SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2762-20

JOSEPH F. HAYES,

Plaintiff-Respondent,

v.

CHRISTINA M. STALLINGS,

Defendant-Appellant.

Submitted April 4, 2022 – Decided April 22, 2022

Before Judges Fasciale and Firko.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FM-08-0718-16.

The Law Office of Louis G. Guzzo, attorneys for appellant (Louis G. Guzzo, on the brief).

Henry M. Weinfeld, attorney for respondent.

PER CURIAM

In this post-judgment matrimonial matter, defendant Christina M. Stallings appeals from an April 23, 2021 Family Part order denying her motion

to modify the parties' parenting time schedule and child support obligations. The judge found there were no substantial change of circumstances justifying a modification of parenting time, and therefore there was no need to interview the parties' children. On the issue of child support, defendant contends the judge erred in not recalculating her child support obligation as of March 2020 because plaintiff was no longer incurring after care costs due to virtual learning as a result of the COVID-19 pandemic. For the reasons that follow, we affirm the order under review insofar as it pertains to custody and parenting time because we agree with the Family Part judge that defendant failed to establish a prima facie case of changed circumstances. As to the child support aspect of defendant's appeal, since we were not provided with a complete record, we dismiss this issue without prejudice to defendant's right to re-file a motion in the Family Part.

I.

We summarize the pertinent history of this litigation. The parties were married in November 2004 and divorced in January 2017. Their final judgment of divorce (FJOD) provided the parties would share legal custody of their four children born in 2006, 2007, 2010, and 2011. The mediated consent order incorporated into the FJOD stated the parties "were not able to agree to the

residential custodian designations." Therefore, neither defendant nor plaintiff Joseph F. Hayes were designated as the parent of primary residence (PPR) or the parent of alternate residence (PAR). Defendant also has a fifth child; a son from a previous marriage, who was twenty years old at the time relevant to this appeal, who resided with her. The FJOD required plaintiff to pay $230 per week in child support to defendant.

The FJOD also provided that defendant would remain in possession of the former marital residence (FMR), which was plaintiff's pre-marital asset. Plaintiff waived his legal and equitable rights to the FMR, leaving defendant as the sole owner. A home equity line of credit (HELOC) in plaintiff's name encumbered the FMR. The FJOD stipulated defendant "was supposed to pay off the HELOC in full, if unable to refinance it, or indemnify [plaintiff] for any loss associated with [her] non-payment of [the] loan" before January 18, 2018.

In 2018, defendant's son "was dealing drugs" out of the FMR in the presence of one of the parties' younger children. The record shows "[t]he police found deplorable conditions in the home when they entered to arrest" defendant's son, such as animal feces on the floor, black smog on the ceiling, and old food and trash throughout the home. As a result, plaintiff filed a motion to change custody on September 11, 2018. On December 5, 2018, the parties entered into

a consent order, which provided plaintiff would "have parenting time every Wednesday and Thursday and every other weekend," defined as Friday after school until drop off of the children at school on Monday morning. The consent order also provided that "[d]efendant's parenting time [was] Monday and Tuesday and every other weekend." Neither party was designated as the PPR.

In February 2019, the children's school principal, Raymond Anderson, made a referral to the Division of Child Protection and Permanency (the Division). Anderson reported the children's clothing was saturated with kerosene, causing them to suffer nausea and headaches, which required them to be evaluated at an emergency room. Defendant told Anderson that "she spilled gasoline while she filled her tank," in an effort to explain what happened. However, the Division's investigation revealed defendant did not pay her utilities bill and had no gas, heat, hot water, or electricity at the FMR "for extended periods of time." Consequently, defendant was using kerosene heaters in the home. The Division implemented a safety plan to address the issues at defendant's home.

On July 8, 2019, plaintiff filed a second motion to modify the custody arrangement of the children. On November 6, 2019, another consent order was entered by the Family Part judge. Plaintiff was designated PPR. The consent

order granted defendant "parenting time on Mondays and Tuesdays after school through [7:00 p.m. and] every other weekend from Friday after school until Sunday at" 7:00 p.m. She was ordered to drop off the children at plaintiff's residence on "Monday and Tuesday eves." Plaintiff was to "pick up [the] children at defendant's residence 'curb-side' on Sundays." The parties were ordered to exchange financial information and recalculate child support. If no agreement was reached on a new child support amount, the parties agreed to submit the issue to the judge for a determination.

