NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2935-11T2

M.I.,

Plaintiff-Respondent,

v.

B.I.,

Defendant-Appellant.

Submitted January 8, 2013 - Decided January 23, 2013
Before Judges Fisher and Waugh.

On appeal from the Superior Court of New Jersey, Monmouth County, Chancery Division, Family Part, Docket No. FM-13-1846-05.

Diamond & Diamond, P.A., attorneys for appellant (Richard S. Diamond and Lynn M. Matits, on the briefs).

August J. Landi, attorney for respondent.

PER CURIAM

Defendant B.I. (Brad¹) appeals the January 27, 2012 order of the Family Part denying his application for change of the primary residence of his daughter A.I. (Amy). The parent of

¹ We refer to the parties and their children by pseudonyms to preserve their privacy.

primary residence is currently plaintiff M.I. (Meg). Brad, with Amy's concurrence, seeks to become the parent of primary residence. He also appeals the judge's removal of the parenting coordinator. We affirm the removal of the parenting coordinator, but remand to the Family Part for further consideration of the parenting issue consistent with this opinion.

I.

We discern the following facts and procedural history from the record on appeal.

The parties were married in 1996. They have two children, Amy, who was born in January 1997, and P.I. (Paul), who was born in September 2001. They were divorced in August 2006, at which time they entered into a custody and parenting-time agreement. The parents arranged to have joint legal custody of the children, with Meg designated as the parent of primary residence. The agreement set forth parenting schedules for the academic year and summer, as well as holidays and special occasions. The generous academic-year parenting time for Brad was conditioned on his residing "within 20 minutes" of Meg.

In August 2009, the Family Part judge reduced Brad's parenting time during the academic year because he was not living within the agreed upon distance. In March 2011, the

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judge denied Brad's application to reinstate the prior parenting arrangements, but required the parties to meet with a courtappointed parenting coordinator to address their issues.² Those efforts were not successful.

In November 2011, Brad filed a motion for the transfer of Amy's primary residence to him, specifically asking that Amy be interviewed in camera. Following argument on December 16, the judge agreed to hold the interview and deferred decision on the motion.

On January 4, 2012, the trial judge conducted an in camera interview of Amy, who was just short of her fifteenth birthday and in her freshman year of high school. During the interview, Amy clearly expressed and explained her preference to live primarily with her father.³

On January 26, the judge placed an oral opinion on the record. He characterized Amy as "a bright young lady" and "a very sophisticated 15 year old girl." He noted that, although there is always reason for concern that a child's preferences

² It is suggested in Meg's brief that the March 2011 motion also raised the issue of a transfer of primary residence, but neither party has included those papers in their appendix. In any event, it appears that any prior order was not based upon an interview with Amy.

³ During the course of the interview, the judge permitted his law clerk to ask two questions, a practice which we disapprove.

with respect to the residential parent reflect pressure from one of the parents, there was not "any evidence that that occurred here." He noted, however, that Amy was overly conversant with the positions of both parents.

The judge stated that during the interview, Amy expressed "her own feelings on th[e] issue" of her residence and that she "very much want[ed] to go live with her father." Nevertheless, the judge denied the application because he did not want the parties' two children living in different primary residences and did not want to remove Amy from a school in which she was doing well. He also concluded that, because Amy was doing well in school, her problems with her mother were not as serious as she or her father portrayed them. Finally, the judge removed the parenting coordinator, finding that there was no need for one and that "too many hands in the kitchen tends to spoil the stew." This appeal followed.

II.

On appeal, Brad argues that the judge erred in disregarding Amy's preferences, putting the assumed needs of the parties' son before Amy's without justification, and relying too heavily on the fact that Amy was doing well in her then current school. He further contends that the judge demonstrated bias during the interview because he was skeptical that Amy was speaking for

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herself. He also argues that the judge had no basis to remove the parenting coordinator.

We ordinarily accord great deference to the discretionary decisions of Family Part judges. <u>Donnelly v. Donnelly</u>, 405 <u>N.J. Super.</u> 117, 127 (App. Div. 2009) (citing <u>Larbig v. Larbig</u>, 384 <u>N.J. Super.</u> 17, 21 (App. Div. 2006)). Similar deference is accorded to the factual findings of those judges following an evidentiary hearing. <u>Cesare v. Cesare</u>, 154 <u>N.J.</u> 394, 411-12 (1998). Although there was no formal trial or plenary hearing in this case, the judge interviewed Amy, although she was not under oath. Finally, a judge's purely legal decisions are subject to our plenary review. <u>Crespo v. Crespo</u>, 395 <u>N.J. Super.</u> 190, 194 (App. Div. 2007) (quoting <u>Manalapan Realty</u>, <u>L.P. v. Twp. Comm. of Manalapan</u>, 140 <u>N.J.</u> 366, 378 (1995)); <u>LoBiondo v. O'Callaghan</u>, 357 <u>N.J. Super.</u> 488, 495 (App. Div.), <u>certif. denied</u>, 177 <u>N.J.</u> 224 (2003).

A party who seeks modification of a judgment or order that incorporates a property settlement agreement regarding custody or visitation "must meet the burden of showing changed circumstances and that the agreement is [no longer] in the best interests of the child." Abouzahr v. Matera-Abouzahr, 361 N.J. Super. 135, 152 (App. Div.), certif. denied, 178 N.J. 34 (2003); see also Finamore v. Aronson, 382 N.J. Super. 514, 522-23 (App.

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Div. 2006). The issue is "two-fold and sequential." Faucett v. Vasquez, 411 N.J. Super. 108, 127 (App. Div. 2009), certif. denied, 203 N.J. 435 (2010). The party seeking a modification "must first make a prima facie showing . . . that a genuine issue of fact exists bearing upon a critical question such as the best interests of the child[]. . . Once a prima facie showing is made, [the party] is entitled to a plenary hearing to resolve the disputed facts." Id. at 127-28 (citation and internal quotation marks omitted).

The Legislature has found and declared "the public policy of this State to assure minor children of frequent and continuing contact with both parents [after divorce] and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy." N.J.S.A. 9:2-4. Both parties here have a fundamental right to "the custody, care and nurturing of their child[]." Watkins v. Nelson, 163 N.J. 235, 245 (2000) (quoting In re D.T., 200 N.J. Super. 171, 176 (App. Div. 1985)). Because neither has a right that is superior to the other, "the sole benchmark" to a determination of their parenting arrangements is the best interests of the child, Sacharow v. Sacharow, 177 N.J. 80 (2003), that is, what will protect the 62. happiness, physical, mental and moral welfare of the child,"

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Beck v. Beck, 86 N.J. 480, 497 (1981) (quoting Fantony v. Fantony, 21 N.J. 525, 536 (1956)). The child's best interests are controlling "no matter what the parties have agreed to."

P.T. v. M.S., 325 N.J. Super. 193, 215 (App. Div. 1999) (quoting Giangeruso v. Giangeruso, 310 N.J. Super. 476, 479 (Ch. Div. 1997)) (internal quotation mark omitted).

Pursuant to N.J.S.A. 9:2-4, a judge determining custody shall consider 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 parenting time not substantiated abuse; the interaction and relationship of the child with its parents siblings; the history of domestic violence, if any; the safety of the child the safety of either parent 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 child; the stability of the home environment offered; the quality and continuity of the fitness education; the of 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. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.

"The age of the child certainly affects the quantum of weight that his or her preference should be accorded[.]" <u>Lavene</u>

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<u>v. Lavene</u>, 148 <u>N.J. Super.</u> 267, 272 (App. Div.), <u>certif. denied</u>, 75 <u>N.J.</u> 28 (1977). However,

"[a] trial judge is not bound by a young child's preference to live with one parent over the other." The judge is only required to give "due weight to the child's preference;" the preference is a factor which the judge should consider along with all of the other relevant factors. Thus, stated preferences are not conclusive but must be considered in applications for modification.

[Ali v. Ali, 279 N.J. Super. 154, 169 (Ch. Div. 1994) (quoting W.W. v. I.M., 231 N.J. Super. 495, 511 (App. Div. 1989)); see also Sheehan v. Sheehan, 51 N.J. Super. 276, 291 (App. Div.), certif. denied, 28 N.J. 147 (1958); Boerger v. Boerger, 26 N.J. Super. 90, 103 (Ch. Div. 1953)].

Courts should also evaluate the "'character, condition, habits and other surroundings' of the parents in considering their fitness and the welfare of the children." Sheehan, supra, 51 N.J. Super. at 291 (quoting Clemens v. Clemens, 20 N.J. Super. 383, 392 (App. Div. 1952)).

Here, the judge recognized that Amy had her own views on the issue of her primary residence and that she very much wanted to live with her father. The views of Amy, then age fifteen, were entitled to significant, albeit not controlling, weight. Although the judge was rightly concerned that Amy was overly influenced by her father, he found no evidence that such was the case.4

The judge articulated several reasons for not changing Amy's primary residence despite her preference. First, he expressed concern about separating the two children. While that is an appropriate concern, there was nothing in the record to support the judge's inference that either child would be harmed by having separate primary residences or that any detriment to Paul would sufficiently outweigh any benefit to Amy to warrant denial of the transfer sought by Amy. Second, he expressed concern that a change of school would prejudice Amy. Again, that was an appropriate concern, but there was nothing in the record to suggest that the change would adversely affect Amy's education. At the time, Amy knew some children in the school district in which her father resided, his residence having been the former marital residence.

We also conclude that the judge should have explored and determined the validity of Amy's clearly expressed concerns about the level of parenting she was receiving from Meg, including lack of supervision and help with homework. The judge's assumption that Amy's academic success undercut her

⁴ We found no evidence of judicial bias in the transcript of the in camera interview.

assertions was based on conjecture, rather than findings of actual fact. In addition, parenting can adversely affect children in ways other than academic failure. The judge did not hold a plenary hearing to resolve the contested issues, as required by <u>Faucett</u>, <u>supra</u>, 411 <u>N.J. Super.</u> at 128. <u>See R. 5:8-6.</u>

Our review of the record satisfies us that there was a prima facie case of changed circumstances, specifically the preferences of a "very sophisticated" fifteen-year-old girl who expressed a preference for living with one parent and concerns about the parenting style of her then parent of primary residence. Because the record does not contain sufficient factual support for the judge's denial of the application, we vacate the order on appeal and remand for further consideration on an updated record, including another interview with Amy, who is now a year older.

Rule 5:8-1 requires mediation in accordance with Rule 1:40-5 in genuinely contested parenting disputes. We leave it to the discretion of the judge to determine whether the parties' interactions with the parenting coordinator satisfied the mediation requirement.⁵ If mediation is not successful, Rule

⁵ The record is not sufficiently clear for us to determine that issue.

5:8-1 allows the judge to order a best interests evaluation.

also leave determination of need for such an evaluation to the

discretion of the judge. He and the parties will need to

determine whether expert assistance is necessary. If, after

these steps have been taken, the issues outlined above are still

contested by the parties and Amy is still seeking the change, a

plenary hearing will be required.

We urge the judge to resolve the dispute in time to allow

any change of school systems to take place prior to the

beginning of the 2013-2014 academic year. However, in doing so,

we express no view on the merits of the application itself.

Finally, we will not disturb the judge's determination that

the parenting coordinator was longer no serving a useful

purpose. If the judge determines that another coordinator would

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be useful, he has the discretion to appoint one.

Affirmed in part, vacated and remanded in part.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELIATE DIVISION