SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4172-14T1

RONALD DESIMONE,

Plaintiff-Appellant,

v.

ABBE LANG, f/k/a ABBE DESIMONE,

Defendant-Respondent.

Submitted October 17, 2016 – Decided July 17, 2017

Before Judges Nugent and Currier.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FM-03-592-05.

Ronald DeSimone, appellant pro se.

Klineburger and Nussey, attorneys for respondent (D. Ryan Nussey and Carolyn G. Labin, on the brief).

PER CURIAM

Plaintiff, Ronald DeSimone, appeals from December 15, 2014 and April 10, 2015 Family Part orders modifying his parenting time and modifying portions of the parties' settlement agreement concerning payment of their children's college expenses.

Plaintiff also raises an issue he did not raise before the trial court, namely, a "cap" should be placed on his responsibility for the children's college expenses.

For the reasons that follow, we affirm the provision of the order modifying parenting time, vacate the provision of the order deviating from the parties' agreement concerning the children's college expenses, and remand for further proceedings. We decline to address plaintiff's argument concerning a cap on his responsibility for the children's college expenses because he did not preserve the issue for appeal.

Following a fifteen-year marriage and the birth of their three sons, the parties divorced. The March 29, 2007 Final Judgment of Divorce (FJOD) included the terms of the parties' agreement concerning custody, alimony, child support, and equitable distribution (the settlement agreement). The settlement agreement provided, among other things, that plaintiff would have parenting time with the children every Wednesday overnight. The settlement agreement concerning the children's college expenses provided in pertinent part:

> It is specifically understood and agreed by and between Plaintiff and Defendant that both parties have an obligation to pay for the college education expenses of their children, taking into consideration at the time each child attains the appropriate age, the respective total financial circumstances of

the parties, as well as the obligation each child should have to assist himself/herself in obtaining a college degree. The parties agree that they are and shall both be responsible for all of the costs relating to the children's attendance at college. "College costs" shall be defined to include without limitation application fees, test preparation course fees, costs of visiting colleges, tuition, room (on or off campus), board, book, activity fees, reasonable costs for the children to return home for vacations and breaks, spending money and all other costs associated with attendance at college.

The parties agree that both parties shall be actively involved in the selection of each child's college. Both parties shall be entitled to visit colleges with the children, as well as work with the children to select the best college for each child. There shall be mutual decision making with respect to each child's choice of college. In addition, either party may "veto" a child's choice of college based on the party's financial inability to pay his or her share of the costs thereof.

In the absence of an agreement regarding choice of college or the parties' respective contributions toward college costs, either party may apply to the Court. The Court shall consider the total financial and other circumstances of both parties in making its decision. It is anticipated that the children shall apply for all loans, aid, grants and work-study programs for which they may be eligible, and that these shall be applied "on the top" with the uncovered balance of college costs to be divided between the parties per their agreement or, in the absence of agreement, per Court Order.

[(Emphasis added).]

According to the appellate record, motion practice began in earnest after the parties' first son began college in 2011. The motions were plentiful and protracted, occasionally acrimonious, and usually accusatory. Although the motions and cross-motions raised multiple issues, only two issues are relevant to this appeal: plaintiff's Wednesday overnight visitation with the parties' third son and the children's responsibility to apply "for all loans, aid, grants and work-study programs for which they may be eligible" for college.

Plaintiff's Wednesday overnight visitation was placed in issue when defendant filed a January 31, 2013 Notice of Order to Show Cause seeking to "maintain the status quo concerning the parenting time schedule for the parties' youngest son." The status quo was, according to defendant, "alternating weekends beginning Friday after school through Sunday evening." Defendant also requested the court to direct "that in the event of any dispute, the issue of the parenting schedule be addressed at the plenary hearing."

In support of her application, defendant averred plaintiff had not exercised Wednesday overnight parenting time with their youngest son for two years and had made no requests to resume it. Then, the previous day, plaintiff showed up suddenly at defendant's home demanding to resume overnight parenting time. When defendant

refused to accommodate plaintiff, he called the police. The police suggested the parties resolve the matter in court.

Defendant explained in her application the child's fragility. She described how his physical and neurological impairments affected him, how a disruption in his daily routine would exacerbate his emotional condition, and that plaintiff lived an hour away. Defendant surmised plaintiff's motivation to resume his "forgotten parenting time" was to "get back" at her because of his intense discontent with a recent mediation session.

The court eventually conducted interviews with the parties' children in August 2013.[1] For reasons not apparent from the appellate record, it does not appear the court addressed the issue again until August 19, 2014. At that time, the court granted defendant's application. In an August 27, 2014 order, the court provided that plaintiff would have overnight parenting time "[d]uring the summer vacation until school commences, as well as on any school year weekday during which [the child] does not have school on Thursday[.]" The court further ordered that "[o]nce the school year commences, as well as on any school year weekday during

[1] The court apparently placed its findings and observations on the record on August 14, 2013. The appellate record does not include a transcript of these findings. Defendant filed a motion to compel plaintiff to provide a copy of the transcript. The motion was denied.

which [the child] does have school on Thursday, [p]laintiff's Wednesday parenting time shall not be overnight and shall commence at 5:00 p.m. and conclude at 8:30 p.m."

Meanwhile, in January 2014, plaintiff filed a motion seeking recalculation of child support and reallocation of certain expenses, and a "recalculation" of the parties' responsibility for their sons' college expenses. In his supporting papers, plaintiff averred the parties' second son qualified for loans totaling $5500 per year, which he declined to take. Plaintiff asserted that under the settlement agreement, those loans "must be taken off the top of his tuition" before the remaining costs were allocated to the parties.

Defendant filed a cross-motion seeking various relief not at issue in this appeal. In a March 2014 letter, the trial court sought additional information from the parties. After receiving the additional information, the court decided, among other issues, those now raised in this appeal. Based on its interview with the children, specifically the youngest child, the court determined there was "a prima facie showing of a substantial change in circumstances, making it necessary for it to review some of the parenting time arrangements[.]" The court went on to determine it "really only . . . needs to make a slight modification on one of those arrangements." Based on its interview with the youngest

child, the court recalled the youngest child had two concerns: that he be permitted to take his skateboard when he visited his father, and "that he was concerned about being returned to school late after times with dad. And he mentioned particular concern on the Thursday after the Wednesday parenting time." For that reason, the court determined it needed only "to make a slight modification on one of [the parenting] arrangements." Accordingly, the court determined "that the Wednesday parenting time shall be on a non-overnight basis," commencing the following Wednesday. The court also ordered the parties to "commence family counseling immediately," and to refer any future parenting time issues to the Burlington County Custody Mediation Program.

Next, the court recounted the considerable information the parties submitted concerning their respective financial conditions, and made findings of fact concerning their incomes and other financial issues. The court determined "the allocation of responsibility for the college education cost will be apportioned at [sixty-nine] percent to the plaintiff and [thirty-one] percent to the defendant." The court also determined "[t]his apportionment shall start with the first dollar for the college education expenses paid on behalf of [the oldest son]."

Addressing the children's obligations to obtain available financial aid, the court decided that if:

> none of the financial aid [was] used, then what the Court believes is that the kids ought not to be penalized because that didn't come out in the wash somehow between their parents. So if there was no form of aid that was utilized by either of the two older children, at this point in time, the Court would order and direct that it would vacate that portion of the . . . agreement which requires that they . . . be obligated to obtain any type of financial aid, except any grants or work-study programs which they would not have to repay.

The court explained it was trying to "put the three [children] on an equal playing field."

The court entered two memorializing orders, both dated December 15, 2014. In the "parenting time order," the court ordered that during summer vacation, and "on any school year weekday during which [the youngest child] does not have school on Thursday, Plaintiff shall have overnight parenting time . . . as otherwise set forth in the [settlement agreement] of the parties." Once the school year commenced, however, when the youngest child "does have school on Thursday, Plaintiff's Wednesday parenting time shall not be overnight and shall commence at 5:00 p.m. and conclude at 8:30 p.m." In the separate order concerning the financial issues, the court ordered the sixty-nine percent – thirty-one percent allocation between plaintiff and defendant for the expenses of their children's college educations. Paragraphs six and seven of the order provided:

> 6. The [c]ourt reiterates as of October 22, 2014, there is a continuing obligation of all of the children to obtain and utilize all available loans, aid, grants and work-study programs for which they may be eligible. These funds shall be applied "on the top" and then any uncovered balance of college costs shall be divided between the parties in the percentages set forth . . . above.
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> 7. If any time frame has passed within which either of the college age children could have obtained loans, aid, grants and work-study programs for which they may have been eligible but did not obtain, then Paragraph 6 shall not apply in that situation.

Defendant filed an order to show cause on January 29, 2015, seeking enforcement of the December 15, 2014 order and compelling plaintiff to pay his allocated share of the children's college expenses. In his opposition, plaintiff alleged he had paid his allocated share, but the second child did not take out available loans in the amount of $6500, so plaintiff subtracted the amount of the loan "off the top" and paid his allocated share of the remaining balance. The court heard argument on the motion on April 10, 2015.

The court issued a written opinion the same day, stating:

> Based upon a review of the submissions . . . the [c]ourt finds and determines that neither [the oldest child] nor [the middle child] shall be obligated to obtain loans in connection with their college education expenses. At the time of the hearing on this matter, the [c]ourt expressed an intention to place the children "on an equal playing field"

> with respect to college costs being subsidized by loans. By way of further clarification, in the event either [the oldest child] or [the middle child] obtain financial aid by way of scholarships, grants, or other assistance that does not require repayment, that form of financial aid shall be deducted from the gross college education expenses due and owing to the educational institution prior to the utilization of the allocation of responsibility as previously provided for in the Order entered on December 15, 2015. This determination applies to [the oldest child] and [the middle child] and their respective college costs and loans. By way of further clarification, in the event either [the oldest child] or [the middle child] obtain financial aid by way of scholarships, grants, or other assistance that does not require repayment, that form of financial aid shall be deducted from the gross college education expenses due and owing to the educational institution prior to the utilization of the allocation of responsibility as previously provided for in the Order entered on December 15, 2014.

Plaintiff filed this appeal. He makes three arguments:

POINT I THE COURT ERRED IN ITS DETERMINATION THAT A SUBSTANTIAL CHANGE OF CIRCUMSTANCE OCCURRED TO ALLOW THE COURT TO DEVIATE FROM THE AGREED VISITATION SCHEDULE WITHIN THE FINAL JUDGMENT OF DIVORCE.

POINT II THE COURT ERRED IN ITS DETERMINATION TO MODIFY THE COLLEGE PROVISIONS SET FORTH IN THE FINAL JUDGMENT OF DIVORCE AS TO CAUSE THE CHILDREN NOT TO HAVE TO CONTRIBUTE TO THEIR COLLEGE EXPENSES BY TAKING LOANS WHICH WERE OTHERWISE AVAILABLE TO THEM.

POINT III THE COURT ERRED BY NOT PLACING A CAP OF RESPONSIBILITY UPON THE PARENTS AS TO THEIR CONTRIBUTIONS TOWARDS COLLEGE

EXPENSES TO ENSURE THE AFFORDABILITY TO THE PARENTS TO CONTRIBUTE TO EACH CHILD'S SECONDARY EDUCATION EQUALLY.

Plaintiff's arguments in Points I and III are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following comments. In the "Statement of Facts" section of his brief under "Visitation," plaintiff makes assertions without any reference to the record. An appellant's brief is required to contain "[a] concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript." R. 2:6-2(a)(5) (emphasis added). Moreover, plaintiff did not include in his appendix the transcript of the trial court's findings following the court's interview with the children. Appellants are required to provide "such . . . parts of the record . . . as are essential to the proper consideration of the issues[.]" R. 2:6-1(a)(1)(I). Our consideration of those parts of the record that have been included in this appeal lead us to conclude the trial court did not abuse its discretion in making the slight modification to the parties' parenting time agreement.

Plaintiff did not raise before the trial court the issue of a "cap" on his obligation to pay for the children's college expenses. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly

presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960)).

Unlike the first and third points, we find merit in plaintiff's second point. "Settlement of disputes, including matrimonial disputes, is encouraged and highly valued in our system." Quinn v. Quinn, 225 N.J. 34, 44 (2016) (citation omitted). If parties have settled a matrimonial dispute, and the terms of the settlement agreement are "clear, unambiguous, and mutually understood," then a court should enforce the settlement terms unless there is a compelling reason to depart from them. Id. at 55. "When a court alters an agreement in the absence of a compelling reason, the court eviscerates the certitude the parties thought they had secured, and in the long run undermines this Court's preference for settlement of all, including marital, disputes." Ibid.

Here, it appears that the trial court's primary purpose in departing from the clear, unambiguous terms of parties' settlement agreement was to put the children "on equal footing." The trial

court did not appear to undertake any in-depth legal analysis as to whether or not such a reason was "compelling." Children may differ in their abilities, and the differences may result in one child getting financial assistance for college. For example, one child may qualify for an academic or athletic scholarship, and another may not. Such differences in children's abilities is not a reason for departing from a parental agreement and understanding that children should, to the extent possible, contribute to their college educations by taking out loans for which they may qualify.

Having said that, we are unable to determine from the record whether other considerations played a role in the trial court's decision. For example, there is some suggestion that the decision was based in part on the court's interview with the children. As previously noted, we do not have the transcript of the court's findings following the interviews. There is also some suggestion in the record that the court's decision may have been based on financial and other considerations. For these reasons, and out of an abundance of caution, we vacate the provisions in the orders essentially relieving the children from their obligations to obtain appropriate aid. On remand, the court shall provide the parties an opportunity to make an appropriate record on the issue. The court shall support whatever decision it makes with appropriate findings of facts and conclusions of law.

The orders from which plaintiff appealed are affirmed in part and vacated in part. This matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.