SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0464-21

R.G.,

Plaintiff-Appellant,

v.

K.G.,

Defendant-Respondent.

Submitted October 17, 2022 - Decided February 2, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FM-08-0579-16.

Stacy L. Spinosi, attorney for appellant.

Cockerill, Craig & Moore, LLC, attorneys for respondent (Barbara Barclay Moore, on the brief).

PER CURIAM

Plaintiff R.G.[1] appeals from Family Part orders dated June 25, 2021, and August 26, 2021, transferring custody and providing other relief to defendant K.G. Based on our review of the record and the applicable legal principles, we reverse and remand for further proceedings.

I.

The parties were divorced on October 17, 2016, after entering into a marital settlement agreement (MSA), which contained a shared parenting schedule for the two children: Ellen, born December 2005 and Sarah, born December 2008. Beginning in December 2019, custody and parenting time disputes arose, which caused extensive motion practice and ultimately resulted in the June 25, 2021 court order awarding defendant sole custody as a sanction for plaintiff failing to comply with certain court orders. We summarize the procedural history below to provide context for the issues on appeal.

For a period of time prior to the beginning of the COVID-19 pandemic in March 2020, the children began to express a desire to spend more time with plaintiff. This issue only worsened when the pandemic started. The parties disputed the cause of the children's estrangement from defendant. Plaintiff

[1] We utilize initials and pseudonyms to protect the confidentiality of the parties and their children. R. 1:38-3(d)(3).

generally asserted he encouraged the children to visit with their mother, but he would not force them to go. Plaintiff disputed defendant promoted or helped foster plaintiff's relationship with the children. On March 13, 2020, the trial court denied plaintiff's motion for increased parenting time. The court also denied a cross-motion filed by plaintiff, who was living in Pennsylvania, to be able to pick the children up early on days when he was not working.[2] Thereafter, plaintiff filed an order to show cause (OTSC) for the return of the children, after they refused to go with her for parenting time, and requested that she be awarded residential custody until further order of the court. Defendant indicated he would not break the COVID quarantine to take the children to the exchange location. On April 6, 2020, the court ordered the children be immediately returned to defendant. During oral argument on April 29, 2020, the court asked to speak with the children. The court then entered an order dated May 4, 2020, denying defendant's OTSC on the basis that failure to exchange the children did not arise from plaintiff's actions, but rather from the "strained relationship" between the children and their mother.

[2] There were other aspects of the motion and cross-motion concerning medical expenses, child support, and other issues not related to parenting time that are not relevant to this opinion.

On April 22, 2020, plaintiff filed a motion seeking a change of custody, for the court to interview the children, and for the children to start therapy in an attempt to reestablish the mother-daughter relationship and commence custody evaluations. On May 13, 2020, defendant filed a cross-motion seeking to enforce the MSA parenting schedule and for the court to select a reunification therapist. On May 29, 2020, the court denied plaintiff's request for a change in custody, ordered family reunification therapy counseling, and ordered plaintiff to continue to encourage the children to see defendant. On June 9, 2020, the court appointed Joseph Racite, Ph.D., to commence reunification therapy with the family. As discussed more fully below, the court's utilization of Dr. Racite's report is central to this appeal.

On September 14, 2020, defendant filed an OTSC compelling the youngest child to attend school in New Jersey and not in Pennsylvania where plaintiff resided, that Dr. Racite provide a report to the court, that New Jersey retain jurisdiction over the children, and for counsel fees. On September 23, 2020, the court denied the application to compel the children to attend school in New Jersey, ordered Dr. Racite to provide a report, ordered New Jersey would retain jurisdiction, and denied counsel fees.

On October 27, 2020, the court provided Dr. Racite's report to counsel under a protective order. Dr. Racite recommended defendant's parenting time be reinstated no later than January 2, 2021, along with several other recommendations. Parenting time issues during this period continued to be problematic. Defendant wanted the children to attend her sister's wedding. Ellen did not want to attend if defendant's boyfriend was there.[3] As of December 2020, the children had not slept at defendant's home since March 2020.

