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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1095-21

MICHAEL PETRONGOLO,

Plaintiff-Respondent,

v.

MELINA ALVES,

Defendant-Appellant.

Submitted September 21, 2022 – Decided November 3, 2022

Before Judges DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FD-08-0438-19.

Adinolfi, Lieberman, Burick, Roberto & Molotsky PA, attorneys for appellant (Kimberly A. Greenfield and Drew A. Molotsky, on the briefs).

Einhorn, Barbarito, Frost & Botwinick, attorneys for respondent (Matheu D. Nunn and Jessie M. Mills, on the brief).

PER CURIAM

Defendant Melina Alves appeals from an October 26, 2021 order that (1) denied her application for a change in custody; (2) denied her application for permission to relocate with the parties' minor child; and (3) denied her application to modify parenting time. Defendant also appeals a November 16, 2021 protective order permitting the child's therapist to receive custody expert Dr. Gregory Joseph's report and a December 8, 2021 order awarding plaintiff counsel fees. After a two-day trial at which only defendant testified, the judge concluded that defendant failed to show a change of circumstances warranting relief. We affirm, substantially for the reasons set forth in Judge John Tomasello's well-reasoned oral opinions.

On appeal, defendant presents the following arguments for our consideration:

> POINT I
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> STANDARD OF REVIEW
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> POINT II
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> THE TRIAL COURT ERRED AND VIOLATED APPELLANT'S DUE PROCESS RIGHTS BY DENYING DEFENDANT THE OPPPORTUNITY TO REVIEW DR. JOSEPH'S FILE PRIOR TO TRIAL.
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> A. The Trial Court Erred in Ordering Dr. Joseph's Report be Provided to the Child's Therapist as The Report was not Entered

Into Evidence and Thereby not Considered by the Court.

POINT III

THE TRIAL COURT ERRED AND VIOLATED APPELLANT'S DUE PROCESS BY ORDERING APPELLANT TO PLACE HER CASE IN CHIEF FIRST DESPITE RESPONDENT HAVING BEEN THE MOVING PARTY AND HAVING NOT WITHDRAWN HIS APPLICATION THEREBY MISAPPLYING THE BURDEN OF PROOF TO THE ISSUES PRESENTED.

A. The Trial Court Erred in Granting Respondent's Motion for Judgment and Denying Appellant's Cross-Application without Presentation of Testimony or Evidence from Respondent

POINT IV

THE TRIAL COURT PREJUDGED THIS MATTER AND FAILED TO PROPERLY CONSIDER APPELLANT'S APPLICATION AND ERRED IN FINDING NO CHANGE IN CIRCUMSTANCES TO REVIEW CUSTODY AND PARENTING TIME.

POINT V

THE TRIAL COURT ERRED IN GRANTING RESPONDENT COUNSEL FEES.

POINT VI

THE MATTER MUST BE REMANDED TO A NEW JUDGE BASED UPON THE TRIAL JUDGE'S

PRIOR DETERMINATION REGARDING CREDIBILITY OF APPELLANT.

Our review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We typically accord deference to 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. (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Deference is particularly warranted where, as here, "the evidence is largely testimonial and involves questions of credibility." Cesare 154 N.J. at 412 (quoting In re Return of Weapons of J.W.D., 149 N.J. 108, 117 (1997)). 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.'" Id. (quoting Rova Farms, 65 N.J. at 484). However, we 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 parent seeking to modify a parenting time schedule "bear[s] the threshold burden of showing changed circumstances which would affect the welfare of the children." Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993). Stated differently, a party seeking to change a judgment involving a custodial arrangement bears the burden of proof to demonstrate the status quo is no longer in a child's best interest. See Bisbing v. Bisbing, 230 N.J. 309, 322 (2017).

In considering the custody arrangement that is in the best interest of the child, the court applies N.J.S.A. 9:2-4(c):

> In making an award of custody, the court shall consider but not be limited to the following factors: 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. A parent shall not be deemed

> unfit unless the parents' conduct has a substantial adverse effect on the child.

Our review of the record indicates that Judge Tomasello painstakingly analyzed each factor of N.J.S.A. 9:2-4(c), considering defendant's testimony and the other evidence submitted at trial. The judge's conclusion that defendant had not met her burden of showing a change of circumstances is amply supported by the record. The judge found defendant's testimony about the problems with the current custody arrangement incredible, noting plaintiff communicated the child's progress regularly and adhered to the four-times weekly FaceTime visitation schedule. The judge found that defendant's claims about her stability were undermined by her frequent moves; at the time she filed her initial application she was living in Virginia, but while the matter was pending she moved to California, and there was evidence she intended to relocate within California in the future. Beyond this, the judge had concerns about defendant's judgment based on her formulation of a GoFundMe page that falsely claimed that she lost her green card (defendant was a citizen at the time) and that she had breast cancer, which she did not. Defendant presented no plan for where the child, who is currently starting kindergarten, would attend school. Based on these facts, and others which are more fully set forth

in the record, the judge found the current order placing primary residential custody with plaintiff was in the child's best interest.

We reject defendant's argument that plaintiff was erroneously granted attorneys' fees. "Although New Jersey generally disfavors the shifting of attorneys' fees, a prevailing party may recover attorneys' fees if they are expressly provided for by statute, court rule, or contract." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 440 (2001). Pursuant to Rule 5:3-5(c), attorneys' fees may be awarded in a family action. See R. 4:42-9(a)(1). Under R. 5:3-5(c), "[a]n allowance for counsel fees and costs in a family action is discretionary." Eaton v. Grau, 368 N.J. Super. 215, 225 (App. Div. 2004). Fee determinations should be disturbed only where there has been a clear abuse of discretion. Giarusso v. Giarusso, 455 N.J. Super. 42, 51 (App. Div. 2018).

The judge based his decision to award plaintiff attorneys' fees on his finding of defendant's "bad faith and unreasonableness." The decision was further supported by the findings that defendant could pay her own fees; could contribute to plaintiff's fees; and acted in bad faith by insisting on a trial of her meritless application. We discern no abuse of discretion.

Defendant's remaining arguments that her due process rights were denied and that the trial court erred in ordering Dr. Joseph to provide his report to the

child's therapist lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION