SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1507-22

CATHERINE L. HEATH,

Plaintiff-Respondent,

v.

JAMES FLORIO, II,

Defendant-Appellant.

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Argued September 28, 2023 – Decided October 24, 2023

Before Judges Vernoia and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FD-13-0687-16.

James Florio, II, appellant, argued the cause pro se.

Respondent has not filed a brief.

PER CURIAM

Defendant James Florio, II and plaintiff Catherine L. Heath are the parents of a child born in 2013.[1] Defendant appeals from a December 6, 2022 Family Part order denying his September 12, 2022 motion to modify prior parenting time and custody orders awarding plaintiff full legal custody of the child, designating plaintiff the parent of primary residence, and establishing a parenting time schedule allowing defendant one five-hour visitation each week and alternate weekends. Based on our review of the record, the defendant's arguments, and the applicable legal principles, we affirm in part, vacate in part, and remand for further proceedings.

I

We glean the following facts from the scant record submitted by defendant in support of his appeal.[2] Because defendant's arguments are founded on a series of motions and events occurring over many years, we summarize each separately to the extent the record permits.

[1] Plaintiff did not file a brief in opposition to defendant's merits brief and has not otherwise participated in the appeal.

[2] As we explain throughout this opinion, the record on appeal does not include transcripts of pertinent court proceedings, pleadings filed in support and opposition to prior motions, or the court orders for which plaintiff sought modification from the court. See generally R. 2:6-1(a) (specifying those portions of the trial court record that must be included in the record on appeal).

The January 2016 Motion

On January 28, 2016, the court entered an order that in pertinent part granted plaintiff "temporary sole legal custody and primary residential custody" of the child and provided that defendant could "apply for joint legal custody after he complied with" requirements established by the New Jersey Division of Child Protection and Permanency (DCPP).[3] The DCPP requirements to which the court referred are not set forth in the order. In its order, the court expressly stated it did not make "a determination on defendant's parenting time."

The Parties Parenting Time Arrangement Following Entry Of The 2016 Order

Based on the testimony presented at the hearing on defendant's September 2022 motion that is the subject of the pending appeal, it appears that at some point following entry of the 2016 order, plaintiff allowed defendant parenting time, including overnight visitation with the child, over a period of years. It also appears that during the COVID-19 pandemic, plaintiff changed what had been a long-standing parenting arrangement between the parties due to what she testified was her work schedule and the child's return to in-person schooling in 2021 following a period of virtual schooling due to the pandemic.

[3] The record on appeal does not include any pleadings filed with the court in connection with the January 17, 2016 order or the transcripts of any proceedings related to the motion and its disposition.

Defendant's March 2021 Motion To Modify Custody And Parenting Time

In an apparent response to plaintiff's decision to change the parenting time arrangement, defendant moved on March 4, 2021, for a modification of the 2016 custody and parenting time order. In his application, defendant requested the court both "[e]stablish custody" and parenting time and "change custody [and] parenting time terms of the current order." Defendant asserted the 2016 order "was a temporary order" and sought a new order to "reflect changes in . . . visitation and custody." Defendant further explained he did not request modification of the 2016 order earlier because "over the course of the last few years" the parties had an agreement concerning custody. Defendant claimed he sought modification of the 2016 order "due to recent events and complications from the pandemic."

The record on appeal does not include transcripts of any court proceedings related to the disposition of defendant's motion or the pleadings, if any, filed on plaintiff's behalf in response to the motion. The record also does not include any orders entered by the court in response to the motion. However, during her testimony at the hearing on defendant's September 2022 motion that is the subject of this appeal, plaintiff testified about the 2021 proceedings on defendant's motion and the orders entered by the court.

Plaintiff explained that in response to defendant's March 4, 2021 motion, she filed a cross-motion based on claims defendant "had not done certain things pursuant to the 2016 order."[4] Plaintiff further testified the court entered a June 16, 2021 order referring the parties to mediation. The mediation was unsuccessful, and the parties returned to the court, which on October 13, 2021, ordered the parties participate in a custody neutral assessment.

Plaintiff also described the parties' involvement with DCPP, explaining in part that DCPP had ordered defendant undergo a psychological examination and a drug test, but defendant never completed the psychological examination. Plaintiff also explained "DCPP ended up dropping the case because defendant had no legal rights to the child," and therefore "[t]here was no reason for [DCPP] to keep the case open."[5]

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[4] The only "things" required of defendant in the 2016 order were his maintenance of a life insurance policy for the child's benefit and defendant's compliance with DCPP's requirements as a condition of his filing an application for a change in legal custody.

[5] Plaintiff also testified that following the start of the COVID-19 pandemic, DCPP again became involved with the parties, investigating issues related to a claim the child slept in defendant's bed. Plaintiff explained the case was closed because DCPP went to defendant's home and determined the child had her own bed there. Plaintiff further testified there are no pending DCPP services open for her or defendant.

Plaintiff's testimony concerning the proceedings on defendant's March 2021 motion is unrefuted. Moreover, the record includes a March 18, 2022 custody neutral assessment report from David A. Brandwein, Psy.D., LLC, that in part states he performed the assessment pursuant to an October 12, 2021 court order.

The record does not include any court orders filed in response to defendant's March 4, 2021 motion that were entered after the date of Brandwein's report. That is, the record does not include an order from the court addressing the disposition of defendant's motion following the parties' participation in the custody neutral assessment that, as plaintiff explained, was ordered as part of the proceedings on defendant's motion. On appeal, defendant asserts the court never entered an order disposing of his March 4, 2021 motion.

The May 26, 2022 Order

On May 26, 2022, the court entered an order in response to an emergent application—an order to show cause—filed on defendant's behalf by his then-counsel. The record on appeal does not include the pleadings filed on defendant's behalf in support of the order to show cause or the pleadings, if any,

filed on plaintiff's behalf in response to defendant's application.[6] The record also does not include the transcripts of any court proceedings on the application.

The May 26, 2022 order does not address the issue of custody in any manner and because defendant supplies only the court's order, it is unclear if his application sought a change in custody. The order directs that the parties complete the "Children in Between Coparenting Time Program" and use a computer application for their communications concerning their child. In addition, the order sets a parenting time schedule, noting the schedule was the product of an agreement between the parties reached during a May 17, 2022 "consent conference."

Defendant's September 2022 Motion For Modification of Custody and Parenting Time

Less than four months later, defendant filed a September 12, 2022 motion for modification of the May 26, 2022 order. During a December 6, 2022 hearing on the motion, defendant explained he sought a change in custody and parenting time for the child. After hearing testimony from defendant and plaintiff, the

[6] The May 26, 2022 order refers to plaintiff's "cross-application for attorney's fees," but defendant does not include in the record on appeal the pleadings supporting that application, or any other pleadings filed in response to his motion.

court denied the application, finding defendant failed to demonstrate a significant change in circumstances "justifying a change in custody and visitation and parenting time since" entry of the May 26, 2022 order only months earlier. The court entered a December 6, 2022 order denying defendant's application for a change in custody and parenting time for the reasons set forth in the court's decision from the bench. This appeal followed.

II

Reviewing courts accord deference to the findings of the Family Part because of its "special jurisdiction and expertise in family matters." Cesare v. Cesare, 154 N.J. 394, 413 (1998). Thus, findings made by the Family Part are "binding on appeal when supported by adequate, substantial, and credible evidence," id. at 412, and we reverse only if there is "'a denial of justice' because the family court's 'conclusions are [ ] "clearly mistaken" or "wide of the mark,"'" Parish v. Parish, 412 N.J. Super. 39, 48 (App. Div. 2010) (alteration in original) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). Accordingly, we should not disturb the trial court's fact findings unless we are "convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant, and reasonably credible evidence as to offend the interests

of justice." Cesare, 154 N.J. at 413 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)).

We do not defer to a trial court on questions of law. N.J. Div. of Youth & Fam. Servs. v. V.T., 423 N.J. Super. 320, 330 (App. Div. 2011). We conduct a de novo review of a trial court's legal conclusions and interpretations of the law. Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

A party seeking modification of an existing custody or parenting time order must demonstrate changed circumstances and that the current arrangement under the existing order is no longer in the child's best interests. Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007); Finamore v. Aronson, 382 N.J. Super. 514, 522-23 (App. Div. 2006). To satisfy this burden, the moving party must first show "a change in circumstances warranting modification" of the extant custody and parenting time order. Costa v. Costa, 440 N.J. 1, 4 (App. Div. 2015) (quoting R.K. v. F.K., 437 N.J. Super. 58, 63 (App. Div. 2014)). After that showing is made, "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. v. F.K., 437 N.J. Super. 58, 62-63 (App. Div. 2014)) (citation omitted); see also Lepis v. Lepis, 83 N.J. 139, 159 (1980).

Defendant argues the court erred by denying his motion based solely on a finding he failed to demonstrate a change in circumstances warranting a modification of parenting time and custody. He contends we should reverse the court's order because it failed to conduct a plenary hearing as to whether it was in the child's best interests for there to be a modification of custody and parenting time.

A determination of whether a party moving for modification of a custody or parenting time order has demonstrated a sufficient change in circumstances warranting a plenary hearing necessarily requires that the court consider the circumstances extant when the custody and parenting time orders for which modification is sought were entered. See, e.g., Beck v. Beck, 239 N.J. Super. 183, 190 (App. Div. 1990) (explaining assessments of changed circumstances concerning child support involve consideration of the parties' current situations compared "with the circumstances which formed the basis for the last order fixing support obligations"); Donnelly v. Donnelly, 405 N.J. Super. 117, 127-28 (App. Div. 2009) (holding changed circumstances are evaluated based on those

existing at the time the prior order was entered). It is by comparing the circumstances extant when and under which the prior orders were entered with those presented at the time modification is sought that a court may determine whether the circumstances have substantially changed such that it may consider whether a plenary hearing on the issues of custody and parenting time is required.

In his September 12, 2022 motion, defendant sought both modification of the May 26, 2022 order and modification of "custody and parenting time." However, in pertinent part, the May 26, 2022 order addressed only parenting time. It did not make any provision concerning custody and did not otherwise reflect any disposition of defendant's request for a change in custody. Moreover, and as we have explained, the appellate record does not include the pleadings submitted in connection with May 26, 2022, or the transcripts from any proceedings related to the motion, so it is not possible to determine whether a change in custody was requested or whether the court addressed or decided any issues related to a change in custody.

Similarly, we have not been provided with any orders or transcripts from proceedings related to defendant's March 4, 2021 motion for a change in custody and parenting time, other than the application he filed in support of the motion

which expressly sought modification of the January 28, 2016 order. As noted, the 2016 order granted plaintiff temporary sole legal and primary residential custody subject to defendant's right to move to modify custody after fulfilling unspecified DCPP requirements. In his March 4, 2021 motion, defendant sought modification of the January 28, 2016 order, but the record on appeal suggests the court never entered an order disposing of that request beyond referring the parties for a custody neutral assessment.

We again summarize those proceedings to make the point that even in the absence of all the pleadings, orders, and transcripts pertaining to the January 28, 2016 order, the March 4, 2021 application for modification, and the May 26, 2022 order, and based on our review of the record and transcript of the hearing on the September 12, 2022 modification motion, we are convinced the court has never directly addressed defendant's motion for modification of what appears to be the only custody order entered in this matter—the January 28, 2016 order granting sole legal custody and primary residential custody of the parties' child to plaintiff. And that is precisely what defendant argues on appeal; he claims that despite his requests for modification of the original and only custody order—the January 28, 2016 order—the court has consistently failed to address or decide his requests for a change in both legal and residential custody.

As we have explained, the May 26, 2022 order did not address defendant's request for a change in custody but instead only gave effect to the parties' agreement on parenting time. Defendant sought a modification of that parenting time order in his September 12, 2022 motion, but we discern no basis in the record to support a reversal of the court's determination defendant failed to show the requisite substantial change in circumstances permitting or requiring a modification of the parenting time order entered only months earlier.

Defendant argued the change in circumstances warranting a change in parenting time included: the child's purported preference for spending more time with, and residing with, him; plaintiff's alleged failure to emotionally support the child; plaintiff's alleged failure to adequately feed the child; and plaintiff's alleged "partying." After hearing testimony from the parties, the court did not accept defendant's version of the pertinent events as either credible or as constituting circumstances sufficient to justify a modification of the parenting schedule to which the parties had agreed a few months earlier. In addition, the record otherwise shows the alleged facts submitted in support of the September 12, 2022 motion were known to him prior to entry of the May 26, 2022 parenting

time schedule to which he agreed.[7] See Chen v. Heller, 334 N.J. Super. 361, 380 (App. Div. 2000) (explaining a party seeking to modify custody must show a substantial change in circumstances arose from the time the current custody arrangement was established). As such, the court did not err by finding defendant failed to present evidence establishing a change in circumstances warranting modification of the parenting time order entered only four months prior to the filing of defendant's September 12, 2022 motion.

The same cannot be said of the court's denial of defendant's motion for a change in custody. In the court's analysis of the motion for a change in

[7] The March 18, 2022 custody neutral assessment report that defendant includes in the record on appeal describes in detail information provided by defendant on February 21, 2022, months before entry of the May 26, 2022 order incorporating the parties' agreed-upon parenting time schedule. Defendant submitted the report in support of his September 12, 2022 motion to modify the March 26, 2022 order. The assessment notes defendant's February 21, 2022 statements that the child feels "ignored in mother's care," the child says she "want[s] to spend more time with" defendant, defendant's claim plaintiff does not do "a good job with [the child's] emotional needs," defendant's claim the child reports not being "fed when at [plaintiff's] home," and plaintiff's alleged continued illegal drug use. These claims, all known to defendant prior to his consent to the parenting time schedule set forth in the May 26, 2022 order, are identical to those made in support of the September 12, 2022 modification motion. Thus, the circumstances defendant cited in support of his September 12, 2022 motion did not constitute a change in circumstances permitting modification of the May 26, 2022 order because they were known to defendant prior to the entry of the May 26, 2022 order incorporating the parenting time schedule to which the parties agreed.

custody—both legal and residential—the court did not recognize that the May 26, 2022 order did not address the issue of custody, and the court did not otherwise examine the record to determine when the prior custody order was entered such that a determination as to whether a substantial change in circumstances had occurred since entry of the immediately preceding custody order.

For the reasons we have explained, based on the record presented on appeal, it appears the only order expressly addressing custody is the January 28, 2016 order. Nonetheless, the trial court did not consider whether defendant made an adequate showing the circumstances had substantially changed following entry of that order such that a change in custody is appropriate. We observe the January 28, 2016 order provided defendant could apply for a change in custody after satisfying then-extant DCPP requirements, but the record is unclear if defendant satisfied those requirements. Moreover, plaintiff testified there are currently no open DCPP investigations against the parties and the record otherwise shows defendant has enjoyed parenting time with the child and plaintiff wants the child to have a relationship with defendant. In other words, even the thin record presented on appeal suggests there may be changed circumstances supporting a modification of a custody order that was almost

seven years old when the court heard argument on defendant's September 12, 2022 modification motion.

In our view, the court erred by not identifying either the appropriate pending custody order or an order, if any, disposing of a prior motion for modification of a custody order such that it could properly consider the appropriate benchmark for determining whether defendant made the requisite showing of changed circumstan. It is only by identifying the immediately preceding custody order or order disposing of a motion to modify custody that the court could properly decide if plaintiff satisfied his burden of demonstrating the requisite change of circumstances warranting a custody modification. For those reasons, we vacate the court's December 6, 2022 order to the extent it denied defendant's motion for modification of custody, and remand for further proceedings on that request.

In remanding the issue to the motion court, we do not express any view on the merits of the motion and we do not hold or suggest defendant has demonstrated a sufficient change in circumstances warranting either a change in custody or a plenary hearing on the issue. Those determinations shall be made by the trial court in the first instance based on the record presented as supplemented by a review of the prior pleadings, orders, and proceedings on the

prior motions related to custody.[8] The court shall conduct such proceedings on remand as it deems appropriate to address and decide defendant's motion for modification of custody anew.

For purposes of completeness, we also address defendant's remaining arguments. He contends the court erred by denying his request to call his then-twenty-two-year-old daughter as a witness at trial. He argues his daughter would have testified concerning issues such as plaintiff's alleged "bullying" of the parties' child, the child's preference to live with defendant, and defendant's challenges to "the character and validity of" plaintiff. We reject the argument because it is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We offer only the following brief comments.

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[8] As we have explained, based on the record presented on appeal, the only order directly addressing custody is the January 28, 2016 order. Thus, it might be determined on remand that is the immediately preceding custody order that provides the benchmark for the change of circumstances analysis for defendant's motion for a modification of custody. However, to the extent defendant's prior motions in 2021 and 2022 resulted in a denial of an application for a change in custody, it may be that the circumstances extant when those motions were decided provide the benchmark for assessing whether defendant's September 12, 2022 motion demonstrated a sufficient change of circumstances warranting a determination on the merits of the modification application. On remand, the parties shall be permitted all available arguments concerning defendant's burden of establishing a change of circumstances as supported by the record before the remand court.

Defendant claims his daughter would have testified in many areas he argues are pertinent to his case, but at trial he proffered her as putative witness solely for the purpose of establishing that he and plaintiff had a long-term parenting time arrangement, which defendant characterized as a de facto agreement, pursuant to which he had parenting time, including overnight weekend visitations, with the parties' child. The court denied defendant's request to call his daughter for that purpose because plaintiff had stipulated to the existence of the long-term parenting time arrangement and, thus, there were no fact issues pertaining to its existence.

Since defendant did not offer any other basis for calling his daughter as a witness at trial, the court did not abuse its discretion by denying his request to call her as witness as to facts for which there was no dispute. See State v. Sanchez, 247 N.J. 450, 465 (2021) (finding an appellate court reviews a trial court's decision to exclude law witness testimony for an abuse of discretion). Defendant's belated attempt to argue for the first time on appeal that his daughter would have testified as to other pertinent factors does not alter the validity of the court's determination based on his limited proffer at trial. See N.J.R.E. 403(b) (providing a court may properly exclude relevant evidence if its

probative value is substantially outweighed by the risk of "undue delay, waste of time, or needless presentation of cumulative evidence").

Defendant also argues the court erred by considering plaintiff's cross-application, claiming it was not filed within the time permitted under Rule 5:5-4.[9] We reject the argument because the record is bereft of any evidence defendant raised the claim before the motion court, see Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (explaining reviewing courts generally do not consider arguments that were not "properly presented to the trial court" unless the issues "go to the jurisdiction of the trial court or concern matters of great public interest"), defendant fails to include the cross-motion pleadings in the record on appeal, see Soc. Hill Condo. Ass'n, Inc. v. Soc. Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div. 2002) (quoting Rule 2:6-1(a)(1)(H)) (explaining a reviewing court has "no alternative but to affirm" an order where the appellant does not include in the record on appeal the "parts of the record . . . essential to the proper consideration of the issues"), and defendant does not argue or

[9] Rule 5:5-4(c) provides that cross-motions shall be served and filed not later than fifteen days prior to the return date of the original moving party's motion. Defendant argues plaintiff's cross-motion was filed only six days before the December 6, 2022 return date of defendant's September 12, 2022 modification motion.

demonstrate the court granted the cross-motion such that he was prejudiced by its late filing.

Defendant's remaining argument, that the court erred in matters of law and in exercise of its judgment, is without sufficient merit to warrant discussion in written opinion, R. 2:11-3(e)(1)(E), beyond our prior discussion of the issues raised on appeal.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.