On December 21, 2020, the trial court, in large measure, adopted the recommendations of Dr. Racite. The order provided for increased parenting time for defendant and required plaintiff to "support and encourage" the children to attend parenting time.[4] The court also noted that sanctions would be imposed on plaintiff in the amount of $100 for each time the children's parenting time with defendant was not honored and when the children failed to

[3] Ellen accused defendant's boyfriend of inappropriate contact by touching her during a cruise with her mother. Dr. Racite indicated in his report Ellen asserted a "belt or towel . . . made contact with her buttocks while [the boyfriend] tripped" and defendant was in the same room a few feet away. Plaintiff claims that Dr. Racite simply reported defendant's version of the event.

[4] The court noted in its written decision plaintiff "needs to take steps to ensure, not just encourage, compliance with the [c]ourt's and Dr. Racite's recommendations."

text or call defendant at specific times during plaintiff's parenting time. The court also ordered individualized therapy for Ellen. The court further noted defendant's boyfriend was not to stay overnight during the children's visits until Ellen's incident with her mother's boyfriend was addressed in therapy. The court held a conference with the parties on January 25, 2021, entered a further parenting time order, and lifted the restriction on defendant's boyfriend being present during her parenting time. The children still failed to consistently attend parenting time with defendant as set forth in the orders.

Both parties filed additional motions to change parenting time and for other relief. The court entered an order on February 26, 2021, scheduling a "conference" with Dr. Racite. The order stated the purpose of the conference was to "speak with Dr. Racite regarding his thoughts and recommendations on: (1) the parties' current parenting schedule and their requests to modify that schedule; [and] (2) how that parenting schedule can best be effectuated . . . ."

On March 4, 2021, Dr. Racite was questioned, under oath, extensively by the court regarding his observations and recommendations based on the weekly reunification therapy sessions with the family, which began in June, 2020. At the end of the court's questioning, plaintiff's attorney requested to question Dr. Racite. The trial court responded, "[t]his wasn't the point. The

point was . . . for me, [to] get feedback from Dr. Racite as to his position." The court further stated, "I'm not sure of the value of the questions that would be asked. I don't want to have Dr. Racite being cross-examined or anything about what he was saying." Counsel was permitted to ask one question and the proceeding ended.

On March 10, 2021, the court found plaintiff had violated litigant's rights and ignored prior orders of the court. The court entered an order granting defendant make-up parenting time and awarded unobstructed parenting time for thirty days. The court also sanctioned plaintiff $2,500 for defendant's missed parenting time, $2,200 for missed telephone calls, and $1,900 for missed text messages since December 21, 2020. The court further awarded defendant counsel fees in the amount of $2,235. The order further provided, "[t]he parties and children are hereby placed on notice that if they do not comply with that prior parenting schedule . . . the [c]ourt may again modify the parenting arrangement to ensure that unobstructed parenting time continues."

The parenting time issues continued, and defendant filed a motion to enforce litigant's rights and for sole legal and physical custody of the children, along with various other forms of relief. Plaintiff filed a cross-motion to

modify the December 21, 2020 parenting time order, to remove sanctions, for the court to interview the children, and to appoint a guardian ad litem.

On June 25, 2021, the court stated that "at its core, the present motion is simply [defendant's] application to enforce the court's prior orders and [plaintiff's] application to change them." The court granted defendant's application and awarded sole custody to defendant and suspended plaintiff's in-person parenting time. The court further sanctioned plaintiff $23,500 for failing to comply with prior orders regarding defendant's entitlement to parenting time, phone calls, and text messages with the children. The court also denied defendant's request to interview the children, appoint a guardian ad litem, and remove sanctions.

