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APPROVAL OF THE APPELLATE DIVISION**

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-2752-15T2

Y.D.,

Plaintiff-Appellant,

v.

T.H.,

Defendant-Respondent.

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Argued December 5, 2017 – Decided January 9, 2018

Before Judges Reisner, Hoffman and Mayer.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Essex County,  
Docket No. FD-07-2437-16.

Christyn D. Clifton argued the cause for  
appellant (Williams Law Group, LLC, attorneys;  
Allison C. Williams, of counsel and on the  
brief; Elizabeth D. Burke, on the briefs).

Shari Lee Genser argued the cause for  
respondent (Seiden Family Law, LLC, attorneys;  
Shari Lee Genser, of counsel and on the  
brief).

PER CURIAM

Plaintiff Y.D. and defendant T.H. are the biological parents of Allison.<sup>1</sup> On March 25, 2014, the Circuit Court of York County, Virginia awarded defendant primary custody of Allison (the Virginia order). In December 2015, plaintiff filed a verified complaint in Essex County, where defendant resides with Allison, seeking to modify the Virginia order, arguing a change in circumstances. The Family Part denied plaintiff's request without a plenary hearing, prompting the instant appeal. We affirm.

I

The parties married in June 2010 and divorced three-and-one-half years later. They have one child together, Allison, born in 2010. During their relationship and marriage, the parties never established a joint residence; instead, they alternated visiting plaintiff's residence, first in Maryland and then in Virginia, and defendant's residence in New Jersey.

Plaintiff moved to Virginia shortly after she gave birth to Allison, and the parties were unable to agree upon her custody after their relationship ended. In October 2011, defendant filed for custody with the Virginia court. Following a plenary hearing, the judge granted the parties joint legal and residential custody with a two week on/off visitation schedule.

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<sup>1</sup> We refer to the child by pseudonym to preserve her privacy.

In March 2013, allegedly on the advice of counsel, plaintiff withheld Allison from visiting defendant.<sup>2</sup> In response, defendant initiated custody proceedings with the York[-]Poquoson County Juvenile and Domestic Relations court in Virginia. The court conducted a show cause hearing on April 4, 2013, but initially declined to decide defendant's motion, and deferred the matter for six months.

On February 19, 2014, the Circuit Court for the County of York, Virginia conducted a lengthy plenary hearing on defendant's motion to modify custody. The court heard testimony from Shannon Mitchell, a social worker from the York-Poquoson Department of Social Services, who wrote to the court in 2012 regarding several Child Protective Services complaints against plaintiff. Plaintiff has four other children from other relationships. According to Mitchell, plaintiff had two "founded" maltreatment cases in Prince George County, Maryland, one in 1992 and one in 1998.

Plaintiff also testified, reiterating her allegation that her attorney, Tanisha Robertson, advised her to withhold Allison from visitation with defendant. Plaintiff stated she filed an ethics

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<sup>2</sup> Plaintiff stated she tried to schedule Allison an urgent care appointment that fell during defendant's visitation; however, she asserts defendant was unreceptive to changing the visitation schedule.

complaint against Robertson due to her deficient conduct. Moreover, plaintiff testified that the "founded" Maryland maltreatment allegations were made in error, and that she had these findings removed from her record.

Robertson also testified, and denied advising plaintiff to violate the court order. Further, she alleged that defendant threatened to kidnap Allison, but Robertson admitted she did not notify the authorities or defendant's counsel about this alleged threat.

During defendant's testimony, he admitted he was two years behind on his mortgage payments and "significantly behind" on his taxes. However, he stated his accountant was working to modify his mortgage and was handling his tax issues. Furthermore, when asked what defendant would do if he lost his home, he testified that he could move in to his mother's home. Defendant's mother also testified, stating that she lives next door to defendant, and has resided in her home, which she owns, for fifty-two years. She stated she was available to help care for Allison if defendant required assistance.

Ultimately, on March 25, 2014, the Virginia motion judge entered an order granting the parties joint legal custody, and defendant primary physical custody. He found plaintiff presented "significant credibility concerns," and opined that "left to her

own devices[,] I think there could be a real risk that [plaintiff] would in fact attempt to alienate the affections of her daughter as concerns her relationship with her father." Regarding the abuse allegations, the judge stated he could not reach any "concrete conclusions," and doubted the reliability of plaintiff's evidence exonerating her Maryland maltreatment cases.

