SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3608-16T2

K.L.,

Plaintiff-Respondent,

v.

S.L.,

Defendant-Appellant.

---

Submitted February 7, 2018 – Decided March 27, 2018

Before Judges Alvarez and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket No. FM-18-0475-12.

S.L., appellant pro se.

K.L., respondent pro se.

PER CURIAM

Defendant S.L. appeals from a March 15, 2017 order denying his post-judgment motion to reduce child support, to require plaintiff K.L. to reimburse work-related childcare expenses, and to reduce defendant's responsibility for unreimbursed health care expenses and extracurricular activities. We affirm.

We discern these facts from the record. Plaintiff and defendant were married in 1996 in China. They have one child, born in 2005. On June 17, 2009, the parties were divorced in Webb County, Texas and left Texas soon thereafter. Plaintiff moved to New Jersey with their daughter. Between 2009 and September 2011, their daughter attended day care, summer camp, and began kindergarten. She also participated in Chinese lessons, ballet, keyboarding, ice skating, and swimming lessons.

Defendant moved to Kentucky in 2009, Michigan in 2010, and Ohio in 2011. He visited his daughter only three times between July 2009 and October 2011.

Defendant provided plaintiff with child support every month until October 2011. In the same month, plaintiff moved to register the Texas divorce judgment in New Jersey for purposes of modification of custody and child support provisions and to have New Jersey assume jurisdiction as the minor child's "home state" under the Uniform Child Custody Jurisdiction and Enforcement Act, N.J.S.A. 2A:34-53 to -95. Plaintiff's moving papers included a Case Information Statement (CIS), her 2010 tax returns, 2010 W2 forms, and three paystubs. Although Defendant opposed the motion, he did not include copies of his W2 forms or tax returns with his opposing papers.

Plaintiff also filed a complaint against defendant seeking entry of a restraining order pursuant to the Prevention of Domestic Violence Act (the Act), N.J.S.A. 2C:35-17 to -35. Plaintiff alleged defendant was strict with her and their child, beating plaintiff almost daily and would sexually and emotionally abuse her for not following his rules. Plaintiff claims that after years of abuse, neighbors finally called the police in December 2008. Plaintiff dropped the charges based on defendant's threats and filed for divorce soon after.

Plaintiff further alleged defendant sent constant abusive and threatening emails to her, screamed at her on the phone, left threatening voicemail messages, threatened to contact plaintiff's employer, threatened to contact the government to get plaintiff deported, and had raped her during his last visit to see their child.

On November 30, 2011, the trial court sent defendant a tentative decision. The trial court also advised defendant it would consider defendant's tax forms if they were provided to the court before a final decision was entered.

The court's final decision was issued on December 2, 2011, prior to receiving defendant's W2s and tax returns from 2008-2010, which he submitted at the end of the business day on December 2, 2011. The trial court granted plaintiff sole legal custody of

their daughter, established defendant's child support obligations, and entered a temporary restraining order against defendant.

In his accompanying statement of reasons, the judge imputed defendant's annual income to be $120,000 but indicated he would "consider an adjustment after those documents are provided, if warranted." The judge also indicated he would "not make a ruling concerning imputations of income to [defendant] until and unless those documents are provided."

The judge set basic child support at $340 per week pursuant to the child support guidelines. The judge further ordered defendant responsible for fifty-eight percent of the additional child care expenses based on the parties' respective percentages of income. Plaintiff was directed to pay the expenses initially, with defendant being required to reimburse her after receiving a copy of the bill through certified mail. The court calculated the total monthly child care, which included before and after school care and summer camp expenses, to be $711 per month.

The minor child's extracurricular and educational activities were also calculated. The court concluded expenses for these activities, which included ballet class, keyboarding class, Chinese lessons, and swimming class, totaled $266 per month. As a result, the court ordered defendant to pay an additional $154 on the first day of each month to plaintiff. The judge also

required defendant to reimburse plaintiff for fifty-eight percent of their daughter's unreimbursed medical expenses. Defendant did not move for reconsideration or appeal the order.

On January 5, 2012, a final restraining order (FRO) was entered against defendant. Defendant did not appeal the FRO. Plaintiff remarried and relocated to Canada but has since moved back to New Jersey.

On February 7, 2017, defendant moved to modify child support, claiming he had also remarried in late 2012 and has a son from that marriage. Defendant further claims his wife is currently a full-time graduate student and his son is in kindergarten. Defendant's moving papers make it clear he was attempting to relitigate his child support obligations, not simply modify them based on changed circumstances. Plaintiff filed a cross-motion to deny defendant's motion, compel defendant to pay all child support and arrears, and for counsel fees and costs.

Plaintiff contended defendant's motion should be denied because he caused his own unemployment. Plaintiff alleged that in 2015, defendant hired a private investigator to track her down and serve her with papers. When the investigation proved fruitless, defendant attempted to reach plaintiff through her brother who lived in Bernards Township, New Jersey. To this end, defendant contacted the Bernards Township Police Department.

During the course of his conversation with the Bernards Township Police Department, defendant "quickly began ranting about how the courts illegally took his [Second] Amendment rights away" and "stated that after his experience in family court '[he] understand[s] why people in America want to buy Ak-47's and kill people.'" The police report indicates defendant did not disclose the FRO and the officer found his comments concerning, especially considering his teaching position at the University of Texas. After their conversation with defendant, police faxed a copy of the FRO to his department at the University of Texas. Defendant was subsequently terminated by the university.

The trial court heard oral argument on March 10, 2017, with defendant appearing by phone. On March 15, 2017, the court denied defendant's motion to modify child support. The order also required plaintiff to submit copies of the bills and proof of payment to defendant for their child's extra-curricular activities in order to receive payment from him.

In an accompanying statement of reasons, the judge explained defendant had not presented a prima facie case warranting modification of child support because he had not demonstrated his unemployment was a permanent and substantial change:

> [Defendant] is alleging there is permanent and substantial change in circumstances because he will not be able to secure employment. While

> [defendant] states he lost his job, he doesn't certify as to his attempts to secure a new job or show evidence of any effort at a diligent and robust job search. He fails to provide a copy of his resume and cover letters; any evidence of his attendance at job fairs; evidence of his scouring newspapers for jobs; evidence of the use of any employment agencies or head hunters; evidence of his networking efforts; and/or evidence of any walk-in attempts. The [c]ourt notes that any litigant can argue he is searching for jobs and doing everything he can. However, doing so is insufficient as a litigant has an obligation to show the [c]ourt his efforts in a tangible form. In fact it appears [defendant] has decided he will be unable to secure employment [and] has not made any efforts to find a new job. Clearly, [defendant's] failure to try to find a new job does not establish the high burden he has to meet to show a substantial and permanent change in circumstances.

The judge further found it inappropriate to disturb the prior child support order, especially since defendant had been compliant until his recent modification application. The judge held, in relevant part, "[u]nder the doctrine of stare decisis and/or the rule of the case, this [c]ourt will not decide on an issue that has already been decided nearly six (6) years ago, especially since [defendant] had not opposed the request when the motion was filed." The judge also commented, upon review of the court's December 2, 2011 statement of reasons, he believed the court "made its decision appropriately based on the parties' submissions." This appeal followed.

Defendant raises the following issues on appeal:

> POINT I
>
> THE COURT ERRED BY FAILING TO REDUCE IMPUTED INCOME [$120,000] TO MY REAL INCOME [$100,000] AND REDUCE BASIC CHILD SUPPORT FROM $340/WEEK TO $217/WEEK
>
> POINT II
>
> THE COURT ERRED BY FAILING TO ORDER THAT WORK-RELATED CHILDCARE COST BE REIMBURSED ON AN IF-OCCURRED BASIS
>
> POINT III
>
> THE COURT ERRED BY FAILING TO ORDER THAT UNCOMPENSATED HEALTHCARE COST IN EXCESS OF $250 PER YEAR PER CHILD BE REIMBURSED ON AN IF-OCCURRED BASIS
>
> POINT IV
>
> THE COURT ERRED BY FAILING TO ORDER THAT EXTRACURRICULAR ACTIVITIES FEES NOT BE SHARED AGAIN
>
> POINT V
>
> THE COURT ERRED BY FAILING TO ORDER THAT OVERPAID CHILD SUPPORT BE REIMBURSED

Defendant argues the trial court improperly imputed his income as part of its 2011 child support ruling. Defendant further argues the burden of proof should be on plaintiff to provide evidence of her claim; he should not be forced to "rebut the obvious lies with evidence." Defendant also argues the trial court ignored its "promise" to "not make a ruling concerning

imputations of income to [defendant] until and unless" his W2s and tax returns for the past three years were provided. Defendant claims he timely submitted the required documents and they were willfully ignored by the judge in determining his child support obligations.

As to the 2017 ruling, defendant contends the trial court erred in perpetuating the 2011 plain error and abuse of discretion regarding defendant's required payments for work-related childcare costs, uncompensated healthcare costs, and extracurricular activities. Defendant argues his child support should be modified to reflect a "variable" model and should be required to pay costs only "if incurred."

With regard to changed circumstances, defendant argues the FRO accounts for a significant and permanent change in circumstances that has negatively affected his employment. He further claims plaintiff's international migration to Canada and subsequent marriage constitute significant changes in circumstance. He also claims his remarriage in 2012 and the birth of his son constitutes a change in circumstances.

As a result of the court's alleged error in determining his initial child support obligations and the subsequent changed circumstances, defendant maintains he should be reimbursed for his overpaid child support.

Our review of a Family Part's order is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We review decisions granting or denying applications to modify child support for an abuse of discretion. Jacoby v. Jacoby, 427 N.J. Super. 109, 116 (App. Div. 2012) (citing Larbig v. Larbig, 384 N.J. Super. 17, 21 (App. Div. 2006); Loro v. Del Colliano, 354 N.J. Super. 212, 220 (App. Div. 2002)). "The trial court has substantial discretion in making a child support award. If consistent with the law, such an award will not be disturbed unless it is manifestly unreasonable, arbitrary, or clearly contrary to reason or to other evidence, or the result of whim or caprice." Ibid. (quoting Foust v. Glasser, 340 N.J. Super. 312, 315-16 (App. Div. 2001)). An abuse of discretion "arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002) (citations omitted). 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, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

We begin our analysis with defendant's attempt to relitigate the trial court's 2011 ruling. If defendant felt aggrieved by that ruling, review was available in the form of a timely filed

motion for reconsideration, pursuant to Rule 1:7-4(b), or by way of a timely filed appeal, pursuant to Rule 2:4-1(a). Defendant did not move for reconsideration or file an appeal. Instead, defendant seeks relief from the 2011 order under Rule 4:50-1. Specifically, defendant contends he is entitled to relief under subsections (a) for mistake; (c) for fraud; (e) because the order is no longer equitable; and (f) for other reasons. Defendant's application under Rule 4:50-1 is untimely.

Rule 4:50-1 motions "shall be made within a reasonable time, and for reasons (a), (b) and (c) of R. 4:50-1 not more than one year after the judgment, order or proceeding was entered or taken." R. 4:50-2. Defendant filed his motion more than five years after the 2011 order was entered. Therefore, his application under subsections (a) and (c) of the rule are time-barred.

Defendant offers no explanation for the five-year delay in filing his motion. By any measure, defendant did not file his motion within a reasonable time. Therefore, his application under subsections (e) and (f) is also time-barred. Consequently, we need not address the merits of his application seeking review of the 2011 order. R. 4:50-2.

With respect to his attempt to modify the child support order, defendant must demonstrate a substantial change in circumstances. Lepis v. Lepis, 83 N.J. 139, 157 (1980). We recognize evidence

of changed circumstances includes a significant increase in income or assets, J.B. v. W.B., 215 N.J. 305, 327 (2013), an involuntary and permanent decrease in income or assets, ibid, and remarriage and new family members, Martinez v. Martinez, 282 N.J. Super. 332, 341-42 (Ch. Div. 1995).

"The party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support or maintenance provisions involved." Lepis, 83 N.J. at 157 (Martindell v. Martindell, 21 N.J. 341, 353 (1956)). Generally, the changed circumstances must be permanent. Walles v. Walles, 295 N.J. Super. 498, 517 (App. Div. 1996). Defendant failed to demonstrate his reduction in income is permanent. His unemployment has not resulted in the inability for him to practice in his particular profession.

Additionally, "one cannot find himself in, and choose to remain in, a position where he has diminished or no earning capacity and expect to be relieved of or to be able to ignore the obligations of support to one's family." Arribi v. Arribi, 186 N.J. Super. 116, 118 (Ch. Div. 1982). For example, in Aronson v. Aronson, we concluded the movant had failed to present a prima facie case of changed circumstances when he "allow[ed] his practice to continue to diminish unchecked while bemoaning his fate." 245 N.J. Super. 354, 361 (App. Div. 1991). Here, the trial court

determined defendant should have been attempting to earn more and had not demonstrated any attempt to do so. We agree. Defendant has not proffered evidence as to why he has remained unemployed or that his unemployment will persist.

We further note defendant's present employment situation was self-created by his voluntary conduct leading to the FRO and his subsequent behavior when communicating to the police. We view these circumstances as being materially different than a child support obligor who suffers a loss of employment at no fault of their own making. Although not dispositive, it is one of a number of factors to be taken into account. See Kuron v. Hamilton, 331 N.J. Super. 561, 571 (App. Div. 2000).

Defendant's application was also materially deficient. A party seeking relief from a prior order based on a change in circumstances is required to submit an updated CIS, attaching their most recent tax returns, together with their previously filed CIS in connection with the order sought to be modified. R. 5:5-4(a). "This mandate is not just window dressing. It is, on the contrary, a way for the trial judge to get a complete picture of the finances of the movants in a modification case. This is important because the movant bears the initial burden in such a case under [Lepis]." Palombi v. Palombi, 414 N.J. Super. 274, 287

(App. Div. 2010) (quoting Gulya v. Gulya, 251 N.J. Super. 250, 253-54 (App. Div. 1991).

Defendant failed to append a copy of his prior and current CIS to his application. As a result, the court had no ability to adequately assess defendant's financial circumstances. In particular, it effectively prevented any meaningful attempt by the trial court to determine the budgetary impact of defendant's remarriage and the birth of his son. In turn, it precluded assessment of whether the remarriage and birth constituted a substantial change in circumstances. The failure to provide the prior and current CIS and tax returns compounds defendant's failure to demonstrate a prima facie case.

Given these circumstances, we discern no abuse of discretion by the trial court. Defendant failed to demonstrate a prima facie showing of a substantial change in circumstances. The record supports the trial court's determination that defendant failed to meet the burden of establishing changed circumstances within the meaning of Lepis.

Finally, defendant sought reimbursement of alleged overpaid child support. In essence, he seeks to retroactively reduce child support or eliminate accrued arrears. With limited exceptions, none of which apply here, a child support obligor is barred by New Jersey's anti-retroactive modification statute, N.J.S.A. 2A:17-

56.23(a), from seeking a retroactive reduction in child support. Defendant's application to reimburse previously paid child support is, likewise, statutorily barred.

Affirmed.