The court denied plaintiff's motion for reconsideration on August 26, 2021. This appeal followed. The parenting time issues with the children have apparently continued to be an issue.[5]

[5] Defendant filed various enforcement applications in New Jersey and Pennsylvania following the entry of the June 25, 2021 order. In July 2021, the children ran away from defendant and contacted their paternal grandfather, who transported them to plaintiff's residence. A Pennsylvania court ordered the children returned to defendant. Plaintiff's counsel advised in a supplemental submission there were subsequent proceedings in Pennsylvania as late as March 2022, where the Pennsylvania court again ordered the children returned to defendant.

II.

We ordinarily accord "great deference to discretionary decisions of Family Part judges[,]" in recognition of the "family courts' special jurisdiction and expertise in family matters . . . ." Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (citations omitted); 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)). 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) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

III.

Plaintiff raises the following points:

> POINT I
>
> THE TRIAL COURT ERRED BY REFUSING TO ALLOW COUNSEL'S CROSS EXAMINATION OF THE WITNESS, DR. RACITE[,] PRIOR TO ACCEPTING HIS RECOMMENDATIONS ABOUT HOW TO RESOLVE THE ISSUES BETWEEN THE PARTIES.

POINT II

IT IS REVERS[I]BLE ERROR FOR THE TRIAL COURT TO FAIL TO CONSIDER THE FACTORS OUTLINED IN N.J.S.A. 9:2[-]4 PRIOR TO ORDERING A CHANGE IN CUSTODY AND PARENTING TIME.

POINT III

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO INTERVIEW THE CHILDREN OR IN THE ALTERNATIVE APPOINT A GUARDIAN AD LITEM TO ALLOW THE CHILDREN'S VOICES TO BE HEARD ON THE ISSUE OF CUSTODY, AND ALL OTHER ISSUES INCLUDING BUT NOT LIMITED TO ALLEGATIONS OF INAPPROPRIATE TOUCHING OF THE OLDEST CHILD BY DEFENDANT'S BOYFRIEND.

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING MONETARY SANCTIONS AGAINST PLAINTIFF FOR MATTERS OVER WHICH HE HAD NO CONTROL AND THEN BY ORDERING PROBATION TO OPEN A CHILD SUPPORT ACCOUNT FOR THE SOLE PURPOSE OF COLLECTING THE SANCTIONS.

A.

Plaintiff claims the court prevented him from cross-examining Dr. Racite regarding the inconsistencies in his report, and his qualifications and experience contrary to N.J.R.E. 611. He asserts the court heavily relied on Dr.

Racite in changing custody, suspending parenting time, and imposing sanctions. Plaintiff contends Dr. Racite's report and testimony was inconsistent with what took place in the therapy.[6]

Defendant counters plaintiff did not appeal the order of March 10, 2021. Defendant further contends that while plaintiff did file a motion for reconsideration of the June 25, 2021 order, arguing the court improperly denied an opportunity to cross-examine Dr. Racite,[7] the trial court properly denied the motion.[8]

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[6] For example, Dr. Racite advised the court plaintiff fails to punish the children for inappropriate behavior and that plaintiff cut off his mother due to her involvement in the parenting time dispute. Plaintiff contends Dr. Racite was aware of his efforts to discipline the children, and it was Dr. Racite who recommended the other family members should not be involved in the dispute between the parties. Plaintiff points to various other purported inconsistencies and Dr. Racite's reliance on inaccurate portions of defendant's pleadings in his report. In addition, plaintiff asserts Dr. Racite accepted defendant's version of the alleged inappropriate touching incident involving Ellen and defendant's boyfriend as if it was uncontradicted.

[7] The court stated, "[t]he fact that [plaintiff's] counsel was not permitted to cross examine Dr. Racite during his testimony to the court does not warrant a motion for reconsideration." No other factual or legal basis was provided.

