

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: March 18, 2021

530848

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JESSICA WW.,

Respondent,

v

MEMORANDUM AND ORDER

MISTY WW.,

Appellant.

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Calendar Date: February 11, 2021

Before: Garry, P.J., Egan Jr., Lynch, Clark and Pritzker, JJ.

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Stephen L. Molinsek, LLC, Delmar (Stephen L. Molinsek of counsel), for appellant.

Nixon Peabody LLP, Buffalo (Erik A. Goergen of counsel), for respondent.

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Egan Jr., J.

Appeal from an order of the Supreme Court (Hartman, J.), entered September 9, 2019 in Albany County, which, among other things, denied defendant's motion to modify a prior order of custody.

Plaintiff and defendant were married in December 2015 and are the parents of a child (born in June 2016). On February 12, 2017, defendant left the marital residence with the child and, on February 16, 2017, plaintiff filed two petitions in Family Court – (1) a family offense petition, alleging that defendant was not permitting her to visit with the child and was verbally and physically abusive toward her, and (2) a custody petition,

seeking sole legal and physical custody of the child. That same day, Family Court (Walsh, J.) issued a temporary order of protection in favor of plaintiff and the child, and temporarily granted plaintiff legal and physical custody of the child, with parenting time for defendant.<sup>1</sup> In March 2017, defendant filed her own petition seeking sole custody of the child.

In February 2018, the parties entered into a stipulation of settlement in Family Court wherein the parties agreed to share joint legal and physical custody of the child, with a detailed schedule of parenting time. Family Court (Rivera, J.) incorporated this stipulation into a custody and visitation order. While the above proceedings were pending in Family Court, but prior to the settlement being reached, plaintiff commenced an action for divorce in Supreme Court in November 2017, alleging an irretrievable breakdown of the parties' relationship (see Domestic Relations Law § 170 [7]). This action proceeded to trial in October 2018, at which time Supreme Court determined, over defendant's objection, that the issue of custody would not be relitigated in light of the stipulation entered into by the parties earlier that year in Family Court. By notice of motion dated June 3, 2019, defendant moved in Supreme Court for an order modifying the existing order of custody to provide her with primary legal and physical custody of the child. On June 6, 2019, Supreme Court issued a final judgment of divorce, continuing joint legal and physical custody of the child pursuant to Family Court's February 2018 custody order. Plaintiff opposed the motion via an affidavit dated July 12, 2019, and requested that, if modified, the order should provide her with sole legal and physical custody of the child. In a decision dated August 9, 2019, Supreme Court denied defendant's motion, without a hearing, finding that defendant failed to demonstrate a change in circumstances warranting an analysis of whether modification of the existing custody order was in the child's best interests. Defendant appeals.

Initially, we reject plaintiff's contention that the appeal is moot. Although the parties presently have

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<sup>1</sup> In April 2017, Family Court modified the order of protection, making it applicable to plaintiff only.

modification petitions pending before Family Court, no fact-finding hearing has yet to be conducted on these petitions and no final custody determination has been rendered by Family Court with regard thereto. Accordingly, the custody issues presently at issue on this appeal remain unresolved and, as such, the appeal is not moot (see Matter of Elizabeth NN. v Hannah MM., 148 AD3d 1235, 1236 [2017]; Matter of Poremba v Poremba, 93 AD3d 1115, 1116 [2012]).

Turning to the merits, we find no abuse of discretion in Supreme Court's denial of defendant's motion, without a hearing. As relevant here, "[w]here a voluntary agreement of joint custody is entered into, it will not be set aside unless there has been a . . . change in circumstances showing that a modification will be in the best interests of the children" (Nolan v Nolan, 104 AD3d 1102, 1103 [2013]; see Matter of Gerber v Gerber, 141 AD3d 901, 902 [2016]; Matter of Lowe v Bonelli, 129 AD3d 1135, 1136 [2015]). Notably, the majority of the claims that defendant proffered in support of her motion pertain to allegations of fact that predate Family Court's February 2018 custody and visitation order (see Matter of Jessica EE. v Joshua EE., 188 AD3d 1479, 1482 [2020]). Moreover, although the parties' email and text exchanges since February 2018 reveal that the parties' relationship remains strained, it has not become any more acrimonious than it was prior to the parties entering into the stipulation of settlement resolving their competing custody petitions in February 2018 (see Matter of Chase v Benjamin, 44 AD3d 1130, 1131 [2007]) and, in fact, demonstrates that, despite their relationship issues, they have nonetheless been able to manage parenting time exchanges and medical decisions involving the child. Accordingly, as the record fails to demonstrate a complete "inability to work and communicate with one another in a cooperative fashion" (Matter of Crystal F. v Ian G., 145 AD3d 1379, 1382 [2016] [internal quotation marks and citations omitted]), defendant failed to demonstrate the requisite change in circumstances and, therefore, Supreme Court appropriately denied her motion for a hearing (see Matter of Jessica EE. v Joshua EE., 188 AD3d at 1482; Matter of Gerber v Gerber, 141 AD3d at 902; Matter of Bjork v Bjork, 23 AD3d 784, 785 [2005], lv denied 6 NY3d 707

[2006]), and did not err in not appointing an attorney for the child (see Spratt v Fontana, 46 AD3d 670, 671 [2007]).

Garry, P.J., Lynch, Clark and Pritzker, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large, stylized 'R' and 'M'.

Robert D. Mayberger  
Clerk of the Court