SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5548-14T3

RODRICK L. HAMPTON,

Plaintiff-Appellant,

v.

JENNIFER P. CASSESE,

Defendant-Respondent.

Submitted November 17, 2016 - Decided March 16, 2017

Before Judges Lihotz and O'Connor.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FD-07-4172-04.

Williams Law Group, LLC, attorneys for appellant (Brent DiMarco, of counsel and on the brief).

The Micklin Law Group, attorneys for respondent (Brad M. Micklin and Richard M. Muglia, on the brief).

PER CURIAM

Plaintiff Rodrick L. Hampton and defendant Jennifer P. Cassese share legal custody of two minor children. Defendant is the designated parent of primary residence and plaintiff is the

parent of alternative residence. This matter concerns the parties' disagreement regarding custody, parenting time, and the high school their older child should attend. Plaintiff appeals from the final July 1, 2015 Family Part order denying his motion to modify the custody order for the two children and to allow him to decide the path of the older child's secondary schooling. The order also awarded defendant counsel fees, after the judge concluded plaintiff's application demonstrated bad faith. On appeal, plaintiff submits several arguments challenging the judge's factual findings and conclusions drawn from established facts. He seeks reversal of the order. Following our review, we affirm in part and reverse in part.

I.

The facts are found in the motion record. These unmarried parents agreed, when their older child was two, to share joint legal custody. The August 6, 2004 order provided for the child's custody, designated plaintiff as the parent of alternate residence and defendant the parent of primary residence, scheduled parenting time, and set child support. A second order, filed on August 3, 2013, at a time when the parties had two children, adjusted child support and provided the parents would "work together to establish a parenting time schedule for both children." Although it is not entirely clear, it seems the parenting time schedule for the older

child remained as ordered in 2004 and a different schedule was followed for the younger child.

In the spring of 2015, as a self-represented litigant, plaintiff moved to modify the custody and parenting time schedules. Plaintiff and his third child, for whom he had sole custody, resided in Hillside with his mother. Using the designated court forms for non-dissolution matters, plaintiff requested to amend the custody order, seeking joint residential custody and equal parenting time of the older child and increased parenting time, including overnight parenting time, with the younger child. Finally, plaintiff desired direct involvement in choosing the older child's high school. More specifically, plaintiff asserted the older child should attend Science Park High School (Science Park), a competitive magnet school, within the Newark public school system.

It is undisputed the older child is an outstanding student, who expressed interest in pursuing a career in medicine. The parties originally agreed the older child would attend Abundant Life Academy (ALA), where the child completed eighth grade. Plaintiff asserted the child's abilities required he attend a school with a more challenging curriculum than ALA. In a later filed certification, he stated he attempted to discuss his educational concerns with defendant for more than a year; however,

she unfortunately refused to consider any school but ALA. Plaintiff suggested defendant asked teachers and parents of the older child's friends to suggest he stay at ALA.

Plaintiff began having the child complete applications for admission to other high schools, which he believed were better suited for the child's abilities and ambitions. As the motion was pending, plaintiff and defendant narrowed the search to two schools, Science Park and Immaculate Conception High School (Immaculate Conception), a parochial school in Montclair. Of those two, plaintiff believed the International Baccalaureate (IB) program at Science Park and its concentration in science and medicine would give their child the best opportunity to reach his dreams. The child's application to Science Park was selected as one of the incoming freshman class, limited to 124 students. When defendant declined to consider Science Park, plaintiff sought court relief.

As to custody, plaintiff stated defendant routinely interfered with his parenting time and rejected his thoughts, as illustrated by her insistence the child not consider Science Park. He asserted the older child desired to spend more time with him and the younger child was old enough for overnight visits.

Defendant opposed plaintiff's requested relief and filed a cross-motion compelling payment of child care costs, enjoining

plaintiff from making disparaging comments about her or discussing the litigation with the children, granting her the right to care for the children during plaintiff's parenting time if he were unable to do so (the right of first refusal), imposing sanctions, and awarding her attorney's fees.

