SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0605-20

R.V.,

Plaintiff-Respondent,

v.

C.N.[1],

Defendant-Appellant.

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Submitted January 20, 2022 – Decided June 8, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FD-08-0099-21.

Patricia A. Darden, attorney for appellant.

Borger Matez, PA, attorneys for respondent (Peter M. Halden, on the brief).

PER CURIAM

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[1] We use initials to protect the parties' and their minor child's privacy interests. See R. 1:38-3(d).

Defendant C.N. appeals from a September 17, 2020 order granting plaintiff R.V.'s request to be named parent of primary residence (PPR) for school purposes. We affirm.

We discern the following facts from the record. The parties have one son, R.J. who was born in 2013. The parties were never married and separated shortly after R.J.'s first birthday. Following their separation, the parties agreed on joint custody and 50/50 parenting time.

At age three, R.J. began exhibiting behavioral problems. R.J.'s daycare reported that R.J. had physical outbursts resulting in hitting and biting, sometimes of other children. Despite both parents allegedly disciplining R.J. through spankings, on or around December 17, 2017, plaintiff called DCPP after seeing bruises on R.J. DCPP filed a complaint, and defendant's parenting time was suspended, making plaintiff R.J.'s sole legal and physical custodian. Defendant was required to complete a variety of parenting classes, anger management classes, therapeutic counseling with R.J., and co-parenting therapy with plaintiff. Defendant completed all her required services and alleged plaintiff did not go to the co-parenting therapy.

While acting in his capacity as sole custodian, plaintiff enrolled R.J. at South Harrison public school. On February 7, 2018, South Harrison proposed a

speech/language evaluation and a social history evaluation because R.J. was suspected of having a disability that was affecting his educational performance. Plaintiff consented to both evaluations. On September 26, 2018, the school implemented R.J.'s initial Individualized Education Plan (IEP).

On October 30, 2018, defendant's parenting time was fully reinstated. On November 29, 2018, the DCPP proceeding was dismissed. The parties once again had joint legal and physical custody and 50/50 parenting time.

In the fall of 2018, after being informed that R.J. was struggling with the kindergarten curriculum and had many outbursts, defendant sought professional help for R.J. Because the psychologist at South Harrison could only provide a list of outside services that might be available, defendant found Dr. Wendy Price, a specialist in children with emotional and behavioral issues at Delaware Valley Psychological Associates. The parties split the cost for R.J. to attend at first weekly sessions and then bi-weekly sessions. R.J. was required to attend summer school prior to entering first grade in 2019.

When R.J. started first grade, he fell behind in all areas. Although R.J. received speech therapy once a week, he fell further behind as the year progressed. On January 30, 2020, R.J.'s pediatrician, Dr. Megan Ann Williamson at Cooper Pediatric Care, diagnosed R.J. with ADHD, combined

type. In her report, Dr. Williamson recommended a 504 plan for R.J. and an expansion of R.J.'s speech therapy services.

The next day, defendant took the diagnosis to South Harrison and requested a 504 meeting. Once the Covid-19 crisis began, R.J. moved to remote schooling. On March 31, 2020, the school held the 504 meeting. The plan listed the following eleven accommodations[2]:

> 1. Use positive behavioral intervention techniques, including positive reinforcement.
>
> 2. Have a daily communication notebook. Re: Target behaviors.
>
> 3. Provide clear and simple directions. Have RJ repeat back directions.
>
> 4. Break assignments/tests into smaller parts.
>
> 5. Small group testing, extended time.
>
> 6. Reduce the number of homework problems without reducing the level or content of what is being taught.
>
> 7. Sensory Breaks — especially during writing.
>
> 8. Flexible Seating options.
>
> 9. Oral input (Sensory chews, sensory pencil toppers).

[2] Although South Harrison recommended these accommodations, it is not clear from the record whether they were actually implemented.

> 10. OT - Virtual Check Ins for the 19-20 SY * When school goes back in session, therapy sessions will be within the school day. *
>
> 11. OT — 25 visits small group for the 20-21 SY.

On March 31, 2020, South Harrison also reviewed R.J.'s IEP, which detailed R.J.'s speech and language issues and provided R.J. with a fifteen minute speech-language consultation monthly. Notably, the IEP did not implement a behavior intervention plan, supplementary aids, and services, or testing accommodations.

On June 17, 2020, the parties were informed that R.J. needed to repeat first grade. At a meeting on July 7, 2020, the principal informed the parties she was unaware R.J. was behind in school and stated R.J. should have been regularly tested and provided with services if he did not show progress. Frustrated with South Harrison, defendant investigated Mantua school district and discovered Mantua has in-house programs and services to assist R.J., which allegedly are not available at South Harrison. Plaintiff did not want R.J. to go to Mantua.

On September 2, 2020, plaintiff filed an emergent OTSC, requesting that he be appointed PPR to ensure that R.J. remained in South Harrison. An order dated September 2, 2020 found the OTSC was not emergent and ordered R.J. to

stay at South Harrison pending a hearing scheduled for September 17, 2020. The day before the hearing defendant filed a cross-motion, requesting that she be appointed PPR to enroll their son at Mantua to better serve his special education needs.

On September 8, 2020, R.J. started first grade again at South Harrison. At the time, South Harrison was in person every day but Wednesdays.

