SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0976-22

C.E.W.,[1]

Plaintiff-Respondent,

v.

C.D.M.,

Defendant-Appellant.

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Submitted October 24, 2023 – Decided November 8, 2023

Before Judges Rose and Perez Friscia.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FD-03-0025-20.

Weinberger Divorce and Family Law, LLC, attorneys for appellant (Jessica Budrock, on the brief).

William Kirby Law, LLC, attorneys for respondent (Allison C. Kruk, on the brief).

[1] We use initials to protect the identities of the parties and their child. See R. 1:38-3(d)(9) and (13).

PER CURIAM

Following a bench trial, defendant C.D.M. appeals from the October 17, 2022 order designating plaintiff C.E.W. as the parent of primary residence (PPR) for their child, Z.W., designating defendant as the parent of alternate residence (PAR), and modifying parenting time. We affirm.

The parties had a non-marital relationship and resided in New Jersey as active members of the Air Force. Their child, Z.W., was born in September 2017. Z.W. lived in New Jersey with the parties for approximately two years until the parties separated in June 2019.

During the relationship, defendant accused plaintiff of domestic violence, which she reported to plaintiff's superiors in the Air Force. An investigation revealed that plaintiff committed physical and emotional maltreatment of defendant and he was included in the Air Force Central Registry database.

The parties continued to each have a strong loving relationship with Z.W. after their separation. On July 28, 2020, the parties entered into a consent order, which provided shared joint legal and physical custody of Z.W. The same month, defendant moved to Indiana and plaintiff remained in New Jersey. The parties agreed to alternate parenting time with Z.W. every six weeks until he became of school age, "meeting at a mid-point location" on weekends to

facilitate the exchange of Z.W. The consent order provided that "[s]ix months prior to [Z.W.'s] attending school full-time, [the] parties shall mutually agree upon where the child is to attend school and on-going parenting time." After the parties separated, they consistently had issues communicating. Each parent accused the other of withholding relevant information about Z.W.'s welfare.

In May 2022, when Z.W. became of school age, plaintiff moved: to be designated as the PPR, to address a parenting time schedule, and to set child support. Defendant cross-moved for similar relief and requested to be the PPR in Indiana. Judge Mary Ann O'Brien conducted a two-day trial in October 2022, during which eight witnesses, including the parties, testified. Plaintiff presented three witnesses: his wife at the time, a friend, and an Air Force colleague. Defendant also presented three witnesses: her sister, her mother, and her grandmother.

On October 17, 2022, Judge O'Brien rendered a cogent twenty-five-page written decision summarizing her factual findings and analyzing the fourteen enumerated best interests factors set forth in N.J.S.A. 9:2-4(c). The judge recognized that: the parties each had a strong loving relationship with Z.W.; the parties both wanted to be the PPR; Z.W., at five years old, did not have the capacity to convey an arrangement preference; and Z.W was bonded with his

two half siblings, K.W., plaintiff's daughter, and A.W., defendant's daughter. Additionally, Judge O'Brien found the parties were both fit to be the PPR and could provide for Z.W.'s needs, stability, and education. The judge determined the parties had difficulties effectively communicating with each other regarding their son. Finding there was conflict between the parties while they resided together, which resulted in the Air Force finding plaintiff committed acts of maltreatment, the judge nonetheless noted plaintiff neither was charged criminally nor issued a restraining order.

The judge made credibility determinations that "both parties conducted themselves appropriately during the hearing," "were able to recall specific details[,] and presented their positions in a straightforward manner." Additionally, plaintiff testified accurately as to dates and history, and defendant gave "reflective" testimony. However, the judge noted "some inconsistency" in defendant's testimony regarding her weekend work schedule.

Citing Bisbing v. Bisbing, 230 N.J. 309 (2017), Judge O'Brien found "much equipoise in this situation" under the best interests factors. However, she found the following five facts "favor[ed]" plaintiff's designation as Z.W.'s PPR and that Z.W. be enrolled in school full time in New Jersey: (1) "[Z.W.] w[ould] be able to stay within his own school district by remaining in New Jersey for the

school year"; (2) "[Z.W.] w[ould] have his parent present when he g[ot] home from school if he attend[ed] school in New Jersey"; (3) "[Z.W.] w[ould] be able to remain living in the area in New Jersey where he ha[d] lived the majority of his life"; (4) "[plaintiff] c[ould] provide a more stable home and environment"; and (5) "[plaintiff] ha[d] evidenced a 'total' effort in seeking to provide for the best interests of [Z.W.]" The judge ordered continued shared joint legal custody of Z.W., with plaintiff as the PPR and defendant as the PAR, and issued a parenting time schedule. This appeal followed.[2]

Defendant contends the judge erred in her analysis of Z.W.'s best interests, failed to address relevant removal factors under Baures v. Lewis, 167 N.J. 91 (2001), overruled by Bisbing, 230 N.J. at 309, and improperly addressed parenting time.

