



Not Reported in A.2d  
 Not Reported in A.2d, 2009 WL 587099 (N.J.Super.A.D.)  
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UNPUBLISHED OPINION. CHECK COURT  
 RULES BEFORE CITING.

Superior Court of New Jersey,  
 Appellate Division.  
 D. W.,<sup>FN1</sup> Plaintiff-Respondent,

**FN1.** Because of the sensitive mental health issues raised in this child custody matter, we have impounded the record. We shall refer to the parents by their initials and to the minor children by first-name pseudonyms, “Abigail” and “Neal.”

v.

P. W., Defendant-Appellant.  
 Submitted <sup>FN2</sup> Feb. 9, 2009.

**FN2.** We have fully considered all of the parties' submissions, including the reply brief that appellant filed after the calendar date as the result of a court-approved time extension for respondent's brief.

Decided March 10, 2009.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Mercer County, Docket No. FM-11-603-01.  
 Bernstein & Manahan, LLC, attorneys for appellant ([James P. Manahan](#), of counsel and on the brief).

Szaferman, Lakind, Blumstein & Blader, P.C., attorneys for respondent ( [Brian G. Paul](#), on the brief).

Before Judges [R.B. COLEMAN](#), [SABATINO](#) and [SIMONELLI](#).

PER CURIAM.

\*1 Defendant, P.W. (the “mother”), appeals an order of the Family Part dated June 12, 2008, awarding sole physical and legal custody of her two minor children (“Abigail” and “Neal”) to plaintiff, her ex-husband, D.W. (the “father”). The order followed a plenary hearing, at which the court heard testimony from the parties as well as from a court-appointed psychologist. The psychologist, whose testimony was not rebutted by another expert, had recommended the custody change based on extensive evaluations of the children and their parents. His independent review was prompted by reports that the mother had engaged in aberrant and abusive behavior harmful to the children.

The mother contends that the Family Part erred in removing the children, who had primarily resided with her after the parties' divorce, from her custody. More specifically, she argues that the court should have interviewed the children in chambers and that its decision was tainted by hearsay proofs about her alleged misconduct. The mother further maintains that the evidence supporting a custody transfer is particularly insufficient as to Neal, with whom she now has only biweekly parenting time.

In addition, the mother criticizes the court's order insofar as it gives Abigail, who is nearly age sixteen, the option to cancel parenting time with her mother when she would prefer not to see her. The mother also objects to the court requiring her to accommodate the children's extracurricular activities during her scheduled parenting time.

We recite, in brief, the pertinent background. The parties were divorced in 2003. At that time, a court-appointed psychologist, Gerald Cooke, Ph.D, performed a custody evaluation. Dr. Cooke recommended that the mother retain primary custody of Abigail and Neal. He also recommended that the father, who had moved to an adjacent county, be granted substantial parenting time. The court adopted those recommendations in the terms of the divorce judgment.

Following entry of the divorce judgment, the father appealed the trial court's award of permanent alimony to the mother. The appeal did not concern custody issues. We vacated the alimony ruling and remanded for further proceedings. *D.W. v. P.W.*, No. A-1449-03 (App.Div. July 7, 2005). On remand, the parties consented to an award of limited duration alimony. Meanwhile, the father remarried and continued to have parenting time with the children.

In January 2006, about three years after the divorce, the father noticed that Abigail was limping. After initially claiming that she had simply fallen, Abigail disclosed that she had been bitten on the leg by her mother after they had an argument. The human source of the bite mark was confirmed in a certification by Abigail's pediatrician. Abigail also reported other hurtful and aberrational behavior by her mother. These acts included, among other things, the mother allegedly hitting Abigail with a spoon, making her sleep in her street clothes, and, on one occasion, squeezing her face so hard that her eyeglasses broke.

\*2 Based on these revelations, the father brought an order to show cause and gained temporary custody of the children. The court ordered the mother to undergo a psychiatric evaluation and also ordered Dr. Cooke to perform an updated custody evaluation. In the meantime, the court required supervision of the mother's parenting time.

The court-appointed psychiatrist, Dr. Charles Martinson, found that the mother was suffering from **major depression**, which was exacerbated by stressors such as the divorce, the family's move out of the marital home and the death of her own mother. Dr. Martinson noted that the mother's symptoms had worsened over time, leading to "emotional acting out and [the] exercise of poor judgment in her parenting approach towards her children, especially [her daughter]." He also observed that "the mother's personality style predisposes her to behave in an angry and emotionally reactive manner towards her children, especially in moments of high frustra- tion."

After meeting with both parents and the children and also administering various personality tests, Dr. Cooke completed an updated custody evaluation in September 2006. He recommended that the father be awarded sole legal custody. Dr. Cooke, who has performed over 900 custodial evaluations, acknowledged that he "rarely" recommends sole custody but that it was warranted here because of the mother's instability. The psychologist did note, however, that both children still love their mother and wanted to see her.

Having considered the findings of Dr. Martinson and Dr. Cooke, the court continued the father's temporary custody and the supervised conditions on the mother's visitation. In the meantime, the mother received professional counseling.

In December 2006, the mother moved to modify the extant custody arrangement and regain the status of primary caretaker. The court scheduled a plenary hearing and, in advance of that hearing, asked Dr. Cooke to do another updated evaluation. Dr. Cooke met again with the parties and the children, and administered more tests. He also consulted, among others, with defendant's therapists, the children's therapist, and Neal's classroom teacher.

In his third written report, issued in October 2007, Dr. Cooke found that the mother's mental health issues and parenting problems had persisted. In particular, he noted that the mother had repeatedly tried to get Abigail to say that her negative statements about the mother were lies. She also pressured the children to say that they preferred to live with her. In connection with his assessment, Dr. Cooke alluded to a troubling incident reported to him by Neal, who apparently had seen his mother take a pending homework assignment out of Abigail's purse one day and run it through the shredder.

In contrast to his assessment of the mother, Dr. Cooke found that the father is "free from any psychological problems." The expert described the father as appearing to be "in control" and "effective in dealing with situations." He also found that the

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father's new spouse was a stabilizing influence for the children.

\*3 At the end of his third report, which spanned forty-nine-pages, Dr. Cooke offered the following conclusions:

Based on these considerations this examiner makes the following recommendations to the Court regarding custodial issues. *First, it is my opinion that [the father] should continue to have sole legal custody.* Given the type of pathology that [defendant] has which is not likely to change, it is my opinion that this should be on a permanent and ongoing basis. I see many instances in which [the father] has acted in the best interests of the children, that [the mother] acts in an unpredictable and irrational manner based on her own needs without seeing what is in the best interest of the children. Further, at times she even acts destructively toward them, such as if it is true that she is taking things out of [Abigail's] backpack that she needs for school.

[(Emphasis added).]

Dr. Cooke continued:

It is also my opinion that *at this point [Abigail] should not be under Court ordered visitation.* She loves her mother and wants to visit with her mother and this examiner is convinced that she will do so when she wants to.... It is also my opinion that *[the father] should continue to have primary residential custody.*

[(Emphasis added).]

With respect to the son, Dr. Cooke stated:

[Neal] should continue to see [the mother] on the same schedule that he is currently during the school year.... I am less concerned, at least at this point in [Neal's] development, about conflict arising between [the mother] and [Neal] than I would be about conflict arising between [the mother] and [Abigail].

After the parties engaged in unrelated motion prac-

tice concerning alimony payments, Judge Fleming conducted a plenary hearing on January 15 and January 16, 2008, to rule on the open custodial issues. Both parties were represented at the hearing by counsel.

In his testimony, the father detailed several instances of the mother's apparent abuse. These included the bite on Abigail's leg, the mother's use of the wooden spoon and other punishment methods, the incident with Abigail's broken glasses, and several other examples. The father also noted that Abigail's grades had declined while she was living with her mother.