Defendant initially used the court's standard form of pleadings, but retained counsel, who submitted her certification.[1] Defendant resides in Newark and insisted she, as the residential custodial parent, believed ALA is better suited for their older child than a Newark public school. She argued no changes in custody or parenting time should be made because plaintiff routinely violated the parenting time schedule and unilaterally acted when he believed she would object, such as taking the child out of school on a Friday to go to New York City. She attached her citizen's police report dated May 11, 2015, filed when the older child was not returned to her timely, on Mother's Day.

Additionally, defendant alleged plaintiff often acts irresponsibly with the children, stating he bought a video game, knowing defendant objected to its violent content. Further, defendant asserts plaintiff sometimes left the children with his

[1] Plaintiff certified the initial pleadings, including defendant and her attorney's certifications, although dated June 17, 2015, were not filed until after the June 21, 2015 hearing date.

elderly mother and left them for an hour at Dunkin Donuts with his friend, the store manager.

She asserted plaintiff disparaged her when speaking to the children and only filed the motion to harass her. She attached an October 2014 police incident report recording a "minor verbal [incident] over child custody." She maintains if there was a disagreement, such as the instant disagreement regarding the older child's school, she must be permitted to make the final decision. Her attorney filed a certification estimating he would spend thirteen hours on the matter and requested counsel fees at his rate of $395 per hour.

Apparently a hearing was held on June 22, 2015. The transcript of that proceeding is not included the record. The judge's order of even date is included and provided, "[f]or the reasons placed on the record" the matter was adjourned, at which time the child would be interviewed. Defendant was permitted to enroll the child in the school of her choice to "reserve his spot," and both parents were restrained from uttering disparaging remarks in front of the children, discussing the litigation with the children, and from "attempt[ing] to alienate" the children's affections.

Prior to the continued hearing date, defendant filed a supplemental certification objecting to plaintiff's request for increased parenting time for either child.[2]

Defendant determined Immaculate Conception served the child's best interests. She noted it was a smaller school, similar to ALA, with a low teacher to student ratio of 12:1; however, Science Park had a student enrollment of 700. Defendant identified Immaculate Conception's courses geared to the child's interest in medicine and noted the school awarded the child a scholarship.

Plaintiff's responsive certification recounted details of what he characterized as "a significant history of physical, verbal and emotional abuse" by defendant, who he maintained could not control her temper. He expressed his attempts over the years to work with defendant regarding the children and related counseling efforts he engaged in to try to stay together. He refuted defendant's claims he was uncooperative and acted unilaterally, listed his efforts to improve defendant and the children's home, and to aid defendant to achieve her online degree. He noted the Mother's Day incident in the police report occurred during his

[2] We observe defendant's submissions in this case, replicating plaintiff's appendix, seem contrary to the rules. See R. 2:6-1(a)(2) (prohibiting respondent's appendix to contain documents provided in appellant's appendix). The record contains six pages of defendant's certification, which does not include a signature page, suggesting a portion of the document may have been omitted.

designated parenting time when defendant decided because it was Mother's Day, the children must leave. Also, he attached his email communication stating defendant changed his parenting time with the younger child, by enrolling him in day care, and continued to reject plaintiff's requests the younger child spend the night at his home.

Plaintiff reiterated his view the opportunity presented by Science Park was important, so he reserved a spot for the child, then filed his motion. He noted defendant repeatedly refused to consider Science Park, without even looking at the school, solely because it is a public high school. After initially insisting on ALA, she finally agreed to consider Immaculate Conception and he knows she took the child to events at the school. He had not taken the child to Science Park.

On the July 1, 2015 return date, the trial judge heard oral argument from defendant, suggesting her papers were filed first,[3] then interviewed the older child in camera. Defendant argued plaintiff submitted his application in bad faith, as demonstrated by the enrollment in Science Park without her consent. Further, defendant argued there was no change of circumstances to justify a change in custody. Plaintiff rejected the notion he was

[3] The motion was initiated by plaintiff. Defendant filed a cross-motion.

motivated by bad faith, insisting it was only recently that defendant considered an alternative to ALA. Plaintiff conceded he would respect the child's decision to attend Immaculate Conception. Plaintiff then related facts, not recounted in his papers, regarding an alleged, recent physical altercation between the child and defendant, where she purportedly placed the child in a choke hold. Defendant immediately denied this assertion and the judge stated he would address this topic in camera with the older child.

The parties then left the courtroom and the judge interviewed the older child. Thereafter, the judge reported the child's comments, heard additional arguments, and rendered the order under review. The judge found no plenary hearing was necessary because plaintiff failed to carry his burden of proof to warrant a modification of custody. Further, the judge determined plaintiff did not demonstrate good faith in filing his application, found he had "clearly unduly influenced the child[,]" and commented "there is no doubt in my mind that this child wanted to be anywhere other than sitting at that counsel table with me today, talking about this stuff."

The judge's stated factual findings denying a modification of custody included plaintiff's purchase of the violent video game, leaving the children at Dunkin Donuts and with his elderly

mother, which is evidence plaintiff "goes behind [defendant's] back." Also, he stated "the fact that the child would like to spend more time with [plaintiff] . . . makes sense . . . when somebody is buying you gifts, taking you to fun places, that that is where you would love to be." The judge also declined to consider overnight time with the younger child, determining plaintiff did not demonstrate his ability to provide supervision and care for his children. He also found plaintiff's suggestion defendant choked the older child was not mentioned by the child, which called plaintiff's credibility into question.

Regarding secondary school choice, the judge found the child preferred attending Immaculate Conception, stating the child's

> emotions said to me that in his mind, he knows what he wants to do. And that is, go to Immaculate Conception. The way that he talked about the IB program clearly was [plaintiff] trying to influence the outcome of the event. The way that he spoke about knowing more people, the school being smaller, having more friends going there, having been there and liked the school, [and] not having seen Science Park all said to me that that really is the school of his choice.

Turning to the cross-motion, the judge ordered plaintiff restrained from enrolling the children in any school without defendant's consent, denied defendant's requests for work-related childcare costs, and enjoined both parties from making disparaging remarks. He also increased parenting time with the younger child

to two days and one weekend day every other week, and permitted defendant the right to care for the children during plaintiff's parenting time if he were not available to do so; overnight visits were denied. Finally, the judge awarded defendant $4,880 in attorney's fees, finding "it was inappropriate for [plaintiff] to arrange for the enrollment in Science Park."

Plaintiff filed his appeal from the July 1, 2015 order. The judge rendered a written supplemental opinion on August 26, 2015, pursuant to Rule 2:5-1(b), amplifying his findings.

II.

"The scope of appellate review of a trial court's fact-finding function is limited" because "findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 483-84 (1974)). This court defers to a trial judge's factual findings unless they are "so manifestly unsupported by[,] or inconsistent with[,] the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova, supra, 65 N.J. at 484 (citing Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). Also, "where the focus of the dispute is not credibility but, rather, alleged error in the trial judge's evaluation of the underlying facts and the

implications to be drawn therefrom," the traditional scope of review is expanded. Matter of Guardianship of J.T., 269 N.J. Super. 172, 188-89 (App. Div. 1993) (quoting Snyder Realty, Inc. v. BMW of N. Amer., Inc., 233 N.J. Super. 65, 69 (App. Div.), certif. denied, 117 N.J. 165, (1989)). However, challenges to legal conclusions, as well as a trial judge's interpretation of the law are subject to de novo review. Estate of Hanges v. Metro Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010); Finderne Mgmt. Co., Inc. v. Barrett, 402 N.J. Super. 546, 573 (App. Div. 2008), certif. denied, 199 N.J. 542 (2009).

On appeal, plaintiff first argues the judge's decision regarding the older child's secondary school failed "to consider the various classes offered at each school and no discussion of the academic benefits that Science Park or Immaculate [Conception] will provide to [the child]." Further, he asserts the judge also failed to consider the conduct of defendant.

When joint custodians disagree on the choice of school, the court decides the issue using the "best interest of the child" standard. Levine v. Levine, 322 N.J. Super. 558, 566 (App. Div. 1999). "It is axiomatic that the court should seek to advance the best interests of the child where [the] parents are unable to agree on the course to be followed." Asch v. Asch, 164 N.J. Super. 499, 505 (App. Div. 1978). When the court must determine the best

interests of a child by choosing a school, subjectivity is unavoidable. Levine, supra, 322 N.J. Super. at 567. In addition to quantifiable metrics such as "the age of its buildings, the number of computers or books in its library and the size of the gymnasium[,]" there are other factors which are "[e]qually if not more important" such as "peer relationships, the continuity of friends and an emotional attachment to school and community that will hopefully stimulate intelligence and growth to expand opportunity." Ibid.

Here, plaintiff's investigation determined the top two high schools, which could provide the type of education he believed was challenging for the child, were Science Park and Immaculate Conception. The two schools were academically excellent and addressed the child's interest in pursuing medicine. Science Park offered an IB program, but plaintiff did not provide proof how this supported his opinion "Science Park presented the best opportunity for [the child] to achieve" the goal of becoming a physician. There was no evidence to differentiate between the IB program at Science Park and the Advanced Placement/college credit courses offered by Immaculate Conception. The record evidence suggests the educational opportunities at the schools were comparable.

The judge also found the child was serious and a good student. The child knew friends who would be attending Immaculate Conception, as well as some of the teachers. The child also stated Immaculate Conception was across the street from a hospital where he could intern, and he liked the "feel" of the school. We conclude these findings gave proper weight not only to the subjective considerations impacting the social and comfort aspects associated with the child's attendance when determining whether the child should attend Immaculate Conception, but also the academic attributes of the school. Levine, supra, 322 N.J. Super. at 567.

Although we agree with plaintiff any suggestion a parent attempted to influence the child's school choice should not detract from the court's evaluation of the child's best interests, we do not agree the judge "rewarded defendant" for taking the child to Immaculate Conception. Rather, we conclude the factual support identified by the judge adequately and satisfactorily supports the conclusion he reached. On this issue, we reject plaintiff's allegation the judge abused his discretion or misapplied the law.

We also reject plaintiff's contention a plenary hearing was necessary to determine school enrollment. There were no disputes regarding each school's qualities and both were shown to suit the child's needs. Shaw v. Shaw, 138 N.J. Super. 436, 440 (App. Div.

1976) (holding a plenary hearing is only required when the submissions show there is a genuine and substantial factual dispute regarding the welfare of a child). In fact, plaintiff stated he would accept the child's choice of Immaculate Conception.

We turn to plaintiff's challenge to the denial of his request to modify custody and parenting time. The 2004 order governing custody and parenting time for the older child was entered when the child was two. Plaintiff suggests the parties now need a more structured schedule, which the judge denied.

A party moving to modify a custody or parenting order must first prove circumstances affecting the welfare of the child have changed since the entry of the custody order. Lepis v. Lepis, 83 N.J. 139, 159 (1980). The moving party bears the burden of proof and the court's primary consideration in making the evaluation is the best interests of the children. Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007). In this regard, our Supreme Court has explained: "The paramount consideration in child custody cases is to foster the best interests of the child. This standard has been described as one that protects the safety, happiness, physical, mental and moral welfare of the child." Beck v. Beck, 86 N.J. 480, 497 (1981).

The trial judge found plaintiff failed to present a change in circumstances affecting the child's welfare, stating:

> Based upon inconsistencies in [the child's] interview, plaintiff did not convince the [c]ourt that defendant used improper corporal punishment. Indeed, it was [plaintiff's] actions, including leaving the child alone for extended periods of time, that caused the [c]ourt concern. [The child] appears to be well-adjusted and is thriving in school. Nothing in the record suggests that his welfare is in peril.

We question the judge's view, limited to these facts, when considering the entire record. Plaintiff's certification, the child's interview, the passage of time, and the child's age and maturity suggest a review of parenting time is in order, necessitating a plenary hearing.

The parties have shared joint legal custody from the time each child was born. "Under a joint custody arrangement legal custody -- the legal authority and responsibility for making 'major' decisions regarding the child's welfare -- is shared at all times by both parents." Beck, supra, 86 N.J. at 486-87. See also N.J.S.A. 9:2-4(a)(2) (listing consultation between the parents with joint custody requires "making major decisions regarding the child's health, education and general welfare"); Pascale v. Pascale, 140 N.J. 583, 596 (1995).

Both parents have a solid relationship with the children, and each remains a regular and active part of their lives. The older child, now a teenager, expressed a desire to spend more time with

plaintiff. The younger child is no longer an infant and, as of the hearing date, reached the age the parties previously agreed was appropriate to commence overnight parenting time for the older sibling.

Plaintiff provided evidence of defendant's unilateral decision-making, notwithstanding his legal status. For example, the record contains information showing defendant, who has a relationship with the administration at ALA, instructed the older child's records not be released to plaintiff; yet legally he has every right to receive them. N.J.S.A. 9:2-4(a)(2). Plaintiff also certified the Mother's Day dispute resulted because it was his day for parenting time and defendant "just decided" it was time for the older child to be returned to her, which resulted because there is no specific holiday schedule. Defendant painted a different picture and alleged incidents suggesting plaintiff acted without her consent, such as purchasing a video game she disapproved of and having the older child miss a day of school.

In rejecting plaintiff's application for additional parenting time, the judge placed great emphasis on what he concluded was plaintiff's disregard of the children's welfare by leaving them alone or with an incapable caretaker. During the older child's interview with the trial judge, he commented on his grandmother sleeping while he was left in her care, yet this alone is

insufficient to support findings made by the judge. However, there is no evidence showing plaintiff's mother is infirmed or even elderly, and there certainly is no evidence she is incapacitated.

Many factual findings, stated as underpinning to the denial of plaintiff's request, were unsupported by the evidence and represent erroneous assumptions by the judge. These include: plaintiff left the children alone "multiple times"; plaintiff left the children "with inadequate supervision"; plaintiff's mother is infirm and incapable of caring for "two younger children running around the house doing Lord knows what and not being watched over"; and the friend who watched the children "alone in an urban setting Dunkin Donuts" who, as the store supervisor, was "obviously very busy working" and could not "keep an eye on two eight year olds." Further, unsupported is defendant's rejection of the older child's expressed desire to spend more time with his father, finding it resulted because plaintiff "buy[s him] gifts" and "take[s him] fun places."

Plaintiff testified he does not work outside his home and has provided care for both children on a regular basis during the week and on weekends. Defendant did not relate recent events which might call into question plaintiff's current parenting ability and decision-making, but opposed changing the schedules.

Another area the judge failed to fully examine is whether there is current conflict between the child and defendant. The judge rejected the issue because plaintiff's recitation of a physical altercation was not verified during the child's interview and thus found incredible. However, the judge ignored the child's account of an incident with defendant, who he said "was scratching me and stuff. And I was — I had, like, a big scar on my chest." Further, this same incident resulted in a police response after a neighbor's report. Perhaps this was an isolated event, perhaps not. In any event, the judge's focus on plaintiff's disputed assumed irresponsibility at Dunkin Donuts from five years ago pales in comparison to an altercation where defendant was yelling and scratched the child such that police were alerted, which occurred a few weeks earlier.[4]

As to the younger child, plaintiff averred defendant insists his parenting time must occur in her home, in accordance with a schedule started when the child was born. The schedule implemented years ago for this child and the older child may no longer best serve the children's current needs.

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[4] We are also aware plaintiff's pleadings state defendant was prescribed medication for emotional health issues. He also speculates defendant may not be diligent in taking her medicine. Defendant's pleadings do not comment on these areas, and there is no collaborating proof; but the issue is significant and must not be ignored when examining the children's best interests.

> The matter of visitation is so important, especially during the formative years of a child, that if a plenary hearing will better enable a court to fashion a plan of visitation more commensurate with a child's welfare, a plenary hearing must be required by the court even if the parties have waived it.
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> [Fusco v. Fusco, 186 N.J. Super. 321, 327 (App. Div. 1982).]

The parties have not been successful in reaching agreement, which is what prompted plaintiff's motion. The judge's decision to reinstate the existing schedule and order the parties "work together" on any changes begs the question.

Plaintiff's application requested a "detail[ed] visitation schedule including an increase in parenting time for my children that can be easily followed by [the parents] . . . without issue." He further sought a set schedule regarding holiday time and vacations. At the very least, plaintiff's assertions of difficulty or defendant's claims of late return of the children was the apparent disagreement when regular parenting time falls on holidays, the child's statements of conflict with defendant, and the mere passage of time, represent sufficient changes in circumstances to review parenting time first in mediation, R. 1:40-5(a)(1). Thereafter, if necessary, a plenary hearing to fully flesh out facts and circumstances affecting the children's best interests must be conducted. The need to hold a plenary

hearing is particularly compelling where there are material factual disputes raised by the parties, which cannot be resolved on conflicting certifications. See K.A.F. v. D.L.M., 437 N.J. Super. 123, 137 (App. Div. 2014) (noting when presented with conflicting factual averments on material issues, a court may not resolve those issues without a plenary hearing).

Accordingly, the denial of plaintiff's request to review parenting time and to conduct a plenary hearing are reversed. See id. at 138 (concluding the failure to conduct a plenary hearing where there are genuine issues of fact in dispute requires reversal and remand for such a hearing).

We turn to the award of attorney's fees. Rule 4:42-9(a)(1) authorizes a trial judge court to award attorney's fees and costs in family matters to permit parties with unequal financial positions to litigate on an equal footing. A counsel fee award is left to the sound discretion of the trial court, after consideration of the factors identified in Rule 5:3-5(c). This court will set aside a counsel fee award if we find "a clear abuse of discretion." Rendine v. Pantzer, 141 N.J. 292, 317 (1995). This matter presents such a case.

The fee awarded was based on the judge's perception plaintiff "has not demonstrated good faith in this application," resulting in his finding "under all of the circumstances, this . . . [wa]s

an application that need not have been made. It was inappropriate for the father to arrange for the enrollment at Science Park." Such findings are not supported by the record.

"[B]ad faith for counsel fee purposes relates to the conduct of the litigation . . . ." Mani v. Mani, 183 N.J. 70, 95 (2005). "Bad faith is not simply bad judgment or negligence, rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Borzillo v. Borzillo, 259 N.J. Super. 286, 292 (Ch. Div. 1992).

Here, plaintiff took steps to have the older child complete entrance examinations and applications for various high schools, and complete the enrollment in the magnet public school to save a spot once the child was accepted. Far from a smacking of bad faith, the record shows plaintiff's actions sought to benefit the child because defendant refused to even consider the issue. All evidence supports that ALA was insufficient to challenge the child's intellectual needs, yet defendant, as shown by her first filing, insisted ALA was the only school the child should attend. When the matter reached a hearing, defendant changed her position, accepting plaintiff's vision the child's educational needs required more. She then began advocating for the child's attendance at Immaculate Conception and expressed her rejection of any Newark public school, even Science Park.

In the interview, the child told the judge he did not "really like" ALA as it apparently was not challenging him. He also demonstrated knowledge of programs offered at both schools and stated defendant actually took him to events at Immaculate Conception and he was awarded a scholarship; he was never taken to visit Science Park.

These facts demonstrate plaintiff's motion was far from unnecessary; it served as the impetus for defendant to begin considering the most appropriate course for the child's secondary schooling. Contrary to the negative implications the judge attached to plaintiff's actions, plaintiff's persistence for more than a year and his motion seeking court intervention on the issue moved defendant to accept a change from what she wanted.

