SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4336-19

DOROTA C. GARCIA,
n/k/a DOROTA C. SKIBA,

Plaintiff-Appellant,

v.

JOSEPH J. GARCIA,

Defendant-Respondent.

Submitted May 18, 2022 – Decided June 15, 2022

Before Judges Gooden Brown and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FM-16-0681-15.

Douglas J. Kinz, attorney for appellant.

Joseph Garcia, respondent pro se.

PER CURIAM

Plaintiff Dorota Garcia appeals an order granting in part the motion of defendant Joseph Garcia to have more parenting time with the parties' ten-year-

old son, specifically providing defendant with one more week of parenting time during the summer in even years and six additional nonconsecutive overnights of parenting time in odd years. Because we conclude the motion judge did not abuse her discretion by determining changed circumstances supported defendant's request for a modification of the party's earlier agreement and that it was in their son's best interests to increase defendant's parenting time, we affirm.

I.

The parties were married in 2007 and have a son, who was born in 2010. Both represented by counsel, the parties executed a Marital Settlement Agreement (MSA) on June 29, 2017, which was incorporated into a Dual Judgment of Divorce issued on the same day.

In the MSA, the parties agreed to joint legal custody of their son, with plaintiff designated as the parent of primary residence and defendant as the parent of alternate residence. Defendant had parenting time on alternating weekends; alternating Memorial Day weekend, Easter Sunday, and Independence Day; Good Friday and the weekends of Martin Luther King Jr. Day, Presidents' Day, Father's Day, Labor Day, Columbus Day, teacher's convention, and Thanksgiving. He also had parenting time during their son's

winter and spring breaks and two nonconsecutive weeks during the summer. The parties agreed in the MSA they would "engage in the services of a Parent Coordinator to resolve any disputes regarding parenting time."

On September 25, 2018, plaintiff, representing herself, filed an "emergent Order to Show Cause." After completing a "Child Welfare Assessment and Child Protective Matter," the Division of Child Protection and Permanency advised the court "[b]oth parties have complied with both the Substance Abuse Evaluations and Child Welfare Assessment and were not referred for services or treatment." The Division closed its case, and, in a December 4, 2018 order, the court reinstated the parenting-time schedule, which apparently had been temporarily suspended, and awarded defendant "makeup parenting time."

In the fall of 2019, defendant, representing himself, filed a motion "for additional overnight parenting time, holiday and vacation time." Defendant sought to add to his parenting time two weeknight overnights every week; alternating Halloween, Christmas, and New Year's Day holidays; and amending their son's summer vacation schedule to split the time such that each party would have four uninterrupted weeks. In support of his motion, defendant submitted a certification in which he stated:

> There has been a change of circumstance with my work schedule. As of April 5, 2019, I have been approved

> for a flextime . . . twice a week specifically for picking up [the parties'] son . . . . I am permitted to leave work by 2:30PM twice a week in order to pick up [their son] directly from school, so he does not have to attend the after school day care program during my additional weeknight overnights. I will also be able to drop [him] off the next day when school starts instead of [him] having to attend the before school day care program. . . . With this change in schedule, I would be able to pick [him] up by 3:05PM and drop him off at 8:40AM (when school actually starts), reducing his day care time and increasing his family time significantly.

Defendant also certified the parties' son had told him he did not enjoy before or after school care, felt he was spending too much time at school, and was excited about the opportunity to spend more time with defendant. Defendant stated because he had entered his tenth year of employment with his employer, he was authorized to take an additional two weeks of vacation and wanted to have their son for those additional weeks instead of sending him to camp. Defendant submitted a letter from his employer's president confirming approval of his flextime request and an additional two weeks of vacation. Reviewing both the school-year and summer calendar, defendant asserted there were "too many gaps in time" between defendant's parenting-time sessions.

Plaintiff opposed defendant's motion and cross-moved for an award of counsel fees. In a certification, plaintiff asserted the relief sought by defendant was contrary to their son's best interests and "would unravel and undermine the

parenting[-]time provisions of [the parties'] divorce agreement which was the subject of extensive negotiations and compromise." According to plaintiff, "the mid-week parenting issue" was "the major point of disagreement and threatened to force a trial." As to the "mid-week parenting issue," plaintiff referenced her purchase of a house located forty-one minutes from defendant's residence and her concern about defendant's "prior history of drug abuse and his ability to properly supervise [their son] during the overnight parenting sessions." Plaintiff stated that in exchange for defendant giving up his request for mid-week parenting time, she had agreed to other concessions, including giving defendant "most major holidays" – although she has their son Christmas Eve and the Christmas to New Year's break every year – and spring and winter breaks, taking less child support, and waiving a claim for unpaid pendente lite child support.