On June 2, 2020, defendant filed a motion to transfer residential custody of the children from plaintiff to her and be designated the PPR. In the alternative, defendant requested the judge "interview the children to determine where they wish[ed] to reside" or schedule a plenary hearing. In support of her motion, defendant argued there was a substantial change in circumstances since the November 2019 consent order was entered because she moved from the FMR into a home more suitable for raising the children. In addition, defendant claimed plaintiff had "anger issues," and that he and his wife harassed and verbally and physically abused one of the children necessitating the Division's involvement. In her moving certification, defendant described several instances

illustrating how plaintiff and his wife's alleged behavior caused the children's unhappiness living with them and their preference to live with defendant.

On June 25, 2020, plaintiff filed a notice of cross-motion requesting defendant's motion be denied. He also sought counsel fees. In his cross-moving certification, plaintiff denied defendant's contentions and stated the Division concluded the allegations against him and his wife were unfounded. Plaintiff reiterated the deplorable conditions found at defendant's home and noted two of their children were "diagnosed with scabies" on August 14, 2019. One child was diagnosed with "sinitus," which plaintiff attributed to the conditions at defendant's home. Plaintiff also stated defendant failed to seek medical attention for the children.

On July 10, 2020, the judge denied defendant's motion and denied plaintiff's cross-motion for counsel fees. In a written opinion, the judge found defendant's move did "not create a substantial change in circumstances because the home itself was not the impetus for [Division] involvement, but rather [d]efendant's failure to properly care for the parties' children." The judge highlighted defendant did not proffer any evidence in support of her motion, and therefore, she did not demonstrate a prima facie case to modify custody. In addition, the judge found "no cause to interview the parties' children" because

"[t]he adverse incidents [d]efendant described were investigated by [the Division] and [its conclusion was] unfounded." A memorializing order was entered.

On March 4, 2021, plaintiff filed a motion to enforce litigant's rights. He requested the judge enforce the FJOD and compel defendant to pay off the HELOC in full if she did not refinance the loan. Plaintiff also moved to enforce the custody and parenting time agreement established in the November 2019 consent order, and to order defendant to file amended 2019 and 2020 tax returns claiming only two of the children as dependents as set forth in the FJOD. Further, plaintiff requested that the parties be required to abide by the Children's Bill of Rights, and for fees incurred in filing his motion.

In response, defendant filed opposition to plaintiff's motion and a notice of cross-motion to establish a fifty-fifty custody schedule of alternating weeks; to prohibit plaintiff from modifying the custody arrangement; requiring the children's input relative to the parenting schedule; to compel plaintiff to abide by the holiday visitation schedule; to prohibit plaintiff from tracking her location; to prohibit plaintiff from listening in on her phone calls to the children; and to recalculate her child support obligation to "reflect that [he] is not incurring after-school/child care costs" due to COVID-19. Defendant asked the

judge to order plaintiff to submit an updated case information statement (CIS) so that a proper recalculation of child support could be made.

In support of her cross-motion, defendant certified as to many of the claims found in her previous motion, such as her demonstrating a substantial change of circumstances by relocating, and the alleged abusive behavior exhibited by plaintiff and his wife towards the children. Defendant stated the move to her new home "is critical since the only issue [plaintiff] was truly ever able to raise concerning the care of the children was the state of her home."[1]

In reply to defendant's opposition and cross-motion, plaintiff certified the HELOC's balance was $18,526.02, but Navy Federal Credit Union would "accept a pay-off of $8,340 within [thirty] days" or $202 a week for twelve months, totaling $10,500. Plaintiff also argued that COVID-19 does not constitute a permanent change of circumstances warranting a re-calculation of child support.

On April 23, 2021, the judge conducted oral argument on the motion and cross-motion via Zoom. The judge indicated on the record that the same issues raised in the previous motions before him as to custody modification were presented again. The judge emphasized "[t]here's been no change in

[1] The record reflects the FMR was foreclosed upon.

circumstances since that last order to warrant modification to . . . custody at this point in time." As to defendant's application to have the judge interview the children, the judge explained:

> I do understand the request for the [c]ourt to interview the children. And if the [c]ourt found that there was a substantial change in circumstances warranting a modification, then the [c]ourt may interview those children as it goes through the factors set forth in N.J.S.A. 9:2-4 to determine what the children's best interests are.
>
> But since the [c]ourt doesn't find that there's a change in circumstances, no reason to go forward and . . . move to the second step to determine what the best interests of the children are. The [c]ourt finds the best interests of the children are already put in place by virtue of the prior custody determination.

Following oral argument that day, the judge entered an order accompanied by a comprehensive ten-page memorandum of decision.

In his decision, the judge granted plaintiff's motion to enforce litigant's rights as to the HELOC and ordered defendant to amend her 2019 and 2020 tax returns to claim only two of the parties' children as dependents as set forth in the FJOD. The judge granted plaintiff's motion to require the parties to abide by the Children's Bill of Rights and ordered defendant to pay plaintiff $50 for his filing fees.

As to defendant's cross-motion, the judge denied her request for a shared fifty-fifty custody schedule of alternating weeks; denied her request to require the children's input as to the parenting time schedule; and granted her application to enforce litigant's rights to prohibit plaintiff from modifying their custody and parenting time agreement. In addition, the judge granted defendant's cross-motion to enforce the holiday visitation schedule; to prohibit plaintiff from tracking her location during her parenting time; and granted her request to prohibit plaintiff from listening in on her calls to the children. The judge denied defendant's cross-motion to recalculate child support and therefore, deemed her request to require plaintiff to submit a completed CIS moot.

Defendant raises the following issues on appeal:

> (1) the judge committed a critical flaw by not interviewing the children; and
>
> (2) the judge was required to recalculate child support since plaintiff was not incurring after-care costs.

II.

We have routinely recognized the Family Part's "special jurisdiction and expertise in family matters." Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83 (2016) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)); see also Avelino–Catabran v. Catabran, 445 N.J. Super. 574, 587 (App. Div. 2016) (recognizing

"review of the Family Part's determinations regarding child support is limited"). As such, we will defer to the Family Part's factual findings and decision unless such decision constitutes as an abuse of discretion, i.e.: (1) its "findings are 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice,'" Spangenberg v. Kolakowski, 442 N.J. Super. 529, 535 (App. Div. 2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)); (2) the court failed to consider all controlling legal principles, Gotlib v. Gotlib, 399 N.J. Super. 295, 309 (App. Div. 2008); or (3) the court entered an order that lacks evidential support, Mackinnon v. Mackinnon, 191 N.J. 240, 254 (2007).

"In custody cases, it is well settled that the court's primary consideration is the best interests of the children." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007) (citing Kinsella v. Kinsella, 150 N.J. 276, 317 (1997)); see also Bisbing v. Bisbing, 230 N.J. 309, 322 (2017) ("A custody arrangement adopted by the trial court, whether based on the parties' agreement or imposed by the court, is subject to modification based on a showing of changed circumstances, with the court determining custody in accordance with the best interests standard of N.J.S.A. 9:2-4." (citing Beck v. Beck, 86 N.J. 480-496 n.8 (1981))). "The court must focus on the 'safety, happiness, physical, mental and

moral welfare' of the children." Hand, 391 N.J. Super. at 105 (quoting Fantony v. Fantony, 21 N.J. 525, 536 (1956)).

N.J.S.A. 9:2-4(d) provides courts must order custody arrangements in accordance with the parties' agreement unless it is not in the best interests of the child. "Parties cannot by agreement relieve the court of its obligation to safeguard the best interests of the child." P.T. v. M.S., 325 N.J. Super. 193, 215 (App. Div. 1999) (citing In re Baby M., 109 N.J. 396, 418 (1988)). "While custody agreements should be taken into account by the court, a trial court must determine whether the agreement is in the best interests of the children." Ibid. (citation omitted).

It is also well-settled that a party seeking modification of an existing custody arrangement must demonstrate a change in circumstances. See R.K. v. F.K., 437 N.J. Super. 58, 62-63 (App. Div. 2014). To determine whether there are changed circumstances, the court must consider the circumstances that existed when the original custody order was entered. Sheehan v. Sheehan, 51 N.J. Super. 276, 287-88 (App. Div. 1958). After considering those facts, the court "may ascertain what motivated the original judgment and determine whether there has been any change in circumstances." Id. at 288.

The party seeking to modify custody, however, must first demonstrate a substantial change of circumstances, which will affect the children's welfare, before the Family Part will consider the best interests of the children anew. E.g., Hand, 391 N.J. Super. at 105. The Family Part will not reconsider the best interests of the children absent the moving party's prima facie showing of changed circumstances. See, e.g., Id. at 112. Nor may the Family Part conduct a plenary hearing where the moving party has failed to establish a prima facie showing that such a hearing is necessary. Id. at 106. The judge is required to conduct a plenary hearing only "when the submissions show there is a genuine and substantial factual dispute regarding the welfare of the children, and the [Family Part] determines that a plenary hearing is necessary to resolve the factual dispute." Id. at 105 (emphasis added); Jacoby v. Jacoby, 427 N.J. Super. 109, 123 (App. Div. 2012).

First, defendant argues the judge erred in declining to interview the children to ascertain where they preferred to live because it was in their best interests. Specifically, defendant asserted "since virtually every change of custody was premised on the condition of [her] home[,] the trial court could have questioned the children on the state of [defendant's] home." We disagree.

"[T]he decision whether to interview a child in a contested custody case is left to the sound discretion of the trial judge, which, as in all matters affecting children, must be guided by the best interest of the child." D.A. v. R.C., 438 N.J. Super. 431, 455-56 (App. Div. 2014). As the judge adroitly pointed out in his April 23, 2021 decision, defendant failed to establish a prima facie case of changed circumstances, and therefore, the court does not consider the best interests of the children anew. Hand, 391 N.J. Super. at 105. Moreover, the judge noted "[d]efendant's arguments turn on conclusory allegations forbidden by Lepis v. Lepis, 83 N.J. 138, 159 (1980)." And, defendant did not prove how moving to a new home affects the children's interest. The judge's decision was based upon substantial credible evidence in the record and is entitled to our deference. Donnelly v. Donnelly, 405 N.J. Super. 117, 126 (App. Div. 2009); Cesare, 154 N.J. 394.

Moreover, the clear language set forth in Rule 5:8-6 provides that "the judge's interview with the child is discretionary rather than mandatory." Pressler & Verniero, Current N.J. Court Rules, cmt. 1.4.3 on R. 5:8-6 (2022). The judge placed his reasons on the record for declining to interview the children and reasoned the same issues supporting defendant's motion to change custody advanced in June 2020 mirrored the issues raised in her March 4, 2021 motion,

leading to the order under review. The judge concluded defendant again failed to present a substantial change of circumstances justifying the need for him to interview the children.

We are satisfied that the judge was well within his discretion under Rule 5:8-6 to decline to perform an interview of the parties' children. 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 parties. 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). We see no reason to disturb the judge's decision declining to interview the children.

III.

Regarding defendant's second argument that the judge erred by not recalculating child support, the record is incomplete. Defendant merely contends on appeal, as she did before the Family Part judge, that the children's schedules changed in March 2020 and thereafter due to the COVID-19 pandemic. According to defendant, plaintiff was not incurring after care costs due to virtual learning from his home. Plaintiff does not specifically challenge defendant's contention but argued before the Family Part, and now on appeal,

that the children's virtual learning does not constitute a permanent change of circumstances, and therefore, child support does not need to be recalculated. Our review of this issue is impeded by the lack of a complete record on appeal.

Notably, defendant did not include a current CIS or her previous CIS's filed with the Family Part in her appendix as required by Rule 5:5-4(a)(4).[2] The rule provides for "motion attachments for modification or termination of alimony or child support not based on retirement," and states:

> When a motion or cross motion is filed for modification or termination of alimony or child support, other than an application based on retirement filed pursuant to N.J.S.A. 2A:34-23(j)(2) and (j)(3), the movant shall append copies of the movant's current [CIS] and the movant's [CIS] previously executed or filed in connection with the order, judgment or agreement sought to be modified. If the court concludes that the party seeking relief has demonstrated a prima facie showing of a substantial change of circumstances or that there is other good cause, then the court shall order the opposing party to file a copy of a current [CIS].

Under Rule 2:6-1(a)(1)(I), the appendix must contain "parts of the record . . . essential to the proper consideration of the issues." When such items are not provided, we may decline to address the issues raised, Cmty. Hosp. Grp., Inc. v.

[2] We glean from the record that in support of her motion to recalculate child support on March 23, 2021, defendant included an updated CIS and attached a copy of her 2020 tax return and three most recent paystubs. These documents were not included in her appendix.

Blume Goldfaden Berkowitz Donnelly Fried & Forte, P.C., 381 N.J. Super. 119, 127 (App. Div. 2005), or affirm the order on review, Soc'y Hill Condo. Ass'n, Inc. v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177 (App. Div. 2002). Furthermore, "[t]he appellate court may at any time on its own motion . . . dismiss [an] appeal." R. 2:8-2.

Because defendant failed to comply with Rules 2:6-1(a) and 5:5-4(a)(4), we must dismiss the second issue raised in her appeal relative to the recalculation of child support. See Pressler, cmt. 1.1 on R. 2:8-2 (permitting the appellate court "to dismiss an appeal because of procedural and technical defects"); see also In re Zakhari, 330 N.J. Super. 493, 395 (App. Div. 2000) (permitting dismissal of an appeal where procedural deficient "make it impossible for [this court] properly to review [a] matter"). The dismissal of this aspect of defendant's appeal is without prejudice to her refiling a motion in the Family Part. We express no opinion as to what the outcome of the motion should be.

In sum, we discern no error in the custody and parenting time determinations made by the judge or his decision not to conduct in camera interviews of the children, and we affirm the April 23, 2021 order. We dismiss defendant's appeal without prejudice as it relates to recalculation of child

support to adjust for after care costs in light of the COVID-19 pandemic. To the extent we have not addressed defendant's remaining arguments, we are convinced they lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed in part, dismissed in part.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION