SUPERIOR COURT OF NEW JERSEY
Appellate Division
DOCKET NO. A-4789-99T1

William M. Plaintiff / Appellant v. M-Theresa M. Defendant / Respondent	Civil Action On Appeal from A Final Order of the Superior Court of New Jersey, Chancery Division, Family Part, Mercer County Sat below: Hon. Alan J. Pogarsky

Appellant's Brief and Appendix

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Procedural History

This is an appeal from an Order entered in a post-judgement matrimonial action on May 5, 2000.

On December 9, 1999 defendant filed an application for an Order to Show Cause with temporary restraints (1a, 4a-8a). The Court signed the Order to Show Cause the same date (1a-3a).

Plaintiff filed a response certification on December 14 (18A-25a). Defendant's prior counsel executed a substitution of attorney on February 9, 2000.

On March 30, 2000, plaintiff filed a motion returnable April 14 (36a-38a). Defendant requested the motion be adjourned, stating it was not served on her within the time period permitted by the Court Rules. Defendant requested a 28 return on the motion. Plaintiff acknowledged that the motion had been served one day out of time, but requested that the Court set the motion down for a 16 day return (200a). Family Part motions are heard every Friday in Mercer County. By letter dated April 10, 2000, the Court adjourned the motion until May 5, 2000 (201a).

On April 21, 2000, defendant filed an "answering certification (79a).

On May 1, 2000, plaintiff filed a reply certification (191a). On May 5, 2000, the trial Court issued the Order now under appeal (198a-199a).

On May 10, 2000, the Notice of Appeal was filed. On May 10, an application for emergent relief was denied.

Statement of Facts

On December 9, 1999 defendant filed an application for an Order to Show Cause (1a) alleging plaintiff Bill M. had sexually abused his six year old daughter, Natasha M. (4a-8a). The Court responded correctly to the allegation. The Order to Show Cause was granted, temporary restraints were entered and the Court scheduled an evaluation by Dr. Alan Gordon. Dr. Gordon had previously conducted a custody and parenting time evaluation during the parties' contentious divorce and had issued both a custody evaluation (47a-64a) and a supplemental report when plaintiff sought increased parenting time (76a-77a). He had previously noted the intense conflict and acrimony between the parties (63a). The December 9, 1999 allegations were also referred to the Division of Youth and Family Services (hereinafter DYFS) for investigation.

The Court stated in its December 9 Order that the "the restraints contained herein shall continue until the court receives Dr. Gordon's report, at which time the court shall set the matter down for hearing." (2a at ¶ 4).

Plaintiff filed a response certification on December 14 denying the allegations and alleging that same were made maliciously with full knowledge they were false (18a-25a). Plaintiff pointed out that it defied reason that he would abuse his daughter in this manner considering the he had been dragged into Court repeatedly on various allegations since the time of

the parties separation and that their daughter was highly verbal and obviously would talk about abuse. He also pointed out that defendant had repeatedly made similar allegations, all of which had all been discredited by the prior judge assigned to the case (18a-23a).[1]

Defendant filed a Reply Certification on December 20 (26a-33a) insisting the allegations were made in good faith. On December 22, 1999, the trial Court entered an Order on the return date of the Order to Show Cause compelling plaintiff's contact with his daughter to be held in a public place and to be supervised by his defendant's mother (84a-85a).

The Court again specifically stated in its December 22 Order that the "the Court shall scheduled further proceedings in this matter upon receipt of Dr. Gordon's report."

Dr. Gordon issued his report on January 21, 2000 (67a-75a). The report indicated that the child displayed "none" of the psychological symptoms of a child sexual abuse survivor and that "confirmation of such allegations has to be made through observation of children's behavior and/or physical evidence. Neither of these is evident in this situation." (74a). There is no indication in the report that Dr. Gordon credited the sexual abuse allegations (67a-75a) and the above statements indicate

[1] The previous allegations against plaintiff were heard and dismissed by Hon. Charles Delehey, who was transferred from the Family Part in 1998. Judge Pogarsky was assigned the case when defendant filed the December 9, 1999 Order to Show Cause.

that he did not find that sexual abuse had occurred (74a).

In discussing plaintiff's allegation that "the child was fed the statements by her mother and grandmother" Dr. Gordon stated "at the present time, neither can proven or disproved" (74a). The report ends with Dr. Gordon offering to the trial Court that he would "expand on any of the views presented" if requested to do so by the Court.

On March 2, 2000, DYFS issued a report exonerating plaintiff by stating "[t]he Division conducted its required investigation and determined that the allegation was unfounded." (78a). Plaintiff certified that he had met with Norma Solis, the assigned DYFS worker. When plaintiff asked Ms. Solis whether "she believed that the allegations had been invented by defendant," Ms. Solis responded "yes." (42a).

On March 30, 2000, plaintiff filed a motion returnable April 14 requesting, *inter alia*, that the plenary hearing be immediately scheduled and that, upon the return date, various sanctions be imposed upon defendant for knowingly making false allegations of child sexual abuse (36a-37a). Plaintiff enclosed a copy of the DYFS letter (78a) and Dr. Gordon's report (67a-75a) as well as recounting the conversation he had with Ms. Solis (42a). Further, he explained and documented that defendant had a long history of making false allegations against him dating back to at least 1997 (96a-102a). She had in the past succeeded in having his parenting time temporarily supervised until Dr. Gordon

conducted an evaluation (40a), but each time Dr. Gordon had recommended the lifting of the supervision requirement (63a). No allegations were ever credited by a trial Court.

In response to plaintiff's motion, defendant filed a certification (79a) and enclosed a different letter from DYFS stating that no further services would be provided by the Division "because you have demonstrated the ability to cooperate with recommended services without DYFS intervention" (160a). She did not oppose plaintiff's request that a plenary hearing be scheduled. In fact, in reference to Dr. Gordon, defendant stated that he "has not yet testified to this Court, nor has he been cross-examined." (86a at ¶25), and that the plenary hearing "will determine the facts" (86a at ¶26).

On May 1, 2000, plaintiff filed a reply certification again denying the allegations and pointing to various inconsistencies in defendant's allegations and her certification (191a).

On May 5, 2000, the trial Court heard oral argument and issued an Order *sua sponte* vacating all its priors Orders that a plenary hearing would be scheduled after the evaluations were completed. The Court indicated that it would not consider the DYFS' workers statements as they constituted inadmissible hearsay, would not open the DYFS files, and would not open the files of the Prosecutor's Office nor the Ewing Township Police Department. The Court ordered, relying solely on Dr. Gordon's ambiguous and hotly disputed report (2T 6-14 to 6-19), that

supervised visitation would continue without any indication of when or if the supervision would be lifted. The Court also denied plaintiff's application to change the supervisor to his parents.

I.THE TRIAL COURT ERRED BY VACATING ITS PRIOR ORDERS THAT A PLENARY HEARING WOULD FOLLOW THE COMPLETION OF THE EXPERT REPORT AS TO THE ABUSE ALLEGATIONS MADE AGAINST PLAINTIFF

The general rule is that findings of a trial Court are binding on appeal when supported by adequate, substantial and credible evidence. Pascale v. Pascale, 113 N.J. 20, 33, (1988) (quoting Gallo v. Gallo, 66 N.J.Super. 1, 5, (App.Div.1961)), Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). It is not the role of the Appellate Division to re-weigh the factual determinations of the trial court, which alone has the opportunity to view the demeanor of and judge the credibility of witnesses. Cesare v. Cesare, 154 N.J. 394, 416 (1998).

However, a trial Court may decide issues on a motion and without holding a plenary hearing only when to do so does not require the resolution of a question of material fact. See, e.g., Tancredi v. Tancredi, 101 N.J.Super. 259 (App. Div. 1968), Shaw v. Shaw, 138 N.J.Super. 436 (App.Div.1976). See also Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520 (1995).

The issue of whether plaintiff abused his daughter and, alternatively, whether defendant knowingly made false allegations and "fed statements" to the child is a material fact question warranting a hearing. P.T., A.T. and H.T. v.M.S., 325 N.J.Super. 193 (App. Div. 1999), Matter of Guardianship of J.C., 129 N.J. 1, 22, (1992), In re Registrant G.B., 147 N.J. 62, 87 (1996), In re

D.C., 146 N.J. 31, 59, (1996). The trial Court's ruling to the contrary was plain error mandating reversal.

The trial Court stated that it was basing its decision to vacate the Orders calling for a plenary hearing based on Dr. Gordon's report. (2T 17-25 to 18-6).

Expert reports are hearsay and generally are not admissible. Hill v. Cochran, 175 N.J.Super. 542, 546-47 (App.Div.1980). For several reasons, Dr. Gordon's report was inadmissible hearsay that could not be relied on the justify the trial Court's decision.

Initially, Dr. Gordon's report did not even purport to resolve the fact question of whether plaintiff assaulted his daughter (75a). Expert opinions are not intended to resolve fact questions. N.J.R.E. 702 states that an expert opinion is designed to "assist **the trier of fact to determine a fact** in issue." State v. Spencer, 319 N.J. Super. 284 (App. Div 1999) citing State v. Clowney, 299 N.J.Super. 1, 19, (App.Div.), certif. denied, 151 N.J. 77 (1997) (Emphasis added). See also N.J.R.E. 705.

While an exception to this general rule has been carved out for custody reports in the context of a trial, in every reported case where an otherwise inadmissible report was admitted, it was done in the context of a full and fair hearing. See, e.g. W.W. v. I.M., 231 N.J. Super. 495 (App. Div. 1989); Callen v. Gill, 7 N.J. 312, 318, (1951) ("[T]he rules of evidence are somewhat

relaxed ***in trials*** having to do with a determination of custody of an infant where it is necessary to learn of the child's psychology and preferences." Emphasis added.) There is no support for the trial Court's decision to rely on Dr. Gordon's report outside of the context of a plenary hearing.

Moreover, Dr. Gordon's report cannot possibly be read as having resolved the fact question presented when its conclusions were that the child "does not show evidence of" the behaviors associated with a victim of sexual abuse, and that plaintiff's allegation that the child had these statements "fed to her by her mother and grandmother could neither be proven nor disproved." (74a).

Dr. Gordon's report has several internal inconsistencies that require exploration and testing in the context of a plenary hearing. As one example only, he states that plaintiff told him he had "jumped into a tub with [Natasha] playfully with a bathing suit on. Nothing happened inappropriately." (72a) Yet in his conclusions, Dr. Gordon states that plaintiff "should not take baths in the nude with his daughter" (74a-75a) - a significant and unexplained departure from plaintiff's statement.

According to Dr. Gordon, plaintiff also noted that he had recently purchased a three bedroom house (with a separate bedroom for his daughter) (71a at ¶9, 72a at ¶8). Yet in his conclusions, Dr. Gordon stated that "if [plaintiff] has a one bedroom apartment, the child could be sleeping in a bed and Mr.

M. could sleep on the couch or on an inflatable bed." (74a at ¶4).

These examples are illustrative only. Plaintiff was clear that he disputes many of the statements attributed to him and that he wished to test Dr. Gordon's report in the context of a plenary hearing (2T 6-14 to 6-17).

During oral argument, plaintiff's counsel raised the constitutional dimension of the parent-child relationship and the absolute right of both a parent and child to a hearing when allegations of this type are made. In apparent disagreement with this assertion, the trial Court inquired "What -- what section of the constitution are you citing, Mr. Davis?" (2T 6-20 to 7-2).

It is well settled law that the parent-child relationship is of constitutional dimension. It "is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court" and both the child and plaintiff have an absolute due process right to the resolution of these allegations. See, e.g. Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), Troxel v. Granville, ____ U.S. ____, 120 S.Ct. 2054 (2000), Watkins v. Nelson, 163 N.J. 235 (2000).

II. THE TRIAL COURT ERRED BY CONTINUING THE RESTRAINTS ON PLAINTIFF'S PARENTING TIME IN THE ABSENCE OF ANY FINDING WARRANTING SUCH RESTRICTIONS

When first presented with the allegations against plaintiff (4a-8a), the trial Court acted appropriately by taking steps to address what it perceived to be a danger to the child (34a-35a). However, the Court stated in its December 9 Order that the "the restraints contained herein shall continue until the court receives Dr. Gordon's report, at which time the court shall set the matter down for hearing." (2a at ¶ 4). Dr. Gordon's report does not recommend continuation of supervised visitation (75a). While this matter should be remanded for a plenary hearing, the allegations that led to the supervision of plaintiff's contact with his daughter have been discredited by DYFS (78a) and were not substantiated by the court-appointed evaluator (67a-75a).

In denying plaintiff's application to remove the supervision requirement from his parenting time, the trial Court stated that it relied on Dr. Gordon's report. However, the report stated that plaintiff should engage in therapy with the child, it did not say that plaintiff's visitation should remain supervised (2T 20-4 to 20-12). In denying plaintiff's application to lift the supervision requirement, the trial Court stated "[Plaintiff] currently has a one-bedroom house and they sleep in the same bed." Dr. Gordon based these findings on the information that the child and the

plaintiff husband shared with him. By plaintiff husband's own admission, he has a one-bedroom home and he and the child shared a bed during her overnight visitation. The Court finds this arrangement unacceptable. While the Court does not make a finding of inappropriate conduct by plaintiff toward the child, nonetheless, the potential for such occurrences exist based on that sleeping arrangement. (2T 20-1 to 20-4).

It was never disputed that plaintiff now lives in a three bedroom house (44a). The housing arrangement which existed at the time of plaintiff's interview with Dr. Gordon no longer existed as of the return date of plaintiff's motion.

In the absence of a finding of "inappropriate conduct," and with the sole justification for the continuing restraints removed, this Court should order that the restrictions be immediately lifted. While restrictions on the parent-child relationship can be ordered to protect a child's best interests, such restraints must be backed by evidence in order to justify the infringement of the fundamental constitutional right of both the child and parent to a loving and meaningful relationship with each other. Cf., e.g. Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), Troxel v. Granville, ___ U.S. ___, 120 S.Ct.

2054 (2000), Watkins v. Nelson, 163 N.J. 235 (2000).

In the alternative, the restraints should be modified to take the DYFS findings and Dr. Gordon's recommendations into account and plaintiff's application to lessen the restrictions by changing the supervisor to his parents (194a at ¶13) should have been granted.

III. THIS COURT SHOULD REVERSE THE REMAINDER OF THE TRIAL COURT'S MAY 5, 2000 ORDER

Several other issues were addressed when the Court denied plaintiff's application to set a date for the plenary hearing. All of these rulings were related to the Court's denial of plaintiff's motion and should be reviewed on remand.

Under the December 22 Order, defendant's parents were appointed as supervisors for parenting time between plaintiff and Natasha (84a-85a). Plaintiff requested that, in the event supervision was to continue pending the hearing, the supervisor should be changed to either plaintiff's parents or a neutral party (2T 14-24 to 15-10). Although the Court noted that there has been ongoing acrimony between plaintiff and his former in-laws (2T 20-16 to 20-22), the request to change the supervisor to a neutral party was denied (2T 20-22 to 21-5).

The purpose of imposing supervision on plaintiff's parenting is to protect the child (2T 20-15). To require that plaintiff's parenting time be supervised by a party with whom there exists tremendous acrimony does not further this interest. The trial Court abused its discretion by failing to order that a neutral third party could act as a supervisor pending a hearing.

Plaintiff's request that the Court impose sanctions at the hearing was denied as the Court sua sponte vacated its orders that a hearing would be held (2T 21-14 to 21-23). At a hearing, should plaintiff persuade the Court by substantial and credible

evidence that the allegations were not only baseless but part of a pattern of knowingly false and malicious allegations, sanctions would be appropriate. Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997).

In order to properly prepare for a hearing, plaintiff should have access to the records of DYFS, the Ewing Township Police, and the Mercer County Prosecutor's office. The Court denied this request specifically as part of its decision that "there will be no hearing." (2T 22-6 to 22-10). On remand for a hearing, this information should be made available to plaintiff. While the records of the police and prosecutor should be available by subpoena, the records of DYFS require a finding that "good cause" be shown for their release.

DYFS interviewed the child extensively and presumably kept records of these interviews. Two letters were issued with apparently contradictory conclusions. These records can be released whenever "good cause" justifies their release. N.J.S.A. 9:6-8.10a (b)(6). Under the circumstances of this case, it is respectfully suggested that these records should be made available to the parties.

IV.ON REMAND, THIS MATTER SHOULD BE HEARD BY A DIFFERENT JUDGE

While not strictly a matter of disqualification, the appellate court has the authority to direct that a different judge consider the matter in order to preserve the appearance of a fair and unprejudiced hearing. See, e.g., Carmichael v. Bryan, 310 N.J. Super. 34, 49, (App. Div. 1998). Although not as a result of a full and fair hearing, Judge Pogarsky, in reversing his own prior orders that the required plenary hearing be held, made findings that indicate that a "fresh judicial examination" is warranted. See R. 1:12-1(f).

In In re Baby M., 109 N.J. 396, 463, (1988), reversing 217 N.J.Super. 313, (Ch. Div. 1987), the Supreme Court cited the trial judge's "potential 'commitment to its findings'" to support a determination that a different should hear a matter on remand. The Appellate Division also has remanded cases to be heard by a different judge on several occasions. See, e.g., P.T., A.T. and H.T. v.M.S., 325 N.J.Super. 193, 222 (App. Div. 1999); New Jersey Division of Youth and Family Services. v. A.W., 103 N.J. 591, 617, (1986); J.L. v. J.F., 317 N.J.Super. 418, 438, (App. Div. 1999); Carmichael v. Bryan, 310 N.J.Super. 34, 49 (App.Div.1998).

Conclusion

For the foregoing reasons, the trial court's May 5, 2000 Order should be reversed and the matter remanded for a hearing. In the alternative to summary reversal, this Court should reverse the trial Court and order that the matter be resolved on an expedited schedule pursuant to the instruction of the New Jersey Supreme Court in Watkins v. Nelson, 163 N.J. 235 (2000).

The matter should be assigned to a new judge on remand.

Respectfully submitted,

David Perry Davis, Esq.