SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5398-15T4

E.H., f/k/a E.L.,

Plaintiff-Respondent/
Cross-Appellant,

v.

J.L.,

Defendant-Appellant/
Cross-Respondent.

Submitted February 27, 2018 - Decided April 17, 2018

Before Judges Reisner, Gilson, and Mayer.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FM-07-0145-11.

Cowen & Jacobs, attorneys for appellant/cross-respondent (Barbara E. Cowen, on the briefs).

Snyder, Sarno, D'Aniello, Maceri & da Costa, LLC, attorneys for respondent/cross-appellant (Edward S. Snyder, of counsel and on the brief; Stacey A. Cozewith and Lydia S. LaTona, on the brief).

PER CURIAM

In this post-judgment divorce matter, defendant J.L.[1] appeals from a September 16, 2014 order denying his motion to vacate a consent order, and a March 10, 2015 order increasing his child support obligation. Plaintiff E.H. cross-appeals from portions of the March 10, 2015 order allocating the guidelines-based child support award, and a June 30, 2016 order denying her request for attorney's fees.

We affirm the September 16, 2014 order denying defendant's motion to vacate the consent order, and the June 30, 2016 order denying plaintiff's request for attorney's fees because those orders were supported by substantial, credible evidence. We are constrained to vacate the March 10, 2015 order, however, and remand the matter to the Family Part to recalculate the amount and allocation of child support.

I.

The parties were married in June 2005. They have one child, a daughter, born in October 2007. Plaintiff filed for divorce in 2010. With the assistance of counsel, the parties entered into a matrimonial settlement agreement (MSA). The MSA was incorporated into their final judgment of divorce, and the judgment was entered in March 2011.

[1] We use initials to protect the parties' privacy interests. See R. 1:38-3(d).

Under the terms of the MSA, defendant agreed to pay plaintiff $147,000 per year in limited duration alimony for three and one-half years. Defendant also agreed to pay $2750 per month in basic child support, and seventy percent of other child-related expenses. The MSA provided that after alimony was terminated, the parties would renegotiate defendant's child support and child-related expense obligations.

Following their divorce, both parties have remarried. Plaintiff began dating her current husband in 2011. They were engaged in March 2012, moved in together in June 2012, and got married in September 2012. When defendant learned that plaintiff was planning to remarry, the parties began to discuss resolving alimony with a lump sum payment. Initially, the parties were not successful in negotiating a resolution and, in August 2012, defendant filed a motion to terminate or modify alimony based on plaintiff's cohabitation with her then-fiancé.

During those negotiations, plaintiff did not disclose her actual wedding date. Through mediation, the parties eventually agreed that defendant would pay a lump sum of $55,000 to plaintiff as full satisfaction of all alimony obligations. That agreement was incorporated into an August 31, 2012 consent order (August 2012 consent order).

In October 2012, plaintiff moved to modify defendant's child support obligation in light of the termination of alimony and in accordance with the terms of the MSA. Defendant cross-moved to vacate the August 2012 consent order contending that plaintiff fraudulently concealed her September 2012 wedding date during settlement negotiations. In connection with his motion, defendant sought to elicit testimony from the mediator to establish plaintiff's alleged fraud. The Family judge ruled that the mediator could not be called as a witness because the parties' discussions during mediation were privileged and inadmissible.

The Family Part held a five-day plenary hearing between April and December 2014. After the hearing, the court denied defendant's motion to vacate the August 2012 consent order and granted plaintiff's motion to increase defendant's child support obligation. The court embodied its rulings in a September 16, 2014 order.

Addressing defendant's application to vacate the August 2012 consent order, the court found that defendant failed to establish that plaintiff had engaged in fraud. Specifically, the Family judge found that "it would be different . . . if defendant's attorney or defendant had specifically asked [plaintiff] when she was getting married, but there was no testimony or evidence presented showing that that question was ever asked[.]" With

regard to child support, the court calculated the child's reasonable monthly expenses, and then addressed the child support guidelines. Ultimately, the court ordered defendant to pay a total of $3700 per month in child support.

Defendant moved for reconsideration of the September 16, 2014 order, arguing that the court erred in calculating his modified child support obligation. Plaintiff cross-moved for attorney's fees. On March 10, 2015, the court entered an order granting in part and denying in part defendant's motion for reconsideration as to child support. In that regard, the court decreased defendant's child support obligation to $3,553.43 per month due to certain miscalculations. On June 30, 2016, the court entered an order, supported by a statement of reasons, denying both parties' requests for attorney's fees in connection with the plenary hearing.

