SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2937-16T4

FLORENTINO MENENDEZ,

Plaintiff-Respondent,

v.

COLEEN MENENDEZ,

Defendant-Appellant.

Submitted February 15, 2018 – Decided April 30, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FM-12-1553-15.

George J. Otlowski, Jr., attorney for appellant.

Senoff & Enis, attorneys for respondent (Ira M. Senoff, of counsel; Alfred M. Caso, on the brief).

PER CURIAM

In this post-judgment matrimonial matter, defendant (mother) appeals from a February 3, 2017 Family Part order denying her motion to name additional temporary caregivers, other than those

specified in the matrimonial settlement agreement (MSA), for the parties' two sons, born December 2007 and November 2010. Defendant argues that, by denying her motion, "the motion judge ignored or misinterpreted the plain language of the parties' MSA." We reverse and remand for further proceedings.

We glean the following facts from the record. The parties divorced on June 24, 2016. Under the MSA incorporated into their dual judgment of divorce, the parties shared joint legal custody of their two sons with "no designation of parent of primary residence." The agreement implemented a fifty-fifty shared parenting plan with a "regularly recurring parenting [time] schedule." According to the MSA:

> If one party is unable to exercise his or her parenting time, that party is solely responsible for child care expenses. As an alternative to private child care, the parties may leave the children under the care of family members only. If this arrangement becomes problematic or not in the children's best interests, either party is entitled to file for a modification of this provision, and seek appropriate relief from the [c]ourt.[1]
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> [Emphasis added.]

In the MSA, the parties agreed that its provisions were "fair, adequate and satisfactory as to each of them," and were "not the

[1] The underscored provision was hand-written into the otherwise typed document and initialed by both parties.

result of any fraud, duress, or undue influence exercised by either party or any third person upon either of them." They further acknowledged they had "entered into [the agreement] voluntarily," and each party had "been represented by counsel of their own selection."

On December 5, 2016, defendant filed a motion to add three of six proposed non-family caregivers to the MSA's list of people allowed to watch the children "for short periods of time," in the event plaintiff (father) is unavailable. In her supporting certification, defendant acknowledged that at the time, "the only persons permitted to act as alternate caregivers [were] plaintiff's mother and sisters[,] as [defendant had] no immediate family members living in . . . New Jersey to assist [her]." Defendant certified "[t]his ha[d] caused many hardships and problems" because she did not have "a positive relationship with . . . plaintiff's family members" after the divorce. Defendant claimed plaintiff's family members made "derogatory remarks" about her "directly to the children," thus "confus[ing] them" and putting them "in an awkward position."

Defendant also certified that plaintiff's family members did "not keep lines of communication open," as her phone "calls [were] sent directly to voice mail[,] and sometimes it [took her] several hours to receive a response," if she received one at all. Further,

defendant noted that having plaintiff's mother as the sole caregiver "increase[d] [the children's] exposure to danger" because she "does not speak English well," "does not have a driver's license," and "spends the majority of her time . . . with her three daughters," who reside in Clark, which is approximately nine miles from defendant's home. According to defendant, "[t]he time spent traveling could instead be used for productive and safe interaction with the children." Defendant certified that, in contrast, all six people she submitted as alternate caregivers live in close proximity to her home, had "committed to making themselves available . . . on short notice," and were "very close" to her and her sons, despite the fact that they "are not relatives."

Plaintiff opposed the motion and cross-moved for other relief not relevant to this appeal. In his supporting certification, plaintiff argued that "[d]efendant ha[d] not met the burden for . . . modify[ing] . . . the supervisor(s) for the children" because, despite claiming "the situation 'ha[d] caused many hardships and problems,'" she had not proved the existing arrangement had become "problematic and/or contrary to children's best interests." According to plaintiff, defendant's sister and mother passed away in 1997 and 2001, respectively, and her brother and father both reside in other states. As such, throughout the

marriage, his sisters and his mother, who lived with them, had "always provided [them] with child care assistance when needed." Plaintiff denied defendant's allegations that his siblings "malign [her] to anybody, especially the children," and claimed his sisters and mother, who he said "speaks fluent English, albeit with an accent," returned defendant's calls "at their first opportunity."

Plaintiff rejected defendant's proposed alternate caregivers, describing them as "strangers and miscreants," and noted he had "rejected them" when defendant previously submitted them "during the litigation." Plaintiff argued the MSA allows defendant to "use a daycare facility at her expense or [their] respective family members," and "[d]efendant was well aware of these limitations when [they] settled [their] litigation."

In her reply certification, defendant argued plaintiff was "asking the [c]ourt to take a rigid and inflexible view of the MSA" rather than "a practical reading." According to defendant, the MSA "[was] worded very broadly[,] and . . . envision[ed] the need for possible revision," upon a showing "that the arrangements previously agreed to ha[d] become 'problematic' or [was no longer in] the children['s] best interests." Defendant certified daycare was "problematic because [it] require[d] specific days and specific times[,] planned and paid for in advance," which was "not always possible" due to the nature of her work operating "a mobile

hairdressing business." Defendant also criticized plaintiff's suggestion that she should "use private day care[,] especially when he [was] not paying his child support in a timely manner."

On February 3, 2017, following oral argument, the motion judge denied defendant's application. The judge rejected defendant's argument that the pertinent provision of the MSA did not require a finding of "changed circumstances," and questioned how the agreement could "become problematic," or "no longer be in [the children's] best interest" unless "something ha[d] changed." The judge noted that "the extended family [becoming] dysfunctional to the point of disintegration" was not "some new occurrence" because that circumstance, and all others defendant relied upon in her motion, existed at the time the parties entered the divorce judgment. According to the judge, he was simply "enforcing the settlement agreement, not re-writing it, but . . . interpreting it the only way that it could possibly be interpreted" by requiring a "substantial change, such that the arrangement is problematic."

The judge concluded:

> [I]t [did] not appear based on either part[y's] certification that there ha[d] been any change in circumstances with respect to the [d]efendant's family since the parties entered into their [MSA]. In other words, the [d]efendant knew she had no family that was local and knew that [p]laintiff had various local family members. Thus, while [d]efendant [was] entitled to file for a modification

> pursuant to the parties' MSA, she ha[d] not established a substantial change in circumstances warranting a modification at th[at] time.
>
> The [c]ourt note[d] that while it [did] not appear that [d]efendant ha[d] any family that [could] serve as a caregiver for the children, the parties [were] both entitled to engage private child care. With respect to private child care, [d]efendant ha[d] also not certified as to any substantial change in circumstances warranting a modification of the parties' [M]SA. . . . The [c]ourt note[d] that neither [defendant's work schedule nor plaintiff's late child support payments] represent[ed] a substantial change in circumstances. Specifically, [d]efendant [did] not certify that her job ha[d] changed since entry of the [M]SA. Thus, she was aware of her obligation when she executed the [M]SA[.] Additionally, the [c]ourt [could not] find that needing to pay for daycare in advance, or scheduling daycare in advance to be a change in circumstances. Additionally, as the [M]SA require[d] the party using daycare to pay for it, the fact that [p]laintiff [was] allegedly late on his support payments [was] not a change in circumstances. In fact, [d]efendant never raised the child support issue until her reply certification. Thus, the [c]ourt [could not] find that "this arrangement [had become] problematic" such that a modification of the parties' MSA [was] warranted at th[e] time.

The judge entered a memorializing order, and this appeal followed.

Our review of the issue raised in this appeal is guided by well-settled principles. "Settlement of disputes, including matrimonial disputes, is encouraged and highly valued in our system." Quinn v. Quinn, 225 N.J. 34, 44 (2016). We apply basic

contract principles to matrimonial settlement agreements, though tempered by principles of equity. Id. at 45-46. Consequently, as with other contracts, we review de novo the trial court's interpretation of a MSA. Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011).

In our review, we "must discern and implement 'the common intention of the parties,'" the purpose they tried to achieve, and then "enforce [the mutual agreement] as written." Quinn, 225 N.J. at 46 (alteration in original) (first quoting Tessmar v. Grosner, 23 N.J. 193, 201 (1957); then quoting Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)). Our "role is to consider what is 'written in the context of the circumstances' at the time of drafting and to apply 'a rational meaning in keeping with the expressed general purpose'" of the contract. Sachau v. Sachau, 206 N.J. 1, 5-6 (2011) (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953)).

"[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result." Quinn, 225 N.J. at 45. "To the extent that there is any ambiguity in the expression of the terms of a settlement agreement, a hearing may be necessary to discern the intent of the parties at the time the agreement was entered and to implement that intent." Ibid.

"Therefore, 'fair and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed.'" Id. at 44 (quoting Konzelman v. Konzelman, 158 N.J. 185, 193-94 (1999)). Moreover, "a court should not rewrite a contract or grant a better deal than that for which the parties expressly bargained." Id. at 45. Absent inequity or unanticipated changed circumstances not addressed by the agreement, a court is obligated to enforce its terms when it was "entered [into] by fully informed parties, represented by independent counsel, and without any evidence of overreaching, fraud, or coercion." Id. at 55. Otherwise, "the court eviscerates the certitude the parties thought they had secured, and in the long run undermines [the judicial] preference for settlement of all, including marital, disputes." Ibid.

Here, we discern no ambiguity in the parties' agreement. The MSA clearly allowed defendant to seek a modification if the "arrangement" of "leav[ing] the children under the care of family members only" became "problematic" or was no longer "in the children's best interests." We agree with defendant that the motion judge misinterpreted the plain language of the agreement by requiring defendant to demonstrate a substantial change in circumstances in order to meet the "problematic or not in the children's best interests" standard the parties adopted in the

agreement. If the parties had intended to apply a "change in circumstances" standard to this provision, they would have done so, as they did in the provisions regarding alimony and spousal support.[2] The fact that they did not is a clear indication of their intent. Accordingly, we reverse and remand for the judge to determine whether the "arrangement" became "problematic" or was no longer "in the children's best interests," regardless of whether or not the circumstances that rendered it so existed when the parties executed the MSA.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

[2] As to alimony and spousal support, the MSA provided that plaintiff "waive[d] any and all rights to [such] support both now and in the future" and, in doing so, plaintiff "ha[d] considered the mandates of the cases of [Lepis v. Lepis, 83 N.J. 139 (1980)] and [Crews v. Crews, 164 N.J. 11 (2000)] and waive[d] the right pursuant to those cases to make an application for alimony predicated upon a change in circumstances."