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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-1559-21**

DONNELL JOYCE,

Plaintiff-Appellant,

v.

TONYELLE THOMPSON,

Defendant-Respondent.

Argued May 23, 2023 – Decided August 22, 2023

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Warren County,
Docket No. FM-21-0119-10.

Jane M. Personette argued the cause for appellant
(Bastarrika, Soto, Gonzalez & Somohano, LLP,
attorneys; Jane M. Personette, of counsel and on the
brief).

George J. Cotz argued the cause for respondent.

PER CURIAM

In this post-judgment matrimonial case, plaintiff Donnell Joyce appeals from a December 17, 2021 order denying his motion concerning residential custody of and his child-support obligation regarding the parties' unemancipated eighteen-year-old son. Because the judge erred in deciding the motion without holding a plenary hearing, we reverse the order and remand for a plenary hearing.

I.

Plaintiff and defendant Tonyelle Thompson¹ were married in 2002. They have two sons: one born on September 19, 2002, and another born on October 17, 2003. The parties were divorced by way of a dual final judgment of divorce on July 12, 2010. They previously had executed a Matrimonial Settlement Agreement (MSA), dated June 30, 2010. In the MSA, the parties agreed they would share joint legal custody of their children, with defendant designated as the parent of primary residence and plaintiff designated as the party of alternate residence. The parties also agreed in the MSA that plaintiff would pay defendant \$223 weekly in child support.

¹ Some of the documents in the record refer to defendant as Tonyelle Thompson; some refer to her as Tonyelle Joyce. In her certification, defendant referred to herself as "Tonyelle Thompson f/k/a Tonyelle Joyce." Accordingly, we refer to her as Tonyelle Thompson.

In May 2020, plaintiff moved for, among other things, modification of the parties' MSA concerning residential custody of their youngest son and his child-support obligation. In a June 19, 2020 order with an attached statement of reasons, a Family Part judge denied plaintiff's motion as to a modification of custody. The judge held plaintiff had "not shown a substantial change of circumstances affecting the welfare of [the youngest son]." The judge found the son's "current preference" was "not sufficient to change residential custody," stating generally that "[t]eenagers shift their opinions about where they wish to reside, oftentimes based on their preference of house rules." The judge granted plaintiff's request for modification of his child-support obligation and, in a July 6, 2020 order, reduced it to \$212 weekly.

Plaintiff moved for reconsideration. In support of that motion, he submitted the youngest son's certification, in which he testified he had been living "continuously" with plaintiff "since June of 2019 when [he] returned from boarding school" and had slept at defendant's house "about [five] to [six] times total." The son expressed his desire and intent to continue to live with plaintiff. A different Family Part judge denied plaintiff's reconsideration motion.

In a September 20, 2021 order, plaintiff's child-support obligation as to the parties' oldest son was terminated because he had reached the age of nineteen. Plaintiff's new child-support obligation was reduced to \$170 weekly.

In October 2021, plaintiff moved for residential custody of the youngest son and designation as the son's parent of primary residence based on "a substantial change in circumstances." Plaintiff also requested, among other things, that the court terminate his child-support obligation. In support of the motion, plaintiff certified that the youngest son had been residing with him "uninterrupted for the past two years – since June, 2019 when he returned from the boarding school he was attending in Virginia" and that he spent "only sporadic overnights" at defendant's home.

Defendant opposed the motion and cross-moved to restore plaintiff's child-support obligation for the parties' oldest son. Defendant certified that the youngest son lived with her and gave as an example the month of October 2021, in which he had spent twenty nights at her house. She stated "nothing has changed" and that she washed the youngest son's clothes, took him to the barber, shopped and vacationed with him and had not worked for the past five years so she could be available to him "24/7/365." She asserted the youngest son had

never expressed a desire to live with plaintiff and seemed "happy with the present arrangement, where he goes freely from one home to the other."

Plaintiff submitted a certification in opposition to defendant's cross-motion and in further support of his motion. He certified, contrary to defendant's representations, that the youngest son had spent the month of October 2021, sleeping at plaintiff's house, "in the same room and bed he has occupied for the past two and a half years." According to plaintiff, the son "rarely" slept at defendant's house and "the bulk of his laundry [was] done at [plaintiff's] home where he lives."

Plaintiff also submitted the certification of the youngest son he had submitted in support of the reconsideration motion and an "updated" certification of the youngest son. In the new certification, the son "reaffirm[ed] the statements contained" in the reconsideration certification. He again certified he had lived with plaintiff since June of 2019 and that he had "every intention of continuing to do so." He stated he did not live with defendant and had slept at her house only "on rare occasions."

The motion judge decided the motions – without hearing argument and apparently without considering plaintiff's reply submissions – before their return date, as memorialized in a November 16, 2021 order. The judge denied

defendant's cross-motion and plaintiff's requests to designate him as the parent of primary residence, award him residential custody of the youngest son, and terminate his child-support obligation. After plaintiff submitted a letter complaining about that procedure, the judge scheduled and heard argument.

In a December 17, 2021 order, the judge again denied defendant's cross-motion and plaintiff's requests concerning residential custody of the youngest son, designation as parent of primary residence, and terminating his child-support obligation. In an attached statement of reasons, the judge acknowledged the parties' contradicting statements concerning the youngest son's residence. He made no reference to the son's certifications. The judge held plaintiff had "again failed to show a substantial change in circumstances affecting the welfare of [the youngest son]" and had not "set forth any evidence of what days [the youngest son] is residing with him rather than [d]efendant."

On appeal, plaintiff argues the judge abused his discretion by failing to conduct a plenary hearing and erred in failing to consider the factors set forth in N.J.S.A. 9:2-4 and in concluding plaintiff had not met the threshold burden of showing substantially changed circumstances. We agree the judge abused his discretion in deciding the motion without conducting a plenary hearing.

II.

We review a judge's decision to decide a custody-modification motion without a plenary hearing under an abuse-of-discretion standard. Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015). Generally, we "afford substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters." W.M. v. D.G., 467 N.J. Super. 216, 229 (App. Div. 2021). However, "[w]hile we respect the family court's special expertise, a court may not make credibility determinations or resolve genuine factual issues based on conflicting affidavits." K.A.F. v. D.L.M., 437 N.J. Super. 123, 137-38 (App. Div. 2014).

"Modification of an existing child custody order is a 'two-step process.'" Costa, 440 N.J. Super. at 4 (quoting R.K. v. F.K., 437 N.J. Super. 58, 62 (App. Div. 2014)). "First, a party must show 'a change of circumstances warranting modification' of the custodial arrangements." Ibid. (quoting R.K., 437 N.J. Super. at 63). "If the party makes that 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., 437 N.J. Super. at 63). "A thorough plenary hearing is necessary in contested custody matters where the parents make materially

conflicting representations of fact." J.G. v. J.H., 457 N.J. Super. 365, 372 (App. Div. 2019).

In their certifications, plaintiff and defendant made materially conflicting factual representations. Plaintiff said the youngest son lived with him; defendant said he lived with her. In addition to his own certification, plaintiff submitted two certifications of the youngest son, who consistently testified he lived with plaintiff, not defendant. The judge made no reference to the son's certifications in his opinion, leading us to question whether the judge reviewed and considered that critical evidence. The judge concluded plaintiff had not "set forth any evidence of what days [the youngest son] is residing with him rather than [d]efendant." Had he reviewed the son's certifications, the judge would have seen the son's testimony that he does "not live with [his] mother and only sleep[s] at her home on rare occasions."

Plaintiff's and the son's certifications demonstrate a prima facie change of circumstance. An eighteen-year-old son choosing to live with plaintiff could warrant a modification of the parties' over ten-year old MSA provision concerning residential custody. Given the parties' conflicting certifications and the existence of genuine issues of material fact, the judge abused his discretion in deciding plaintiff's motion without first conducting a plenary hearing.

Accordingly, we vacate the order and remand with instructions the judge conduct a plenary hearing and render a decision after considering the evidence presented during that hearing.

Reversed and remanded for 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