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MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ZACHARY ALEXANDER LUDWIGSEN,)
)
 Petitioner,)
)
 v.)
)
 VICTORIA BLAIR LUDWIGSEN,)
)
 Respondent.)
 _____)

Case No. 2D20-1228

Opinion filed December 2, 2020.

Petition for Writ of Certiorari to the Circuit
Court for Collier County; Scott H. Cupp,
Judge.

Jason K. Castro of Lucarelli Law, Naples,
for Petitioner.

Linda K. Yerger, Naples, for Respondent.

MORRIS, Judge.

Zachary Alexander Ludwigsen, the father, petitions for a writ of certiorari to quash the order of the trial court compelling him to submit to a psychological examination for purposes of determining whether he is able to care for his minor daughter. The order was entered during the pendency of a dissolution action between the father and the child's mother, Victoria Blair Ludwigsen. Following an incident that occurred in late November 2019, when the father was transferring the child to the

mother for purposes of timesharing, the mother filed a motion for the compelled psychological examination based in part on what occurred during the November 2019 incident and on allegations that the father suffered from mental health issues. During that incident, the father called law enforcement and when the responding officer arrived, he determined that the father was suffering from an anxiety attack and was in a "practically paralyzed" state, barely able to communicate. The officer told the trial court at a hearing that he would not have allowed the father to leave with or without the child while he was in such a state due to the officer's fear for the father's and child's safety. And the mother alleged in her motion that the officer had told her not to let the father be alone with the child and that the officer had concerns about the father's ability to care for the child during an emergency. After conducting a hearing, the trial court entered its order concluding that there was good cause for a psychological examination to determine whether the father was able to care for the child during episodes such as the one that precipitated the mother's motion.

In his petition, the father argues several ways in which the trial court departed from the essential requirements of the law, and he contends that because his privacy rights are implicated by the compelled psychological examination, he has established irreparable harm. We find merit in only one of his arguments in this proceeding.

An order compelling a psychological examination is reviewable by certiorari because the alleged harm will not be remediable on appeal. See Vo v. Bui, 680 So. 2d 601, 601 (Fla. 2d DCA 1996). However, the father is also required to establish that the trial court departed from the essential requirements of the law.

As to the father's first issue, he contends that there were no verified allegations in the mother's motion and that the trial court did not explicitly find that his mental health was in controversy or that there was sufficient good cause to compel the psychological examination. Admittedly, the order under review failed to explicitly state that the father's mental health was in controversy, and it referenced the trial court's uncertainty about whether the father's mental condition impacted his ability to care for the child during episodes like the one that resulted in the motion being filed. Citing to Florida Family Law Rule of Procedure 12.360 and relevant case law, the father contends that the order was a departure from the essential requirements of the law because it did not clearly establish that the "in controversy" and "good cause" requirements were met. See Fla. Fam. L. R. P. 12.360; Nobbe v. Nobbe, 627 So. 2d 59, 59-60 (Fla. 2d DCA 1993); Oldham v. Greene, 263 So. 3d 807, 811-12 (Fla. 1st DCA 2018).

However, this is not a situation where the trial court entered an order without making any findings. Cf. Oldham, 263 So. 3d at 812. Rather, the trial court made factual findings in the order by incorporating the testimony of the law enforcement officer who arrived and assisted during the precipitating incident as well as the testimony of the father himself. And when reviewing orders compelling psychological examinations, this court and others have looked to both the record and factual findings made in the order under review to determine whether the "in controversy" and "good cause" requirements have been established. See, e.g., Williams v. Williams, 550 So. 2d 166, 167-68 (Fla. 2d DCA 1989) (reviewing both the order under review and the record to determine whether "in controversy" and "good cause" requirements were met); Barry

v. Barry, 159 So. 3d 306, 307 (Fla. 5th DCA 2015) (noting that although the order did not specifically state that the petitioner's mental condition was in controversy or that the wife demonstrated good cause, the court made factual findings that supported those conclusions); Wade v. Wade, 124 So. 3d 369, 375-76 (Fla. 3d DCA 2013) (noting that the court would examine the requesting party's emergency motion and the admissible evidence presented at the hearing to determine if the other party's mental condition was directly and genuinely in controversy and that there was good cause for the examination). We conclude that based on the allegations made in the mother's motion—which was largely predicated on the November 2019 incident—and on the factual findings contained in the trial court's order, the trial court did not depart from the essential requirements of the law when it ordered the father to submit to a psychological examination. Yet because a new order will need to be entered for another reason, "we note that upon remand, the court should include a specific finding that [the father's] mental condition is in controversy." See Barry, 159 So. 3d at 307.

