SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0215-21

JILLIAN A. MCMICHAEL,

Plaintiff-Respondent,

v.

STEPHEN MAY,

Defendant-Appellant.

Submitted April 4, 2022 – Decided April 20, 2022

Before Judges Rose and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FD-08-0391-18.

Adinolfi, Lieberman, Burick, Roberto & Molotsky, PA, attorneys for appellant (Drew A. Molotsky, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant, Stephen May, appeals from an August 24, 2021 Family Part order granting plaintiff, Jillian McMichael's application to modify a custody order. The trial court, following a summary proceeding, reduced defendant's parenting time from seven overnights every two weeks, to two overnights every two weeks. Following our review of the record and applicable legal principles, we reverse and remand for a plenary hearing and an opportunity for the parties to conduct discovery.

I.

We derive the following facts and procedural history from the record. The parties shared joint legal custody of their eight-year-old daughter, E.M., with defendant designated as the parent of primary residence pursuant to a November 9, 2017 order. Plaintiff and defendant shared parenting time on a 50-50 basis. Defendant had overnights every Monday and Tuesday, and plaintiff had overnights every Wednesday and Thursday. The parents alternated weekend overnights which included Friday, Saturday, and Sunday.

In May of 2021, defendant moved from his parents' home in Deptford Township, which was close to plaintiff's residence and E.M.'s school, to Alloway, New Jersey. Defendant contended the new residence in Alloway is a thirty-minute drive to E.M.'s school and defendant's prior residence. On school

days when E.M stayed with defendant, defendant woke E.M. up shortly before 6:00 a.m. and dropped her off at his mother's home so that he could be at work by 7:00 a.m. Defendant's mother assisted in taking E.M. to school, which starts at 8:15 a.m., and cared for her after school until defendant gets off work.

The parties appeared before the trial judge for a Zoom hearing on August 24, 2021. Plaintiff argued it was unreasonable for E.M. to awaken that early, as she was "dragging" as a result of the changed arrangement, and she did not want overnights with defendant during the week. Defendant, on the other hand, argued the child enjoyed spending time with him, particularly the overnights.

Plaintiff testified she noticed at the end of the prior school year, shortly after defendant moved, that her daughter was "just beat," and could not get into a routine. She also indicated E.M. was being driven to defendant's mother's home at 5:30 a.m.[1] Plaintiff disputed that E.M. got up at 5:55 a.m., and also that the drive was "much longer" than thirty minutes.

Defendant acknowledged his daughter was initially tired on school mornings following the move, but then adjusted. Defendant also testified his

[1] Testimony also was adduced regarding defendant's living arrangements and other people living in the home, where he rented rooms. However, the trial court did not base its decision on those issues and appeared to be satisfied there were no concerns about the living arrangements at defendant's residence.

daughter liked living with him and the fact there were other children living in the other part of the house with whom she liked to play.

The trial judge determined defendant's move from Deptford and its corresponding impact on E.M. constituted a change in circumstances. The court then addressed parenting time. Specifically, the court noted,

> The court will look to adjust the custody parenting time issue in this case. Not custody, custody is gonna remain exactly how it is. But -- actually I am gonna change custody a little bit.
>
> . . . Because the court does have a concern about the child waking up that early in the morning just to go to her grandmother's house where she can go to school from there. . . .
>
> . . . The child is eight years old. While eight hours of sleep may be good for an adult, younger children require more sleep than that.
>
> And having more sleep would impact her ability to do other activities such as dance and softball . . . .
>
> By the time [her activities are done] . . . she would be looking to go to bed, at the earliest, around what she's doing now, approximately 9:00 at night.
>
> And the court finds that that's concerning and mother's concern is justified.
>
> So -- but the court doesn't want to keep parenting time away from dad. It's just the issue about the sleeping and making sure the child has enough time to sleep.

> So the court is gonna modify the parenting time as follows: . . . the parties are still gonna alternate their weekends. Dad's parenting time is still gonna be Friday through Sunday. . . . But what's gonna happen is, the child on . . . Sunday . . . he's gonna bring back the child to mom's house, at 7:00.
>
> Mom is gonna have the child overnight [on Sunday]. . . .
>
> . . . Mr. May will be able to pick up the child and spend the entirety of the afternoon with the child . . . on . . . Mondays and Tuesdays after school . . . .
>
> But . . . Mr. May is . . . gonna have to drop the child off by . . . 8:30 [at plaintiff's home].
>
> . . . .
>
> [E.M.] will stay at mom's house [Monday and Tuesday] . . . and then mom will be able to spend her typical Wednesday, Thursday days with the child.

II.

On appeal, defendant contends the court held a "short summary hearing" and only conducted limited questioning of the parties. In short, there was no plenary hearing. Defendant further argues the court failed to allow discovery and did not conduct or consider a child interview. Defendant avers the court erred by not sending the parties to mediation. Defendant notes the court modified the equal parenting-time arrangement in the original order and reduced

his overnights from seven out of fourteen days to just two out of fourteen days. As a result, plaintiff has become the de facto primary residential custodian. Defendant reiterates the court's order resulted in a substantial change of parenting time which fundamentally overhauled the custodial and parenting time of the parties without a plenary hearing.

In addition, defendant submits he was never provided with a full copy of the complaint filed by plaintiff before the hearing.[2] Defendant notes the trial court also failed to address the statutory factors set forth in N.J.S.A. 9:2-4, which is mandatory in a contested custody case. Kinsella v. Kinsella, 150 N.J. 276, 317 (1997). Defendant further contends the court should have required both parties to submit their custody and parenting time/visitation plan pursuant to Rule 5:8-5 because plaintiff sought a change in residential custody. Defendant also asserts the trial court failed to refer this matter to mediation, which was required pursuant to Rule 5:8-1, because the application required a request to change parenting time.

[2] Rather, defendant was instructed that if he wanted to receive a copy of the "original complaint" he had to call the court.

III.

Our scope of review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We accord deference to the family courts due to their "special jurisdiction and expertise" in the area of family law. Id. at 413. The court's findings are binding as long as its determinations are "supported by adequate, substantial, credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

A decision concerning custody or visitation is within the sound discretion of the judge. See Randazzo v. Randazzo, 184 N.J. 101, 113 (2005). A judge must consider a request for modification of a custody or visitation order in accordance with the procedural framework established in Lepis v. Lepis, 83 N.J. 139, 157-59 (1980). To establish a prima facie case for modification of a visitation arrangement, the moving party must show a substantial change in circumstances. Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007). The moving party must also demonstrate the changed circumstances affect the welfare of the child such that his or her best interests would best be served by modifying the current arrangement. Ibid. In evaluating whether the requisite changed circumstances exist, the court must consider the circumstances that existed at the time the current order was entered. Sheehan v. Sheehan, 51 N.J.

Super. 276, 287-88 (App. Div. 1958). After considering those facts, the court can then "ascertain what motivated the original judgment and determine whether there has been any change in circumstances." Id. at 288.

A plenary hearing is required when there is "a genuine and substantial factual dispute" regarding the child's wellbeing. Hand, 391 N.J. Super. at 105. The need to hold a plenary hearing is particularly compelling where there are material factual disputes raised by the parties. See K.A.F. v. D.L.M., 437 N.J. Super. 123, 137 (App. Div. 2014) ("A court, when presented with conflicting factual averments material to the issues before it, ordinarily may not resolve those issues without a plenary hearing."). The failure to conduct a plenary hearing where there are genuine issues of fact in dispute requires reversal and remand for such a hearing. Id. at 138; see also Faucett v. Vasquez, 411 N.J. Super. 108, 119 (App. Div. 2009) ("Absent exigent circumstances, changes in custody should not be ordered without a full plenary hearing.").

Moreover, our Supreme Court in Faucett noted, "The touchstone for all custody determinations has always been 'the best interest[s] of the child.'" Id. at 118 (quoting Kinsella, 150 N.J. at 317). "Custody issues are resolved using a best interests analysis that gives weight to the factors set forth in N.J.S.A. 9:2-4(c)." Hand, 391 N.J. Super. at 105. That statute permits a judge to make "[a]ny

. . . custody arrangement . . . in the best interests child." N.J.S.A. 9:2-4(c). Faucett, 411 N.J. Super. at 118. N.J.S.A. 9:2-4(c) requires a judge to evaluate various factors involving the custody of a minor child. The statute provides:

> 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 [their] 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.
>
> [Ibid.]

IV.

We recognize non-dissolution matters on the FD docket can be demanding for Family Part judges, and many FD applications are of a summary nature. See J.G. v. J.H., 457 N.J. Super. 365, 374 (App. Div. 2019). However, when an

application involves a contested custody and parenting application, the trial court must "look past the docket designation to the nature of the dispute." Ibid.

Here, defendant never received any specific information or narrative from plaintiff with respect to why plaintiff was seeking a change in custody. Rather, plaintiff only checked two boxes on the FD application form, indicating she sought to change the existing custody/parenting time order. When asked to "explain anything the court should know about this application," plaintiff stated, "See original complaint for narrative." The original complaint, however, is not part of the record, and defendant submits he never received it. Rather, the form advised he could call a number to obtain a copy. While defendant should have called the number in advance of the hearing, the better practice would have been for the court to have forwarded a copy of the complaint to defendant. As a result, defendant appeared for the Zoom hearing without knowing plaintiff was seeking a significant change in the parenting time schedule. While this is no fault of the trial judge, we are concerned plaintiff was not provided with sufficient notice in advance of the hearing regarding the precise nature of the application.

While the court took limited testimony from the parents, the hearing was more in the nature of a summary proceeding. The court simply questioned the

parents about the dispute. This procedure was similar to what occurred in J.G., and did not constitute a plenary hearing.

In J.G., although the parties were represented by counsel, the trial court conducted the questioning and did so in a summary manner. We noted:

> The proceeding that took place did not constitute a plenary hearing. The motion judge asked the parents questions, going back and forth between them. He did not allow Jane's counsel to participate meaningfully in the proceedings. The parents were not given an opportunity to exchange discovery, retain an expert witness, call witnesses, or cross-examine each other.
>
> [Id. at 373.]

Moreover, as with any contested custody matters, prior to a plenary hearing, "the parties should have been sent to mediation, Rules 1:40-5 and 5:8-1, and, if they were unable to resolve the issues, they should have been required to submit a Custody and Parenting Time/Visitation Plan pursuant to N.J.S.A. 9:2-4(e), Rule 5:8-5(a), and Luedtke v. Shobert, 342 N.J. Super. 202, 218 (App. Div. 2001)." Id. at 371. Finally, while the court addressed certain issues with respect to the best interest of the child, the court did not specifically address the factors set forth in N.J.S.A. 9:2-4. See Bisbing v. Bisbing, 230 N.J. 309, 322 (2017) (citing N.J.S.A. 9:2-4(f)).

For the reasons set forth above, we vacate the August 24, 2021 order and remand this matter for discovery and mediation, which shall take place within forty-five days of this opinion. We are mindful that E.M. is eight years old and has been living under the schedule set forth in the August 24, 2021 order the entire school year. On remand, the trial court shall fashion a temporary parenting time order until the parties can attend mediation, or a subsequent plenary hearing, if necessary. If the matter is not resolved at mediation, the matter shall be scheduled for plenary hearing.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.