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2023 VT 44

No. 22-AP-249

Anne Phillips

Supreme Court

v.

On Appeal from  
Superior Court, Lamoille Unit,  
Family Division

Roy Phillips

March Term, 2023

Michael J. Harris, J.

Brice Simon of Breton & Simon, PLC, Stowe, for Plaintiff-Appellee.

Jacob S. Oblak of Bergeron, Paradis & Fitzpatrick, LLP, Essex Junction, for  
Defendant-Appellant.

PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **COHEN, J.** Father appeals from the family division’s order affirming the denial of his records request under the Vermont Rules for Public Access to Court Records. He seeks copies of unsuccessful ex parte relief-from-abuse (RFA) complaints and affidavits filed against him by his ex-wife, referred to herein as mother, on behalf of their three children. Father argues that the defendant in an RFA action has a presumptive right to the complaint and affidavit, and that the family division should have provided him with the filings even if the Public Access Rules prevent the filings from being publicly available. Mother did not file an appellate brief and subsequently did not provide oral argument pursuant to Vermont Rule of Appellate Procedure 31(b). We affirm.

¶ 2. The record contains the following facts. The parties divorced in May 2015. In 2020, mother sought ex parte emergency RFA orders against father on behalf of the parties' three minor children. The family division denied each of the requests on November 12, 2020, finding that the allegations failed to support a finding of abuse. Mother did not appeal the court's decision or request an evidentiary hearing. Father was not notified of the requests or their subsequent denials.

¶ 3. In April 2022, father moved to modify parent-child contact (PCC). Father learned of mother's three unsuccessful ex parte RFA requests during the PCC litigation. In June 2022, he sent the family division an email requesting copies of the complaint and affidavit, along with any orders that were issued as a result. The clerk denied father access to any of the records pursuant to Public Access Rule 6(b)(9), and father appealed to the family division. In July 2022, the court held a hearing on the issue of father's records request, where mother and father both were represented by counsel and presented arguments. The family division issued an order in August 2022 granting father access to the orders denying mother's requests for ex parte relief but not the associated complaints or affidavits. Father appeals from this decision.

¶ 4. The only issue before us is whether father should have been granted access under the Public Access Rules to mother's ex parte RFA complaint and affidavit. Father asserts that the defendant in an RFA action has a presumptive right to the complaint and affidavit, and argues that Public Access Rule 6(b)(9), which makes ex parte RFA complaints and affidavits inaccessible to the public, should not prohibit a defendant's access. Father claims that the intent behind Public Access Rule 6(b)(9) is to protect defendants, "not to shield a plaintiff from any scrutiny of the facts she alleged in a complaint and affidavit she herself filed in court." He further argues that he should have been served the complaint and affidavit upon mother's initial filing, so to later deny his access is an absurd result. In the alternative, father argues that even if Public Access Rule 6(b)(9) prevents his access to the complaint and affidavit, the family division should have weighed the specific

facts under Public Access Rule 9 to assess whether there was a specific showing of substantial harm to public or private interests that would overcome any right of access. We address each of father's arguments in turn and conclude that the family division properly denied father's access to the requested records.

¶ 5. This Court reviews the trial court's interpretation of procedural rules de novo, "employ[ing] tools similar to those we use in statutory construction." State v. Amidon, 2008 VT 122, ¶ 16, 185 Vt. 1, 967 A.2d 1126. "In assessing the meaning of the rule, we examine the language and purpose of the rule." Fed'l Nat'l Mortg. Ass'n v. Johnston, 2018 VT 51, ¶ 5, 207 Vt. 473, 189 A.3d 567. "When the rule is part of a larger scheme, we read the scheme's operative sections in context and the entire scheme in pari materia." In re Atwood Planned Unit Dev., 2017 VT 16, ¶ 11, 204 Vt. 301, 167 A.3d 312 (quotation and alteration marks omitted). Public Access Rule 1 requires us to "liberally construe" the rules "to provide public access or special access to judicial-branch records and to protect the confidentiality of case information where such confidentiality is required by statute, rule, or court order."

¶ 6. Under Public Access Rule 6, the public has access to all case records, with certain enumerated exceptions. V.R.P.A.C.R. 6(a). The version of Public Access Rule 6 in effect at the time father filed his request contains a specific exemption applicable to records in abuse prevention proceedings:

The public does not have access to . . . [a] complaint and affidavit seeking an order of protection pursuant to 15 V.S.A. §§ 1103, 1104, 12 V.S.A. §§ 5133, 5134, or 33 V.S.A. § 6931 until the defendant has an opportunity for a hearing pursuant to 15 V.S.A. § 1103(b) or § 1104(b) or 12 V.S.A. § 5133(b) or § 5134(B). A temporary order is publicly accessible.

V.R.P.A.C.R. 6(b)(9).<sup>\*</sup> The plain language of this rule indicates that the complaint and affidavit only become publicly available after the defendant has the opportunity to be heard. See Until,

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<sup>\*</sup> Public Access Rule 6(b)(9) was amended in April 2023 to clarify that if temporary relief is denied, and the plaintiff does not pursue the case, the complaint, affidavit, and order denying

Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/until> [<https://perma.cc/T4EZ-6SN2>] (defining “until” as conjunction of “up to the time that” and “up to such time as”). If the defendant never gets the opportunity for a hearing, the complaint and affidavit do not become public. Here, mother was denied emergency relief and did not ask the court to hold a hearing on the complaint. See V.R.F.P. 9(e) (providing that when plaintiff is denied emergency relief, “within 7 days after entry of the denial on the docket, he or she may request that the court hold a hearing on the complaint after notice to the defendant”); V.R.C.P. 80.10(e) (stating same). Accordingly, her complaints and affidavits are exempt from public access under the rule.

¶ 7. Although father argues that “he is no ordinary member of the public” and should therefore be granted access, the definition of “member of the public” under these rules “means any individual, group, or entity, including the print or electronic media or their representatives, who seeks access to any judicial-branch record.” V.R.P.A.C.R. 2(v) (quotation marks omitted). In seeking access to the complaint and affidavit under the Public Access Rules, father has sought access as a member of the public and is therefore beholden to its restrictions.

¶ 8. Father argues that as the defendant in the RFA proceedings, he was entitled to access because he was a party. Public Access Rule 5(b) provides, “[a] party in a case has access to records in that case that are not publicly accessible unless a restriction on access specifically applies to the party.” We conclude, however, that the exception in Public Access Rule 6(b)(9) applies to defendants as well as members of the public. The purpose of the RFA statute is to protect victims of domestic violence. See Rapp v. Dimino, 162 Vt. 1, 4, 643 A.2d 835, 836 (1993). Consistent with this purpose, Public Access Rule 6(b)(9) prevents defendants and others from accessing a complaint or affidavit if emergency relief is denied, to protect plaintiffs from

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relief remain not publicly accessible. Vermont Judiciary, Order Promulgating Amendments to Rules 6(b)(9) and 11(c) of the Vermont Rules for Public Access to Court Records, <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATED-VRPACR6%28b%29%289%29and11%28c%29--STAMPED.pdf> [<https://perma.cc/62CH-63KW>].

recrimination by domestic partners who have been accused of abuse. It also, as father notes, protects defendant from reputational damage by preventing the public from accessing the information until after the defendant has been notified of the allegations and been able to respond. See Reporter’s Notes, V.R.P.A.C.R. 6 (“The Reporter’s Notes to the original rule indicate that the intent was that such records should not be open to the public until the defendant has had an opportunity to contest the allegations in the complaint and affidavit.” (quotation omitted)). Granting a defendant automatic access to an unsuccessful complaint and affidavit would undermine the protective purpose and potentially expose victims to further danger. We therefore conclude that the trial court properly denied father—as a member of the public and as a party to the case—access to the complaint and affidavit under Public Access Rule 6(b)(9).

¶ 9. We are unpersuaded by father’s argument that he should have been initially served with the complaint and affidavit under Vermont Rule for Family Proceedings 9(a)(1) and 15 V.S.A. § 1105(a). Family Rule 9(a)(1) states, “[e]xcept as provided in this rule or by statute, the Rules of Civil Procedure shall apply to actions to prevent abuse,” and 15 V.S.A. § 1105(a) reads in relevant part, “[a] complaint or ex parte temporary order or final order issued under this chapter shall be served in accordance with the Vermont Rules of Civil Procedure.”