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[2] Prior to filing her merits brief, defendant moved before us for a limited remand to the trial court to address her change in circumstances motion. Plaintiff alleged defendant was no longer married and had selected a different school for Z.W., and that both those factors had impacted the judge's decision. We denied defendant's motion. Nonetheless, defendant's merits brief includes an argument based on these alleged changes in circumstances. Issues not raised below are not considered on appeal. See Davis v. Devereux Foundation, 209 N.J. 269, 296 n.8 (2012) ("[A]ppellate review is limited to the record developed before the trial court."); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (stating it is "well-settled" that "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available" with limited exceptions).

I.

Our scope of review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). "We accord deference to Family Part judges due to their 'special jurisdiction and expertise in family [law] matters.'" Gormley v. Gormley, 462 N.J. Super. 433, 442 (App. Div. 2019) (alteration in original) (quoting Cesare, 154 N.J. at 413). A judge's findings "are binding on appeal so long as their determinations are 'supported by adequate, substantial, credible evidence.'" Ibid. (quoting Cesare, 154 N.J. at 411-12). Deference is especially important where evidence is testimonial and involves credibility determinations because the observing judge "has a better perspective than a reviewing court in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988). We "accord deference to factfindings of the family court because it has the superior ability to gauge the credibility of the witnesses who testify before it and because it possesses special expertise in matters related to the family." N.J. Div. of Youth & Fam. Servs. v. F.M., 211 N.J. 420, 448 (2012). However, we do not give "special deference" to "[a] trial court's interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

"In custody cases, 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). The focus is on the "safety, happiness, physical, mental and moral welfare" of the children. Fantony v. Fantony, 21 N.J. 525, 536 (1956). Particularly, "[t]he designation of a [PPR] is a consequential decision because 'the primary caretaker has the greater physical and emotional role' in a child's life." A.J. v. R.J., 461 N.J. Super. 173, 182 (App. Div. 2019) (quoting Pascale v. Pascale, 140 N.J. 583, 598 (1995)).

In accordance with N.J.S.A. 9:2-2, trial courts are required to find "a showing of 'cause' before a court will authorize the permanent removal of a child to another state without the consent of both parents or, if the child is of 'suitable age' to decide, the consent of the child." Bisbing, 230 N.J. at 323. A court "should conduct a best interests analysis to determine 'cause' under N.J.S.A. 9:2-2 in all contested relocation disputes in which the parents share legal custody—whether the custody arrangement designates a [PPR] and a [PAR], or provides for equally shared custody." Id. at 335.

When "making an award of custody," courts must consider the following fourteen factors under N.J.S.A. 9:2-4(c) in a best interests analysis:

> [(1)] the parents' ability to agree, communicate and cooperate in matters relating to the child; [(2)] the

> parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; [(3)] the interaction and relationship of the child with its parents and siblings; [(4)] the history of domestic violence, if any; [(5)] the safety of the child and the safety of either parent from physical abuse by the other parent; [(6)] the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; [(7)] the needs of the child; [(8)] the stability of the home environment offered; [(9)] the quality and continuity of the child's education; [(10)] the fitness of the parents; [(11)] the geographical proximity of the parents' homes; [(12)] the extent and quality of the time spent with the child prior to or subsequent to the separation; [(13)] the parents' employment responsibilities; and [(14)] the age and number of the children.

Courts must also "identify on the record the specific factors that justify the arrangement." See J.G. v. J.H., 457 N.J. Super. 365, 374 (App. Div. 2019) (quoting Bisbing, 230 N.J. at 322).

Defendant argues that the judge's findings in favor of plaintiff under the best interests factors "were not supported by adequate and credible evidence." We disagree. We discern the judge considered the evidence in light of the statutory factors and correctly found the substantial credible evidence weighed in favor of plaintiff as the PPR.