Following the entry of the June 30, 2016 order, defendant filed a notice of appeal and plaintiff filed a notice of cross-appeal.

II.

On appeal, defendant makes five arguments, contending that the trial court erred in (1) failing to find that plaintiff engaged in fraud, (2) not vacating the August 2012 consent order, (3) requiring defendant to pay 100 percent of supplemental child

support in excess of the guidelines-based amount, and (4) calculating the amount of supplemental child support. Defendant also argues that this court should correct the alleged errors in the March 10, 2015 decision. In her cross-appeal, plaintiff argues that the trial court erred in (1) allocating the amount of guidelines-based child support that each party was obligated to pay, and (2) denying her request for attorney's fees in connection with the plenary hearing.

Both plaintiff and defendant have identified minor errors in the calculation of the child support obligations. Thus, we affirm in part and reverse and remand in part. We will analyze the consent order, the child support issues, and the attorney's fees in the following three sections.

A. The August 2012 Consent Order

Defendant contends that the trial court erred in finding that plaintiff did not engage in fraud, and in denying his motion to vacate the August 2012 consent order. We disagree.

Settlement agreements in matrimonial cases are contracts that should be enforced provided that they are fair and just. Quinn v. Quinn, 225 N.J. 34, 44 (2016); Petersen v. Petersen, 85 N.J. 638, 642 (1981); see also Lepis v. Lepis, 83 N.J. 139 (1980). "Indeed, there is a 'strong public policy favoring stability of arrangements in matrimonial matters.'" Quinn, 225 N.J. at 44

(quoting Konzelman v. Konzelman, 158 N.J. 185, 193 (1999)). "[F]air and definitive arrangements arrived at by mutual consent should not be unnecessarily or lightly disturbed.'" Ibid. (quoting Smith v. Smith, 72 N.J. 350, 358 (1977)). Thus, a party seeking to set aside a settlement agreement must prove fraud by clear and convincing evidence. See Smith v. Fireworks by Girone, Inc., 380 N.J. Super. 273, 291 (App. Div. 2005), certif. denied, 186 N.J. 243 (2006).

Defendant argues that plaintiff intentionally concealed her wedding date during settlement negotiations and, as a result, received a windfall that exceeded the alimony that she otherwise would have received. The record does not support that argument. The Family judge found no evidence that plaintiff's wedding date was discussed during the August 2012 mediation.

In addition, defendant failed to establish that plaintiff's non-disclosure of her wedding date constituted fraud. In that regard, the Family judge found that "[w]hether [plaintiff's decision not to disclose her wedding date] was a settlement tactic or a negotiation tactic . . . [it did not] rise[] to the level of fraud." The Family judge properly exercised her discretion in denying defendant's motion, and we discern no basis to disturb that decision. See DEG, LLC v. Township of Fairfield, 198 N.J.

242, 261 (2009) (reviewing a trial court's denial of a motion to vacate a consent order for an abuse of discretion).

B. Child Support Calculations

Family judges are vested with "great judicial discretion" in determining the amount of child support. Gnall v. Gnall, 222 N.J. 414, 431 (2015); Elrom v. Elrom, 439 N.J. Super. 424, 433 (App. Div. 2015). We will overturn a child support award, however, when there was a clear abuse of discretion, a failure to correctly apply governing legal principles, or findings of fact that were clearly mistaken or lacking support in the record. Elrom, 439 N.J. Super. at 433; Heinl v. Heinl, 287 N.J. Super. 337, 345 (App. Div. 1996).

Defendant contends that the Family judge erred in calculating the amount and allocation of supplemental child support. Plaintiff argues that the Family judge erred in allocating the guidelines-based child support in defendant's favor.[2] Having reviewed the parties' arguments in light of the record, we are constrained to

[2] Plaintiff did not raise this issue before the Family Part. Generally, we do not consider issues not raised before the trial court. Under the circumstances presented in this appeal, however, we address plaintiff's argument because it affects the recalculation of defendant's total monthly child support award. See Paff v. Ocean Cty. Pros. Office, 446 N.J. Super. 163, 190 (App. Div. 2016) ("[A]n issue not raised below may be considered . . . if it meets the plain error standard or is otherwise of special significance to the litigant . . . .").

vacate the March 10, 2015 order, and remand to the Family Part to recalculate defendant's total child support obligation.

1. Allocation of Guidelines-Based Child Support

Rule 5:6A provides that the child support guidelines "shall be applied when an application to establish or modify child support is considered by the court." To calculate each parent's percentage share of income for purposes of guidelines-based child support, the court must divide each parent's individual net income by their combined net income. Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-B to R. 5:6A (2017). The total guidelines-based child support award is then multiplied by each parent's percentage share of income to determine each parent's guidelines-based child support obligation. Ibid. Even where the parents' combined income exceeds the child support guidelines, the maximum support under the guidelines must be allocated between the parents based on their relative net incomes. Caplan v. Caplan, 364 N.J. Super. 68, 89 (App. Div. 2003).

Here, the Family judge stated that she used defendant's base salary and two annual bonuses in calculating the amount and allocation of guidelines-based child support. Notably, the judge did not include defendant's substantial commissions in calculating his gross and net income, as required under the guidelines. See Child Support Guidelines, Pressler & Verniero, Current N.J. Court

Rules, Appendix IX-B to R. 5:6A (2017) ("Gross income, includes, but is not limited to compensation for services, including wages, fees, tips, and commissions.").

On remand, the Family judge must consider each party's individual net income as a percentage of their total combined net income when allocating the guidelines-based child support award. That calculation must include defendant's commission-based income. Accordingly, on remand, both plaintiff and defendant must produce amended case information statements, and supporting financial documents reflecting their respective gross and net incomes.

2. Amount of Discretionary Child Support

In cases where the parties earn in excess of $187,200, the court must apply the child support guidelines up to that amount, then supplement the guidelines-based award with a discretionary amount based upon the remaining family income and the factors set forth in N.J.S.A. 2A:34-23(c). Elrom, 439 N.J. Super. at 443. Thus, in determining the discretionary child support award,

> the maximum [guidelines-based] child support amount . . . should be subtracted from the [total child-related expenses] to determine the remaining children's needs to be allocated between the parties. Then, the court must analyze the factors outlined in N.J.S.A. 2A:34-23 and determine each party's responsibility for satisfying those remaining needs.
>
> [Caplan, 364 N.J. Super. at 90.]

In the March 10, 2015 order, the Family judge found that the child's total monthly expenses were $4,022.75. The judge then correctly stated that she had to deduct the total guidelines-based child support award from the total monthly expenses to determine the amount of discretionary supplemental child support. In doing so, however, the Family judge inadvertently miscalculated the amount of supplemental child support.

The correct calculation for supplemental child support would have been the child's total monthly expenses of $4,022.75, less the total guidelines-based child support of $2,455.30 ($571 x 4.3) for a total supplemental child support award of $1,567.45 per month. The Family judge did not deduct the correct amount from the child's total monthly expenses and, therefore, a recalculation of the supplemental child support award is necessary.

3. Allocation of Supplemental Child Support

In allocating 100 percent of the supplemental child support obligation to defendant, the Family judge correctly identified and weighed the factors detailed in N.J.S.A. 2A:34-23(c). The court based the allocation of supplemental child support on factors two (standard of living and economic circumstances of each parent), three (all sources of income and assets of each parent), and six (age and health of the child and each parent). The judge placed the greatest amount of weight on factor three (defendant's high

income). These findings were based on substantial, credible evidence and we discern no basis to disturb the Family judge's allocation of 100 percent of supplemental child support to defendant.

C. Denial of Plaintiff's Request for Attorney's Fees

Plaintiff contends that the Family judge erred in denying her request for attorney's fees because defendant did not participate in settlement negotiations in good faith, and forced her to incur legal fees by engaging in needless motion practice.

An award of counsel fees in matrimonial matters rests within the sound discretion of the Family judge. See N.J.S.A. 2A:34-23; R. 5:3-5(c). We will disturb a counsel fee award "only on the 'rarest occasion,' and then only because of a clear abuse of discretion." Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011) (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)).

Here, the Family judge appropriately considered the standards set forth in N.J.S.A. 2A:34-23 and Rule 5:3-5(c) in evaluating the requests for attorney's fees. The judge concluded that neither party was entitled to attorney's fees based upon their ability to pay, and the positions taken during litigation. We discern no abuse of discretion in the Family judge's decision to deny plaintiff's request for attorney's fees.

III.

In sum, we affirm the September 16, 2014 order denying defendant's motion to vacate the August 2012 consent order, and the June 30, 2016 order denying plaintiff's request for attorney's fees. We vacate the March 10, 2015 order and remand the matter for the limited purpose of recalculating defendant's total monthly child support obligation consistent with this opinion. In directing this remand, we emphasize that the parties should not be allowed to re-litigate issues already decided or to raise issues that could have been previously raised, but were not raised.

Affirmed in part, reversed and remanded in part. We do not retain jurisdiction.