With respect to the son, the father recalled an occasion where Neal had been crying at school and went to the vice principal's office. The crying spell apparently was caused by Neal being told by his mother that, unless he obeyed her, Neal would not see her again until he turned eighteen. She also supposedly instructed Neal to say to others that he preferred to live with her.

The father also described an incident where Neal was in his room crying because he had to use the bathroom. When the father asked Neal why he had not gone to the facilities on his own, Abigail interrupted and informed her father that the mother does not allow Neal to get out of bed without permission.

The court also heard testimony about the father's difficulties in maintaining communication with the mother on matters concerning the children. In particular, the mother had changed her e-mail address without informing the father. Accordingly, when the father sent e-mails to her in late 2007 about Neal's participation in a school concert, she never responded. She also failed to respond to an October 2007 e-mail informing her of scheduled parent-teacher conferences. The father also sent the mother a certified letter about the children's schedule and activities, but she did not reply.

\*4 In her own testimony, the mother explained that

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Abigail had become extremely upset after she learned that the marital home would be sold. The mother felt that the house sale contributed to some of the problems Abigail was having in school. The mother contended that the children would be better off living again with her. She denied the use of a wooden spoon to exact punishment. When asked about the bite mark, the mother simply stated that she had “no recollection of ever biting my daughter.”

On the second day of the hearing, Judge Fleming heard testimony from Dr. Cooke, whom the parties stipulated as a qualified expert. Amplifying his three written reports, which were admitted into evidence without objection, Dr. Cooke discussed the mother's attempts to alienate the children from their father. Dr. Cooke opined that the mother has a “tremendous” problem with projecting blame on others, including her children. The personality tests reflected the mother's tendency to not appreciate Abigail's behavioral difficulties. He also cited the biting incident and the mother's use of the wooden spoon. Dr. Cooke opined that the mother's failure to acknowledge her past improper actions portends an inability to correct her parenting deficiencies.

Dr. Cooke also noted that Abigail has a number of friends in her father's neighborhood, that she wants to remain in her current school, and now enjoys school. He commented on the marked improvement in Abigail after moving in with her father, and that her ensuing progress in school—both academically and socially—could only be described as “amazing.”

After considering these proofs, Judge Fleming rendered a detailed oral decision on April 10, 2008. The judge found that “[i]n light of the prior history of abuse, both physical, verbal and emotional,” the children are safer with their father. He determined that the children were “thriving” in their current setting, specifically in the academic context. The judge was satisfied that the father had used reasonable efforts to communicate with his ex-wife, efforts that were frequently to no avail.

Assessing the testimony of the parties themselves, the judge found the father to be “generally credible.” Even though the father at times expressed clear resentment towards his former spouse, the judge found that resentment understandable in light of the parties' history and that it did not undermine his veracity. By comparison, the judge observed that the mother “gave testimony that at times was evasive and inconsistent,” citing in particular her testimony about the biting incident as “difficult to reconcile.”

The judge specifically found Dr. Cooke's expert opinions to be “extremely credible and very helpful.” He noted that the psychologist's “expertise was undisputed” and that “his insights greatly assisted the [c]ourt in reaching its ultimate resolution of the case.”

With respect to the wishes of the children, Judge Fleming was clearly satisfied that Abigail wanted to stay with her father. As to Neal, the judge acknowledged that the boy was “torn,” but found that the mother had manipulated him. Therefore, the judge determined that it was unfair to place upon Neal the burden of choosing which parent to live with. The judge also determined that the father's home environment and Neal's favorable adaptation to his new school district weighed in favor of him remaining with the father.

\*5 Meticulously applying each of the fourteen custody factors enumerated at *N.J.S.A. 9:2-4*, the judge concluded that the overall best interests of the children warranted them remaining with their father. The judge essentially adopted the recommendations of Dr. Cooke, granting the father sole legal custody of the children, subject to weekend parenting time with the mother on a biweekly basis.<sup>FN3</sup> The judge also specified a holiday schedule, transportation and summer camp arrangements. In addition, the father was directed to keep the mother informed of the children's extracurricular activities via e-mail, and the mother was ordered to take the children to those activities when they fell during her parenting time.

