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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0524-09T2

MARY ELIZABETH WALSH-MORALES,

Plaintiff-Appellant,

v.

JON D. MORALES,

Defendant-Respondent.

Argued September 27, 2010 - Decided November 5, 2010

Before Judges Rodríguez, Grall and
C.L. Miniman.

On appeal from Superior Court of New
Jersey, Chancery Division, Family Part,
Bergen County, Docket No. FM-02-1644-05.

Christopher D. Adams argued the cause
for appellant (Walder, Hayden & Brogan,
P.A., attorneys; Mr. Adams and Robert L.
Penza, of counsel; Peter G. Bracuti, on
the brief).

Madeline Marzano-Lesnevich argued the
cause for respondent (Lesnevich &
Marzano-Lesnevich, LLC, attorneys; Ms.
Marzano-Lesnevich, of counsel and on
the brief; Molly S. Turpin, on the brief).

PER CURIAM

The dispute underlying this appeal arose when plaintiff, a divorced mother, told defendant, her former husband, that she

planned to remarry and move to Texas with their daughter. Asserting that he and plaintiff jointly share legal and physical custody of their daughter, defendant moved to bar her from acting on her plan or, in the alternative, to obtain sole residential custody of their daughter in New Jersey. See O'Connor v. O'Connor, 349 N.J. Super. 381 (App. Div. 2002). Plaintiff disputed defendant's characterization of their custodial arrangement. Asserting that she has primary residential custody, plaintiff filed a cross-motion for an order authorizing her to bring their daughter to Texas because her plan was formulated in good faith and is not inimical to their daughter's best interests. See N.J.S.A. 9:2-2; Baures v. Lewis, 167 N.J. 91, 116 (2001).

The trial judge found that the parties truly shared joint physical and legal custody of their daughter after the divorce and concluded that modification of that arrangement was not in their daughter's best interests. Accordingly, he denied plaintiff's request and directed defendant to assume primary residential custody if plaintiff relocates.

Plaintiff appeals. She does not contend that she can prevail if the judge correctly concluded that she and defendant shared physical custody of their daughter. Instead, she argues that the judge erroneously concluded the parties share joint

physical custody and consequently applied the wrong legal standard. See Baures, supra, 167 N.J. at 116.

We affirm because the judge's factual findings are "supported by adequate, substantial, credible evidence" in the record as a whole, O'Connor, supra, 349 N.J. Super. at 400-01, and the "judge's evaluation of the underlying facts and their implications" are not "so wide of the mark that a mistake must have been made." MacKinnon v. MacKinnon, 191 N.J. 240, 254 (2007).

The legal standards provide a framework for our consideration of the evidence presented to the judge during a plenary hearing. "[T]he preliminary question in any case in which a parent seeks to relocate with a child is whether it is a removal case or whether by virtue of the arrangement between the parties, it is actually a motion for a change in custody." Baures, supra, 167 N.J. at 116. That critical determination "has a significant impact on whether a parent will be permitted to remove a child from the jurisdiction." Mamolen v. Mamolen, 346 N.J. Super. 493, 496 (App. Div. 2002).

When physical custody is jointly shared, one parent's move implicates that custodial arrangement. Accordingly, the parent who wants to relocate is required to show changed circumstances sufficient to warrant obtaining primary physical custody.

Baures, supra, 167 N.J. at 116; O'Connor, supra, 349 N.J. Super. at 398.

A less stringent standard is applied when there "is some lesser" sharing of physical custody and parental responsibility. Mamolen, supra, 346 N.J. Super. at 495. In that circumstance, an application filed by the parent who is the residential custodian is granted if it is made in good faith and is not inimical to the child's interest. Baures, supra, 167 N.J. at 118-19; Mamolen, supra, 346 N.J. Super. at 495.

The labels used in a divorce decree to describe the custodial arrangement are not determinative. O'Connor, supra, 349 N.J. Super. at 399-400; Mamolen, supra, 346 N.J. Super. at 499; see Baures, supra, 167 N.J. at 116 (referring to both "de jure and de facto" sharing of physical custody). Time spent with the child is important to the extent that the parent assumes responsibility for duties performed by a primary caretaker during that time. O'Connor, supra, 349 N.J. Super. at 385. The duties that are the hallmarks of primary caretaking include planning for and providing the child's meals, grooming, clothing, medical care, activities, alternate caregivers, bedtime, nighttime and morning care, discipline and education. See id. at 399 (discussing and quoting Pascale v. Pascale, 140 N.J. 583, 598-99 (1995), and the cases relied upon therein).

Thus, to characterize the parties' custodial arrangements, this court has looked to the temporal division of responsibility and the nature of the duties that are shared. A true joint physical parent is more than just a babysitter for the other – that is a subordinate "rather than [a] joint, caretaking role." Barblock v. Barblock, 383 N.J. Super. 114, 125 (App. Div.), certif. denied, 187 N.J. 81 (2006). In assessing a parent's time spent with his or her child, we take account of the unique circumstances of each family. In some families, weekdays may be more significant than weekend nights, because that is when parents are involved with school, homework and medical appointments. In other families, time spent together on weekends may be critical because both parents work outside the home, have others assist during the week with after-school time and reserve family chores and projects for the weekend. In sum, consideration of the facts of the particular case is critical to determining whether physical custody is truly shared.

