SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0271-21

P.V.P.,

Plaintiff-Respondent,

v.

F.J.C.,

Defendant-Appellant.

Submitted May 2, 2023 – Decided August 22, 2023

Before Judges Messano and Gilson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-0449-09.

August J. Landi, attorney for appellant.

Senoff & Enis, attorneys for respondent (Michael J. Gunteski, on the brief).

PER CURIAM

The parties are before us a fourth time following the remand hearing ordered by our last opinion, P.V.P. v. F.J.C., No. A-1966-17 (App. Div. June 8,

2020) (slip op. at 20).[1] We adequately set out the history of the contentious, bitter proceedings that resulted in the first three appeals and need not repeat those facts again. Id. at 2–6.

Our judgment in that appeal: (1) affirmed the Family Part's June 2017 order that denied defendant's motion for joint custody of his son following a plenary hearing, but granted defendant some parenting time with John, id. at 11–12; (2) reversed the court's subsequent November 2017 order that suspended defendant's overnight parenting time and remanded for the judge to consider an appropriate parenting time schedule, id. at 12; (3) ordered the remand judge to also consider defendant's unaddressed application to modify a longstanding final restraining order (FRO) that prohibited defendant's presence at John's school, id. at 15–16; and (4) reversed the September 2017 order granting plaintiff $30,000 in counsel fees incurred during the plenary hearing on custody and remanded for consideration of an appropriate award using the factors outlined in Rule 5:3-5(c), id. at 19–20.

[1] We use initials in the caption of our opinion, and throughout the opinion use a pseudonym for the parties' son, J.C. (John), born in 2008, pursuant to Rule 1:38-3(d)(3) and (9).

I.

The remand judge appointed Dr. David Brandwein to conduct a psychological evaluation of John, meet once with plaintiff and defendant, and render a recommendation on parenting time. As the judge later noted, defendant "brought a large binder or binders of prior reports, orders and briefs from the extensive litigation history" for Brandwein to review, resulting in the judge's September 10, 2020 case management order. Over defendant's objection, the order set out the limited materials plaintiff's counsel was to serve on the doctor. The order also provided that if Brandwein "believes . . . he requires additional documentation," the judge would address the issue in a telephone conference with the doctor and counsel.

Brandwein met with John on three occasions during the summer of 2020, and spoke with plaintiff, defendant, and Dr. Charles Katz, John's treating psychologist. Id. at 4. He issued his report on October 5, 2020, which fully discussed his interviews. Brandwein also administered a variety of psychological tests to John.

Brandwein concluded that John had a poor relationship with his parents, but he demonstrated positive feelings toward plaintiff and negative feelings toward defendant. Brandwein noted John's history of anxiety attacks. John told

Brandwein that he did not want to visit with defendant, and the panic attack he suffered prior to a scheduled visit with defendant on September 11, 2019, caused his grades at school to decline.[2] John said he never wanted to see defendant again.

Brandwein concluded that John presented with a chronic anxiety disorder involving both separation anxiety and social anxiety disorder. He opined that John's anxiety played a "profound role" in his refusal to visit with defendant, and this anxiety needed to be addressed before defendant's parenting time resumed. Moving forward, Brandwein recommended reunification therapy for John and defendant, culminating in resumption of a regular daytime visitation schedule within a few months. He further recommended individual therapy for John with a new therapist and that John become more involved in extracurricular activities. Brandwein also recommended that both parents complete psychological evaluations to rule out any conditions that might affect their parenting going forward.

[2] On that date, John became extremely anxious prior to a scheduled visit with defendant and was taken to the hospital by ambulance. Thereafter, plaintiff unilaterally terminated defendant's parenting time, and, by the start of the remand hearing, defendant had had no further parenting time with John.

In the interim, in August and September 2020, defendant filed motions to hold plaintiff in contempt for refusing to allow him parenting time since John's September 2019 panic attack and objecting to the limitation on materials provided to Brandwein.

On October 23, 2020, the court heard testimony from plaintiff, defendant, and defendant's wife. Immediately following, the judge entered an order noting that the parties had consented to Brandwein's recommendations to select both a new individual therapist for John and a reunification therapist. For financial reasons, the court declined to impose Brandwein's recommendation that each party complete a psychological evaluation.

The order also addressed defendant's request to modify the FRO to allow his presence at John's school. The judge denied defendant's request without prejudice. The order also denied all relief sought in defendant's August 2020 motion to hold plaintiff in contempt, as well as his September 2020 motion in limine regarding the judge's limits on materials submitted to Brandwein for review. Finally, the order deferred a decision on defendant's parenting time pending the parties' report on the status of John's individual and reunification therapy with defendant.

John ceased treatment with Katz and began individual therapy with another therapist. Defendant failed to participate in reunification therapy because, as he later explained, he could not afford the cost. The judge reconvened the hearing and took testimony from both parties on December 11, 2020. She then entered an order directing that John continue individual therapy, and defendant identify a family therapist to promote reunification, the costs of which would be covered by insurance.

On January 27, 2021, the judge held a conference and entered an order approving Grace Abounds Counseling, LLC, to provide family and reunification therapy. She adjourned further proceedings to allow sufficient time to evaluate the effect of the ordered therapeutic services before rendering a decision on the remaining remanded issues, specifically defendant's parenting time and counsel fees. Heiki E. Fischbach, the reunification therapist at Grace Abounds, sent a letter to the court in March advising that John refused to meet with defendant, even in a therapeutic setting, and that he did not wish to have visits with defendant in the future.

On March 16, 2021, the judge held a conference regarding the failed attempt at reunification therapy and took testimony from both parties. Based on Fischbach's letter, the judge concluded that "there's nothing to do until [John]

matures." The judge noted the stress the litigation had caused John, and she entered an order directing Fischbach to confer with John's individual therapist and recommend a "path forward in the effort to reunify" defendant and John.

In response, after meeting with plaintiff and John, Fischbach sent another letter to the court. He reiterated that John refused to meet with defendant due to his anxiety; John cried when the meeting was proposed. Fischbach wrote that John's position must be "respected and honored" in order to "protect him[] emotionally," and concluded that in time, John might "come to terms with his past" and contact defendant, but this will not occur "via ongoing judicial actions taken by [defendant]." Fischbach suggested that John might be willing to meet with defendant following additional individual therapy.

The judge held a hearing on April 1, 2021, to address the remanded counsel fee issue and found the $30,000 counsel fee award to plaintiff entered on September 19, 2017, was "reasonable and appropriate." The judge entered a conforming order on April 14, 2021.

Meanwhile, defendant's motion practice continued unabated. He filed a motion to stay the $30,000 counsel fee award pending a newly-filed appeal, later determined to have been interlocutory and dismissed. He also sought to terminate Katz's therapeutic sessions with John and filed another motion to

implement Brandwein's recommendations. Among other relief, plaintiff cross-moved for counsel fees in opposing defendant's latest applications.

On June 14, 2021, the judge held oral argument and entered an order denying defendant's "frivolous" applications given the unsuccessful reunification therapy. Observing that many of defendant's requests for relief had already been implemented or were underway, the judge concluded there was "nothing reasonable" about the motions and granted plaintiff's request for counsel fees.[3]

On August 6, 2021, the judge interviewed then thirteen-year-old John on the record via Zoom and invited the parties to watch; only plaintiff's counsel participated. John said that during a September 2019 visit, defendant kept him over the time allotted against John's wishes, and that he was "super nervous because [he] just wanted to get home." John spoke about the anxiety attack he suffered before the scheduled visit a few days later, on September 11, 2019. John also confirmed telling Fischbach that he refused to meet with defendant. John also told the judge that he did not miss seeing defendant and felt calmer and less anxious since defendant's parenting time had stopped. John said

[3] Defendant's brief does not address this fee award. We deem any challenge to have been waived. Pullen v. Galloway, 461 N.J. Super. 587, 595 (App. Div. 2019).

defendant made him feel "annoyed, angry, [and] upset," and that he did not want to see defendant in the future or speak to him by telephone.

On August 26, 2021, the judge entered an order suspending defendant's parenting time and telephone contact with John. Defendant filed a timely notice of appeal. Although identifying ten orders entered during the remand proceedings for which he seeks our review, defendant's arguments focus on four in particular.

His primary challenge is to the August 26, 2021 order suspending his parenting time. Defendant contends the judge's findings and conclusions supporting that order were not based on competent, relevant and credible evidence in the record. Defendant also asserts two related arguments. First, he argues the judge abdicated her decision-making authority by relying on the preferences John expressed during his interview with the judge. Second, defendant contends the judge's August 17, 2020 order limiting the materials Brandwein would examine undermined the expert's ability to render a full and complete report.

Defendant also challenges the October 23, 2020 order that denied his request to modify the FRO first issued in 2008, when John was an infant. And lastly, defendant argues the judge's April 14, 2021 order awarding plaintiff

$30,000 in counsel fees incurred during the original plenary hearing failed to appropriately consider the factors contained in Rule 5:3-5(c).

We have considered the arguments in light of the record and applicable legal standards. We affirm.

II.

"The scope of appellate review of a trial court's fact-finding function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411–12 (1998) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "We defer to the credibility determinations made by the trial court because the trial judge 'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare, 154 N.J. at 412). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Cesare, 154 N.J. at 413.

We do not, however, defer to the judge's conclusions if they are "so 'clearly mistaken' or 'wide of the mark'" that we must "interfere to 'ensure . . .

there is not a denial of justice[,]'" Gnall, 222 N.J. at 428 (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)), or "if they are based upon a misunderstanding of . . . applicable legal principles," T.M.S. v. W.C.P., 450 N.J. Super. 499, 502 (App. Div. 2017) (quoting N.T.B. v. D.D.B., 442 N.J. Super. 205, 215 (App. Div. 2015)). We review purely legal issues de novo. C.R. v. M.T., 248 N.J. 428, 440 (2021).

In the written decision that accompanied her August 26, 2021 order suspending defendant's parenting time, the judge carefully reviewed the evidence and the tortuous procedural history both before and after our remand. She credited Brandwein's observations that John had positive feelings toward plaintiff and negative feelings toward defendant, as well as Brandwein's opinion that John's anxiety played a "profound role" in his refusal to visit with defendant. The judge also accepted Brandwein's opinion that John's "escape and avoidance behavior [wa]s reinforcing," and, although it made John feel good in the moment it "serve[d] to continue the anxiety."

The judge found that plaintiff wanted John to have a relationship with defendant, and defendant was reluctant to proceed with reunification therapy. The judge also credited Fischbach's conclusion that at the present time, John refused to meet with his father, and Fischbach's opinion that defendant's

continued pursuit of parenting time via "judicial actions" would not facilitate reunification.

The judge cited her interview with John, and noted John had no desire to speak with or meet defendant, who, the boy said, made him feel annoyed, angry and upset. The judge found that John "needs a break from the discord and the litigation," during which defendant had filed "meritless motion after meritless motion." The judge rejected the assertion that plaintiff caused John's estrangement from his father, finding that plaintiff "consistently expressed" that she wanted John to have a relationship with defendant and had cooperated in that effort, but defendant "failed to recognize any role he may have played" in their estrangement.

The judge concluded that it was contrary to John's best interests to require that he spend parenting time with defendant at the current time. She found suspension of both parenting time and any telephone contact with defendant was in John's best interests. The judge recognized this was unfortunate, but she properly noted John's "best interests are the guiding principle," and visitation with defendant had caused him "increased emotional distress." The order permitted defendant to send John "letters, cards, or gifts . . . with any written correspondence being reviewed with [John's] therapist."

"[P]otential harm to a child is the constitutional imperative that allows the State to intervene into the otherwise private and protected realm of parent-child relations." Johnson v. Johnson, 204 N.J. 529, 544 (2010). "A parent's custody or visitation 'rights may be restricted, or even terminated, where the relation of one parent (or even both) with the child cause emotional or physical harm to the child, or where the parent is shown to be unfit.'" E.S. v. H.A., 451 N.J. Super. 374, 384 (App. Div. 2017) (quoting Wilke v. Culp, 196 N.J. Super. 487, 496 (App. Div. 1984)).

> [W]hen, as here, both parents have a fundamental right to the care and nurturing of their child[] and neither has a preeminent right over the other, their contest stands on different footing. It is not a third party or the State that seeks to intrude into the protected sphere of family autonomy. Rather, by submitting their dispute to the court, it is the parties themselves who essentially seek the impairment of each other's rights. . . .
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> Indeed, by seeking a divorce and invoking the jurisdiction of the Family Part, each party assented to the possibility that there will be some curtailment of what would otherwise be the ordinary rights concomitant to parenthood. . . . The only limitation on the court is the application of correct legal principles to the facts, subject to the standards governing appellate review of judicial decisions.
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> [Sacharow v. Sacharow, 177 N.J. 62, 79–80 (2003).]

As we have noted, "[m]ore than financial contests, custody and parenting time disputes trigger the need for a family judge, acting as parens patriae, to prevent harm and protect the best interests of children." Parish v. Parish, 412 N.J. Super. 39, 52–53 (App. Div. 2010) (citing Fawzy v. Fawzy, 199 N.J. 456, 475–75 (2009)). "In such cases, the sole benchmark is the best interests of the child." Sacharow, 177 N.J. at 80 (citing Watkins v. Nelson, 163 N.J. 235, 253 (2000)). In conducting the best interest analysis, courts may rely on the information supplied by both parents, "other adults with close relationships with the child, . . . documentary evidence, interviews with the child[] at the court's discretion, and expert testimony." Bisbing v. Bisbing, 230 N.J. 309, 335 (2017); see also Kinsella v. Kinsella, 150 N.J. 276, 318 (1997) ("In implementing the 'best-interest-of-the child' standard, courts rely heavily on the expertise of psychologists and other mental health professionals.").

In this case, the judge carefully considered the evidence adduced at the hearing, including the expert opinions of Brandwein and Fischbach, her interview with John, and the testimony of the parties and defendant's wife. The judge diligently attempted to foster defendant's reunification with his son, but, in suspending defendant's parenting time, the judge wrote, "Simply put, [John] needs a break from the discord and the litigation." We find no basis to disturb

the judge's factual findings or her conclusions that were firmly tethered to those findings and controlling law.

We also reject defendant's two ancillary attacks on the August 26, 2021 order. Defendant first contends the judge "abdicated" her role to decide the issue by deferring to John's preferences. We disagree.

Regarding issues of custody, the preference of the child, while not determinative, is a factor to be given consideration. Wilke, 196 N.J. Super. at 498 (citing Palermo v. Palermo, 164 N.J. Super. 492 (App. Div. 1978)); see also N.J.S.A. 9:2-4 (requiring the court to consider "[i]n making an award of custody . . . the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision"). The judge is accorded "wide discretion regarding the probative value of a child's custody preference." Beck v. Beck, 86 N.J. 480, 501 (1981).

"The age of the child certainly affects the quantum of weight that his or her preference should be accorded." Lavene v. Lavene, 148 N.J. Super. 267, 272 (App. Div. 1977). However, "[i]n visitation matters[,] the preference of the child should be subject to closer scrutiny, especially where immature emotions[,] as well as influence by the custodial parent[,] may warrant

diminishing the weight to be accorded such preference." Wilke, 196 N.J. Super. at 498.

The judge did not mistakenly exercise her discretion in considering and weighing the statements John made during her interview of the child. As already stated, the judge carefully reviewed all the evidence and particularly credited the opinions and observations of Brandwein and Fischbach. We find no reason to conclude otherwise.

Defendant's second collateral attack on the August 26, 2021 order focuses on the judge's September 10, 2020 order that limited the materials to be forwarded to Brandwein. As the judge noted, the material defendant tendered was of little relevance, in part, because it was dated and related to past events in this litigation.

Defendant's brief cites no authority for the proposition that the order exceeded the judge's authority or was a mistaken exercise of her discretion, nor does the brief support the claim that the limitation prejudiced Brandwein's consideration and adversely affected his opinions. Defendant stipulated to the admission of Brandwein's report. The argument deserves no further discussion in a written opinion. R. 2:11-3(e)(1)(E).

III.

Defendant contends it was error for the judge to deny his motion to amend the FRO, first issued in 2008, when John was an infant. Defendant argues that his presence at John's school events would not exacerbate the child's anxiety and the FRO's continued existence in its present form represented a misuse of the "DV process."

"The party asking to modify or dissolve the FRO has the 'burden to make a prima facie showing [that] good cause exists for dissolution of the restraining order prior to the judge fully considering the application for dismissal.'" G.M. v. C.V., 453 N.J. Super. 1, 12-13 (App. Div. 2018) (alteration in original) (quoting Kanaszka v. Kunen, 313 N.J. Super. 600, 608 (App. Div. 1998)). A court should consider an application to modify or dissolve a domestic violence FRO "[o]nly where the movant demonstrates substantial changes in the circumstances that existed at the time of the final hearing" that resulted in the issuance of the FRO. Kanaszka, 313 N.J. Super. at 608.

In her October 23, 2020 oral decision, the judge considered the factors identified in Carfagno v. Carfagno when a court is faced with an application for the dissolution or modification of an FRO. 288 N.J. Super. 424, 434–35 (Ch. Div. 1995). The judge addressed each factor with respect to the evidence

adduced on remand. She denied the modification request without prejudice, explicitly stating that she was doing so because John's relationship with defendant may someday improve. In her later written opinion that supported the suspension of defendant's parenting time, the judge reiterated her conclusion that as long as defendant's parenting time was suspended, he should not appear at John's school because that would "only cause [John] emotional distress."

The record does not demonstrate that defendant marshaled sufficient evidence to establish substantial changed circumstances since the FRO was issued that warrant modification. It is empirically true that when the FRO was issued in 2008, John was less than one-year old, and the prohibition against defendant's presence at the children's school did not apply to him, but rather to plaintiff's other children. Circumstances in that respect may have indeed changed, but they hardly support modification. Although plaintiff testified that defendant's presence no longer made her fearful, the evidence at the hearing supported the judge's finding that, at the current moment, defendant's presence at John's school would emotionally endanger the child. In other words, as to the underlying protection offered by the FRO to plaintiff's other children when issued, the circumstances had not substantially changed. The judge did not mistakenly exercise her discretion in this regard.

IV.

Lastly, defendant challenges the judge's April 14, 2021 order awarding plaintiff $30,000 in counsel fees from the earlier plenary custody hearing. Recall that we remanded this issue to the judge because the prior judge who conducted that plenary hearing failed to properly consider the factors set out in Rule 5:3-5(c).[4] P.V.P., slip op. at 20. In particular, we noted that the prior judge's findings were "without specific reference to the Rule," "equivocal," and lacked consideration of the parties' financial resources and "any lodestar analysis." Id. at 19 (citing J.E.V. v. K.V., 426 N.J. Super. 475, 493 (App. Div.

[4] Rule 5:3-5(c) provides that in determining a fee award in a Family Part matter, the judge should consider

> in addition to the information required to be submitted pursuant to R[ule] 4:42-9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

2012)). Although we directed a different judge to conduct the remand, we expressed "confidence that the [remand] judge [wa]s capable of deciding upon review of the existing record whether plaintiff is entitled to a reasonable and just award for counsel fees and costs incurred as a result of the plenary hearing." Id. at 20 (emphasis added).

Defendant contends the judge failed to account for plaintiff's "bad faith" and failed to obtain current financial information from both parties in order to assess defendant's ability to pay.[5] We find no reason to reverse the April 14, 2021 order granting plaintiff $30,000 in fees.

On remand, the judge considered the information supplied to the prior judge when the fee award was made in 2017, our prior opinion, and the written submissions and arguments of counsel. The judge's written statement of reasons that accompanied her April 14, 2021 order expressly considered in detail all the factors enumerated in Rule 5:3-5(c). The judge also conducted a lodestar analysis. See J.E.V., 426 N.J. Super. at 493 ("In fashioning an attorney fee award, the judge must determine the 'lodestar,' which equals the number of hours

[5] On March 1, 2018, defendant was seriously injured in a workplace accident. He was deemed unable to work and began receiving Social Security disability benefits. Motions to reduce defendant's child support obligations were resolved by consent.

reasonably expended multiplied by a reasonable hourly rate." (quoting Yueh v. Yueh, 329 N.J. Super. 447, 464 (App. Div. 2000)).

"The application of [the Rule 5:3-5(c)] factors and the ultimate decision to award counsel fees rests within the sound discretion of the trial judge." Gotlib v. Gotlib, 399 N.J. Super. 295, 314–15 (App. Div. 2008) (quoting Loro v. Colliano, 354 N.J. Super. 212, 227 (App. Div. 2002)). We will disturb a trial court's determination on counsel fees "only on the 'rarest occasion,' and then only because of clear abuse of discretion[,]" Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)), or "a clear error in judgment," Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010) (citing Chestone v. Chestone, 322 N.J. Super. 250, 258 (App. Div. 1999)), aff'd o.b., 208 N.J. 409 (2011)).

Defendant's bad faith argument is predicated on plaintiff's alleged prior and current violations of court orders. In considering the "reasonableness and good faith of the positions advanced by the parties," the remand judge cited the prior judge's statements regarding the unreasonableness of defendant's position in 2017 that he should be granted custody of John when, at the time, he was allowed only supervised visitation. While stopping short of finding defendant acted in bad faith, the remand judge noted that "[d]efendant's ongoing demands

for full custody during these remand proceedings have likewise been unreasonable[,] which is why [the prior judge's] sentiments are not lost on this [c]ourt." The remand judge concluded plaintiff had not acted in bad faith during the prior plenary custody proceedings nor during the remand.

Defendant argues that the judge needed to assess the parties' current financial information, citing Roberts v. Roberts, 388 N.J. Super. 442, 453 (Ch. Div. 2006). However, our remand required the judge to reconsider the prior fee award based "upon review of the existing record." P.V.P., slip op. at 20. The remand judge carefully considered that record and noted that plaintiff had supplied her financial information "in support of her request for counsel fees," and defendant failed to supply his financial information "despite having been given an opportunity to do so." Given defendant's failure at the time to "contest his ability to pay," or the "disparity in [the parties'] incomes," the judge reasoned, "[t]o now argue that . . . [d]efendant did not have the ability to pay . . . would be difficult."

The remand judge faithfully followed our remand order and did not mistakenly exercise her discretion in making the fee award to plaintiff.

Affirmed.