On January 17, 2020, the motion judge conducted a hearing during which both parties testified. Plaintiff testified, among other things, that defendant was a "heavy pot smoker" who had "no problem with driving drunk." Defendant denied that allegation, stating he had not smoked marijuana in years. Plaintiff asserted defendant took their son to fast-food restaurants; defendant denied that allegation. Defendant stated their son had told him he wanted more time with him and less time in some of his activities, including one of his summer camps;

plaintiff contended their son enjoyed his extra-curricular and camp activities and had told her he did not "like to go to his father." Defendant testified he had asked his employer for flextime and more vacation and his employer had granted that request. When the judge asked defendant how many weeks of vacation he had when the parties executed the MSA, defendant replied, "I think I had, it was four or five weeks. I'm not completely positive."

The judge did not decide the motion on the day of the hearing. She planned to interview the parties' son, but before the interview, she received "letters from both parties stating the other party was influencing the child and attempting to manipulate the interview." As a result, she decided not to interview the child.

The judge conducted a hearing on February 7, 2020,[1] and issued an order that day requiring the parties to participate in mediation regarding "summer parenting time and weekly school non-overnight visits." On February 20, 2020, she issued an order denying plaintiff's cross-motion for counsel fees and defendant's "application for additional overnight parenting time and holiday time with the parties' son" and referencing the previous order requiring mediation "to determine whether defendant should be granted an additional

[1] The record did not contain a copy of the transcript of this hearing.

week of summer vacation time in lieu of the parties' son attending summer camp for that week" and to "address defendant's request for additional non-overnight visits during the school week."

After the mediation was unsuccessful, the judge conducted another hearing on May 8, 2020.[2] According to plaintiff, defendant during that hearing indicated he was willing to accept as a reasonable compromise one additional week of parenting time each summer but refused to accept one additional week of parenting time in alternating summers. Defendant does not dispute that characterization of his position at the May 8, 2020 hearing. According to the judge, by the final day of argument, defendant sought only one additional week of parenting time, having acknowledged the MSA included an in-depth, comprehensive holiday parenting-time provision. Defendant does not dispute that characterization of his position at the end of oral argument.

In a July 23, 2020 order, the judge granted defendant "an extra week of parenting time during the summer of even years" and "six (6) additional overnights during odd years, to . . . be nonconsecutive" and on the first Wednesday night of every other month unless the parties agreed otherwise.

[2] The record did not include a copy of the transcript of this hearing.

After plaintiff filed the notice of appeal, the judge issued an amplification pursuant to Rule 2:5-1(b). In the amplification, the judge found defendant had "established a prima facie case for modification of the custody arrangement by showing a substantial change in circumstance in his ability to take five weeks of paid vacation and flex time from his job" and by his testimony that he had "purposely worked towards the goal of earning extra time off with the hopes of being able to spend extended vacation time with his son."

Considering the impact of the changed circumstances on the child's welfare, the judge found credible defendant's testimony that "most of the child's daily summer time is spent with third parties" and it would be in the child's best interests to spend at least one of the six weeks he typically would spend at summer camp with defendant and his extended family. The judge found incredible plaintiff's testimony that it would not be safe for their son to spend an additional week with defendant due to defendant's alleged marijuana use, citing the December 4, 2018 order reinstating defendant's parenting time after plaintiff's order to show cause was resolved and plaintiff's counsel's statement he had advised plaintiff against raising the issue. The judge also questioned plaintiff's "motives for raising the allegation" given that she had agreed in the MSA defendant would have other weeks of parenting time.

The judge acknowledged the parties' MSA but, citing Borys v. Borys, 76 N.J. 103, 111 (1978), found:

> [O]ne decree cannot decide the best interest of the child during the entirety of their minority. A child entering adolescence will no doubt have differing preferences and needs from what they required years earlier. A rigid stead-fast position that a parenting[-]time schedule contained in [a] judgment of divorce does not take into account the evolving best interests of the child.

The judge concluded "having found [d]efendant had met the threshold of a significant change of circumstance, to balance the equities," it was appropriate to award defendant an additional week of parenting time in the summer of even years and six additional nonconsecutive overnights during odd years. Viewing the additional time as a "slight modification of parenting time," the judge also concluded it was in the child's best interests "to spend an additional week of parenting time with [defendant] while [defendant] has vacation time from work as opposed to third parties such as camps."

On appeal, plaintiff argues the judge erred in (1) granting defendant an additional week of parenting time in the summer in even years because no substantial change in circumstances supported the granting of additional time and defendant had failed to meet his burden to show the MSA was no longer in the parties' son's best interests; (2) granting defendant six additional overnights

in odd years because she had failed to consider the concessions plaintiff made in the MSA and no evidence supported the conclusion mid-week overnight parenting time was in the child's best interests; and (3) finding defendant more credible than plaintiff. Unpersuaded, we affirm.

II.

"We review the Family Part judge's findings in accordance with a deferential standard of review, recognizing the court's 'special jurisdiction and expertise in family matters.'" Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83 (2016) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare, 154 N.J. at 411-12 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)); see also A.J. v. R.J., 461 N.J. Super. 173, 180 (App. Div. 2019). We reverse "only when a mistake must have been made because the trial court's factual findings are 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice . . . .'" Spangenberg v. Kolakowski, 442 N.J. Super. 529, 535 (App. Div. 2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65

N.J. 474, 484 (1974)). We defer to a trial judge's credibility determinations. Gnall v. Gnall, 222 N.J. 414, 428 (2015). We review de novo questions of law. Amzler v. Amzler, 463 N.J. Super. 187, 197 (App. Div. 2020).

"In custody cases, it is well settled that the court's primary consideration is the best interests of the children." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007). "A party seeking to modify custody must demonstrate changed circumstances that affect the welfare of the children." Ibid. "Where there is already a judgment or an agreement affecting custody in place, it is presumed it 'embodies a best interests determination' and should be modified only where there is a 'showing [of] changed circumstances which would affect the welfare of the children.'" A.J., 461 N.J. Super. at 182 (quoting Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993)). However, "our courts' commitment to enforce such agreements is tempered by its equitable power to review and modify support and custody orders upon a showing of changed circumstances." Slawinski v. Nicholas, 448 N.J. Super. 25, 32 (App. Div. 2016). "Specifically, with respect to agreements between parents regarding custody or parenting time, '[a] party seeking modification . . . must meet the burden of showing changed circumstances and that the agreement is now not in the best

interests of a child.'" Id. at 33 (quoting Abouzahr v. Matera-Abouzahr, 361 N.J. Super. 135, 152 (App. Div. 2003)).

We discern no abuse of discretion by the judge in resolving the merits of defendant's motion. Her findings and conclusions are supported by adequate, substantial, credible evidence in the record. Accordingly, we affirm.

Throughout her briefs, plaintiff challenges the judge's ultimate findings as set forth in the amplification that defendant's testimony was "credible" and "reasonable[]" and plaintiff's testimony at significant times was not credible. We note at the outset that in her arguments about the judge's credibility findings, plaintiff has not met the very high standard required for us to strip those credibility findings of the deference to which they are entitled. See Gnall, 222 N.J. at 428; Cesare, 154 N.J. at 412.

Plaintiff premises her argument regarding the award of one additional week of parenting time in summers of even years on defendant's response to the judge's question about how much vacation time he had in 2017: "I think I had, it was four or five weeks. I'm not completely positive." That defendant had four or five weeks of vacation when the parties signed the MSA does not undermine the judge's finding that defendant since then had received additional vacation time. That finding was supported by defendant's testimony, which the

judge found credible, that he had requested and had been given more vacation time, and by a letter from defendant's employer confirming defendant had been awarded an additional two weeks of vacation. That record evidence is sufficient to support the judge's conclusion defendant had more vacation time and that that additional vacation time was a change of circumstances meriting a change in parenting time.

Plaintiff also relies on a statement made by the judge in a colloquy with defendant during the January 17, 2020 hearing. Statements made by a judge in a back-and-forth exchange with a party while the judge is exploring the strengths and weaknesses of the party's argument do not constitute ultimate findings of fact, especially when, as here, additional hearings took place.

As to the award of six additional overnights in odd years, plaintiff questions whether defendant's new flextime arrangement with his employer constituted a "legitimate" change in circumstance given defendant's repeated requests for mid-week parenting time. The judge's conclusion that defendant had a new flextime arrangement was supported by sufficient credible evidence in the record: defendant's testimony, which the judge found credible, and his employer's letter confirming the new flextime arrangement. That new flextime arrangement is a legitimate change of circumstance in that it enables defendant,

as the letter from his employer confirms, to leave work early to pick his son up from school, making mid-week parenting time possible.

The judge's determination that giving defendant additional parenting time was in the child's best interests with respect to both a week in the summer in even years and six overnights in odd years was also supported by sufficient credible evidence. The parties' testimony differed as to what their son had told them about his preferences regarding spending more time with his father or spending time in other activities including camp and extra-curricular activities. The judge's effort to interview the child about his preferences was "thwarted" by the attempts of both parties to "influenc[e] the child and . . . to manipulate the interview." Consequently, the judge was left with the parties' conflicting testimony. Having found defendant's testimony to be "credible" and "reasonable[]" and having found incredible plaintiff's testimony that it would be unsafe for the child to spend an additional week with defendant, the judge held it was in the best interests of the child to spend another week with his father than with a third party. We see no basis to reverse that holding.

Plaintiff faults the judge for not considering the "concessions" plaintiff had made in the MSA. During the hearing on January 17, 2020, the judge questioned the parties extensively about the concessions they purportedly had

made and about the agreements they ultimately had reached as memorialized in the MSA. The judge expressly referenced the MSA in the amplification. The judge in the amplification correctly stated the law: one decree does not forever decide the best interests of a child. As we have repeatedly recognized, although courts give substantial consideration to agreements reached by parties in matrimonial disputes, courts retain their equitable power to review and modify custody and parenting-time orders and agreements on a showing of changed circumstances that affect the welfare of a child. A.J., 461 N.J. Super. at 182; Slawinski, 448 N.J. Super. at 32; Hand, 391 N.J. Super. at 105. The judge found defendant had demonstrated changed circumstances and that it was in the best interests of the parties' son to modify the parenting-time arrangement set forth in the MSA. Because those findings were supported by sufficient credible evidence in the record, we affirm.

Affirmed.