With that framework in mind, we consider the evidence.

Plaintiff and defendant were married in 1999, and their daughter was born in 2000. Within fifteen to twenty months of their daughter's birth, plaintiff hired a nanny and returned to work. She works four days a week, one of which is Saturday. Defendant, who returned to work about two weeks after their

daughter was born, is an executive of a company in the garment industry. He works in New York City Monday through Friday.

The parties divorced in September 2005. They resolved all issues related to the dissolution of their marriage, including the selection of a custodial arrangement that they deemed to be consistent with their daughter's best interests.

Their agreement is incorporated in their divorce decree. It provides for joint legal custody, assigns plaintiff primary residential custody and establishes a visitation schedule. Pursuant to that schedule, defendant has their daughter on alternate weekends from Friday night through school time on Monday morning. When their daughter spends weekends with plaintiff, she is with defendant from Friday evening until plaintiff returns from work on Saturday. In addition, their daughter spends every Wednesday night through school time on Thursday with her father. The agreement also permits each parent to have three weeks of vacation with their daughter in the summer and time on and around the holidays and during school breaks. Setting aside holidays and vacations, the schedule the parties envisioned has their daughter spending 42.8% of her nights in defendant's care as well as the daytime hours on Saturdays during the weekends their daughter spends with

plaintiff. The nanny employed following their daughter's birth continues to care for her after school as needed.

In their divorce agreement, plaintiff and defendant expressly acknowledged the importance of their mutual cooperation as partners in parenting and recognized that each would "provide a home in which the child is loved and to which the child belongs." By all accounts, the arrangement has worked well.

After divorcing, each parent acquired an apartment with a room set aside and furnished for their daughter. Although the apartments are within five minutes of one another in Edgewater, their daughter has books, toys and clothing in both homes. The parent with whom their daughter is staying takes care of her needs during that time by preparing meals, providing the clothing she wears, getting her ready for school, making lunches, caring for her if she is ill and reviewing her school work.

Their daughter is a good student, participates in extra-curricular activities and has been exposed to a variety of educational, athletic and cultural experiences. Both parents are involved. They know their daughter's teachers and attend school conferences. Plaintiff makes her daughter's doctor appointments and takes her most of the time; defendant has taken

her to six of the thirty appointments she has had. Plaintiff enrolls her daughter in her weekday activities, and defendant takes her to museums, plays, circuses and baseball games, and to play soccer and tennis in the park. He also takes her bowling and ice skating and has arranged for her to have lessons. Plaintiff generally arranges her daughter's play dates with other children and birthday parties.

The parents have cooperated and adjusted the time schedule. Defendant has accommodated plaintiff's requests for changes in his parenting-time schedule, and she has filled in for him when his work schedule requires — for example, by getting their daughter to school when he cannot or keeping her when his schedule does not permit vacation.

In 2006 and 2007, defendant did not exercise all of the parenting time contemplated by the agreement. While the parties do not agree on the precise number of overnights defendant missed, their estimates range from his having their daughter 35.616% and 34.797% of total overnights in 2006 and 2007 respectively to his having 36.98% and 35.06% in those years. In 2008 and 2009 respectively, their daughter was with defendant for 38% and 42% of the overnights. The trial judge noted that during 2008 and 2009, their daughter was with her father 45% and

48% of the time, taking into account his time with her on the Saturdays that plaintiff had overnight custody.

Plaintiff's interest in leaving New Jersey for Texas developed along with her relationship with her second husband, a Texas resident she met in January 2007. Plaintiff commenced a search for a house in Texas in September 2007, and she decided to marry in October 2007. She first told defendant about her plans to move in January 2008, and he then commenced this post-judgment litigation. Plaintiff closed on a home in Texas in February 2008. The 3500 square-foot, four-bedroom home is on a half-acre lot and near a yacht club with a family membership. The monthly mortgage payment, including property taxes and insurance, is less than plaintiff's rent in New Jersey. She has yet to determine whether she will work outside the home after moving, and she said the cost of this litigation will likely preclude her from leaving the work force as she had anticipated when she married.

Plaintiff's second husband is divorced and the father of two children, an eight-year-old boy and a six-year-old girl. His children are with him in Texas every Wednesday night, every other weekend from Friday afternoon until school on Monday, for some of the holidays and for four weeks during the summer. Their daughter has met her step-father and his children; they

spent two weeks together in August 2007. She communicates with her step-father and his children by phone, e-mail and webcam.

Their daughter also has relationships with members of defendant's family on the east coast. She spends time with her aunt Dana and her husband and their two adult children, and with her aunt Lisa, who also lives in New Jersey. In addition, she sees her paternal grandparents and her aunts Anita and Debbie in Rochester, New York.

Both defendant and plaintiff's husband indicate they cannot eliminate this controversy by relocating. According to defendant, he will not be able to replace his executive position in the garment industry if he moves to Texas. Similarly, plaintiff's husband, who has worked as a commercial photographer in the Dallas area for about sixteen years and is involved in other business ventures there, believes it would be impossible to continue his endeavors in the East.

Each parent recognizes the importance of the other to their daughter. Their proposals for facilitating the other parent's contact with their daughter in the event of plaintiff's move to Texas are not markedly different. But there is a notable inconsistency between plaintiff's plans for post-move visitation. She offers defendant significantly less time than what she would demand if she were not the primary custodial

parent. Defendant's preference is clear, maintenance of the status quo that gives their daughter the benefit of regular contact with both parents. Plaintiff's preference for the status quo is more limited; she claims she will not move if her daughter cannot come with her.

In the opinion of the parties' respective custody experts, both parents are fit and capable and generally have been able to successfully cooperate in parenting their daughter much as they expected to do at the time of their divorce. Mathias Hagovsky, a psychologist, testified on behalf of plaintiff. Judith Brown Greif, a licensed clinical social worker, testified on behalf of defendant. Much of their testimony was directed to the beneficial and detrimental impacts of plaintiff's plan to move to Texas and is not relevant to the issue raised on appeal. Accordingly, we limit our discussion to the testimony relevant to the central issue — the character of the parenting arrangement in place.

The experts agree that the Morales's daughter is strongly bonded with both parents and will miss her father if she moves to Texas. In Hagovsky's opinion, however, the strong and positive bond between father and daughter is "consistent with a secondary parent experience." Nonetheless, Hagovsky acknowledges that defendant's parenting since the divorce has

been "positive"; that his parenting time has been "considerable"; and that he has "exercised [his responsibilities] with diligence and pride." In Greif's opinion, "the shared parenting arrangement that [the parties] structured . . . has produced a happy well-adjusted child who has by all account thrived." In Greif's view, she needs the continued regular contact with both of her parents to which she has become accustomed.

The trial judge found both parents credible and Grief's opinions more compelling than Hagovsky's. The judge set forth his detailed findings and legal conclusions in a written opinion issued subsequent to his August 14, 2009 order. He correctly identified his obligation to decide the threshold question — whether the parties truly shared physical custody. Moreover, in making that determination, the judge considered the relevant factors and compared the facts in this case with those discussed in our decisions. Based on the frequency with which defendant assumed the responsibility for his daughter's food, clothing, morning and nighttime care, education and activities, the judge concluded that these parents truly shared physical custody.

The material facts found by the judge and set forth in his opinion are supported by substantial credible evidence in the record. We cannot conclude that his evaluation of the

underlying facts and their implications is "so wide of the mark that a mistake must have been made." MacKinnon, supra, 191 N.J. at 254. Accordingly, we affirm the judge's determination substantially for the reasons stated in his written opinion as amplified below to address specific claims raised on appeal.[1]

We have considered and rejected plaintiff's charge that the judge overlooked evidence militating against a finding of shared physical custody. The judge's opinion addresses doctor's appointments, play dates and activities. Although the evidence may have been also adequate to support a finding that plaintiff shouldered the bulk of the responsibility, the question for us is whether the judge's contrary determination could reasonably have been reached on this record. It could.

Plaintiff also argues that the judge erred by considering "hours" spent with her daughter rather than "overnights" spent with her in deciding that these parents shared custody. As we understand the decision, he looked at the temporal division of parental responsibility in several ways — overnights, daytime hours on weekdays and daytime hours on weekends. Given the fact-sensitive nature of the inquiry and the variety of ways

[1] We do not endorse the judge's statements about the wisdom of plaintiff's decision to marry and purchase a home in Texas or the character of her husband. Those statements are not material to the issues raised on appeal, however.

that the duties of a primary caretaker can be divided between parents, it is not inappropriate for a judge to consider all the evidence relevant to their individual roles.

Plaintiff contends that the judge's decision is inconsistent with Mamolen. We disagree. In Mamolen, we relied, in part, on the illustrations of joint physical and legal custody given by the Supreme Court in Pascale. 346 N.J. Super. at 499-500; see Pascale, supra, 140 N.J. at 596-97. Pascale's illustrations of joint parenting include children "'spending three entire days with one parent and four entire days with another parent or alternating weeks or even years with each parent.'" Mamolen, supra, 346 N.J. Super. at 499 (quoting Pascale). Considering those examples, we concluded that four of every fourteen days was insufficient time to qualify as a joint custodial arrangement. Id. at 499. While defendant's six of fourteen overnights are not consecutive, like the example provided in Pascale, his share of the day-to-day responsibilities of a primary caretaker is far greater than the responsibility assumed by the non-custodial parent in Mamolen. See Pascale, supra, 140 N.J. at 597 (distinguishing numerous "parenting times" from "joint physical custody"). In our view, the judge's approach was consistent with, not contrary to, Mamolen.

Finally, plaintiff argues that she established her entitlement to removal under the standard applicable when custody is not shared. There is no reason to address that claim, because that standard did not apply in this case.

Affirmed.