¶ 10. However, each of mother’s RFA requests were for ex parte emergency relief, which the Family Rules further regulate and distinguish procedurally from ordinary civil proceedings. For example, Family Rule 9(c) reads, “[t]emporary orders may be issued ex parte, without written or oral notice to defendant or defendant’s attorney, upon motion and affidavit and findings by the court as required by 15 V.S.A. § 1104,” thereby carving out a clear exception to the ordinary notice requirements. The rule is based on the statute, which contains similar language. 15 V.S.A. § 1104 (“In accordance with the Vermont Rules of Civil Procedure, temporary orders under this chapter may be issued ex parte, without notice to the defendant, upon motion and findings by the court that the defendant has abused the plaintiff or the plaintiff’s children, or both.”). The purpose

behind this procedure is clear: it allows a victim of domestic violence to obtain immediate relief through an emergency order without alerting the defendant, who might otherwise seek to inflict revenge or to stop the victim from seeking help. If and when a temporary order is issued, the defendant is subsequently notified by service and given an opportunity to defend against the complaint. See V.R.F.P. 9(f).

¶ 11. However, when, as here, a request for an ex parte RFA is denied, “the judge shall record the reasons for the denial in writing and shall give the written denial to the plaintiff.” V.R.F.P. 9(e). Although the drafters could have included the defendant to an ex parte RFA request in this provision, Family Rule 9(e) explicitly limits the court to giving the written denial to the plaintiff. See Northfield Sch. Bd. v. Wash. S. Educ. Ass’n, 2019 VT 26, ¶ 15, 210 Vt. 15, 210 A.3d 460 (“We presume that the [drafters] chose [their] words advisedly . . .”). A plaintiff who is denied relief then has the right to “request that the court hold a hearing on the complaint after notice to the defendant.” V.R.F.P. 9(e). The plain language of this rule indicates that the request for a post-denial hearing is the event that would trigger notification to the defendant; there is no requirement in the Family Rules or Title 15 that the ex parte RFA defendant be provided with notice if the plaintiff declines to request such a hearing. We therefore reject father’s claim that Public Access Rule 6(b)(9) is inconsistent with his right to notice under the rules and statute.

¶ 12. Father finally argues that the family division should have followed the procedure set forth in Public Access Rule 9 and assessed whether the potential harm from denying father’s access to the records would overcome the exception established in Public Access Rule 6(b)(9). Public Access Rule 9(c) reads,

As provided in this rule, the court may grant access to all or part of a record that is not publicly accessible. A motion seeking such relief may be filed by any party, or a person or entity not otherwise entitled to access. . . .

(1) Following notice to all parties . . . and opportunity for hearing, the court shall issue its decision and order granting or denying the

motion for access, in whole or in part, subject to the requirements and standards set forth in Rule 9(a)(4)-(5).

¶ 13. However, father did not file a motion with the trial court under Public Access Rule 9(c) requesting relief in the form of access to case records that are not publicly available. The full sum of his filings with the family division in this case was a one-page email requesting the records and a one-page notice of appeal from the clerk's denial, neither of which reference Public Access Rule 9(c). Father stated at the hearing that he was appealing under Public Access Rule 6(h), which applies to public records requests, and is a separate procedure from that outlined in Public Access Rule 9. Father did not mention Public Access Rule 9 during the hearing on his records request on July 25, 2022, or indicate that he wished the court to analyze the factors set forth in that rule.

14. Because father failed to raise this issue with the trial court and raises it for the first time on appeal, we decline to consider it. See In re Mullestein, 148 Vt. 170, 175, 531 A.2d 890, 893 (1987) (“Issues not presented below will not be considered on appeal.”). Similarly, we will not consider father's arguments that he has First Amendment and common-law rights to access the records, because he did not raise them below. See Miller-Jenkins v. Miller-Jenkins, 2010 VT 98, ¶ 28, 189 Vt. 518, 12 A.3d 768 (“Failure to preserve issues below results in waiver, even of constitutional issues.”).

Affirmed.

FOR THE COURT:

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Associate Justice