# Changed Circumstances? The Impact of Increased or Decreased Parental Availability Post-Judgment on Parenting Time Arrangements

*by William W. Goodwin and Diana N. Fredericks*

What is the standard for modifying a parenting time arrangement post-divorce? When will a plenary hearing be ordered or dispensed with? Under what circumstances will the Appellate Division reverse and remand a trial court's decision not to modify parenting time, and without even ordering a plenary hearing? What is the impact, if any, of an increase or decrease in one parent's availability to care for the children post-divorce on an application to modify parenting time? Who has priority, in terms of caring for children, between one parent and a third-party caregiver substituting for the other parent during that parent's parenting time? What can or should practitioners do in drafting a marital settlement agreement (MSA) to address this potential eventuality? What impact does specific language in an MSA have in terms of determining whether or not changed circumstances exist in these cases? Does the concept of 'reasonable foreseeability' have a place in this analysis?

These questions, among others, were triggered after reading the recent unreported decision *Fasano v. Scales*.[1]

In *Fasano*, the parties were married in May 2000 and had two children. While the children's dates of birth are not provided, it appears their daughter was born in 2001 and their son in 2002.[2] The parties were divorced in 2010. They executed a property settlement agreement (PSA) on Sept. 1, 2010, when the children were approximately nine and eight years of age.

In their PSA, the parties agreed to joint legal custody and a shared parenting schedule. Specifically, on a bi-weekly basis, the mother had the children for eight nights and the father had them for six nights. The father also had parenting time one of the evenings the mother had the children overnight. As a consequence, each parent had some parenting time with the children on seven days out of every 14-day "cycle."[3] Their PSA did not prohibit the use of third-party child care providers, nor did the PSA include a clause requiring either parent to offer parenting time to the other before leaving the children with a third party. (This is often referred to as the right of first refusal.)

In Feb. 2011, the mother remarried a man who worked in Iowa, and she enrolled in an educational program in Iowa. She attended classes there, but commuted to New Jersey to facilitate the parenting schedule, which had not changed. The mother obtained an advanced legal degree in May 2012.

In Nov. 2012, the mother filed a motion to modify parenting time. She alleged the following changed circumstances:

1. Having completed her educational program, the mother asserted she now had more time to spend with the children; and
2. The father used a nanny to pick up the children after school and care for them until he returned from work, and to provide care for the children in the morning, including bringing them to school, after he left for work.[4]

In her application, the mother sought an order compelling the father to pick up the children at the inception of his parenting time or to allow the mother to do so, to drop the children off at her home on his way to work in the morning, and to grant her a "right of first refusal" in the event he needed child care during his parenting time for more than two and a half hours.

The trial court denied the application based upon the papers submitted, and after having heard oral argument. The court concluded the use of third-party caregivers is a "foreseeable part of parenting," and that there was no competent evidence that having a nanny care for the children during relatively short periods of time was contrary to their best interest.

The mother filed a motion for reconsideration, which was denied. In its decision, the trial court amplified and augmented its prior reasons. For example, the court observed the parties themselves had used a third party to care for the children while they were married. Moreover, the court cited to language in the PSA acknowledging the parties had "considered and carefully weighed all of the potential life changes that may occur...during the upcoming approximately ten year period until their son...graduates high school." Thus, the court introduced a concept of foreseeability that precluded a finding of changed circumstances.

The trial court also concluded that a parent's choice to retain the use of a childcare provider during his or her parenting time was a "routine or day-to-day decision" and, therefore, did not trigger a responsibility on the part of one party to consult with the other parent in advance.

Finally, the court observed that the PSA in question did not include a right of first refusal provision and, therefore, the court was not going to insert one after the fact.

The court directed the parties to mediate the issues, and permitted either party to request a plenary hearing in the event mediation was unsuccessful. Later that year, after mediation failed to result in an agreement, the mother filed an application for a plenary hearing. The trial court denied the application, finding "no need for a plenary hearing under the circumstances presented."[5] The wife appealed.

The Appellate Division affirmed "substantially for the reasons expressed by [the trial court]." In affirming the trial court decision, the Appellate Division set forth the limited scope of its review. Specifically, the appellate judges acknowledged they owe "substantial deference" to the family part's findings of fact, and that here they could not "conclude that a clear mistake was made by the Judge."

The appellate court also used the decision to remind us that "a party who seeks modification of a judgment that incorporates a PSA regarding parenting time must meet the burden of showing changed circumstance *and* that the agreement is no longer in the best interests of the child."[6] The court emphasized the analysis is 'two-fold and sequential."[7]

The court made two additional observations in support of its affirmance:

1. The mother's early completion of her educational program was not a change of circumstances because the parties had contemplated her participation in the program at the time they executed their PSA (*i.e.*, it was foreseeable); and
2. The children were apparently excellent students and, by all accounts, were doing well in school.

In *Hand v. Hand*,[8] the appellate court also agreed that a plenary hearing was unnecessary, as there was no genuine and substantial factual dispute regarding the welfare of the children. In the *Hand* case, the mother filed a post-judgment application to change custody of the two sons, who were then approximately 13 and 11. The parties divorced in late 2001, when the boys were eight and six years of age. As part of their divorce, the parties agreed to a parenting plan under which the boys resided with their father and the mother was entitled to parenting time on weekends, some holidays, and certain weeks during the summer.

In support of her application, the mother asserted the father was an alcoholic who drank on a daily basis and frequented bars. She further certified there were many times the boys were left to care for themselves while their father engaged in social activities. In further support of her application, the mother alleged the father might be physically abusing the boys.

Unbeknownst to the father, the mother had taken the boys to a licensed clinical social worker. The social worker met with the children on three occasions. The therapist did not speak to the father, his live-in girlfriend, the children's teachers or any other collateral sources.

The therapist prepared a report, which the mother submitted with her moving papers. In essence, the therapist reported what the boys told her about their father yelling at them and striking them with an open hand on their back or buttocks if they did not listen to him. She also reported the boys expressed they would be better off living with their mother, and that their "unhappiness with their living situation with the natural father appears to be largely connected to his abuse of alcohol and resulting behaviors and actions."

In denying the mother's application, the trial court concluded she had not set forth a *prima facie* case justifying further action, including a plenary hearing. In fact, the court was impressed by how well the boys were doing in school, among other factors.[9]

In affirming the trial court opinion, the Appellate Division was equally unimpressed with the mother's allegations, describing them as "completely unsubstantiated" and "conclusory."[10]

In view of the *Fasano* case and the opinion in *Hand*, what are the lessons to be learned and how can they assist practitioners in guiding their clients? Let's face it, no client is happy reengaging in the litigation process to seek a modification of custody or parenting time, only to be shot down at oral argument without even the opportunity for a plenary hearing. That client will feel misled by his or her attorney, which can only lead to a damaged professional relationship.

Accordingly, it is important to be mindful of the following:

1. Courts encourage settlements, protect settlement agreements, and are loath to modify the terms of a settlement, even regarding custody and parenting time, without some compelling reason to do so.
2. It bears repeating there is no chance of success unless one can establish *both* changed circumstances *and* that the agreement no longer serves the best interests of the children.
3. The occurrence of an event predicted within an MSA, or reasonably foreseeable based upon the circumstances existing at the time the MSA is executed, is not a changed circumstance.
4. When evaluating the impact of a change upon the best interests of the children, the court will focus upon harm to the children. If the children are honor students, have healthy peer and other social relationships, are not using drugs or alcohol, and are maintaining good health, the fact that one might argue the children will be even better off with a different parenting schedule does not appear to impress the courts.
5. Unless there are genuine and substantial factual issues in dispute regarding the welfare of the children, the result will be a final decision and not a plenary hearing.
6. Unless the trial court's conclusions after reading the papers and entertaining oral argument are very wide of the mark, or unless the court misapplied the law, an appeal will be for naught and an already unhappy client will be even more upset.

Aside from all this, *Fasano* raises a separate substantive issue, namely the issue of using third-party caregivers in lieu of the other parent. While the arrangement in *Fasano* did not faze the trial court, nor did it alarm the appellate court sufficiently to cause a reversal or remand, one cannot lose sight of the fact that N.J.S.A. 9:2-4c mandates the court consider a series of factors, several of which are implicated, at least indirectly, under these circumstances:

4. The interaction...of the child with its parents;
14. The extent...of the time spent with the child...subsequent to the separation; and
15. The parents' employment responsibilities.

Family law cases in particular are decided based upon their peculiar facts. Cases are like snowflakes; no two are exactly alike. It is certainly plausible that were the facts in *Fasano* changed, the results may be different.

For example, suppose that during the marriage the mother worked part time and the children were in childcare while she worked, but not for more than four hours per day. The children were two and three years of age when the parties divorced. Two years later, the mother remarries, leaves her employment, and becomes a full-time homemaker. Because of his work schedule, the father hires a nanny who stays at home with the now four- and five-year-old children all day while he works. As in *Fasano,* the parties reside on the same street and they agreed to the same parenting schedule as the Fasanos did in their PSA. While there are some parallels between this fact pattern and that in *Fasano,* it would be more troubling to receive the same decision knowing that a nanny stayed with the children the entire day while the children's mother was at home at the same time, all day, living down the street.

As is almost always the case, the best lawyering can be done in the negotiating and drafting stages of representation, pre-divorce. A carefully drafted MSA or *pendente lite* consent order may save substantial litigation expense, and an unhappy client, down the road. Many practitioners include a narrative statement in the support sections of their agreements, most commonly in the alimony portion, generally consisting of a factual recitation of the 'baseline circumstances' undergirding the amount and duration of the alimony agreed upon. This usually includes such facts as the ages and health status of the parties; their educational backgrounds; their current and past employment arrangements; their current incomes and some representation, usually accompanied by facts and figures, regarding the marital lifestyle. This is done to protect clients, and ultimately the practitioners, in the event of a post-judgment application seeking a modification based upon an allegation of changed circumstances.

But how many practitioners include the same type of narrative statement, accompanied by baseline circumstances, in the custody and parenting time sections of agreements? Perhaps it is time to rethink this practice (or a lack thereof) and include a statement of the facts and circumstances that supported the consensual parenting plan in the first place. For example, such baseline facts as the parties' current and anticipated residential locations and their proximity to one another, the children's current school district, the parents' living arrangements (*e.g.*, whether they are living with third parties, whether they rent or own, whether they have a backyard, how many bedrooms do they have, and the like), the parties' hours of employment, work schedules, and time spent commuting could easily be incorporated into an agreement, thereby making it easier for the parties to prove or defend a significant change in circumstances post-divorce.

As explained above, the courts are reluctant to modify agreed-upon parenting time and custody agreements. In the end, thoughtful negotiation and careful drafting using the above practice tips will serve clients most effectively.

Finally, there are no good reasons to fail to address the issue of third-party caretakers in an MSA. If the parties currently use a nanny, an *au pair*, or some form of childcare, and/or anticipate doing so in the future, those facts should be set forth. Moreover, although it is often an unpleasant discussion, the issue of a right of first refusal should be addressed, and either explicitly included or excluded in the MSA. If included, the parameters (*e.g.*, is it overnight or just for a few hours? Is there an exception for grandparents, aunts and uncles or no exceptions at all?) should be clear and explicit so practitioners can effectively advocate for clients and avoid unnecessary post-judgment litigation. ■

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**Endnotes**

1. A-0798-13T1, 2014 WL 2208604 (N.J. Super. Ct. App. Div. May 29, 2014).
2. *Fasano*, 2014 WL 2208604 at 1.
3. *Fasano*, 2014 WL 2208604 at 1.
4. *Fasano*, 2014 WL 2208604 at 1.
5. *Fasano*, 2014 WL 2208604 at 2.
6. *Fasano*, 2014 WL 2208604 at 2.
7. *Fasano*, 2014 WL 2208604 at 2.
8. 391 N.J. Super. 102 (App. Div. 2007).
9. *Hand*, 391 N.J. Super. at 275.
10. *Hand*, 391 N.J. Super. at 276.