In Emma v. Evans, 215 N.J. 197 (2013), the Supreme Court reexamined the prior deferral to a parent of primary residence on the issue of changing a child's surname. Id. at 217-18. Noting "[t]he custodial parent, while enjoying an intimate living relationship with the child, does not have the sole relevant information on the subject," the Court further commented:

> Moreover, in a post-divorce setting, and absent an agreement between two parents sharing joint legal custody, it is far from clear that the custodial parent should be entitled to a presumption in connection with a rigorous application of a best-interests

> analysis to a request to change a child's surname.
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> [Id. at 218.]

A child's education is another area that is not a subject best left solely to the residential parent's discretion. See N.J.S.A. 9:2-4(a). Many variables impact such an evaluation, including a parent's own level of education and educational experiences, the understanding of varying curricula, college placement efforts by a school for a child so inclined, as well as the type of environment that would best advance the child's success. Therefore, plaintiff's motion raises an important issue and the need for court assistance to resolve this issue and overcome defendant's recalcitrance to discuss the subject.

Next, we are hard pressed to find support in this record for the judge's finding plaintiff exerted undue influence on the older child regarding the high school decision. The judge grounded his decision, in part, on the child's mention of the IB program at Science Park. However, the child also discussed specific programs offered at Immaculate Conception. He clearly stated both parents voiced opinions regarding the schools. Defendant actually had the child tour Immaculate Conception and applied for a scholarship. These efforts likely also influenced the child. We cannot

reconcile the judge's conclusory finding on this issue as evincing undue influence.

The judge further mentioned the child's recollection of the events at Dunkin Donuts as showing he was reminded of the facts by plaintiff. However, the Dunkin Donuts incident was raised by defendant in her second certification. We are not able to discern why it was believed plaintiff coached the child on this issue, especially in light of the child's statement both parents spoke to him about the interview.

Next, the judge linked the child's discomfort during the judicial interview to plaintiff's influence. Again, this is not explained. Most children are uncomfortable being taken to a courthouse to be interviewed by a judge, who is deliberating a dispute between the child's parents. This child was keenly aware only one parent's choice of school would succeed, and he acknowledged a desire not to disappoint either parent. Disquiet under such circumstances is not unusual, nor is relief when the judge told the child the decision was the court's to make.

Finally, the judge found plaintiff made "incendiary allegations of potential abuse," against defendant. While the child did not say defendant placed him in a choke hold as asserted by plaintiff, the child did relate defendant's yelling and that she scratched him in anger. In our view, this conduct speaks of

uncontrolled behavior that might lead to further adverse consequences. Such discord bears on the child's best interests.

We conclude the need to obtain a decision regarding the child's secondary schooling was integral to the child's best interests. Plaintiff's motion on this issue was necessary and proper. Our review fails to find the badges of bad faith the judge pinned on plaintiff. We reverse the order mandating he must pay defendant's counsel fees.

Finally, based on our opinion, which includes setting aside factual findings, as not supported by the evidence, most particularly the finding of a bad faith motive, we require the case be reassigned by the Presiding Judge to a different Family Part judge to conduct the remand hearing. See In re Baby M., 109 N.J. 396, 463 n.19 (1988) ("The original trial judge's potential commitment to [his] findings and the extent to which a judge has already engaged in weighing the evidence, persuade us to make that change." (citations omitted)).

In summary, we conclude the judge's order requiring the older child be enrolled in Immaculate Conception is supported by substantial, credible evidence and is affirmed. The order denying plaintiff's request for review of parenting time for both children is reversed, and the matter is remanded for a plenary hearing before a different Family Part judge to evaluate the disputed

facts and circumstances and to modify the aged orders in light of the current best interests of the children. We reverse the award of counsel fees to defendant as unsupported and an abuse of discretion.

Affirmed in part, reversed in part, and reversed and remanded in part.