At the September 17, 2020 hearing, the parties presented arguments about whether R.J. should remain at South Harrison. Plaintiff asserted R.J. has an IEP at South Harrison and that South Harrison has all the services R.J. needs. Additionally, plaintiff argued R.J. is used to the school and has friends at the school. If R.J. were to transfer to Mantua, plaintiff alleged R.J. would have to go through the whole evaluation process again, which would result in delays in getting him the necessary services.

Defendant in turn disputed that South Harrison has the necessary services for R.J. and referenced an email from the school psychologist stating the school does not do in-house counseling. Defendant further argued R.J. had not received any of the occupational therapy he was supposed to receive under the 504 plan. Defendant asserted Mantua has services in-house that are not available at South Harrison such as a program specifically designed to help children like R.J. and

an intervention team that will immediately step in to deal with any issues. Defendant argued these opportunities could be available to R.J. immediately. Finally, defendant stressed that before the judge made his decision, he should hold a plenary hearing so that he could get a chance to see everything.

At the conclusion of the hearing, the judge first found that a plenary hearing was not necessary and "would require a lot of money and effort and emotion to be expended by the parties." The judge did not think "this family or child would be served by engaging in the emotional, psychological, and financial burden that would be placed upon them by dragging this case out even longer and having a divisive plenary hearing in regard to whether Mantua or Harrison Townships are better."

The judge found "this is . . . technically, a custody application." The judge went on to state,

> [a]nd so if you go through all of the custody factors, I'm pretty sure that [defendant] and [plaintiff] are in absolute equipoise, probably. . . .
>
> But it comes down to, in all probability and all of the custody factors, the quality of the education as compared to the continuity of the education of the child.

In balancing those two factors, the judge reasoned,

> even if those two factors are in equipoise, that the continuity of the child's education and the history of

> why the child is in [South] Harrison to begin with, with the underlying FN, that there is no reason to take him away from the district he's been in, the people that are familiar with him, the plan he has been laboring under even if it has not been followed appropriately, to take him away from his friends, to take him away from the way that he's used to going to school, the places he's used to going to school.

After finding that the "continuity of the child's education [was] the most important factor[,]" the judge decided it was "in the child's best interest to remain in [South] Harrison . . . based on the totality of the circumstances." The judge then granted plaintiff's request to be named PPR and ruled that if plaintiff tried to remove the child from South Harrison, then that would constitute a change of circumstances for which review of the order would be appropriate. The judge issued an order that same day. This appeal followed.

On appeal, defendant raises the following argument for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN REFUSING TO GRANT A PLENARY HEARING

Our review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We typically accord deference to the Family Part judges due to their "special jurisdiction and expertise in family matters." Id. at 413. The judge's findings are binding so long as they are "supported by adequate,

substantial, credible evidence." Id. at 412. Thus, we will "not disturb the 'factual findings and legal conclusions of the trial judge unless [we are] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid. (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). We, however, review de novo "the trial judge's legal conclusions, and the application of those conclusions to the facts." Elrom v. Elrom, 439 N.J. Super. 424, 433 (App. Div. 2015) (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

A plenary hearing is required where there is a "genuine and substantial factual dispute regarding the welfare of the children, and the trial judge determines that a plenary hearing is necessary to resolve the factual dispute." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007); see also R. 5:8-6 (requiring the court to "set a hearing date" if it "finds that the custody of children is a genuine and substantial issue"). "[A] court may not make credibility determinations or resolve genuine factual issues based on conflicting affidavits." K.A.F. v. D.L.M., 437 N.J. Super. 123, 137-38 (App. Div. 2014). As a threshold matter, the party seeking the plenary hearing "must clearly demonstrate the

existence of a genuine issue as to a material fact before a hearing is necessary." Lepis v. Lepis, 83 N.J. 139, 159 (1980).

In the context of child custody, "[t]he court shall specifically place on the record the factors which justify any custody arrangement not agreed to by both parents." N.J.S.A. 9:2-4(f). Relevant factors include:

> the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children.
>
> [N.J.S.A. 9:2-4(c).]

In making its determination regarding custody, the court's paramount concern is the best interest of the child. V.C. v. M.J.B., 163 N.J. 200, 227-28 (2000); Kinsella v. Kinsella, 150 N.J. 276, 317 (1997). The court must concentrate on the child's "safety, happiness, physical, mental and moral

welfare." Fantony v. Fantony, 21 N.J. 525, 536 (1956). Consideration of the above factors helps guide the judge's analysis.

Although we are troubled by the judge's dismissive attitude of defendant's concerns about the quality of education provided by South Harrison, we are constrained to affirm. The judge properly considered the relevant factors governing custody, and the record supports his conclusion that it was not in the child's best interest to "take him away from the district he's been in, the people that are familiar with him, [and] the plan he has been laboring under." In that regard, the issues with R.J.'s services arose in early 2020, just as the pandemic was impacting schools and just before South Harrison went to remote learning. Plaintiff made this application in September 2020, when South Harrison was still partially conducting remote learning, and the hearing was held after the school year commenced. We conclude that the record supports the judge's conclusion that it would be unduly disruptive for a young child to switch schools under these circumstances.

In addition, although a plenary hearing might flesh out what services are offered by the two school districts, that alone would not resolve the question of whether R.J. would qualify for those services. We are unconvinced that the Family Part is vested with jurisdiction to decide whether and why a school

district is complying (or not) with its obligations under an IEP or 504 plan, issues that are more properly presented in the first instance to South Harrison's Board of Education.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION