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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2404-16T4  
A-3562-16T4

JOSEPHINE PENZA,

Plaintiff-Respondent,

v.

ROBERT A. PENZA,

Defendant-Appellant.

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Argued May 2, 2018 – Decided June 1, 2018

Before Judges Currier and Geiger.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Camden County,  
Docket No. FM-04-0687-02.

Robert A. Penza, appellant, argued the cause  
pro se (Christine A. Dolan, on the briefs).

Julie R. Burick argued the cause for  
respondent (Adinolfi & Packman, PA, attorneys;  
Julie R. Burick, of counsel and on the brief;  
Kevin J. Murphy, on the brief).

PER CURIAM

In these back-to-back appeals arising out of this matrimonial matter, we review the post-judgment orders of January 13, 2017,

and March 10, 2017, regarding work-related child care expenses, medical expenses, and other related issues, as well as the provision compelling defendant Robert A. Penza to sell a vacation property. Because we find the judge failed to consider defendant's meritorious opposition to the motions, and the applications of plaintiff, Josephine Penza, were deficient and lacking in documentation to support her requests, we reverse and remand to the trial court.

The parties divorced in 2003 after eight years of marriage. Their daughter was born in 1999. The parties remain contentious, resulting in protracted post-judgment motion practice and numerous appeals. As the present appeals pertain to issues of expenses for childcare, medical bills, tutoring, and extra-curricular activities, we must briefly refer to several prior orders.

A July 2008 order set forth defendant's childcare obligation and the allocation of shared expenses; private school expenses were specified as a shared expense. A subsequent order in August 2012 clarified that "private school expenses" included tuition and expenses for school supplies, uniforms, and school lunches. The order required a request for reimbursement of any expense to include: copies of canceled checks, complete billing statements from the child's school and medical providers, and copies of any receipts for expenses paid in cash.

A January 9, 2014 order revisited the issue of expenses and their reimbursement, wherein the trial court required consultation between the parties before incurring a tutoring expense. In requesting reimbursement for tutoring expenses, the court required plaintiff to provide invoices or a written note from the child's tutor. The court ordered defendant to pay medical expenses within a specific timeframe, "upon receipt of the proper documentation." Defendant was responsible for fifty percent of any work-related childcare expenses, capped at \$125 per week. Upon receipt of cancelled checks and receipts, defendant was required to reimburse plaintiff for childcare expenses.

On June 16, 2014, the trial court modified the allocation of shared expenses, requiring defendant to pay eighty percent and plaintiff to pay twenty percent.<sup>1</sup> Shared expenses included medical expenses (plaintiff is required to pay the initial \$250), extra-curricular activities, and tuition. The order also reduced defendant's monthly child support obligation.

Against that backdrop, we turn to a discussion of the orders that are the subject of these appeals. In November 2016, plaintiff moved to enforce litigant's rights in connection with work-related

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<sup>1</sup> The previous arrangement set out in the June 2008 order imposed an allocation of eighty-eight percent to defendant and twelve percent to plaintiff.

childcare, medical, and other miscellaneous expenses. She sought reimbursement for \$32,952.40 in expenses, contending that although she had provided documentation to defendant, he had not reimbursed her for his share of the expenses.

In opposing plaintiff's motion, defendant disputed the legitimacy of the work-related childcare expenses and asserted that plaintiff did not provide the requisite receipts for the services. With regard to tutoring, defendant asserted plaintiff did not provide receipts or consult with him prior to incurring this expense. He also contended plaintiff did not consult with him prior to incurring medical expenses and did not provide invoices or any calculations reflecting she had paid her share. Defendant further asserted plaintiff was not paying her share of various school expenses, and she was asking him to pay for school expenses that were included in his child support payment.

Plaintiff contended in reply that she had provided cancelled checks for the child care expenses and she was not required to confer with defendant prior to incurring either tutoring or medical expenses. She advised defendant now owed her in excess of \$36,000.

Defendant, appearing pro se,<sup>2</sup> and plaintiff's counsel were in court for oral argument in December 2016. The judge advised them, however, that he did not have their papers. Although plaintiff represented to the court that her application was an enforcement order, defendant apprised the judge of his opposition to the motion, specifically the inclusion of three years of cancelled checks never previously sent to him for work-related childcare expenses for his seventeen-year-old daughter. He argued the payment of \$15,000-\$17,000 yearly to an elderly woman for childcare services to his high school daughter who had a full schedule of after-school activities was not credible. Defendant also disputed his responsibility for the significant extra "school" expenses for which plaintiff sought reimbursement. He further advised plaintiff had not consulted with him as to any of the tutoring or medical expenses incurred by their daughter.

The argument was adjourned for one month so the judge could review the submissions. When the parties returned on January 13, 2017, the judge commenced the argument by stating: "We're here for an enforcement application." He then asked plaintiff's counsel if defendant had \$32,000. Counsel replied affirmatively and the

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<sup>2</sup> We glean from comments in the record that defendant is an attorney admitted to the bar in Delaware where he practices law and is a member of a firm.

judge said "Well, let's get to the . . . ability to pay." The judge proceeded to query defendant as to the value of his homes, and whether they were subject to a mortgage. When defendant stated he had a one percent interest in a country club he had inherited, the judge responded: "I don't care if you inherited it or not. . . . You're liquidating everything you have right now. I am going to take one step at a time and you're going to liquidate things."

When defendant advised the court he carried substantial mortgages on both of his residences, the judge accused defendant of "hiding money" and threatened to report him to the ethics commission in Delaware. Defendant told the court he had never failed to pay either the ordered \$2600 monthly child support figure or the \$1300 monthly private school tuition. Plaintiff's counsel conceded that was true. In response, the judge said:

Well, the child needs to be pulled out of school right now. . . . [Y]ou want this money imposed, take his deposition, give me a list of things to do and I'll do it.

. . . .

Counsel, for me to put him in jail, which I will do, you've got to show that in this account he's got this amount of money and he won't give it up. That's when you go to jail.

. . . .

And [defendant is] going to lose his license to practice law.

As the colloquy continued, defendant answered the judge's questions concerning his salary. Nevertheless, the judge ordered defendant to provide ten years of tax returns to plaintiff. When defendant requested plaintiff also provide copies of her tax returns, the judge responded: "[This is] an enforcement application."

Defendant reminded the judge he had filed opposition to the reimbursement requests, and specifically pointed out the \$17,875 plaintiff requested for day care expenses for the parties' seventeen-year-old daughter. He told the judge there was a "factual dispute" as to that item. The judge responded again that the application was an enforcement motion and without a cross-motion, he would not listen to any of defendant's arguments. The judge ordered the production of a list of, and statements, for all of defendant's bank accounts as well as an updated case information statement (CIS).<sup>3</sup> The judge suggested to plaintiff that she serve a subpoena duces tecum on defendant "for anything else that you want that is relevant to the case" and then take his deposition.

In the January 13, 2017 order, the court entered judgment for \$36,018.16, which included all of the reimbursement monies requested by plaintiff. Defendant was ordered to make a lump sum

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<sup>3</sup> Defendant's request for a CIS from plaintiff was denied.

payment of \$3000 to plaintiff within ten days. Although plaintiff had only requested an additional monthly amount of \$100 to go towards the arrears, the judge advised he was raising the arrears amount to \$1000 a month. When defendant said he could not afford that amount, the judge retorted: "Prove it. Prove it." The court also ordered defendant to list a vacation property for sale – a condominium he had inherited from his parents. The order awarded counsel fees of \$1000 if defendant complied with the order within thirty days. If he failed to comply, the counsel fees award would increase to \$4000.

Defendant filed a notice of appeal from the January 13, 2017 order and subsequently moved before the trial court for a stay of enforcement pending the appeal. In response, plaintiff filed a cross-motion seeking enforcement of the January order and requesting a warrant for defendant's arrest and his incarceration for non-compliance with the order.

During oral argument on March 10, 2017, defendant, now represented by counsel, advised the court of its failure to perform any evaluation in the previous hearing as to whether plaintiff had met her burden of proof and provided the appropriate documentation to support her request for reimbursement of the substantial expenses. Counsel specifically referred to the judge ordering the sale of defendant's vacation condominium prior to plaintiff



establishing she was entitled to \$36,000 of reimbursed expenses. She also reminded the judge of defendant's objections and queries regarding the childcare expenses sought by plaintiff, noting that the applicable order required him to pay fifty percent of childcare expenses up to \$125 a week. All of the checks written by plaintiff to the childcare provider were for \$250.

In response to the judge reiterating that this was an enforcement motion, defense counsel advised there was opposition as to the amount due. She explained that defendant was not challenging the prior orders but was contesting the necessity for childcare and the legitimacy of the provider, as well as the sufficiency of the backup documentation for all of the requested reimbursements.

In an order issued the same day, the judge denied defendant's motion to stay enforcement and ordered compliance with all provisions of the January 13, 2017 order. With regard to the childcare issue, the order stated: "[T]he [c]ourt recognizes the Defendant's frustration in paying for what can arguably be considered unnecessary and inappropriate child care costs. However, the previous [c]ourt [o]rders that established Defendant's child support obligation are not being challenged at this juncture."

Defendant appeals from both orders. As to the January 2017 order, he argues that the trial court failed to address the merits of his opposition to plaintiff's motion, instead only considering whether defendant had the ability to pay the requested reimbursements. He contends that the multiple conflicting certifications submitted by the parties presented disputed issues of material facts requiring a plenary hearing. Defendant reiterates his arguments respecting the March 2017 order, contending that the court erred in not vacating its prior order.

We are mindful that a trial court's fact-finding is entitled to deference if supported by adequate, substantial, credible evidence in the record. Cesare v. Cesare, 154 N.J. 394, 412 (1998). "Therefore, an appellate court should not disturb the 'factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid. (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, LP v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

It is clear the court misapprehended the nature of the application before it. We, therefore, vacate both orders, reverse the provisions requiring the sale of defendant's vacation property, and remand to the trial court for fresh consideration of plaintiff's application and defendant's opposition to it.

Defendant filed a comprehensive opposition to the motion, contending there was a factual dispute as to reimbursement amounts, plaintiff replied, and each party thereafter filed additional responses. During oral argument, the judge never considered the merits of defendant's opposition. Instead, he immediately inquired into defendant's finances, accused him of hiding money, threatened to remove the teenage daughter from her school, and provided advice to plaintiff's counsel as to how to put defendant in jail and serve a subpoena on him for documents. He also warned defendant he could lose his law license. The court concluded the hearing by ordering the sale of a vacation home and entering judgment for the full amount requested in plaintiff's application.

Defendant appealed from the January order and subsequently moved for a stay of the order in the trial court. The same judge heard oral argument in March 2017. Defendant had retained counsel for the proceedings who explained to the court that defendant was not contesting the substance of the prior orders but was arguing that plaintiff had not produced sufficient competent evidence to

support her reimbursement requests. Although the judge conceded childcare expenses for a seventeen-year-old was "insane," he nevertheless entered an order on March 10, 2017, denying the motion to stay and granting plaintiff's cross-motion to enforce all of the provisions of his January order.

Under its misapprehension that it was bound to enforce the prior orders, the court never considered defendant's arguments presented in opposition to plaintiff's application. Defendant's arguments concerning childcare expenses for his high-school-aged daughter certainly warranted consideration. He argued there was no information plaintiff was working, what services were provided by the alleged caregiver, or the hourly wage. Instead, defendant was charged the full amount allowed in a prior order. Defendant raised a question of fact as to these expenses.

Moreover, we previously commented on the necessity for childcare costs for the parties' high-school-aged child. In our decision issued February 28, 2017, denying plaintiff's appeal of four Family Part orders, in discussing plaintiff's failure to comply with financial disclosure requests, we said:

The [trial] court's decision to impute \$36,000 in primary income to plaintiff was also supported by the fact that she was spending at least \$20,000 in child care costs. This would suggest that she earned significantly more than \$36,000. We are not clear as to the

reason the child would require such substantial child care costs given her age.

Although both parties had received this opinion and defendant provided it to the court prior to the March 10 oral argument, there is no indication the judge gave the comments any consideration.

Nor did the court hold plaintiff to her responsibilities under the various orders of providing the appropriate documentation to substantiate her reimbursement requests. A review of her application reveals numerous deficiencies. For instance, a June 16, 2014 order required her to pay the initial \$250 in medical expenses. Plaintiff provided no proofs in her submission that she had paid her initial obligation.

Additionally, the documents provided by plaintiff do not support her itemization for medical expenses incurred by the parties' child and their reimbursement. The itemization is dated 2013 to 2016, yet an invoice for medical care rendered in 2011 is attached. She lists medical expenses of \$100 in her itemization for 2013; the only attachment for that year is a bill for \$804.85. Although plaintiff claimed she incurred \$1,900.94 in medical expenses in 2014, there are no attached medical invoices for that year. Invoices for medical expenses in 2015 total \$445.44, but plaintiff claimed in her itemization she incurred \$1,144.70 that

year. Similarly, in 2016, attached invoices total \$644, but plaintiff claimed she incurred medical expenses of \$1,030. On remand, the trial court should address these inconsistencies, denying plaintiff relief where she has not complied with pertinent orders.

Plaintiff also did not properly document tutoring costs. The January 2014 order providing for the reimbursement of such expenses required "consultation before the expense is incurred and plaintiff must provide invoices or some written note from the tutor." Plaintiff conceded she did not consult with defendant prior to incurring these costs and she only attached copies of cancelled checks. The court on remand must consider whether plaintiff complied with her responsibilities when assessing her request for reimbursement under this and all categories of her application.

We provide some guidance for the remand court in assessing "private school expenses." Plaintiff sought reimbursement of expenses she incurred for school books, uniforms, and lunches. A July 2008 order categorized private school expenses as shared expenses. An August 20, 2012 order clarified that private school expenses included "not only tuition but also expenses for school supplies, uniforms, and school lunches." Defendant pays his share of tuition directly to the school. To obtain reimbursement of

other school-related expenses, plaintiff is required to submit proof of payment, along with full and complete billing statements.

Defendant argued to the trial court and in this appeal that these additional school costs sought by plaintiff as shared expenses were contemplated in the calculation of his child support obligation. We disagree. Although Appendix IX-A of the Child Support guidelines states that school uniforms, books, and school supplies are expenses included in a child support guideline, it has been expressly established in this case that private school expenses are separate shared expenses. The child support figure here was not set pursuant to the guidelines due to the high income levels.

We reject defendant's argument that the June 2014 order superseded any prior order regarding private school expenses. The June 16, 2014 order changed the parties' respective allocation of three specific shared expenses – medical, extra-curricular activities, and tuition. The order did not change any prior definition of a specific shared expense. Defendant remains obligated to contribute towards properly documented expenses for books, school lunches, and uniforms. The remand court will determine the proper amount due.

In light of our decision today and the remand for a proper consideration of defendant's arguments, we reverse the pertinent

provisions of the order requiring the listing and sale of defendant's vacation property. It was an abuse of discretion to blithely order the sale of an asset without a review of financial documents and a proper ability to pay hearing. Defendant was current in his child support and tuition payments. He did not contend he could not pay; he argued instead that he was not responsible for the sums sought in the asserted expenses, and the application was deficient.

During oral argument, the parties advised that following the entry of these two orders, plaintiff filed several additional motions for enforcement relating to these orders and for the reimbursement of additional claimed expenses of \$22,000. Plaintiff was also awarded \$24,000 in counsel fees. All of these motions were granted and are the subject of additional appeals. One of the orders appointed an attorney-in-fact to sell defendant's vacation property. Following the entry of that order and denial of defendant's request to stay the orders, defendant paid the amount owed to plaintiff under the January and March 2017 orders and \$4000 in counsel fees.



On remand,<sup>4</sup> the court must consider plaintiff's application as is, defendant's opposition, and both parties' subsequent submissions presented to the motion judge at the time of the first application, and determine whether plaintiff has properly supported her requests for reimbursement of certain expenses. We leave it to the judge's discretion whether a plenary hearing is needed to resolve issues of fact.

The court will then determine, in light of the payments made by defendant, what credits he is owed for payments he was ordered to make in error. As a result of our remand, we also vacate the award of counsel fees and direct the monies be returned by plaintiff's counsel within twenty days of the date of this decision.

Finally, in light of our decision, we also direct defendant to review the matters currently on appeal and determine whether they may be withdrawn wholly or in part as moot.

We vacate paragraphs 1, 2, 5, and 6 of the January 13, 2017 order. We reverse paragraphs 3 and 4. We vacate paragraphs 2 and 6 of the March 10, 2017 order. We reverse paragraphs 3 and 4.

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<sup>4</sup> The record reflects numerous judges in the Family Part have handled this litigation through the years. For the "fresh consideration" of the parties' dispute that is needed here, we direct that the matter be assigned to a judge unfamiliar with the parties and their issues.

Vacated in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

A handwritten signature in black ink, appearing to be the initials 'JMA'.

CLERK OF THE APPELLATE DIVISION