[8] Ordinarily, we would confine our review to the order denying reconsideration, and we would not consider the underlying order. Fusco v. Bd. of Educ. of Newark, 349 N.J. Super. 461-62 (App. Div. 2002). However, there are situations when the order for reconsideration and underlying order are so intertwined it is necessary to address both orders. The instant appeal is distinguishable from that in Fusco, where we noted there was no indication in

Rule 5:3-3 governs court appointed experts in family cases. When a Family Part judge determines "disposition of an issue will be assisted by expert opinion, . . . the court may order any person under its jurisdiction to be examined by a physician, psychiatrist, psychologist or other health or mental health professional designated by it." R. 5:3-3(a). Rule 5:3-3(f) provides:

> Any finding or report by an expert appointed by the court shall be submitted upon completion to both the court and the parties. At the time of submission of the court's experts' reports, the reports of any other expert may be submitted by either party to the court and the

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the notice of appeal or appellate case information statement the appellant was appealing from the underlying order, which had granted summary judgment. Rather, the appellant there focused on the reconsideration order. 349 N.J. Super. at 460. However, we noted:

> [w]e are mindful . . . that in some cases a motion for reconsideration may implicate the substantive issues in the case and the basis for the motion judge's ruling on the summary judgment and reconsideration motions may be the same. In such cases, an appeal solely from the grant of summary judgment or from the denial of reconsideration may be sufficient for an appellate review of the merits of the case, particularly where those issues are raised in the [case information statement].
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> [Id. at 461.]

Here, although the better practice would have been for plaintiff to appeal from both the underlying order and the reconsideration order, the issues are so interconnected we address both orders in this appeal.

> other parties. The parties shall thereafter be permitted a reasonable opportunity to conduct discovery in regard thereto, including, but not limited to, the right to take the deposition of the expert.

Rule 5:3-3(g) states:

> An expert appointed by the court shall be subject to the same examination as a privately retained expert and the court shall not entertain any presumption in favor of the appointed expert's findings. Any finding or report by an expert appointed by the court may be entered into evidence upon the court's own motion or the motion of any party in a manner consistent with the rules of evidence, subject to cross-examination by the parties.
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> [(Emphasis added).]

As evidenced by the trial court's opinions and corresponding orders in this matter, it relied extensively on Dr. Racite's report and court conducted testimony in implementing a parenting plan and subsequently changing custody. Plaintiff has identified various issues he would have addressed had he been afforded an opportunity to question Dr. Racite. We cannot say what impact it would have had on the court's conclusion. However, Rule 5:3-3 provides he should have been given an opportunity to cross-examine Dr. Racite. The court erred by denying plaintiff's request to question Dr. Racite. See Rente v. Rente, 390 N.J. Super. 487, 495 (App. Div. 2007) (finding procedural and substantive deficiencies that required reversal when trial court

failed to comply with Rule 5:3-3, when it admitted an expert report into evidence without providing a copy of the report to the defendant or affording the defendant an opportunity to obtain her own expert, and without permitting the defendant a reasonable opportunity to depose and cross-examine the expert). Accordingly, we are constrained to reverse and remand. Because we are remanding for further proceedings, we only briefly address the remaining arguments.

B.

Plaintiff claims the trial court failed conduct an analysis of N.J.S.A. 9:2-4 prior to changing custody. Defendant contends the court did address several of the factors set forth in N.J.S.A. 9:2-4.

The trial court changed custody as a sanction for plaintiff's failure to comply with prior orders of the court. We recently noted in A.J. v. R.J.,

> [p]ursuant to Rule 5:3-7(a)(6), there is no question the trial judge had authority to transfer custody to defendant as a sanction for plaintiff's failure to comply with [a court order] . . . . Contrary to plaintiff's argument, the plain language of Rule 5:3-7(a) does not require the court select a less severe sanction before it can order a modification of custody.
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> [461 N.J. Super. 173, 181 (App. Div. 2019).]