It is undisputed Z.W. lived with his parents in New Jersey for two years before the parties separated. Approximately one year later, defendant moved to

Indiana. Judge O'Brien determined it was a greater benefit for Z.W. to reside with plaintiff in New Jersey where he would attend local schools, continue to develop peer relationships with children in his neighborhood, and participate in extracurricular activities in the same community. Conversely, citing defendant's testimony, the judge found if Z.W. resided with her in Indiana, he would "not go to the local school" but would enroll in a county school with children with whom he was not familiar and where there was no busing. The judge concluded those factors were not in Z.W.'s best interests. Referencing plaintiff's credible testimony, the judge found his workdays ended in time for him to be present when Z.W. "[got] home from school." The judge reasoned that plaintiff's availability weighed heavily in Z.W.'s best interests.

Although defendant accurately asserts that the parties shared equal parenting time since 2020, Judge O'Brien recognized that, before the parties separated, Z.W. lived in New Jersey since his birth in 2017, and had "spent the majority of his life in New Jersey." Thus, the judge found that remaining in New Jersey was in his best interests. The judge credited plaintiff's testimony that Z.W. had many friends from his neighborhood and relationships with family friends, whereas defendant did not provide compelling similar benefits in Indiana.

Defendant's contention that the judge erred in finding that plaintiff would provide a stable home because he testified to possibly "relocat[ing] out of New Jersey" in a few years is unsupported. Judge O'Brien's stability findings were based on more than plaintiff's mere physical location in New Jersey, including that plaintiff was "more hands on" and "deliberately concerned with laying the groundwork" for Z.W.'s future. Judge O'Brien found with certainty that both parties were able to provide a loving and nurturing home, but plaintiff "provid[ed] a more stable home and environment." Plaintiff's job, it was determined, had "much [more] flexibility."

We generally accord "great deference" to Family Part judges' "discretionary decisions," "provided they are supported by adequate, substantial, and credible evidence in the record." D.A. v. R.C., 438 N.J. Super. 431, 451 (App. Div. 2014). We defer to the judge's credibility determination because the judge had the opportunity to evaluate the witnesses and assess the credible evidence in light of the N.J.S.A. 9:2-4(c) best interests factors in awarding joint custody to both parties and PPR status to plaintiff. See Gnall v. Gnall, 222 N.J. 414, 428 (2015).

Defendant's argument that the judge "failed to address any of [the] factors" under Baures, 167 N.J. at 91, is unavailing. Here, the parties had joint custody

with equal parenting time and had agreed by consent order that the PPR was to be addressed once Z.W. was of school age. Our Supreme Court has made clear:

> In place of the Baures standard, courts should conduct a best interests analysis to determine 'cause' under N.J.S.A. 9:2-2 in all contested relocation disputes in which the parents share legal custody—whether the custody arrangement designates a [PPR] and a [PAR], or provides for equally shared custody.
>
> [Bisbing, 230 N.J. at 335.]

See also A.J., 461 N.J. Super. at 183 ("[O]ur Supreme Court already spoke in Bisbing, overturned the Baures standard, and held the best[]interest[s] standard embodied in N.J.S.A. 9:2-4 govern[ed] interstate removal of children."). Here, the judge correctly applied Bisbing and analyzed the best interests factors to determine which party would be the PPR and thereby the location for Z.W.'s enrollment in school.

Lastly, defendant's argument that the judge erred under Rule 5:8-5 by not "specifically writing" the "parenting time arrangement that it was ordering" is without merit. A court shall "set out in its order or judgment fully and specifically all terms and conditions relating to the award of custody," R. 5:8-5(b), and a parenting time plan shall include a "[s]pecific schedule as to parenting time/visitation including, but not limited to, weeknights, weekends, vacations, legal holidays" and other occasions. R. 5:8-5(a)(4). Here, the order

provides a delineated parenting time schedule in accordance with Rules 5:8-5(a)(4) and (b) because it specifically provided for parenting time during the school year, holiday breaks, and the summer, among other things. Although defendant argues the judge should have included "more thorough guidance" regarding the logistics of facilitating the parties' physical exchange of Z.W., their consent order established a midpoint exchange, as referenced by the judge. Our decision does not preclude either party from seeking to modify the parenting time order pursuant to Z.W.'s best interests.

To the extent that we have not addressed defendant's remaining contentions, it is because they lack sufficient merit to be discussed in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.