FN3. It is not entirely clear whether the trial court continued the requirement that the mother's visitation be supervised. The April 10, 2008 bench ruling and the corresponding order of June 12, 2008 are silent on that aspect.

With respect to Abigail, the court ordered that the daughter "shall have the option of deciding whether she wishes to exercise her parenting time with her mother." The judge noted that Dr. Cooke had found it "was important to let [Abigail] see [her mother] when she wishes to do so, not under a set schedule." The judge recognized the testimony suggesting that Abigail "will want to see her mother quite often." Even so, the judge ruled that the teenager "should be permitted the right to decline to participate in parenting time when [she] believes it is necessary."

The mother moved for reconsideration, which the court denied. She then filed the instant appeal, raising the issues that we have already identified. The father has not cross-appealed any of the court's determinations.

Our scope of review in this custody matter is limited. We recognize "the family court's special jurisdiction and expertise," warranting substantial deference to the factual findings and conclusions of judges who hear such sensitive and dynamic matters. *Cesare v. Cesare*, 154 N.J. 394, 412-13 (1998); see also *DeVita v. DeVita*, 145 N.J.Super. 120, 123 (App.Div.1976). A family court judge's credibility determinations are accorded great weight on appeal, given the judge's "feel of the case" based upon his or her ability to see and hear the witnesses. *Id.* at 411-12; see also *Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 484 (1974).

Guided by this deferential review standard and having carefully reviewed the record as a whole, we are satisfied that the trial court's determinations are supported by substantial credible evidence and fully comport with the applicable law. We therefore affirm the custody order in all respects, substantially

for the cogent reasons expressed in Judge Fleming's comprehensive oral opinion of April 10, 2008. We add only a few remarks.

The central objective of any custody decision is to serve the "best interests of the child[ren]." *Sacharow v. Sacharow*, 177 N.J. 62, 80 (2003); see also *N.J.S.A. 9:2-4*. This "best interests of the child" standard is, at its core, a safeguard to ensure the safety, happiness, and welfare of a child. See *Fantony v. Fantony*, 21 N.J. 525 (1956). In reaching a conclusion on how those interests are best served, a judge faced with this task must come to a decision that "foster[s], not hampers," a healthy parent-child relationship. *Nufrio v. Nufrio*, 341 N.J.Super. 548, 550 (App.Div.2001).

\*6 Although joint legal custody between parents is the most commonly preferred arrangement because it "is likely to foster the best interests of the child in the proper case," *Beck v. Beck*, 86 N.J. 480, 488 (1981), "the decision concerning the type of custody arrangement [is left] to the sound discretion of the trial court[.]" *Pascale v. Pascale*, 140 N.J. 583, 611 (1995). Here, the 2003 divorce judgment originally provided for joint legal custody and for the mother to serve as the parent of primary residence. However, the father justifiably sought to have the court alter those arrangements after observing Abigail's bite mark and having other reasons to be concerned about the mother's behavior and stability following the divorce.

We agree with Judge Fleming that the father sustained his burden of proving sufficiently changed circumstances to justify a modification of custody. See *Beck, supra*, 86 N.J. at 496 n.8; *Finamore v. Aronson*, 382 N.J.Super. 514, 522 (App.Div.2006). The testimony of Dr. Cooke, the independent court-appointed expert, was detailed, analytical, and un rebutted by a competing professional. Dr. Cooke's multiple testing and extensive interviews corroborated Dr. Martinson's psychiatric finding that the mother unfortunately suffers from mental health problems that have led her to treat her children inappropriately. We do not find that the judge was

unduly attentive to Dr. Cooke's recommendations. Rather, the judge carefully considered the expert's input on its merits, also weighing the testimony of the parties and the evidence as a whole.

Although we recognize that the proofs in favor of a custody change are less compelling as to Neal, they suffice to meet the statutory criteria. We also note that the judge's decision has the virtue of keeping the siblings together in the same primary household. See *S.M. v. A.W.*, 281 N.J.Super. 63, 71 (App.Div.1995); see also N.J.S.A. 9:2-4 (recognizing sibling relationships as a custody factor). The son still has substantial parenting time with his mother on a biweekly basis, which, of course, is always subject to potential modification as things develop.

It was unnecessary for the court to put the children in this case through the rigors of questioning in chambers. Even assuming, for the sake of argument, that the mother's counsel requested such interviews to take place at the time of the plenary hearing (although no such explicit request is contained in the transcripts), we are satisfied that the judge was well within his discretion under Rule 5:8-6 to decline to perform them. Given the repeated and professional interviews of the children performed by Dr. Cooke, this is not a situation in which their views were conveyed through a child's letter to the court or through a certification drafted by an attorney for one of the parents. Cf. *Mackowski v. Mackowski*, 317 N.J.Super. 8, 10-13 (App.Div.1998) (generally disapproving of the consideration of such letters and certifications in lieu of child interviews).

\*7 As the judge noted, Abigail's strong preference to remain with her father and enrolled in her present school is obvious from her discussions with Dr. Cooke. There was no need for the judge to place her in yet another situation that could harbor more ill feelings and conflict with her mother. As to Neal, who is presently age eleven, the judge recognized that he had been subject to pressure from his mother to say "the magic words" and state that he

wanted to live with her. That pressure would have made Neal's in-chambers responses of limited value, and likewise would have placed him in a difficult situation. The judge recognized that Neal was "torn" and conflicted, and we defer to his discretion in choosing not to elicit this boy's direct statements.

We also reject the mother's claim that the court's decision was tainted by hearsay statements attributed to Abigail. Since the mother's counsel failed to object at the hearing when Dr. Cooke and the father recounted the daughter's out-of-court assertions, the plain error standard of review applies. *Bradford v. Kupper Assocs.*, 283 N.J.Super. 556, 573-74 (App.Div.1995), certif. denied, 144 N.J. 586 (1996); see also R. 1:7-2, R. 2:10-2. We discern no such plain error here. The hearsay statements predominantly were utilized to inform Dr. Cooke's opinions as part of his overall expert assessment, which is permitted under *Evidence Rule 703* (allowing experts to rely upon "facts or data" not admitted into evidence), see also *State v. Berry*, 140 N.J. 280, 304 (1995); *New Jersey Div. of Youth and Family Services v. Z.P.R.*, 351 N.J.Super. 427. (App.Div.2002). Moreover, Abigail's main accusation about being bitten by her mother was consistent with the bite mark itself and by the certification of her pediatrician confirming a human bite. The mother did not deny biting Abigail, but rather testified to a lack of recollection on the subject.

We further reject the mother's claim that the judge erred in not compelling Abigail to spend regular parenting time with her. This was a highly discretionary ruling, and a perfectly understandable one, in light of the history of conflict between mother and daughter and the mother's documented mental health issues. The option afforded to Abigail was consistent with Dr. Cooke's expert insights and recommendations. We see no compelling reason to require this adolescent, who is now almost sixteen, to be with her mother on a rote schedule. Indeed, forcing Abigail to do so may well prove counterproductive to the mother-daughter relationship in the long run.

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The remaining points raised by the mother, including but not limited to her objections about her extra-curricular activity obligations, all lack sufficient merit to require discussion in this opinion. *R. 2:11-3(e)(1)(E)*.

We offer a final observation. This family, like many shaken by divorce, has been through some difficult adjustments and challenges. Those changes appear to have been particularly hard for the mother, who evidently has reacted multiple times with inappropriate parenting behaviors. We are encouraged by the mother's subsequent efforts to obtain counseling that might allow her some day to attain the stability needed to be a more effective parent. That being stated, we emphasize that the decision that we affirm today is, like most Family Part decisions, one that is not cast in stone and is without prejudice, of course, to future developments.

**\*8** Affirmed.

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