SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3674-20

M.J.S.,

Plaintiff-Appellant,

v.

B.J.F.,

Defendant-Respondent.

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Argued May 16, 2022 – Decided June 13, 2022

Before Judges Rose and Enright.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Warren County, Docket No. FD-21-0291-21.

John C. Pierce argued the cause for appellant (Winegar, Wilhelm, Glynn & Roemersma, attorneys; John C. Pierce, of counsel and on the brief).

Respondent has not filed a brief.

PER CURIAM

In this one-sided appeal, plaintiff M.J.S. challenges a July 13, 2021 order denying his request to be designated as the parent of primary residence (PPR) for the parties' twelve-year-old son, J.S. (Jon).[1] We affirm.

Pursuant to a custody order entered in Pennsylvania in March 2017, Jon's mother, defendant B.J.F., was designated as Jon's PPR. That order also awarded plaintiff parenting time on the first, third and fifth weekends of each month, plus shared holiday time with Jon.

In January 2019, after defendant relocated with Jon to New Jersey, the Division of Child Protection and Permanency (Division) instituted an action under the "FN" docket,[2] based on concerns regarding the conditions in defendant's home and Jon's welfare. Due to the Division's involvement, the trial court ordered Jon to temporarily live with his father in Pennsylvania. But following hearings in August and September 2019, the trial court found it was in Jon's best interest to return to his mother's custody. The record reflects the FN litigation was terminated by court order in January 2020.

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[1] We refer to the adult parties by their initials and to their son by a fictitious name to protect their privacy. R. 1:38-3(d)(3).

[2] The Family Part's FN docket consists of abuse and neglect matters.

In June 2021, plaintiff filed a complaint under the "FD" docket,[3] asking the trial court to: "review the FN . . . file"; allow his attorney "to review the Orders entered in the FN docket"; and designate plaintiff "as the [PPR]" while permitting defendant parenting time on alternating weekends. Plaintiff also asked the court to "institute a holiday schedule akin to the schedule contained in" the order issued in Pennsylvania in March 2017.

In support of his requests, plaintiff certified Jon had confided in him that defendant and her family subjected Jon "to verbal and mental abuse due to his weight," and Jon did not want to keep living with his mother. Plaintiff also alleged the conditions in defendant's home "are/were unhealthy," and he had "reached out to [the Division] about these matters, and as far as [he knew], there ha[d] not been any investigation regarding the conditions of the home."

On July 12, 2021, the parties appeared before the same judge who heard their FN matter to address plaintiff's custody and parenting time application. Plaintiff was represented by counsel, whereas defendant appeared pro se.

The judge placed both parties under oath and recited her prior involvement with the case before asking plaintiff's counsel to place his argument on the record. At that time, counsel reiterated the concerns raised in plaintiff's

[3] The FD docket consists of custody, visitation, and other non-divorce matters.

pleadings; but the judge also permitted counsel to address an issue not set forth in plaintiff's pleadings, namely that Jon had recently contracted lice. Counsel implied the child suffered from this condition due to ongoing, unsanitary conditions in defendant's home.

The judge asked defendant to respond to plaintiff's allegations. Defendant testified the Division was "tired of coming to [her] home for the same stuff over and over that's not happening here." She stated that a month before plaintiff petitioned to become Jon's PPR, the Division was called to her home and Jon "told them . . . he wanted to live" with her. Defendant also denied Jon was uncomfortable living in her house, explaining that when she retrieved Jon from plaintiff's home after weekend visits, Jon would come "running out to [her] vehicle and jump[] in." Further, defendant testified Jon had graduated from elementary school and all her children were "out of therapy right now because they[] all graduated."

Regarding plaintiff's allegations her home was unsanitary, defendant stated Jon showered multiple times a day while in her care. Also, while not denying Jon recently contracting lice, defendant testified the child was with his father "for eight days straight," then returned to her custody for four days, and was with plaintiff "for another two days when his father found the lice." Further,

defendant stated plaintiff was "not communicating with" her and did not tell her until she arrived to pick up Jon from his home that Jon had lice. She testified, "why couldn't he pick up the phone and text me and say 'I found lice in [Jon's] hair, can you treat his room and . . . make sure nobody else in your house has it?'" Further, defendant stated she was "trying to co-parent," but messages between the parties were relayed through plaintiff's wife "because [plaintiff] doesn't want to communicate with me or share this kid with me." When defendant's testimony concluded, plaintiff's counsel did not ask the judge for permission to cross-examine defendant, nor did he request that plaintiff testify.

The judge promptly rendered a decision from the bench. After outlining the background of the case, the judge noted that after she temporarily awarded physical custody of Jon to plaintiff during the 2019 FN litigation, she returned the child to defendant's physical custody following a best interests hearing. The judge highlighted that defendant engaged in "comprehensive services" in 2019 and "created an environment where the court found it was safer for [Jon] to return to his mother." Further, the judge found it was necessary to transfer Jon back to his mother's physical custody

> because . . . [plaintiff] was not able to properly care for [Jon]. . . . At that time, [plaintiff's] then girlfriend, now wife . . . had had [an] altercation with [Jon] that rose to

> the level of having physical contact between [her] and [Jon].

Additionally, the judge recalled Jon was ordered back to his mother's physical custody because the judge

> found it was not in [Jon's] best interest to reside with his father. And that . . . was principally because [Jon] refused to attend school . . . at the time. And [plaintiff] . . . was unable to get [Jon] to attend school.
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> . . . . And what was most troubling to the court at the time was that [plaintiff] was not attending his own individual counseling, and he was not able to get [Jon] to attend his counseling, or to his medical appointments — simple appointments, like his medical — his wellness check.
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> In-home therapy was attempted . . . and that was unsuccessful.

Turning to plaintiff's allegations regarding Jon's current circumstances, the judge was persuaded Jon had "graduated from therapy" and "graduated from elementary school," and had "no issues getting back into the car with [defendant] when she pick[ed him] up from parenting time." Additionally, the judge found

> there are no continuing issues regarding [Jon's] hygiene, although he has suffered some bouts of lice. It's not clear . . . that lice was contracted at [defendant's] home.
>
> And for those reasons, the court finds that [plaintiff] has not made a showing of change of

> circumstances, and there is no need for another plenary hearing in this matter.
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> [Plaintiff's] application for [a] change of physical custody of [Jon] is denied.

Finally, before concluding the hearing, the judge recognized the parties "need[ed] an FD order memorializing the parties' current arrangement." Thus, she delineated a holiday and parenting time schedule for the parties to follow. Additionally, she directed defendant to provide plaintiff with parenting time "to compensate for the number of days . . . [plaintiff] did not see [Jon] during the COVID pandemic."

On appeal, plaintiff raises the following overlapping contentions for our consideration:

> POINT I
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> THE COURT ABUSED ITS DISCRETION IN FINDING THAT NO CHANGE IN CIRCUMSTANCES EXISTED THAT WARRANTED A PLENARY HEARING ON THE ISSUE OF MODIFYING THE CUSTODY SCHEDULE IN THE BEST INTERESTS OF THE CHILD.
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> POINT II
>
> THE COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S REQUEST FOR A PLENARY HEARING TO DETERMINE THE BEST INTERESTS OF THE CHILD.

POINT III

THE COURT ABUSED ITS DISCRETION BY MAKING A FACTUAL FINDING BASED ON THE TESTIMONY OF DEFENDANT, WITHOUT SUBJECTING THE DEFENDANT TO CROSS-EXAMINATION. (Not raised below).

These arguments are unavailing.

In general, because the Family Part has special expertise in family matters, we defer to factual determinations made by the trial court as long as they are "supported by adequate, substantial, and credible evidence in the record." Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)). However, we review the Family Part's interpretation of the law de novo. D.W. v. R. W., 212 N.J. 232, 245-46 (2012).

Regarding plaintiff's Points I and II, we are mindful a decision concerning custody and parenting time rests in "the sound discretion of the trial courts." Pascale v. Pascale, 140 N.J. 583, 611 (1995). Additionally, in any custody or parenting time dispute, "it is well settled that the court's primary consideration is the best interests of the children." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007) (citing Kinsella v. Kinsella, 150 N.J. 276, 317 (1997)). Therefore, 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) (citing Sheehan v. Sheehan, 51 N.J. Super. 276, 287 (App. Div. 1958)); see also Lepis v. Lepis, 83 N.J. 139, 157 (1980). Stated differently, a party seeking modification of a custodial arrangement bears the burden of proof to demonstrate the status quo is no longer in a child's best interest. Bisbing v. Bisbing, 230 N.J. 309, 322 (2017).

To determine whether the requisite changed circumstances exist, the court must consider the circumstances that existed at the time the current order was entered. Sheehan, 51 N.J. Super. at 287-88. Then, the court can "ascertain what motivated the original judgment and determine whether there has been any change in circumstances." Id. at 288.

Once the moving party makes a prima facie showing of changed circumstances, only then is the moving party entitled to "a plenary hearing as to disputed material facts regarding the child's best interests, and whether those best interests are served by modification of the existing . . . order." Faucett v. Vasquez, 411 N.J. Super. 108, 111 (App. Div. 2009). Thus, a plenary hearing is not required unless the parties' submissions demonstrate "there is a genuine and substantial factual dispute regarding the welfare of the children." Hand, 391 N.J. Super. at 105; see also Lepis, 83 N.J. at 159 (holding "a party must clearly

demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary," and noting that "[w]ithout such a standard, courts would be obligated to hold hearings on every modification application").

Here, eighteen months after the judge assigned to this matter conducted a best interests hearing and fixed the parties' custodial arrangement, plaintiff sought to modify that arrangement. While we are mindful "a judgment involving the custody of minor children is subject to modification at any time upon the ground of changed circumstances," Innes v. Carrascosa, 391 N.J. Super. 453, 500 (App. Div. 2007) (quoting Sheehan, 51 N.J. Super. at 287), plaintiff's proofs in demonstrating changed circumstances were lacking. Indeed, by his own account, he had "reached out" to the Division to express concern Jon was subjected to "verbal and mental abuse," but he also certified that "as far as [he knew], there ha[d] not been any investigation regarding the conditions of the home." Further, he certified he "fear[ed] that the conditions of the home have returned to the state that caused [the Division] to be concerned for the welfare of [Jon]," Jon did not want to live with his mother, and the conditions in defendant's home "are/were unhealthy." Each of plaintiff's allegations were supported only by his own account, meaning he failed to supply the court with

any corroborating evidence, such as certified statements from other individuals, medical reports, counseling records or school documents.

Additionally, plaintiff provided no specifics in his complaint or certification as to what steps he had taken to ensure Jon would fare better in his custody than the child had in 2019, nor did counsel provide any such particulars. Instead, plaintiff merely argued through counsel that "things have gotten better; [Jon] has gotten older. And the issues that presented themsel[ves] during the FN matter have gotten better to the point where [plaintiff] could, in fact, . . . get [Jon] to go to school and engage in any kind of therapy or counseling."

Under these circumstances, we are persuaded plaintiff's mere allegations fell short of the proofs necessary to establish a threshold showing of changed circumstances. Thus, no plenary hearing was warranted. See Lepis, 83 N.J. at 159 (noting that conclusory allegations should be disregarded by the court when determining whether a hearing is necessary).

Finally, regarding Point III, it is well established we will not consider an argument which was not raised before the trial court. Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). "Appellate review is not limitless. The jurisdiction of appellate courts rightly is bounded by the proofs and objections critically

explored on the record before the trial court by the parties themselves." State v. Robinson, 200 N.J. 1, 19 (2009); see also Zaman v. Felton, 219 N.J. 199, 226-27 (2014).

Here, plaintiff did not request the opportunity, through counsel, to cross-examine defendant; moreover, plaintiff did not seek to testify at the July 12 hearing to rebut defendant's testimony. Moreover, the judge afforded plaintiff the latitude, through counsel, to expand his argument at the July 12 hearing beyond what was set forth in plaintiff's pleadings. Thus, although we are satisfied the better approach would have involved the court offering the parties the chance to respond to each other's allegations while under oath, we are convinced the judge did not foreclose plaintiff from testifying at the July 12 hearing nor bar his counsel from cross-examining defendant if he wished.

In sum, because we agree with the judge who was intimately familiar with this matter that plaintiff's proofs were insufficient to meet the changed circumstances threshold, she was not obliged to hold a best interests plenary hearing.

To the extent we have not addressed plaintiff's remaining arguments, we conclude they are without sufficient merit to warrant discussion. 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