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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2585-14T3

K.L.,

Plaintiff-Appellant,

v.

D.L.,

Defendant-Respondent.

Submitted April 26, 2016 – Decided June 10, 2016

Before Judges Reisner and Leone.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-2055-13.

Garces, Grabler & LeBrocq, P.C., attorneys for appellant (Jared A. Geist, on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff K.L. (husband) appeals from a November 21, 2014 order, insofar as it addresses his support obligation to defendant D.L. (wife) and insofar as it denied his

reconsideration motion on visitation.[1] For the reasons that follow, we remand this case to the trial court.

We summarize the background relevant to this appeal. A divorce complaint was filed on June 14, 2013. However, the dispute over child visitation began when the parties applied for domestic violence restraining orders against each other. On October 18, 2013, Judge Leslie Justus found that the wife slapped the husband, but that incident did not warrant the entry of a final restraining order (FRO). She found that the husband hit the wife in the face with a bottle, and that did justify entry of a FRO. She entered a FRO and ordered the husband to attend anger management classes within ninety days and have a psychological evaluation. Nothing in Judge Justus's oral opinion or the October 18, 2013 FRO she entered stated that the psychological evaluation was to include anyone other than the husband.

At the FRO hearing, the husband sought overnight visits with the parties' eleven-year-old daughter. However the judge denied overnight visitation, pending receipt of proof that the husband had an apartment that was appropriate for such visits. The wife agreed that the husband could continue visits with the

[1] We refer to the parties as husband and wife, which was their status when the litigation began. We use their initials because this case involves domestic violence.

daughter on Saturdays from 1:30 p.m. to 9:30 p.m. and the FRO included that provision.

Thereafter, the wife filed a motion to enforce child support. The husband filed a motion seeking overnight visitation every other weekend from Friday to Monday morning. That motion was heard by a second judge, who issued an "order and opinion" dated February 21, 2014. The decision noted that the husband had presented a copy of a lease, documenting that he now had a residence with a separate bedroom for the child. He also submitted copies of a report from a psychologist and a licensed social worker, attesting to his emotional stability. However, in her decision the second judge discounted those reports because one of them was unsigned and neither report was on letterhead. In other words, the judge questioned the authenticity of the reports. The judge also indicated that "nowhere does it [the prior order] say that his parenting time was limited because of his living situation."[2] In other words, she believed that the husband's having a larger apartment was not a positive factor to be considered.

[2] The second judge was correct that the FRO did not contain that notation. However, it was discussed on the record at the FRO hearing. In fairness to the second judge, it is not clear whether either side provided her with a transcript of the FRO hearing.

Nonetheless the second judge found that it was "in the child's best interests to have increased parenting time with her father." She also noted that "Defendant does not assert that Plaintiff is an unfit parent and has not shown that modification is not in the best interests of the child." She found that "Plaintiff, however, would continue to benefit by attending the 26-week domestic violence program as well as regular individual psychotherapy sessions." The judge then "expanded" the husband's parenting time to an additional three hours on Wednesday from 4:00 p.m. to 7:00 p.m., conditioned on his submitting signed and notarized letters from the mental health professionals. Thus, the husband was to have visitation two days every week, on Wednesday and Saturday. However, the judge did not explain why she did not grant overnight visitation, in light of the wife's failure to contest that the husband was a fit parent.

Through his attorney, the husband filed a motion for reconsideration, which the second judge heard on May 30, 2014. Prior to that hearing, the husband's attorney had faxed to the court and to his adversary notarized, signed copies of the reports from the mental health professionals. In the course of the May 30 oral argument, the wife argued, apparently for the first time, that the husband should not have overnight

visitation because he had a roommate living with him, and the daughter was uncomfortable staying overnight at his apartment. At the oral argument, the husband denied under oath that he had a roommate.

On June 10, 2014, the second judge issued another order and opinion addressing the visitation motion, as well as the husband's motion to clarify a prior order concerning child support. The court agreed that the February 21, 2014 order contained a clerical error, and that the husband's child support obligation was $536 per month, not $536 per week. Although it was implicit in her decision, the June 10, 2014 order did not direct the Probation Department to recalculate the husband's support obligation.

Addressing the child visitation issue, the judge stated that the husband had not submitted the notarized versions of the mental health professionals' reports, and only resubmitted the report of one of the professionals. She also noted that the letter from that professional was one-sided and did not reflect any interviews of anyone other than the husband, "such as the child." However, none of the court's prior orders had required the husband to do anything more than obtain his own evaluations. The June 10, 2014 order "denied without prejudice" the husband's motion for overnight visits every other weekend.

The husband then filed a pro se motion for reconsideration of the June 10, 2014 order. In an accompanying certification, the husband pointed out that prior to the May 30, 2014 hearing, his attorney had provided the court with notarized versions of both reports from the mental health professionals, and had also provided copies to the court and his adversary on the day of the May 30 hearing. He once again requested overnight visitation.[3]

The husband's motion did not reference the fact that on June 10, 2014, the parties had entered into a settlement of their divorce, which was reflected in a Final Judgment of Divorce (FJOD) of the same date. The wife, also pro se, filed a cross-motion, pointing out that the FJOD contained provisions for visitation, to which the husband had agreed. Notably, the FJOD specifically provided for overnight visitation, although not on the exact days the husband wanted. Paragraph fourteen of the FJOD provided that "Husband will have parenting time alternate weekends from Saturdays at 1:30 to Sundays at 8 PM[.]" Additionally, the FJOD provided that "[H]usband may also exercise parenting time Wednesdays from 6:30 PM-8:30 PM." The

[3] His motion did not request, or even address, any relief based on his bankruptcy filing. However, the wife asked the judge to enforce the support provisions of the PSA. The husband argued that his support obligation was stayed by virtue of the then-pending bankruptcy petition.

FJOD noted that husband "is seeking alternate weekends from Fridays to Mondays to school and Wife is not agreeable at this juncture."

At the oral argument of the motion on August 22, 2014, the wife's counsel stated that "As part of the divorce agreement, [the husband] does get an overnight. That was something that was negotiated[.]" With respect to the child support issue, the wife's attorney stated that both sides would have to "resolve that through Probation[.]" In her remarks, the judge acknowledged that in the divorce settlement the parties had agreed to abide by her decision of their dispute over the extent of the husband's overnight visits with the child.

On November 21, 2014, the second judge issued an order, accompanied by a written opinion. In her opinion the judge reiterated the reasons for her June 10, 2014 opinion denying additional overnight visitation and denied reconsideration. The judge rejected the husband's argument that his then-pending bankruptcy petition stayed his support obligations to the wife. The judge granted the wife's cross-motion to enforce the support provisions of the FJOD.

On this appeal, the husband presents the following arguments:

I. THE FAMILY COURT ERRED IN DETERMINING CERTAIN DEBTS TO BE NON-DISCHARGEABLE

AFTER FEDERAL BANKRUPTCY COURT ALREADY DISCHARGED THEM.

II. THE NOVEMBER 21, 2014 ORDER ERRONEOUSLY ESTABLISHED SUPPORT ARREARS TO BE $8,036.29 WITHOUT ANY FACTUAL OR LEGAL BA[S]IS AND IN STARK CONTRAST TO WHAT PROBATION'S ARREAR[A]GES FIGURES WERE.

III. THE COURT IMPROPERLY DENIED THE ABILITY OF APPELLANT TO HAVE OVERNIGHT PARENTING TIME WITH HIS DAUGHTER BY CONSIDERING OBJECTIONS RAISED BY RESPONDENT THAT WERE NOT A PART OF RESPONDENT'S MOTION PAPERS AND BY USING THEM AS THE BASIS OF THE DENIAL OF THE OVERNIGHT PARENTING TIME, AS WELL AS BY MAKING OTHER MISTAKES OF FACT NOT SUPPORTED BY THE RECORD.

Bearing in mind that this appeal challenges the denial of a reconsideration motion, we begin with our standard of review. "Reconsideration . . . is 'a matter within the sound discretion of the Court, to be exercised in the interest of justice.'" Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Reconsideration is inappropriate when a party is merely "dissatisfied" with the trial court's decision. Ibid. "Reconsideration cannot be used to expand the record and reargue a motion." Capital Fin. Co. of Delaware Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div.), certif. denied, 195 N.J. 521 (2008). We review the denial of a motion for

reconsideration under the abuse of discretion standard. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996).

We decline to address the husband's first argument because it was not presented to the trial court. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). We required counsel to provide us with copies of all of the motion papers submitted to the trial court on the motion for reconsideration. Those papers did not include the bankruptcy materials that appear in the husband's appellate appendix. Further, in his reconsideration motion, the husband did not ask the court to deem his support obligations to be discharged in bankruptcy. We need not address whether that result would be permissible under bankruptcy law. If the husband believes his bankruptcy discharge entitles him to some form of relief from his State law support obligations, he may apply for relief in the trial court.

In his second point, the husband argues that the November order included the wrong amount of support arrears ($8036.29), when the Probation Department calculated his arrears at a much lower number. The judge's opinion recited that "Defendant does not deny the amounts alleged within Plaintiff's requests for enforcement." However, our reading of the oral argument transcript indicates that both parties acknowledged that the Probation Department might need to re-review the amount of

arrears in light of the error in the court's prior order setting weekly support of $536 when it should have been monthly support of $536. Accordingly, we remand this issue to the trial court with direction that the Probation Department conduct another review of the husband's support arrears, using the correct support amount of $536 per month, which was effective February 21, 2014.

Addressing the visitation issue, we agree with the husband that the trial court erred in basing her reconsideration decision on the mental health evaluation reports. The February 21, 2014 FRO only required that the husband be evaluated. He was evaluated; his attorney provided the reports to the court; and nothing more was required. As a result we conclude it was a mistaken exercise of the judge's discretion to decide the visitation issue based on perceived deficiencies in the psychological reports.

In the FJOD the parties acknowledged a disagreement over the extent of overnight visits and contemplated that the court would decide that issue. The June 10, 2014 visitation order was mistaken in deciding the issue based on alleged deficiencies in the psychological reports, and so was the November 21, 2014 order denying reconsideration on the visitation issue. We vacate those orders to the extent they address visitation, and

remand for reconsideration of the visitation issue, based on the parties' current circumstances. On remand, both sides should be given an opportunity to submit additional legally competent, relevant evidence, concerning the visitation issue. We strongly suggest that on remand the judge interview the daughter, who is now a teenager, to determine her wishes.

Vacated in part and remanded. We do not retain jurisdiction.