SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2326-16T2

R.S.,

Plaintiff-Respondent,

v.

T.B.,

Defendant-Appellant.

Submitted January 8, 2018 – Decided May 11, 2018

Before Judges Ostrer and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-0991-04.

Laterra & Hodge, LLC, attorneys for appellant (Matthew N. Tsocanos, of counsel and on the briefs).

Ansell Grimm & Aaron, PC, attorneys for respondent (Donna L. Maul, of counsel and on the brief).

PER CURIAM

Defendant T.B. appeals from an August 26, 2015 order of the Monmouth County Family Part denying her motion for modification

of alimony, and denying her January 5, 2017 motion for reconsideration. Because the marital standard of living was not established either at the time of divorce or at the modification hearing, we reverse and remand for a hearing to first establish the marital standard of living, and then to address the issue of changed circumstances.

I.

We discern the following relevant facts from the record. Defendant and plaintiff R.S. were married in June 1983, and had two children. During the course of the marriage, defendant was periodically employed in real estate, at Jenny Craig, as a bank teller, an administrative office assistant, and a hairdresser. Plaintiff is a chef and restauranteur, and was also invested in various business ventures. However, at the time of the divorce, plaintiff's interests in certain business ventures were ending and he was expecting a buyout of his interest in the amount of $909,000. He listed his gross income for 2003 as $580,000.

The parties experienced a "lavish" lifestyle during the marriage, and according to plaintiff's case information statement at the time of the divorce, had combined monthly expenses that were $32,406.99. According to defendant's case information statement, her personal monthly expenses totaled $12,512.

In March 2005, plaintiff and defendant entered in to a dual judgment of divorce, which incorporated a property settlement agreement (PSA). Under the PSA, the parties waived any and all rights to assets acquired after the date of the agreement. Additionally, plaintiff was responsible for paying defendant $3000 per month in permanent alimony, totaling $36,000 per year. Further, he was responsible for the children's college expenses and paid $1600 a month in support for their son and $700 per month for their daughter. Defendant agreed to be responsible for her own expenses, including "household-related expenses, day-to-day living expenses, automobile expenses, clothing expenses, medical, dental, hospital, surgical, prescription, psychological, and any other medically-related expenses." The parties also agreed that neither party would be responsible for the medical insurance costs of the other.

Pertaining to the equitable distribution of assets, the parties waived any right or interest in the other party's bank accounts, past, present, or future. With relatively minor exceptions favoring defendant, the parties agreed to equally divide the marital assets. Defendant would receive half of the sale proceeds from their marital home, which, less payments for certain bills due, amounted to approximately $55,500. Additionally, the parties' timeshare in Villa Roma, New York was

to be signed over to defendant. Altogether, defendant received approximately $416,000 cash through equitable distribution. At the time of the agreement, plaintiff's salary was $135,000 per year, while defendant's salary was $10,000 per year.

Plaintiff has seen success in his career post-divorce. He is an Executive Chef and Partner of the TAO Group and has made appearances on various television programs. Meanwhile, defendant asserts that after the divorce she suffered various disabling medical conditions. Additionally, she was involved in a car accident that required multiple surgeries, which led to complications and other disabling conditions. Because of her medical conditions, defendant was granted permanent medical disability and receives approximately $900 per month.

On March 26, 2015, defendant moved for an increase in alimony, asking for the increase based upon "substantial change of circumstances and inability to maintain the marital lifestyle retroactive[ly]." In the alternative, she sought time for discovery, requested a court appointed forensic expert to examine plaintiff's income, and requested a plenary hearing. Plaintiff filed a cross-motion asking the court to deny defendant's notice of motion and award him counsel fees.

Defendant argues that while plaintiff has been able to return to the standard of living the parties experienced during the

marriage, described as "ownership in a successful restaurant franchise and income to cover high shelter expenses, new cars, a generous allowance for personal expenses, luxurious vacations, lavish entertaining and nice lifestyle for the entire family," she has not. In addition, defendant states she has never received a cost of living adjustment to her alimony, which is why she filed the motion for an increase in alimony ten years after the final judgment of divorce.

In August 2015, without oral argument, the court denied both defendant's motion and plaintiff's cross-motion. It found defendant failed to provide proof that her physical and medical conditions hindered her ability to find employment in order to supplement her income, and thus she did not meet her burden of demonstrating a prima facie case of a substantial and permanent change in circumstances.

In September 2015, defendant moved for reconsideration of this order; plaintiff cross-moved, asking the court to deny defendant's motion for reconsideration and to award him counsel fees. Oral argument on the motion for reconsideration was eventually held in August 2016; the court reserved its decision.

On January 5, 2017, the court granted partial reconsideration but ultimately denied defendant's request for an upward alimony modification and denied plaintiff's cross-motion for counsel fees.

This appeal followed. On appeal, defendant argues the court erred by denying her motion for upward modification, and that changed circumstances existed, discovery should have been granted, and that a plenary hearing was warranted. She also argues the modification judge effectively read in to the PSA an anti-Lepis[1] clause in denying her request for modification of alimony.

II.

We "have a strictly limited standard of review from the fact-findings of the Family Part judge." N.J. Div. of Youth & Family Servs. v. I.H.C., 415 N.J. Super. 551, 577-78 (App. Div. 2010) (citation omitted). "[A]ppellate courts 'defer to the factual findings of the trial court because it has the opportunity to make first-hand credibility judgments about the witnesses who appear on the stand; it has a feel of the case that can never be realized by a review of the cold record.'" N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 342-43 (2010) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). Furthermore, deference is appropriate "[b]ecause of the family courts' special jurisdiction and expertise in family matters[.]" Cesare v. Cesare, 154 N.J. 394, 413 (1998). However, where the findings of the trial court "went so wide of the mark that the

[1] Lepis v. Lepis, 83 N.J. 139, 146 (1980).

judge was clearly mistaken," this court will reverse. N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007) (citation omitted).

"Alimony and support orders define only the present obligations of the former spouses." Crews v. Crews, 164 N.J. 11, 28 (2000). Therefore, our courts have the authority to modify or alter support orders "from time to time as circumstances may require." N.J.S.A. 2A:34-23. A support order may be subject to review and modification when a party has made a showing of "changed circumstances." Lepis, 83 N.J. at 146 (citations omitted); Miller v. Miller, 160 N.J. 408, 419 (1999). Modification of alimony will be viewed in the context of changed circumstances for both judicial decisions and consensual agreements. Lepis, 83 N.J. at 149.

Parties can waive modification of alimony by including an anti-Lepis clause into an agreement. Morris v. Morris, 263 N.J. Super. 237, 240 (App. Div. 1993). Such a clause is enforceable provided the parties meet certain conditions. Specifically, the parties incorporating an anti-Lepis clause into a PSA must do so "with full knowledge of all present and reasonably foreseeable future circumstances" and further must "bargain for a fixed payment or establish the criteria for payment to the dependent spouse, irrespective of circumstances that in the usual case would give rise to Lepis modifications of their agreement." Id. at 241.

Plaintiff acknowledges there is no specific anti-Lepis clause in the PSA. Further, the modification judge did not read an anti-Lepis clause into the PSA; instead she found, based upon the clear intent of the agreement, that the parties waived any claim to future assets in exchange for equitable distribution and that defendant did not meet her burden under Lepis to demonstrate how the changed circumstances have substantially impaired her ability to sustain herself.

Absent such a clause, "[w]here the parties have agreed on the amount of support or alimony, Lepis permits later modification to the extent that changed circumstances render the agreed terms no longer 'fair and equitable.'" Ibid. (quoting Lepis, 83 N.J. at 148-49). "The supporting spouse's obligation hinges on the parties' economic life during their marriage." Glass v. Glass, 366 N.J. Super. 357, 370 (App. Div. 2004) (citation omitted); see Lepis, 83 N.J. at 150. "Specifically, the party seeking modification of an alimony award 'must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself.'" Crews, 164 N.J. at 28 (quoting Lepis, 83 N.J. at 157). "[T]he ability to support oneself must be understood to mean the ability to maintain a standard of living reasonably comparable to the standard enjoyed during the marriage," or the marital standard of living. Ibid.

"When modification is sought, the level of need of the dependent spouse must be reviewed in relation" to the marital standard of living. Crews, 164 N.J. at 29. "The standard of living during the marriage is the way the couple actually lived, whether they resorted to borrowing and parental support, or if they limited themselves to their earned income." Glass, 366 N.J. Super. at 371 (quoting Hughes v. Hughes, 311 N.J. Super. 15, 34 (App. Div. 1998)). "If that need is met by the current alimony award and there are no other changed circumstances, support should not be increased merely because the supporting spouse has improved financial resources." Crews, 164 N.J. at 29. Ideally, marital standard of living should be identified at the time of the original divorce, "regardless of whether a maintenance order is entered by the court or a consensual agreement is reached[.]" Crews, 164 N.J. at 25-26; see Weishaus v. Weishaus, 180 N.J. 131, 144 (2004) ("A trial court may forego the findings when the parties freely decide to avoid the issue as part of their mutually agreed-upon settlement, having been advised of the potential problems that might ensue as a result of their decision.")

Here, the PSA does not establish the marital standard of living, as it only sets forth the imputed incomes of the parties at the time, and makes no representations about the parties' ability to maintain any specific lifestyle. Further, at the

original time of divorce, the judge explicitly stated that he "took no testimony regarding the issue of support, custody and other matters except as to the issue of divorce" and did not make any findings regarding these issues. See Crews, 164 N.J. at 26 (citing N.J.S.A. 2A:34-23(b)(4) and finding that a determination of the standard of living established in the marriage is required). It is not apparent whether the parties freely decided not to address the issue, having been made fully aware of the future potential problems. Weishaus, 180 N.J. at 144. Therefore, as we have stated, it was incumbent upon the judge hearing the application for modification to make such a finding. Glass, 366 N.J. Super. at 371 (citing Crews, 164 N.J. at 16-17); see Weishaus, 180 N.J. at 145.

However, the modification judge did not make a determination of the marital standard of living. She appeared to express disbelief that "the lifestyle they lived at the time of the dissolution was one that was substantiated correctly by the earnings of the couple at the time[,]" but never continued on to make a specific finding. To then infer from the PSA that the parties had waived any future modifications was an error.

The case information statements submitted at the time of divorce evidence what the parties describe as a "lavish lifestyle"; the family ostensibly had monthly expenses of over $32,000, and

defendant's personal monthly expenses were supposedly over $12,000. Accepting the designation of "lavish" as true, and though the PSA was entered into knowingly and with advice of counsel, there is no language contained within, nor any other evidence, establishing defendant's acknowledgement and acceptance of the fact that she would not be able maintain herself at the marital standard of living. It was error for the modification judge to dispose of the application without resolving the question.

It is true that, even in a situation where "a spouse cannot maintain the marital standard of living on the support payments received, this would not ordinarily warrant modification if it were shown that a single large cash payment made at the time of divorce was included with the express intention of meeting the rising cost of living." Lepis, 83 N.J. at 153; Innes v. Innes, 117 N.J. 496, 519 (1990) (citation omitted). Defendant received, as equitable distribution, approximately $416,000. However, there was no expression of such an intention, except for general clauses waiving future claims. As such, it cannot be said, based on a plain reading of the PSA, that the equitable distribution contained within was intended to forestall any future modifications and to cover rises in the costs of living.

Based on the foregoing, we reverse and remand for a hearing to determine the marital standard of living and whether changed

circumstances warrant modification of plaintiff's support obligations.

We do not retain jurisdiction.