The father contends that the order was inadequate because it failed to specify the parameters of the examination, such as time, manner, conditions, and scope of the examination and the person or persons who are to conduct the examination. Because rule 12.360 requires a trial court to specify certain parameters for psychological examinations, an open-ended order that does "not provide specific directives regarding the psychological evaluation depart[s] from the essential requirements of law." Oldham, 263 So. 3d at 814. This means that an order that fails to identify the length of examination, the type of testing to be performed, or even whether the testing is limited to routine psychological methods is deficient. See id. (citing Barry,

159 So. 3d at 308). "The failure of an order to specify the manner, conditions, and scope of an examination creates a 'carte blanche' scenario for the psychologist to perform any type of psychological inquiry, testing, and analysis." Id. (quoting Maddox v. Bullard, 141 So. 3d 1264, 1266 (Fla. 5th DCA 2014)). "[I]f the trial court does not know the particular examinations that the psychologist plans to conduct, it should not grant the request." Barry, 159 So. 3d at 308.

Here, two orders were entered. The original order stated that the test would be performed "at the [facility] where the father presently testified he receives counseling." No date or time was specified though the mother was ordered to obtain on an expedited basis a transcript of the law enforcement officer's testimony to provide to the evaluator. The order also failed to specify the person who would be conducting the testing. Regarding scope and purpose, the trial court specified that the examination was

to determine what mental condition the Father suffers and render an opinion as to the impact it has on the Father's ability to care for the child, i.e., his ability to communicate, make judgments, drive an automobile, act in emergencies, and in general perform the many mental and physical acts required in normal daily life.

While it appears that the trial court at first attempted to narrow the scope to issues related to the incident that precipitated the mother's motion, the ultimate broadness of the order results in an open-ended directive. The order fails to specify the type of test, the length of the testing, or even whether such testing is limited to routine psychological methods. Further, the order directed the evaluator to examine whether the father can perform general activities of daily life which may not even be related to his ability to care for the child.

The amended supplemental order was entered on the basis that the trial court had learned that the facility named in the first order did not conduct psychological examinations. The amended order thus directed that the examination should be conducted at a different psychological practice. Again, the amended order fails to detail who will be conducting the testing, the length of the testing, the type of testing, or whether the testing is limited to routine psychological methods. We acknowledge that the amended order noted that examinations had been currently suspended due to the Covid-19 pandemic and that the examination should be conducted when scheduling resumes, so we do not fault the trial court for not specifying a time and date of the examination.

However, because both the original and amended orders fail to contain several other required parameters, they constitute a departure from the essential requirements of the law and we must grant the father's petition, in part, so that the trial court can specify the scope of the testing. See Oldham, 263 So. 3d at 814 (concluding that failure of trial court to specify certain parameters of testing constituted departure from essential requirements of law); Barry, 159 So. 3d at 308 (denying certiorari in part because in controversy and good cause requirements were supported by trial court's factual findings but granting certiorari in part because order failed to specify scope of testing).

Within the order under review, the trial court determined that the mother was entitled to an award of attorneys' fees, while reserving jurisdiction on both the amount and the apportionment of costs. The father contends that this too was a departure from the essential requirements of the law because no authority was cited to

justify such an award and because the parties entered into a marital settlement agreement wherein they each agreed to be responsible for their own fees and costs.

However, an order that merely determines entitlement to attorneys' fees "is not reviewable by certiorari where it has not been reduced to a fixed amount because the determination of entitlement does not itself establish material harm or irreparable injury." Parrish v. RL Regi Fin., LLC, 194 So. 3d 571, 571 n.2 (Fla. 2d DCA 2016); see also Boardwalk & Baseball, Inc. v. City Ctr. Bonds, LLC, 161 So. 3d 402, 402 (Fla. 2d DCA 2014). Thus we dismiss the portion of the father's petition that addresses the award of attorneys' fees to the mother for lack of jurisdiction. See Parrish, 194 So. 3d at 572; Boardwalk & Baseball, Inc., 161 So. 3d at 402.

We also dismiss the portion of the father's petition wherein he contends that the trial court departed from the essential requirements of the law in failing to rule on the mother's request for the father to submit to a substance abuse evaluation and the father's request for attorneys' fees related to that issue. Our review of the transcript of the hearing reflects that the mother abandoned that request and that the trial court struck that issue from consideration. Thus there was no pending request for a compelled substance abuse evaluation, and the father cannot demonstrate irreparable harm from the trial court's failure to rule on that issue. Consequently, we dismiss that portion of the petition for lack of jurisdiction. See Dep't of Children & Family Servs. v. J.G., 67 So. 3d 251, 253 (Fla. 2d DCA 2010) (recognizing that "relief by means of certiorari is not available when there is no irreparable harm" and dismissing petition on that basis).

Petition denied in part, granted in part, and dismissed in part; order
quashed in part.

BLACK and SMITH, JJ. Concur.