IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

MOHAMED ESSA,

Appellant,

v.

Case No. 5D20-2599
LT Case No. 05-2011-DR-15231

STEPHANIE PEPE-KATALINAS,

Appellee.

_____/

Opinion filed November 12, 2021

Nonfinal Appeal from the Circuit Court for Brevard County, Charles J. Roberts, Judge.

Elizabeth Siano Harris, of Harris Appellate Law Office, Mims, for Appellant.

Tiffany Crews Loris, of The Loris Law Group, Viera, for Appellee.

EDWARDS, J.

Appellant, Mohamed Essa ("Former Husband"), appeals the trial court's November 19, 2020 order granting Appellee's, Stephanie Pepe-

Katalinas ("Former Wife"), motion for a temporary parenting plan which changed the Stipulated Parenting Plan that had been ratified by and incorporated into the 2012 final judgment of dissolution. The temporary plan set forth in the appealed order was based on a two-year-old social investigation report and substantially changed the parties' time sharing. Because no competent substantial evidence supports the trial court's order finding exigent circumstances, we reverse the order and remand for further proceedings.

Under the parenting plan set forth in the 2012 final judgment, Former Husband had primary time sharing. Former Wife was initially to have supervised visits which would and did transition to unsupervised visits if and as she completed certain counseling, which she did.[1] In December 2017, Former Wife filed a petition to modify the parenting plan. In 2018, she obtained a court order appointing a social investigator, who ultimately filed a report regarding the parties' child. The 2018 report recommended equal time sharing, conditioned upon Former Wife agreeing to attend further counseling weekly and to see a psychiatrist monthly.

[1] It is undisputed that Former Wife has certain conditions that require and apparently respond well to prescription medications and other forms of therapy.

In February 2020, Former Wife filed her motion for a temporary parenting plan. During the hearing held on Former Wife's motion, the trial court orally announced that it was going to grant the motion. Former Husband objected and argued that under *Gielchinsky v. Gielchinsky*, 662 So. 2d 732 (Fla. 4th DCA 1995), and *Smith v. Crider*, 932 So. 2d 393 (Fla. 2d DCA 2006), "a [c]ourt may not modify a final judgment of dissolution of marriage on a temporary basis pending final hearing unless there is an actual, demonstrated emergency." The trial court disagreed.

The trial court's November 19, 2020 written order granting Former Wife's motion stated that there were "exigent circumstances" warranting the temporary modification, and it further stated that the 2018 social investigation report indicated that there were "significant and compelling reasons" for modifying time sharing on a temporary basis by increasing the time the child would spend with Former Wife. The order did not specify what the "exigent circumstances" or "significant and compelling reasons" were.

Standard of Review

> "[A]n order changing custody has a presumption of correctness and will not be disturbed absent a showing of abuse of discretion." *Wade v. Hirschman*, 903 So. 2d 928, 935 (Fla. 2005) (citing *In re Gregory*, 313 So. 2d 735, 738 (Fla. 1975)). Thus, we should affirm the trial court's decision when "there is competent, substantial evidence supporting the trial judge's conclusion." *McKinnon v. Staats*, 899 So. 2d 357, 359 (Fla. 1st DCA 2005)

> (citing *Zediker v. Zediker*, 444 So. 2d 1034, 1038 (Fla. 1st DCA 1984)).

Hollis v. Hollis, 276 So. 3d 77, 78–79 (Fla. 2d DCA 2019).

> However, a trial court's authority and discretion in modifying custody[2] are far more restricted than in initially determining custody. In seeking a change of custody, the movant carries the "extraordinary burden" of showing that the circumstances have substantially and materially changed since the original custody determination and the child's best interests justify changing custody.

Mesibov v. Mesibov, 16 So. 3d 890, 891 (Fla. 5th DCA 2009) (citations omitted).

Analysis

In her 2017 motion, Former Wife alleged that the child had certain health issues that Former Husband was not addressing properly.[3] She further alleged that Former Husband restricted the child's communication with Former Wife, that he left the child in the custody of his new wife, the child's stepmother,[4] frequently when he worked, and that he had failed to list

[2] The term "time sharing" has over time and by statute replaced the use of the term "custody."

[3] The parties are aware of the specific allegations; thus, there is no need to set them forth here. When interviewed for the 2018 report, both Former Husband and the child denied Former Wife's factual assertions and lack of attention to the specific issue.

[4] The 2018 report indicated that, as of that time, there was a good relationship between the child, her stepmother, and her stepsister.

Former Wife as a contact on certain school, daycare, and medical information sheets. Former Wife also alleged that the child expressed a desire to spend more time with her and that she no longer wished to live with Former Husband.

The 2018 social investigation report addressed and confirmed many of these allegations. However, as the trial court recognized, by the time of the 2020 hearing, that report did not contain current information and was no longer relevant.[5] Former Wife presented no evidence during the hearing of any emergency situation. Indeed, she insisted that evidence of an emergency was unnecessary for the trial court to grant her motion. This is incorrect. "[A]n order temporarily modifying custody of a child . . . requires an emergency situation, such as where a child is threatened with physical harm or is about to be improperly removed from the state." *Smith*, 932 So. 2d at 398 (citing *Loudermilk v. Loudermilk*, 693 So. 2d 666, 667–68 (Fla. 2d DCA 1997); *Williams v. Williams*, 845 So. 2d 246, 248 (Fla. 2d DCA 2003); *Gielchinsky*, 662 So. 2d at 733).

[5] During the anticipated final evidentiary hearing on the underlying petition, if the trial court chooses to rely on investigative or social reports, due process requires that both parties have a timely opportunity to review the reports and present relevant evidence in support or opposition. *Kern v. Kern*, 333 So. 2d 17, 20 (Fla. 1976).

Former Wife argues that the parties' parenting plan permits either party to seek modification of time sharing. The parenting plan stipulates that "the petitioning party shall be required to meet the legal standard of a material and substantial change of circumstances." Thus, she argues that, based on the parenting plan, there is no requirement for demonstrating the existence of an emergency situation to justify a temporary modification. However, Former Wife did not allege nor prove that there had been a substantial and material change in circumstances. Accordingly, Former Wife's reliance on the parenting plan is unavailing.

We reverse the November 19, 2020 order and remand with directions to the trial court to enter an order returning the parenting plan and time sharing to what existed prior to entry of that order. We do so without prejudice to either party to seek modification of time sharing based upon proper pleading and proof.

REVERSED and REMANDED with directions.

WALLIS and TRAVER, JJ., concur.