reunification with defendant and, also, her adoption by Lucy. Ronald was not permitted to have contact with Amy due to the court's concerns regarding his substance abuse. That same day, the court signed a case management review order under both the FN and FD docket

numbers. The order continued Amy's out-of-home placement, defendant's visitation, the prohibition on Amy's contact with Ronald, and defendant's requirement to attend Division services.

On October 5, 2018, the court signed a consent order under the combined FN and FD docket numbers that continued Amy 's care, custody, and supervision with the Division. The order continued defendant's obligation to participate in Division services and the prohibition on contact between Ronald and Amy.

Beginning on October 4, 2018, and lasting for twenty-eight non-consecutive days through July 11, 2019, the trial court conducted a best-interests hearing in the FD matter as to whether Lucy was Amy's psychological parent and what placement options were in Amy's best interests. During the hearing, the court heard testimony from thirty-nine witnesses, including Division employees, Lucy, defendant, Ronald, MGM, and Michael, as well as the following expert witnesses:

Dr. Sharon Ryan Montgomery – A licensed psychologist, Dr. Montgomery testified on behalf of Lucy. She performed four interviews with defendant and with Lucy, beginning in October 2017. She also evaluated Amy with both defendant and Lucy on two occasions. In addition, she evaluated W.B. and Ronald. During a bonding evaluation between Lucy and Amy, Dr. Montgomery observed that there was a solid attachment. She testified that Lucy was on "solid ground" in terms of her parenting skills, and owned her

own home, had a stable relationship, and a long-term job. She opined that Lucy was Amy's psychological parent because defendant had fostered a relationship between Amy and Lucy, Amy lived with Lucy longer than she had lived with her biological parents, Lucy performed parental responsibilities, and Lucy shared a bond with Amy. In that vein, she believed that Lucy should retain primary custody of Amy because she was more fit, competent, and consistent as a parental figure.

Gregg Benson – A licensed clinical alcohol and drug counselor, Gregg Benson testified on behalf of Lucy as an expert in addiction evaluations and treatment. He did not evaluate defendant; instead, he reviewed the expert report from defendant's substance abuse evaluator, Dr. Gerard Figurelli. Mr. Benson opined that Dr. Figurelli's evaluation was inadequate and likely underestimated the severity of defendant's substance abuse issues because he used only single source reporting, a methodology "more akin to the process utilized in an intake assessment for entry into a treatment program that is typically void of collateral information and/or challenge to the self-report."

Dr. Jonathan Wall – An expert in psychology and parenting assessments, Dr. Wall testified on behalf of the Division. Dr. Wall assessed defendant in September 2016; at that time, he found her unfit to parent a child due to her substance abuse and previous involvement people who abused substances. Dr. Wall reassessed defendant in November 2017; at that time, he determined that defendant was fit to parent.

Dr. Tara A. Matthews – An expert in developmental behavioral pediatrics and the medical director for a fetal alcohol spectrum disorder program, Dr. Matthews testified on behalf of the Division. Defendant reported that she drank alcohol during the first five or six months

of her pregnancy. Dr. Matthews evaluated Amy, when she was four and a half years old, and found that she had no deficits, developmental delays, or behavioral issues, and no evidence of fetal alcohol syndrome.

Dr. Amanda Morales Clarke – A clinical psychologist, Dr. Clarke testified on behalf of defendant. She served as defendant's therapist after the Division referred her for services. Dr. Clarke was not familiar with whether defendant attended AA during their therapy sessions, whether she had relapsed, or the results of her urine screenings. Dr. Clarke testified that defendant was effectively and appropriately using her time in therapy.

Dr. Gerard Figurelli – A psychologist with expertise in the field of substance abuse, Dr. Figurelli testified on behalf of defendant. He evaluated defendant in May 2018. Dr. Figurelli suggested that a prior drug screen that indicated opiate use was related to defendant's ingestion of a poppy seed bagel. He stated that a strong motivator for defendant to remain substance free was reunification with Amy. Dr. Figurelli noted that defendant's negative drug tests caused him to believe that she had not relapsed. He further believed that defendant's decision to stop attending AA was appropriate and did not place her at high risk of relapse.

Dr. Donald Franklin – A psychologist with expertise in the field of custody and best-interests evaluations, Dr. Franklin testified on behalf of defendant. He performed a parental fitness evaluation on defendant and, also, a bonding evaluation between defendant and Amy in October 2017. Dr. Franklin determined that she met the standard for parental fitness, in part, due to her active treatment. According to Dr. Franklin, Amy was more animated with defendant than with Lucy during the bonding evaluation. He described defendant's bond with Amy was "extremely strong and extremely

positive," and was "significantly closer" than the bond Amy shared with Lucy.

Dr. Elayne Weitz – An expert in psychology, Dr. Weitz testified on behalf of the Law Guardian. Dr. Weitz explained that an individual's ability to protect a child from harm is the most important quality of a caregiver. She found that in October 2017, defendant was not fit to parent Amy due to her involvement with the Division and her alcohol use. Dr. Weitz expressed concern that outpatient treatment may not be adequate to resolve defendant's substance abuse issues. Additionally, she noted that defendant smoked heavily, which was problematic for Amy's restrictive airway disease. She also noted defendant's history of unstable housing. While defendant had been living with her mother at the time, it was unclear to Dr. Weitz if that housing situation would be permanent; additionally, defendant was then residing with Ronald, who presented risks to Amy's safety. At that time, defendant was only five months into a new job, which caused Dr. Weitz to question whether she would be financially stable in the future. Defendant also had a history of minimizing problems, failing to take responsibility for her actions, and omitting important information from evaluators.

Dr. Ave Gozo – A pediatrician at Children's Specialized Hospital in Mountainside with a specialization in neurology, Dr. Gozo testified on behalf of the Law Guardian. Amy's pediatrician since January 2017, Dr. Gozo diagnosed Amy as suffering from restrictive airway disease and recommended that she not be exposed to cigarette smoke. Dr. Gozo also recommended that Amy see an allergist, and other specialists to address her tremors, developmental delays, and heart murmur.

On August 29, 2019, the court issued its decision, determining that exceptional circumstances existed for Lucy to seek custody of Amy because Lucy had become Amy's psychological parent and, therefore, was entitled to a best-interests hearing, pursuant to N.J.S.A. 9:2-4. After that determination, the trial court proceeded to analyze the evidence and testimony presented – but considered it through the lens of a best-interests hearing, pursuant to N.J.S.A. 9:2-4 – to determine the custodial relationship that served Amy's best interests. After considering the fourteen factors listed in N.J.S.A. 9:2-4(c), the trial court awarded joint legal custody to defendant and Lucy and appointed Lucy as the primary residential custodian; in addition, the court provided defendant with weekend visitation and extended summer visits.

On August 30, 2019, the trial court signed a custody order under the FD docket number. The order gave defendant and Lucy joint legal custody of Amy and awarded primary residential custody to Lucy

On October 23, 2019, the court signed a compliance review order under the FN docket number that continued defendant's obligations to attend services and the restrictions on Ronald's contact with Amy. On February 25, 2020, the court signed a consent order terminating the FN litigation and cited to its

determinations in the FD litigation as the basis of its conclusions. These appeals followed.

II.

Well-established principles guide our review of his matter. "[W]e accord great deference to discretionary decisions of Family Part judges [,]" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (citing Donnelly v. Donnelly, 405 N.J. Super. 117, 127 (App. Div. 2009)), in recognition of the "family courts' special jurisdiction and expertise in family matters." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). An abuse of discretion occurs "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Milne, 428 N.J. Super. at 197 (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

A reviewing court will defer to a judge's factual findings determinations when "they are supported by 'adequate, substantial and credible evidence' on the record." N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007), (quoting In re Guardianship of J.T., 269 N.J. Super. 172, 188 (App. Div. 1993)). Additionally, we generally "grant deference to the trial court's credibility

determinations." Ibid. However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 26 (2014) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

A.

While the State can act to curtail the rights of a parent regarding his or her child, a parent's right to custody can also be challenged by a third party who "present[s] clear and convincing evidence of parental unfitness, abandonment, gross misconduct, or the existence of exceptional circumstances affecting the welfare of a child." Watkins v. Nelson, 163 N.J. 235, 253-55 (2000); N.J.S.A. 9:2-4; N.J.S.A. 9:2-9; N.J.S.A. 9:2-10. The exceptional circumstances classification contemplates court intervention, pursuant to the State's *parens patriae* power, to protect the health, safety, and welfare of a child. V.C. v. M.J.B., 163 N.J. 200, 219 (2000). When a third party seeks to exercise custody over or concurrent with the child's biological parent, the court must engage in a two-step analysis. Watkins, 163 N.J. at 253. Specifically, the court must first determine whether exceptional circumstances exist and then determine whether awarding custody is in the best interests of the child. Id. at 254.

The Court has explained that exceptional circumstances can include instances where a third party "has stepped in to assume the legal parent who has been unable or unwilling to undertake the obligations of parenthood." V.C., 163 N.J. at 219. In that vein, an individual given the status as a psychological parent may seek custody of the child, even in instances where the biological parents are fit. Id. at 219-20. In contrast, a stranger may not challenge a child's placement because he or she cannot satisfy the exceptional circumstances prong and, therefore, the stranger cannot request a best-interests hearing. P.B. v. T.H., 370 N.J. Super. 586, 598 (App. Div. 2004); see also Watkins, 163 N.J. at 254-55 (explaining the standard is one of "best interests," not "better interests").

The standard for determining whether an individual is a psychological parent is set forth in V.C., 163 N.J. at 219-20. In V.C., the Court held that a woman had standing to seek custody and visitation of the biological children born to her former domestic partner. Id. at 229-230. Notably, the Court opined that a showing of exceptional circumstances may curtail the absolute rights of a biological parent even if the biological parent is fit and there is no basis for the termination of parental rights. Id. at 215. Also, the woman had performed parental duties alongside of the biological mother, developed a bond with the children, and, therefore, became a psychological parent. Id. at 223-227.

Importantly, the Court realized that psychological parent cases implicate the interest children have in maintaining ties to the adults "who love and provide for them." Id. at 221.

As a result of the Court's analysis in V.C., a trial court must engage in a four-pronged analysis to determine whether an individual is a psychological parent. Id. at 219-20. Specifically, the legal parent "must consent to and foster the relationship" between the individual and the child; the individual must have lived with the child; the individual "must perform parental functions for the child to a significant degree"; and a parent-child bond must be forged. Id. at 223. According to the Court, the most important factor is whether the parent-child bond is forged. Ibid. Notably, however, V.C. does not require that the court determine that the bond between the psychological parent and the child to be greater or equal to the bond between the biological parent and the child. Id. at 226-27. The only prong of the test that requires expert testimony is the fourth prong, whether the parent-child bond had been forged between a third party and the child. Id. at 223, 227. Overall, the four-prong analysis is a fact-sensitive determination made by the court. Id. at 223. A third party who is "determined to be a psychological parent to a child . . . stands in parity with a legal parent" regarding custody and visitation issues. Id. at 227-28.

B.

"[T]he opinion of the trial judge in child custody matters is given great weight on appeal." Terry v. Terry, 270 N.J. Super. 105, 118 (App. Div. 1994) (citations omitted); however, the trial judge must consider the statutory criteria enumerated in N.J.S.A. 9:2-4. Id. at 107. In turn, we "must evaluate that opinion by considering the statutory declared public policy and criteria which a [judge] must consider." Id. at 118.

The judge must "reference the pertinent statutory criteria with some specificity and should reference the remaining statutory scheme at least generally, to warrant affirmance." Id. at 119. The judge must also "consider and articulate why its custody decision is deemed to be in the child's best interest." Ibid. "[T]he paramount consideration is the safety, happiness, physical, mental and moral welfare of the child." Ibid. (quoting Fantony v. Fantony, 21 N.J. 525, 536 (1956)). "[T]hat analysis requires the court to consider any and all material evidence." Kinsella v. Kinsella, 150 N.J. 276, 317 (1997) (citing In re Baby M., 109 N.J. 396, 456 (1988)). "The 'best-interest-of-the-child' standard . . . is an expression of the court's special responsibility to safeguard the interests of the child at the center of a custody dispute because the

child cannot be presumed to be protected by the adversarial process." Id. at 317-18.

As set forth in N.J.S.A. 9:2-4(c), the court must take into consideration fourteen factors when making an award of custody, which include:

[1] the parents' ability to agree, communicate and cooperate in matters relating to the child; [2] the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; [3] the interaction and relationship of the child with its parents and siblings; [4] the history of domestic violence, if any; [5] the safety of the child and the safety of either parent from physical abuse by the other parent; [6] the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; [7] the needs of the child; [8] the stability of the home environment offered; [9] the quality and continuity of the child's education; [10] the fitness of the parents; [11] the geographical proximity of the parents' homes; [12] the extent and quality of the time spent with the child prior to or subsequent to the separation; [13] the parents' employment responsibilities; and [14] the age and number of the children.

Our review of custody findings is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). The general rule is that child custody determinations are binding on appeal when supported by adequate, substantial, credible evidence. W.M. v. D.G., 467 N.J. Super. 216, 229 (App. Div. 2021). Also, a reviewing court provides deference to the findings of fact made by the Family Part, because of

that court's expertise in family matters. Cesare, 154 N.J. at 413. What is more, that deference is especially appropriate in matters where the evidence is "largely testimonial and involves questions of credibility" because the trial court was in the best position to evaluate the veracity of the witnesses. P.B., 370 N.J. Super. at 601. Thus, we do not "weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." Mountain Hill, LLC v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008). However, we review issues of law de novo, including those issues that arise in a custody dispute. R.K. v. F.K., 437 N.J. Super. 58, 61 (App. Div. 2014).

Applying these principles to the to the trial court orders under review, we discern no basis to disturb any of the pre-hearing orders entered by the trial court nor any of the confirming orders entered after the plenary hearing. We are also satisfied that defendant did not sustain a denial of due process.

III.

Psychological Parent Analysis

Our review of the record and the trial court's written opinion clearly demonstrates that the court appropriately engaged in the four-pronged analysis, pursuant to V.C., 163 N.J. at 219-20, to determine whether Lucy was Amy's psychological parent. We address the court's analysis of each prong:

Prong I – Whether the legal parent consented to and fostered the relationship between the third party and the child.

As to the first prong, the V.C. Court explained that the legal parent's participation in, or "foster[ing]" of, a parental relationship between the child and a third party is critical. Id. at 223-24. The Court used the term "fostered" to mean "that the legal parent ceded over to the third party a measure of parental authority and autonomy and granted to that third-party rights and duties vis-a-vis the child that the third party's status would not otherwise warrant." Id. at 224. It further observed that "consent" will have different implications in different factual settings and that a legal parent's voluntary abstention from his or her child may constitute consent. Id. at 223 n.6.

Here, the trial court's description of Lucy's involvement with the parenting functions relating to Amy stems from the testimony of Lucy and defendant at the plenary hearing. According to Lucy, she only sporadically visited with Amy from her birth in August 2014 until approximately July 2015. At that time, Lucy's interactions with Amy increased and Lucy started taking Amy for overnight visits on a regular basis, with the consent of both Ward and defendant. For her part, defendant admitted that Lucy took care of Amy on weekends, but claimed that she never asked Lucy to be Amy's parent; in addition, she claimed she fought with Ward over the amount of time that Lucy spent with Amy.

Although defendant claimed she did not ask Lucy to parent Amy, her actions tell a different story. Defendant allowed Lucy to take Amy for overnight weekends on a regular basis, which is beyond what a typical aunt's status would warrant. In fact, the length of time that Lucy devoted to Amy's care was far more than would be expected of an aunt to address a general need for assistance. Rather, it evinces that defendant had ceded at least some of her parental responsibility to Amy, as the trial court aptly noted.

Further, defendant contends that her consent to a relationship between Lucy and Amy ended upon Amy's removal by the Division. This argument lacks merit because the time period the court considered in determining whether exceptional circumstances existed was the period prior to Amy's removal.

Based on the circumstances whereby Amy stayed with Lucy on weekends, with defendant's knowledge and without defendant expressing any objection to Lucy, we are satisfied there was substantial credible evidence in the record for the trial court to conclude that the first prong of the analysis was satisfied.

Prong II – Whether the third party lived with the child.

As for the second prong, the V.C. Court explained that the third party must have lived with the child in a familial setting. Id. at 223-27. Here, defendant did not dispute that Lucy watched Amy for regular weekend overnight visits at

Lucy's home. For her part, Lucy explained that Amy had her own bedroom, supplies, clothing, food, and toys at Lucy's house. Thus, we are satisfied that there was substantial credible evidence in the record for the court to conclude that the second prong of the analysis was satisfied.

Prong III – Whether the third party performed parental functions to a significant degree.

As for the third prong, the V.C. Court clarified that a finding that a third party assumed parental functions, was not "contingent on financial contributions made by the third party" because the assumption of a parental role is more complex. Id. at 226. While financial contributions could be considered, they should not be given "inordinate weight when determining whether a third party has assumed the obligations of parenthood." Ibid. The court should focus on "the nature, quality, and extent of the functions undertaken by the third party and the response of the child to that nurturance." Ibid.

Lucy testified that she provided resources and money to Ward and defendant prior to Amy's birth. A short time after Amy's birth, in approximately July 2015, Lucy provided supplies for Amy at both her home and defendant's home. Beyond providing money and supplies, Lucy engaged in traditional parenting functions such as taking Amy to doctors' appointments, on trips, and shopping. Additionally, Lucy took Amy to family functions, swim lessons, and

daycare. Lucy also maintained a custodial bank account for Amy. Lucy's participation in these activities went beyond those of an extended family member and was more akin to a parent's responsibilities. As a result, there is ample credible support for the court's conclusions that the nature, quality, and extent of the functions undertaken by Lucy satisfied the third prong of the analysis.

Prong IV – Whether a parent-child bond was forged.

As for the fourth prong, the V.C. Court explained that it was a "necessary corollary . . . that the third party must have functioned as a parent for a long enough time that such a bond has developed." Id. at 226. Notably, what "is crucial . . . is not the amount of time but the nature of the relationship." Ibid. When conducting its analysis, the court should focus on the facts of the case and an assessment of the exact functions that the third party performed while taking into consideration the life-stage of the child. Id. at 226-27. Expert testimony will be needed to assess the "actuality and strength" of the parent-child bond. Id. at 227.

Here, all the experts who completed bonding evaluations between Lucy and Amy concluded that a bond between the two was present. The experts differed over the strength of that bond, with Dr. Franklin and Dr. Weitz

suggesting that defendant's bond with Amy was stronger. We note that the purpose of the psychological-parent analysis is to recognize that a child has an interest maintaining ties to the adults "who love and provide for them." Id. at 221. In that regard, the trial court did not err when it concluded that the bond between Lucy and Amy was important for Amy to maintain. Also, V.C. does not require that the court conclude that the bond between the psychological parent and the child to be greater or equal to the bond between the biological parent and the child. Id. at 226-27. We conclude the trial court's finding that a bond exists between Lucy and Amy, satisfying the fourth prong of the analysis, was well supported by competent expert testimony.

In sum, the record contains ample, credible evidence supporting the trial court's conclusion that Lucy was Amy's psychological parent. Importantly, once a third party is "in parity" with the legal parent, the third party "stands in the shoes of the biological parent" and the court must then conduct a best-interests analysis under N.J.S.A. 9:2-4(c). Because the court concluded that Lucy was a psychological parent, the trial court then correctly engaged in a best-interests analysis to determine the issue of Amy's custody between Lucy and defendant. However, in this portion of its analysis, the court considered the evidence

through the lens of a best-interests hearing, pursuant to N.J.S.A. 9:2-4, to determine the custodial relationship that served Amy's best interests.

Custody Analysis

Defendant challenges the order dated August 30, 2019, from the FD docket, which awarded joint legal custody to defendant and Lucy, visitation to defendant, and physical custody to Lucy. Defendant seeks reversal and remand, arguing that the trial court overlooked "significant facts" related to Amy's best interests and, as a result, arrived at flawed conclusions of law. Specifically, defendant argues that the court erred when it: determined the extent to which Ronald was a risk to Amy; disregarded Lucy's behavior during the litigation and its impact on Amy's best interests; relied on the income disparity between defendant and Lucy; analyzed the risk to Amy if defendant relapsed with alcohol use; and expressed concern regarding the smoking of cigarettes around Amy.

We reject defendant's arguments and affirm the trial court's conclusion that it was in Amy's best interests to be placed with Lucy. The trial court carefully evaluated all fourteen required factors of the best-interests test regarding the award of custody. The court determined that Lucy and defendant had a history of cooperation and a willingness to work together towards Amy's future care; there was no history of defendant denying Lucy time with Amy, but

there was concern that defendant may sabotage Lucy's relationship with Amy or terminate Lucy's relationship with Amy entirely; and that Amy, who lacked sufficient capacity to form an opinion about her custody arrangement due to her young age, had healthy and bonded relationships with both defendant and Lucy.

The trial court also found that there were significant concerns as to whether Ronald would move out of defendant's home and refrain from contact with Amy. The court was also concerned about defendant's ability to address Amy's healthcare needs as well as her refusal to stop smoking, despite knowing that Amy suffers from restrictive airway disease. The court further noted that defendant's home environment was not stable because of her history of transience, inability to support herself financially, and desire to associate with "dangerous individuals," whereas Lucy's home was stable.

The continuity of Amy's education was not a factor due to her young age and geography was not a factor. While both defendant and Lucy were fit to parent, the court had concerns about defendant's ability to remain sober. The court further recognized that Lucy had been Amy's primary caregiver since Amy was one year old, whereas defendant has largely enjoyed visitation. Moreover, while both individuals were employed, the court had concerns about defendant's financial management and job flexibility to allow for child-related issues.

We reject defendant's claim that the trial court overlooked Lucy's alleged poor behavior during the litigation. The court heard testimony that Lucy had a poor opinion of defendant, and that Lucy did not interact well with some Division caseworkers. The court made its own observations about Lucy's and defendant's behavior, noting "various behaviors by both parties evidencing the power struggle and open hostility between them." Nevertheless, the court heard testimony that Lucy desired to work with defendant and to keep defendant in the "loop." The court also noted "the volumes of emails and texts exchanged among the parties exhibiting civilized conversations" before this litigation began.

We also reject defendant's claim that there was no support for the court's conclusion that so long as Ronald was a risk to Amy. Dr. Weitz testified that she did not recommend reunification with Ronald in the home. Also, the court heard testimony from Ronald's family members that he had a long-term substance abuse problem combined with Ronald's own testimony that he suffered from untreated diabetes. Moreover, Ronald, along with defendant and MGM, smoked in or outside of the home, notwithstanding their awareness of Amy's restrictive airway disease.

The trial court also heard testimony from Ronald's cousin, who testified that Ronald lived with him from December 2014 to September 2016. He

ultimately made Ronald move out because he abused drugs, had track marks on his arm, and used cocaine. The court also heard testimony from Ronald's mother, who confirmed that Ronald started living with her in the summer of 2016 and, also, that she had Ronald move out of her home in January 2017 because he stole from her on two occasions. At that point, Ronald started living with his aunt, who recounted that, after a few months, she asked Ronald to leave her home when she found him in the bathroom with a needle in his arm, a blackened spoon nearby, and wearing a tourniquet.

Importantly, defendant minimizes a disturbing fact revealed at the plenary hearing, namely, that she and Ronald did not inform the Division that they were cohabitating. Instead, defendant contends that the issue was overblown because the court never entered an order barring Ronald from living with defendant. However, there is ample evidence in the record that the court signed an order preventing Ronald from contacting Amy and, as a result, Ronald's cohabitation with defendant would result in Ronald's contact with Amy if reunification with defendant were to occur.

Moreover, defendant's and Ronald's unwillingness to be forthcoming about their living arrangement lends support to the court's determination that Ronald may not move out of the home if reunification were to occur. See

Bisbing v. Bisbing, 230 N.J. 309, 338 (2017) (allowing trial court to consider other factors and supplement enumerated factors in N.J.S.A. 9:2-4(c)). Furthermore, although Lucy made much of Ronald's prior criminal history, the court took judicial notice of the resolution of the criminal charges against Ronald. The record does not support defendant's claim that the court overlooked facts relevant to Amy's best interests as it related to Ronald.