However, we noted:

> Rule 5:3-7(a)(6) requires a separate adjudication, which considers the children's best interests and findings pursuant to N.J.S.A. 9:2-4, before the sanction is ordered. Additionally, because the relief granted under Rule 5:3-7(a) is coercive in nature and derived from Rule 1:10-3, the sanctioned parent may seek termination of the sanction when the parent complies with the court's order. The court should be solicitous of such applications.
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> [Id. at 181-82.]

Here, the trial court did not specifically reference the best-interest factors under N.J.S.A. 9:2-4 in rendering its decision to award defendant sole custody. In A.J., we noted:

> In the context of a transfer of child custody as a sanction, affording both parents the ability to address whether a transfer of custody is in the best interests of the children and requiring the court to make the necessary statutory findings provides the necessary process and a reviewable record.
>
> [Id. at 182.]

On remand, should a plenary hearing be necessary, the court should make the necessary best-interest findings.

C.

We do not find the trial court abused its discretion in not conducting interviews of the children or appointing a guardian ad litem. However, as noted below, the dynamics of the parenting time issues may have changed and

the individual circumstances of the children may not be the same as they were when the court transferred custody in June 2021. Therefore, we leave it to the trial court's discretion on remand whether a child interview or the appointment of a guardian ad litem is necessary.

D.

Plaintiff contends the trial court abused its discretion in awarding monetary sanctions against plaintiff for matters over which he had no control. First, we observe the court was well acquainted with the parties and employed an incremental approach to awarding sanctions in this matter based on plaintiff's failure to comply with the court's prior orders. However, because it is unclear how much the court relied on Dr. Racite's opinions in awarding sanctions, we vacate the sanctions imposed in the June 25, 2021 order. The court may revisit this issue if necessary on remand, provided plaintiff is permitted to question Dr. Racite. To the extent the court determines sanctions are warranted, the sanctions should be "in an amount sufficient to sting and force compliance . . . [but] must not be so excessive as to constitute ruinous punishment." Franklin Tp. Bd. of Educ. v. Quakertown Educ. Ass'n, 274 N.J. Super. 47, 56 (App. Div. 1994) (first alteration in original). "In imposing the sanction, the court must consider 'the offending party's ability to pay and the

sanction's impact on that party in light of its income, status and objectives, as well as the sanction's impact on innocent third parties.'" Ibid. (quoting E. Brunswick Bd. of Educ. v. E. Brunswick Educ. Ass'n, 235 N.J. Super. 417, 422 (App. Div. 1989)).

A probation account may not be used to collect monetary sanctions unrelated to enforcement of alimony, child support or some other maintenance related financial obligation. See R. 5:7-4(b) limiting enforcement to these categories; and see also N.J.S.A. 2A:17-56.52 defining a support order payable through probation as "for the benefit of a child, a spouse or a former spouse, which provides for monetary support, health care coverage, arrearages or reimbursement, and may include related costs and fees, interest, income withholding, attorney's fees and other relief." For these reasons, we reverse the portions of the orders under appeal establishing a probation account for the sanctions because the sanctions were limited to custody and parenting time enforcement, matters the Probation Division is not charged with enforcing.

IV.

Although we vacate the June 25 and August 26, 2021 orders, we do not reinstate the order that existed prior to the entry of these orders. Ellen is now seventeen, and Sarah is fourteen. It may be that the court has already adjusted

the parenting time schedule since it issued these orders. Accordingly, we leave it to the sound discretion of the trial court to implement a temporary parenting time order pending any further hearings. The trial court is in a better position to assess the current needs of the children. In addition to the custody issues, the remaining issues in the above orders must be addressed anew by the trial court on remand.

Finally, we conclude this matter should be heard by a different Family Part judge on remand. We do not question the judge's commitment to do what is best for the children. However, due to his extensive prior involvement in the case, and having already expressed an opinion on the matter, this case should be heard by a different judge.

Reversed and remanded. We do not retain jurisdiction.