SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1642-16T2

M.M.,

Plaintiff-Respondent,

v.

A.M.,

Defendant-Appellant.

Argued November 27, 2017 – Decided January 19, 2018

Before Judges O'Connor and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FM-03-0847-14.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the brief).

Dawn D. Kaplan argued the cause for respondent (Weinberg, Kaplan & Smith, PA, attorneys; Dawn D. Kaplan, on the brief).

PER CURIAM

Defendant A.M.[1] appeals from a Family Part order denying his request for a modification of the parenting-time schedule for the three children he shares with his ex-wife plaintiff M.M. We affirm.

I.

Plaintiff and defendant were married in 2002, divorced in 2015, and have three children: Sally, Alice, and Lara. Their May 2015 judgment of divorce incorporated a marital settlement agreement that stated the parties "agreed to engage the services of Dr. Janet S. Berson, Ph.D. as a court-appointed joint expert for a forensic evaluation to help resolve their disputes regarding custody/parenting time." In August 2015, the court entered a protective order limiting distribution of a report issued by Dr. Berson.[2]

The parties subsequently negotiated a custody and parenting time arrangement that was memorialized in a consent order. Defendant claims he agreed to the order in November 2015, but it was not filed by the court until February 23, 2016.

[1] We employ initials and pseudonyms to protect the privacy of the juvenile children.

[2] Plaintiff describes the report as a custody evaluation, but the report is not included in the record on appeal.

The consent order provides that the parties agree to share joint legal custody of the children, with plaintiff designated as the parent of primary residence and defendant the parent of alternate residence. The order included a parenting time schedule: defendant had parenting time every other weekend from Friday after school to Monday morning, and on alternate weeks defendant had parenting time Monday after school through Wednesday morning when defendant dropped the children off at school.

The parenting time schedule was "premised upon both parties' current work schedules," and an agreement the parties would "revisit the overnight schedule" if either of their work schedules changed. The order provided that if a change in either party's work schedule required the children's enrollment in the school aftercare program, the parent enrolling the children was responsible for the cost.

On February 18, 2016, defendant filed an order to show cause seeking transfer of residential custody of the children to him and supervised parenting time for plaintiff. In support of his application, defendant alleged plaintiff exhibited "unexplainable and explosive anger" toward Sally, then age thirteen. He claimed that in January 2016, plaintiff took Sally's cellphone and turned off the wifi in their home, thereby preventing the children from communicating with him. He also relied on a February 2016 incident

during which Sally kicked plaintiff as plaintiff drove Sally to school, plaintiff responded by slapping Sally across the face, and Sally in turn punched plaintiff and caused plaintiff to suffer a black eye. Defendant also argued Sally's report card from one marking period of the 2015-2016 school year showed she was "barely passing" her science course with a seventy-three point average, and had failed to complete her homework assignments. Defendant claimed the physical interactions between Sally and plaintiff, Sally's conduct and poor performance in school, and plaintiff's alleged anger management problems required a change in custody and that plaintiff's parenting time be supervised.

The court entered an order requiring plaintiff to show cause why an order should not be entered transferring custody of the children to defendant, requiring plaintiff to undergo counseling and awarding defendant counsel fees. The order further directed Sally to undergo counseling with a designated counselor within one week and the parties and their children to meet with Dr. Berson as soon as she was available. The court ordered the counselor and Dr. Berson to provide reports within one week, and reserved decision on plaintiff's requests for relief pending review of the reports.

In a February 29, 2016 letter, Dr. Berson reported Sally had "been struggling and . . . had episodes of kicking and hitting

[plaintiff], . . . [including t]he recent incident in which [plaintiff] suffered a black eye . . . ." Dr. Berson advised that defendant believed a seven-day-on, seven-day-off parenting time schedule was appropriate, but she was "not sure that the schedule [was] the problem." Dr. Berson stated it did "not seem . . . advisable to take custody from [plaintiff] . . . or even to make a major change in the parenting time." Dr. Berson thought "it essential that the difficulty be viewed as a family systems problem rather than labeling [Sally] or [plaintiff] as 'the problem.'"

Plaintiff filed a cross-motion for dismissal of the order to show cause. In May 2016, the court ordered that the parties could submit supplemental certifications. Defendant submitted a June 1, 2016 certification, advising the court that his and plaintiff's work schedules had changed and requesting a modification in the parenting time schedule based on the work schedule changes. Under defendant's new schedule, he worked seven consecutive days and then had seven days off. Plaintiff had returned to full time employment with hours of 8.30 a.m. to 5 p.m., Monday through Friday.

Defendant's certification also described plaintiff's refusal to make adjustments to the parenting time schedule and recounted the January and February 2016 incidents between plaintiff and Sally. Defendant further detailed his disagreements with

plaintiff over the choice of Sally's counselor, and his disagreement with Dr. Berson's assessment concerning the cause of Sally's issues. He repeated his claims that Sally's schoolwork was suffering, faulted plaintiff for Sally's issues, and argued changing the parenting time to a seven-day-on, seven-day-off schedule would remedy the problems.

Following the filing of defendant's reply certification, the court entered a June 24, 2016 order directing Sally to attend therapy with a therapist recommended by Dr. Berson, and requiring the parties to attend therapy if deemed essential by Dr. Berson. The order provided the parties with the option of participating in court-sponsored parenting time mediation, and allowed the parties to return to court for a determination on defendant's order to show cause, his request for a modification of the parenting time schedule and plaintiff's cross motion, following the court's receipt of confirmation Sally was in individual therapy and a final report from Dr. Berson.

In an August 1, 2016 supplemental certification, defendant repeated the claims made in his prior certifications, detailed issues related to Sally's therapy, and asserted that plaintiff would not permit him to see the children outside of the established parenting time schedule. Defendant asserted the requested

modification of the parenting time schedule would de-escalate tensions between plaintiff and Sally.

In a November 28, 2016 oral decision, the court noted that defendant first raised the issue of a change in the parenting time schedule in his discussions with Dr. Berson in February. The court observed that in her February 29, 2016 report, Dr. Berson stated she was not sure the source of conflict between Sally and plaintiff was the parenting time schedule. The court noted, however, Dr. Berson's February 29, 2016 report did not provide "specific direction" about the parenting time issue.

The court further explained the consent order's parenting time schedule was predicated on the parties' work schedules and "specifically provided that a change in the work schedules would trigger the opportunity for further review of defendant's parenting time." The court rejected plaintiff's contention that defendant failed to show a change in circumstances, finding the consent order permitting the parties to revisit the parenting time schedule based on work schedule changes. The court, however, found a change in work schedules did not "end . . . the discussion" about defendant's request for a parenting time modification.

The court determined it must consider "the extent to which the modification or retaining the status quo implicates the best interest of the children," and found defendant did not demonstrate

that a change in the parenting time was in the children's best interest. Relying in part on Dr. Berson's reports, the court found the parties' difficulties were the result of an inability to effectively communicate and that the parenting time schedule was not the cause of the problems defendant claimed required modification of the parenting time schedule. The judge denied defendant's request for a modification of the parenting time schedule.[3] This appeal followed.

II.

Defendant presents a single argument. He contends the court should not have denied his request for a modification of the parenting time schedule without an evidentiary hearing. We disagree.

Our scope of review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We accord deference to the family courts due to their "special jurisdiction and expertise" in family law matters. Id. at 413. The court's findings are binding so long as its determinations "are supported by adequate, substantial, credible evidence." Id. at 411-12. We will not

[3] The judge also denied defendant's other requests for relief and plaintiff's cross motion. The parties have not appealed from those denials. The court modified the parenting time schedule by granting defendant an additional overnight with the children each week during the summer months. Plaintiff did not appeal the court's order.

disturb the factual findings and legal conclusions unless convinced they are "so manifestly unsupported by or inconsistent" with the evidence presented. Id. at 412. However, we owe no deference to the court's interpretation of the law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The primary concern of a court confronted with a dispute over parenting time is the best interest of the children. See Sacharow v. Sacharow, 177 N.J. 62, 80 (2003); Wilke v. Culp, 196 N.J. Super. 487, 497 (App. Div. 1984). The court must consider "what will 'protect the safety, happiness, physical, mental and moral welfare of the child.'" Mastropole v. Mastropole, 181 N.J. Super. 130, 136 (App. Div. 1981) (quoting Beck v. Beck, 86 N.J. 480, 497 (1981) (internal quotation marks omitted). "Modification of [a parenting time] order may be appropriate if the moving party shows the modification requested in in the best interests of the child[ren]." Finamore v. Aronson, 382 N.J. Super. 514, 522 (App. Div. 2006).

"A judgment, whether reached by consent or adjudication, embodies a best interests determination." Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993). Accordingly, when a parent seeks to modify a parenting time schedule that parent "must bear the threshold burden of showing changed circumstances which would affect the welfare of the [child]." Ibid. The moving part must demonstrate a change in circumstances from those existing when the

prior parenting time order was entered. See, e.g., Donnelly v. Donnelly, 405 N.J. Super. 117, 127 (App. Div. 2009) (finding party moving for alimony modification must demonstrate changed circumstances since the preceding alimony order).

After a party makes a showing of changed circumstances relating to parenting time, the trial judge must determine if a plenary hearing is required. Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007). The court has the power "to hear and decide motions or orders to show cause exclusively upon affidavits." Shaw v. Shaw, 138 N.J. Super. 436, 440 (App. Div. 1976). However, "[i]t is only where the affidavits show that there is a genuine issue as to a material fact, and that the trial judge determines that a plenary hearing would be helpful in deciding such factual issues, that a plenary hearing is required." Ibid.; see also Lepis v. Lepis, 83 N.J. 139, 159 (1980) (holding the moving party must clearly demonstrate the existence of a genuine issue as to a material fact "before a hearing is necessary" because without such a standard, courts would impracticably be obligated to hold hearings for every requested modification). "[W]here the need for a plenary hearing is not so obvious, the threshold issue is whether the movant has made a prima facie showing that a plenary hearing is necessary." Hand, 391 N.J. Super. at 106. We review a court's

decision whether a plenary hearing is required for an abuse of discretion. Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015).

Applying these principles, we discern no abuse of discretion in the court's decision denying defendant's request for a modification of the parenting time schedule without an evidentiary hearing. The change in the parties' work schedules constituted changed circumstances under the marital settlement agreement permitting consideration of defendant's request for modification of the parenting time schedule. Thus, the court was required to decide if a plenary hearing was necessary to resolve genuine issues of fact as to whether a change in the parenting time schedule was in the children's best interest. See Lepis, 83 N.J. at 159.

Defendant's request for a change in the parenting time schedule is founded on his assertion that Sally's behavioral issues, her conflicts with plaintiff, and her schoolwork would improve if the seven-day-on, seven-day-off parenting time schedule was implemented.[4] He also more generally argues that the current parenting time schedule has a deleterious effect on all of his children. Defendant's conclusory allegations, however, are untethered to any competent evidence that Sally's issues, her

[4] Defendant argues in his brief that his certifications show "the children want[] increased time with" him, but his certifications do not include any such assertions.

disputes with plaintiff, and her school related problems are caused by the parenting time schedule, or would be remediated or resolved by a change in the schedule.

Defendant's consistent assertion that a change in the parenting time schedule is in Sally's and the other children's best interest is unsubstantiated and based on speculation and conjecture. The court did not abuse its considerable discretion by denying defendant's request for a plenary hearing. Defendant failed to present sufficient evidence supporting the request. See Lepis, 83 N.J. at 159 (finding court should disregard "[c]onclusory allegations" in deciding whether a plenary hearing is necessary); Hand, 391 N.J. Super. at 112 (finding movant's conclusory allegations did not require a plenary hearing on change of custody); cf., Dorfman v. Dorfman, 315 N.J. Super. 511, 518 (App. Div. 1998) (finding a plenary hearing was required where the court was presented with a certification and conflicting reports from a social worker and child counselor concerning whether the parenting time schedule was the cause of the child's behavioral issues).

Defendant's reliance on our decision in Faucett v. Vasquez, 411 N.J. Super. 108 (App. Div. 2009) is misplaced. In Faucett, we remanded for a plenary hearing on a request for a change of custody because the mother made a prima facie showing of changed

circumstances based solely on an impending year-long military deployment of the father, who was the parent of primary residence. Id. at 134. In reaching the decision, we noted "that but for [the father]'s impending deployment, [the mother]'s conclusory certifications would have been insufficient to warrant a plenary hearing," and determined that the anticipated year-long separation of the child from his father required a plenary hearing on the request for a change of custody to determine the child's best interests. Id. at 128-29.

Unlike in Faucett, defendant here does not present a change in circumstances that manifestly implicates the children's best interests. To the contrary, defendant seeks a change in a parenting time schedule based on his conclusory assertions that the change will ameliorate Sally's issues and otherwise will be in the other children's best interest.

In addition to defendant's failure to present evidence of a factual dispute bearing on whether it was in the children's best interest to modify the parenting time schedule, the court also considered Dr. Berson's February 29, 2016 report stating the parenting time schedule did not appear to be the source of Sally's and plaintiff's issues. Moreover, in defendant's certifications, he detailed Sally's ongoing therapy and stated "it is essential that Dr. Berson monitor [Sally's] therapy . . ." and communicate

with plaintiff's therapist "to insure that plaintiff is addressing the anger and physicality which led to [defendant's filing of the [o]rder to [s]how [c]ause . . . ." In other words, defendant acknowledged Sally's issues were complex and required therapy, and he endorsed Dr. Berson's role in monitoring and assessing Sally and plaintiff's progress.

We are satisfied the court did not abuse its discretion by denying defendant's request for a plenary hearing. The record shows Sally's and plaintiff's issues and disputes were complicated and were being addressed and monitored through court-ordered therapy and the involvement of Dr. Berson. Defendant failed to present any evidence the requested changed in the parenting time schedule would affect the resolution of the issues and disputes or inure to the benefit of the children's best interest.

Affirmed.