We also reject defendant's claim that the court ultimately placed too much emphasis on the income disparities between the parties. In discussing Amy's needs, the court noted that defendant was "better at providing [Amy] with a relaxed setting" whereas Lucy was "better equipped to provide basic necessities, medical attention, educational and developmental needs." However, the focus of the court's attention was not on the income disparities between the parties, but rather on Amy's healthcare needs. The court recognized that Amy needed health insurance and noted that defendant lacked insurance for herself and Amy. Defendant did not present a plan at the plenary hearing about how she would obtain health insurance for Amy. Further, the court heard testimony that defendant allowed Amy to fall behind on immunizations and other medical needs due to a lack of insurance. The court cited the evidence that demonstrated defendant continued to smoke despite knowing that Amy cannot be exposed to

cigarette smoke. Thus, it was defendant's inability to address Amy 's medical needs that caused the court's concern, rather than any income disparity.

Moreover, when discussing factor eight, the stability of the home environment, the trial court did not engage in a prohibited best-interests versus better-interests analysis. Rather, the court noted that Lucy lived in a townhome with a long-term partner whereas defendant lived with her mother, did not budget for the possibility of paying rent by herself, and demonstrated poor decision-making in terms of cohabitation with others. The focus of the court's analysis was not rooted in income disparity or the differences in the amenities provided by one party over another, but rather it focused on defendant's ability to provide a safe and secure home for Amy while taking into consideration Ronald, Amy's medical needs, and defendant's ability to maintain a residence.

Defendant further contends that smoking in her home was not a valid reason for the court to prevent her reunification with Amy. Despite defendant's claims, the court heard ample testimony that Amy smelled of smoke after returning from defendant's home, defendant and the home's other occupants smoked, and Amy had restrictive airway disease that could be exacerbated by cigarette smoke. Notably, it was the combination of Amy's medical condition and defendant's decision to keep smoking that caused the court's concern, as

opposed to merely defendant's decision to smoke. See Bisbing, 230 N.J. at 309 (explaining that trial court can consider all relevant factors from N.J.S.A. 9:2-4(c), supplemented by other factors as appropriate). Moreover, our courts have recognized that cigarette smoking is a valid consideration in a custody determination under N.J.S.A. 9:2-4(c). See Unger v. Unger, 274 N.J. Super. 532, 337-38 (Ch. Div. 1994) (explaining that smoking around children implicates N.J.S.A. 9:2-4(c) because it pertains to safety of child, child's health, and habits of parents); see generally In re J.S. & C., 129 N.J. Super. 486, 489 (Ch. Div. 1974) (stating that parent's constitutional right to raise child may be restricted upon showing that parent's activity impairs health of child). Thus, defendant's argument that her decision to smoke was not a reason to deny reunification fails.

We also reject defendant's argument that the court ignored expert testimony about defendant's low risk of relapse. The court relied on expert testimony when it concluded that defendant was fit to parent, but noted defendant's continuing risk factors that warranted consideration. The court heard testimony that several experts based their conclusions about defendant's remission on defendant's own self-reports. The court also heard testimony that defendant had been inconsistent and untruthful about her alcohol use in the past.

Also, the court received evidence that defendant lied to the Division regarding whether Ronald was living with her. As a result, the record contains ample support for the court's conclusion that defendant may misrepresent her fitness to regain custody. In that vein, the court considered the expert testimony about defendant's potential for relapse and determined that defendant's lack of reliability and credibility affected its conclusions.

Because defendant's risk of relapse has a direct connection to her ability to provide care to Amy, the court needed to assess all relevant, credible evidence presented at the plenary hearing in making the best-interests determination. Moreover, because a custody matter directly impacts the welfare of a child, the designation of the parent of the primary residence is critical because the "primary caretaker has the greater physical and emotional role." A.J. v. R.J., 461 N.J. Super. 173, 182 (App. Div. 2019) (quoting Pascale v. Pascale, 140 N.J. 583, 598 (1995)). As a result, the court needed to assess defendant's ability to manage the physical and emotional requirements of caring for Amy when analyzing Amy's best interests. We are satisfied the court relied upon ample, credible evidence in the record when it completed its best-interests analysis.

Any arguments not addressed lack sufficient merit to warrant discussion in a written opinion. 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