He also found Robertson lacked credibility, and stated "it would not surprise me one bit" if Robertson advised plaintiff to violate the court order. Finally, although he expressed concerns about defendant's "financial instability," he found defendant's parents' stability alleviated his concerns.

In December 2015, plaintiff filed a complaint in the matter under review, seeking to modify custody and parenting time. In a supporting certification she alleged: (1) she had new evidence regarding her attorney's suspension and the abuse allegations; (2) defendant alienated Allison from her by restricting contact; and (3) she had stable employment while defendant's financial circumstances had deteriorated.

On January 29, 2016, following oral argument, the Family Part denied plaintiff's motion without a plenary hearing. The judge found plaintiff's documentary evidence regarding her attorney's suspension and Maryland abuse allegation unpersuasive. Regarding defendant's financial situation, the judge found the existence of

new liens, although not present at the time of the Virginia order, did not constitute a change in circumstances. He also found plaintiff had not demonstrated defendant alienated Allison from her, and otherwise failed to present anything new to the court. The judge therefore concluded "no substantial change in circumstances exist" to warrant modifying the March 2014 Virginia order. This appeal followed.

## II

Our "review of a trial court's fact-finding function is limited." Cesare v. Cesare, 154 N.J. 394, 411 (1998). The trial court's findings "are binding on appeal when supported by adequate, substantial, credible evidence." Id. at 412 (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974)). However, we review the judge's legal conclusions de novo. N.J. Div. of Youth & Family Svcs. v. L.J.D., 428 N.J. Super. 451, 477 (App. Div. 2012).

In custody determinations, "the primary and overarching consideration is the best interest of the child." Kinsella v. Kinsella, 150 N.J. 276, 317 (1997). This inquiry focuses on the "safety, happiness, physical, mental, and moral welfare of the children." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007) (quoting Fantony v. Fantony, 21 N.J. 525, 536 (1956)).

"A party seeking to modify custody must demonstrate changed circumstances that affect the welfare of the children." Hand, 391 N.J. Super. at 105; see also Lepis v. Lepis, 83 N.J. 139, 159 (1980). "A plenary hearing is required when the submissions show 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." Ibid. However, "the threshold issue is whether the movant has made a prima facie showing that a plenary hearing is necessary." Id. at 106.

Having carefully examined the record and judging it against the appropriate standard and the principles reviewed, we affirm the motion judge's decision. We add the following comments.

Plaintiff first argues the trial judge erred by failing to base his decision on competent and reliable evidence. Specifically, she claims "[i]n both the 2014 plenary hearing in Virginia and the motion hearing held below, neither court heard live testimony as to [defendant's] ability to move him and [Allison] into his parent[s'] home." Plaintiff's contention lacks merit. The Virginia court heard testimony from both defendant and his mother regarding this issue, and concluded that the issue of defendant's "financial instability . . . is largely resolved by

the stability of his parents," who have "a very stable household," and reside next door.

Moreover, if plaintiff wanted to challenge the findings and conclusions that led to the entry of the March 2014 order, she needed to appeal that order in Virginia. Instead, she moved to Maryland and then filed the motion under review in New Jersey, where defendant lives with Allison, seeking to regain residential custody. Because plaintiff now attempts to modify a custody order, she must establish a prima facie case of changed circumstances affecting Allison's welfare. See Hand, N.J. Super. at 105. The motion record fully supports the motion judge's determination that plaintiff failed to establish the requisite changed circumstances.

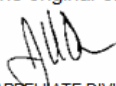
In addition, we find no abuse of the motion judge's discretion in denying plaintiff's motion without a plenary hearing; plaintiff essentially seeks to relitigate in New Jersey a custody issue that the Virginia court previously decided. As noted, the Virginia judge fully acknowledged defendant's financial hardships in his findings, and anticipated defendant's finances may deteriorate. Much of the same information regarding defendant's financial status was available during the Virginia court's custody hearing. We are not persuaded that defendant's accumulation of additional debt constitutes a substantial change in circumstances.



We are satisfied the Family Part judge considered and reviewed each of plaintiff's arguments and provided adequate reasons for denying plaintiff's motion without a plenary hearing. To the extent we have not addressed any argument plaintiff raised, we have deemed such arguments lacking in sufficient merit to warrant comment in a written opinion. See R. 2:11-3(e)(1)(E). Nevertheless, we note our affirmance does not preclude plaintiff from presenting a future application to modify custody or parenting time based upon her establishing changed circumstances warranting such relief.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION