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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-5408-15T1

G.R.R.,

Plaintiff-Appellant,

v.

R.B.,

Defendant-Respondent.

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Submitted November 15, 2017 – Decided April 3, 2018

Before Judges Alvarez and Nugent.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Somerset  
County, Docket No. FM-18-0181-12.

Caryl Wolfson Leightman, attorney for  
appellant.

Luke Lynch, attorney for respondent.

PER CURIAM

This dispute involves custody of and parenting time with the  
parties' only child. Plaintiff-father appeals from certain  
provisions of a July 26, 2016 post-judgment order, including those

that granted defendant-mother joint custody and unsupervised parenting time, restored defendant's parenting time during the child's school and summer vacation to that agreed upon by the parties in their Marital Settlement Agreement (MSA), and relieved defendant of the obligation to test her residence for smoke as a condition of parenting time. Plaintiff argues, among other things, the trial court granted the change in parenting time in the face of disputed certifications without conducting a hearing. We agree and therefore remand for a hearing.

The parties divorced in 2012 after three and one-half years of marriage and the birth of their only child. They agreed in their February 7, 2012 MSA to "share joint legal custody of the child." They also agreed to a two-week cycle as their parenting time plan, which accommodated plaintiff's work schedule and afforded each party holiday and vacation time with the child.

Defendant became ill in October 2013, and the parties signed a consent order, effective November 1, 2013, modifying the MSA. They agreed "to depart from the present custody and parenting time arrangement" for sixty days. During the sixty-day period, plaintiff would have "residential custody" of the child, and defendant would have "supervised parenting time" during designated hours on Saturdays, one Sunday, Thanksgiving Day, and Christmas

Eve.<sup>1</sup> Upon the expiration of sixty days, the parties would again adhere to the MSA's parenting time terms.

Before the sixty days elapsed, plaintiff filed a motion seeking to make the temporary order permanent. Due to her illness, defendant did not oppose the motion. The court granted the order in part after finding it was in the child's best interests to do so. In addition to restricting defendant's parenting time to supervised visits, the court prohibited the parties from performing "healthcare procedures" on the child, requiring instead that such procedures be performed by medically trained personnel. The court also restrained defendant from allowing the child to be in a smoke-filled environment.

In a written statement of reasons, the court noted plaintiff's counsel's representation that defendant's poor health had prevented her from responding to the motion. The court also noted defendant had been hospitalized at a mental health center for three days. The court explained it had repeatedly adjourned the motion at the parties' request, but could wait no longer to decide it.

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<sup>1</sup> This order, as well as subsequent orders, included provisions concerning child support. Such provisions are not at issue on this appeal.

The court further explained that it was unaware of the precise "nature and severity" of defendant's mental health issues, but due to her

illness and the fact she appears to have been unable to bond with [the child] through her limited parenting time, it is in [the child's] best interest, to continue indefinitely the parties' November 1, [c]onsent [o]rder including the portion addressing custody and parenting time subject to the parties' agreement otherwise or further [o]rder of the court . . . .

The court noted "custody and parenting issues are always subject to review and adjustment in the best interests of the children." The court determined the child would benefit from the current stability provided by plaintiff "on a consistent basis as [defendant] continues her healing process." The court stated when defendant recovered, "she may, in the absence of the parties' agreement, petition the court for possible modification of this arrangement."

The court prohibited the parties from performing "healthcare procedures" on the child based on plaintiff's certification about various "procedures" defendant had allegedly performed on the child's skin and nails. The court also restrained defendant from allowing the child – who has severe asthma – to be in a smoke-filled environment. Plaintiff suggested in his moving papers,

"[a]t the very least, it appears . . . a smoke-filled environment could make [the child's pulmonary issues] even worse."

During the next two years, plaintiff filed two more motions, and the parties resolved them by entering into consent orders. The first consent order, dated September 11, 2015, modified defendant's supervised parenting time and required her to have air quality in her residence tested by an independent company to assure the environment was free of tobacco smoke. If the air quality tested above permissible limits, defendant's supervised visitation would be suspended until the test demonstrated the air quality was within normal limits. Plaintiff, at his expense, would administer tobacco exposure tests on the child. The second consent order, dated January 14, 2016, also modified defendant's supervised parenting time.

In June 2016, defendant filed the motion at issue on this appeal. She sought unsupervised parenting time - without the condition that she test her residence for smoke - and joint legal custody of the child. In support of the motion, she certified that in 2013 she developed a medical condition that she realized might impact her relationship with the child. For that reason, she agreed with plaintiff to modify the MSA for a period of sixty days.

Defendant explained that due to her medical condition she was unable to oppose plaintiff's subsequent motion to convert the temporary order to a permanent order. She also explained her condition was now under control, she was no longer experiencing the severe symptoms she had previously experienced, and her condition no longer affected her parenting.

Defendant addressed the issue of smoke in her residence. She said independent laboratory tests and the child's saliva and urine tests "all consistently showe[ed] that [the child] is negative for exposure to tobacco smoke."

Defendant supported her averments with documentary evidence. The documentary evidence included two letters from her doctor and analytical reports of air testing in her residence.

Plaintiff filed a cross-motion seeking to deny defendant the relief she requested. In a supporting certification, plaintiff rehashed the allegations he had made in all his previous motions and added the child had no emergency room visits or hospitalizations since he had obtained sole legal and physical custody. He asserted the child's pulmonary functions had improved. He also averred his screenings of the child for the tobacco smoke were positive. Defendant countered that plaintiff and plaintiff's father had manipulated the screenings.

Plaintiff expressed concern about defendant administering proper doses of medication to the child, having the child do her homework, and getting the child to bed at a time that she would not be exhausted during the school day. Plaintiff included the certifications of a licensed manicurist and a Registered Nurse who each provide specified non-medical professional services to the child.

In granting defendant unsupervised parenting time and joint custody, the court determined the provisions of the parties' consent orders were "particularly draconian." The court acknowledged plaintiff's concerns about defendant over-medicating the child and exposing her to cigarette smoke, but concluded there were methods available to address these concerns while affording defendant meaningful parenting time. The court concluded the present situation did not afford the mother and child sufficient time "to develop a meaningful parent-child relationship."

The court noted the allegations plaintiff had made in previous motions. The court also noted defendant now denied or disputed plaintiff's claims regarding defendant performing medical procedures on the child, the residence testing positive for smoke, the child having undergone excessive hospitalizations, and the allegation defendant cut the child's nails obsessively. The court found "[t]he competing certifications present the parents'

differing views of the other's care for [the child], but other than the exposure to cigarette smoke, the [c]ourt [found] these disputes to be relatively minor and able to be resolved if they continue to present in the future."

The court granted defendant unsupervised parenting time two nights during the week from 3:00 p.m. until 6:00 p.m., Sundays from 8:30 a.m until 6:00 p.m., and holidays to 8:00 p.m. unless the next day was a school day, in which case defendant's parenting time would end at 6:00 p.m. The court awarded defendant other parenting time "as previously agreed by the parties in their [MSA]" to the extent not affected by the court's current order. The court relieved defendant of the obligation to test the air quality in her home and awarded her joint custody of the child.

On appeal, plaintiff argues defendant failed to demonstrate changed circumstances warranting a custody modification, and the court erred by implicitly finding to the contrary. In addition, plaintiff contends "the court erred in reinstating legal custody to defendant." Plaintiff asserts the court abused its discretion when it made its decision without first conducting a plenary hearing. Last, plaintiff argues a new judge should hear the case on remand and venue should be transferred.

In response, defendant argues the court's determination she demonstrated changed circumstances is amply supported by the



record. She contends the court's award of joint custody was also supported by the evidence and based on the child's best interests. Defendant argues there was no need for a plenary hearing because plaintiff failed to make a prima facie case that such a hearing was necessary. Defendant opposes a change of venue on remand.

Well-settled legal principles guide our review of a trial court's order concerning a custody issue. When a court must decide a custody motion, "the primary and overarching consideration is the best interest of the child." Kinsella v. Kinsella, 150 N.J. 276, 317 (1997) (citing Fantony v. Fantony, 21 N.J. 525, 536 (1956)). "The court must focus 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, 21 N.J. at 536). The "best-interest-of-the-child" standard applies not only to cases in which a parent seeks legal custody of a child, but also to cases in which a parent seeks to have a court modify his or her "right with respect to contact with [a] child." Finamore v. Aronson, 382 N.J. Super. 514, 522 (App. Div. 2006) (citing Voit v. Voit, 317 N.J. Super. 103, 121 (Ch. Div. 1998)). "Similarly, a restriction of, or condition placed upon, a parent's visitation rights, must also be controlled by the best interests of the child." Ibid. (citing Sacharow v. Sacharow, 177 N.J. 62, 80 (2003)).

"A party seeking to modify custody must demonstrate changed circumstances that affect the welfare of the children." Hand, 391 N.J. Super. at 105 (citing Borys v. Borys, 76 N.J. 103, 115-16 (1978); Sheehan v. Sheehan, 51 N.J. Super. 226, 287 (App. Div. 1958)). "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.; see also Lepis v. Lepis, 83 N.J. 139, 159 (1980).

Thus, "[m]odification of an existing child custody order is a 'two-step process.'" Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015) (quoting R.K. v. F.K., 437 N.J. Super. 58, 62 (App. Div. 2014)). A party seeking modification must show a change in circumstances that affects the welfare of the child or children, and if the party makes such a showing, "the party is '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 custody order.'" Ibid. (quoting R.K., 473 N.J. Super. at 62-63 (citation omitted)).

Here, defendant demonstrated changed circumstances. She had suffered an illness that prevented her from properly supervising the child, led her to enter into a consent order with plaintiff to modify the MSA, and prevented her from opposing plaintiff's

subsequent motions. Defendant made a showing that the illness was now under control. She also made a showing that tobacco smoke did not exist in her residence at a level that would be adverse to the child's health. In addition, defendant denied she had ever over-medicated or performed any medical procedures on the child. And as the trial court found, it was in the child's best interest to have sufficient quality parenting time to bond with defendant. See Finamore, 382 N.J. Super. at 523 ("The child's 'best interest' is fostered when both parents are involved with the child, assuring him of frequent and continuing contact with both parties." (citing N.J.S.A. 9:2-4)).

We disagree, however, that plaintiff was not entitled to a hearing. Although defendant submitted documentary medical evidence that a condition from which she had suffered was now under control, the evidence did not precisely disclose the nature and extent of the condition that initially led defendant to enter into the consent order relinquishing physical custody and agreeing to supervised parenting time. Nor is it clear the doctor who wrote the letters concerning defendant's medical condition being under control was qualified to give an opinion as to the medical condition that originally rendered defendant unable to properly supervise the child.


Moreover, the evidence concerning both the quality of air in defendant's residence and the extent of its impact on the child were disputed. The dispute was significant given the evidence plaintiff produced about the severity and sensitivity of the child's pulmonary problems. In short, though defendant made a showing of changed circumstances, there were significant factual issues in dispute that could not be resolved without a plenary hearing. Accordingly, we remand this matter for that purpose, provided the trial court determines a hearing remains necessary.

We do not vacate the order from which plaintiff has appealed. The order has not been stayed. Due to the time that has passed since the entry of the order, it may be that the issues in dispute have become non-issues, and we are reluctant to interfere with a situation that may have stabilized. We suggest the trial court conduct a management conference as soon as possible to review these issues with the parties and schedule a hearing if necessary.

We have considered plaintiff's remaining arguments and determined they are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION