SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0407-21

ERIC THOMAS FITZGERALD,

Plaintiff-Respondent,

v.

SHARON FORSATZ-FITZGERALD,

Defendant-Appellant.

Submitted November 28, 2022 – Decided January 18, 2023

Before Judges Bishop-Thompson and Puglisi.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket No. FM-18-0892-16.

Cipriano Law Offices, PC, attorneys for appellant (Karen T. Willitts, on the briefs).

Joseph J. Fritzen, attorney for respondent.

PER CURIAM

Defendant Sharon Forsatz-Fitzgerald appeals the January 25, 2019 Dual Judgment of Divorce (DJOD) denying her request to enforce an April 2012 memorandum of understanding (MOU) as a binding agreement between the parties. Defendant also appeals paragraphs five (MOU creation), six (February 2011 marriage end date), ten (MOU determined as non-binding), eleven (alimony), seventeen (children and tax exemptions), and twenty (attorney's fees) of the Amended Final Dual Judgment of Divorce (AFDJOD). Lastly, defendant appeals the August 13, 2021 order denying an extension of alimony to June 2025, requiring plaintiff to provide life insurance to secure his child support obligation, and to claim all three children as tax exemptions. We are not persuaded that the Family Part motion judge either mistakenly exercised his discretion or misapplied the law. We affirm.

I.

Plaintiff Eric Fitzgerald and defendant were married for just over twelve years. Three children were born to the marriage in 2002, 2004, and 2007. The parties participated in mediation in the fall of 2010. Thereafter, plaintiff moved out of the marital home in February 2011.

In April 2012, the parties signed a MOU reflecting certain agreements reached by them during mediation. Pertinent to this appeal, in the introductory

paragraph, the MOU explicitly stated, "[i]t is specifically understood that there will be no binding agreement until [the parties] sign a [p]roperty [s]ettlement [a]greement to be prepared by an attorney." Also, the MOU was silent as to plaintiff's obligation to obtain life insurance securing his child support obligation.

Following mediation, neither party immediately retained counsel nor filed for divorce. However, they followed most of the terms of the MOU until 2016 when plaintiff retained an attorney to review the signed MOU and file a complaint for divorce.

Both parties were represented by counsel during a four-day nonconsecutive divorce trial in May and August 2018. After noting the parties submitted proposed findings of fact and conclusions of law, the Family Part judge rendered a detailed oral opinion and entered a DJOD on January 25, 2019. The judge concluded the MOU was not a binding agreement, given its explicit written terms.

As to the parties claiming the children on their income taxes, the trial judge ruled:

> As far as claiming the children on taxes, I'm going to have that alternate. So for 2018, dad can claim two of the children, mom claims one. For 2019, mom claims two, dad claims one, et cetera. Obviously, when there

> are only two left that can be claimed, they're both going to claim one. When there's only one left that can be claimed, it's going to alternate as I just set forth.

With respect to alimony and child support, the judge found that given the length of the marriage − twelve years and three months − plaintiff should pay defendant alimony of $2,400 per month until June 30, 2021[1] and child support of $324 per week. The judge did not order plaintiff to maintain life insurance as security for his child support obligation, and neither party requested it. After rendering his oral decision, the judge directed plaintiff's counsel to submit an AFDJOD to include the above terms. Plaintiff however did not immediately file the AFDJOD. In July 2021, defendant moved to extend her alimony; modify child support; compel plaintiff to provide proof of life insurance to secure his child support obligations; and permit her to claim all three children as tax exemptions. Plaintiff cross-moved for the entry of an AFDJOD.

On August 13, 2021, a motion judge considered the parties' motions and denied defendant's request for an extension of alimony, proof of life insurance and to claim all three children as tax exemptions. The motion judge granted

[1] The alimony term equaled ten years and four months.

defendant's unopposed motion to modify child support.[2] The judge granted plaintiff's cross-motion for the entry of an AFDJOD. The first AFDJOD was entered on August 23, 2021. A second AFDJOD was entered on October 18, 2021 to correct a clerical error. This appeal followed.

Defendant raises the following issues for our consideration: the trial court erred in finding the MOU was nonbinding; not enforcing the MOU; plaintiff is estopped from asserting the MOU is nonbinding. Plaintiff also argues the motion judge erred by failing to: extend alimony to June 2025; order plaintiff to provide a life insurance policy to secure alimony and child support obligation; terminate sharing or alternating the children as tax exemptions.

II.

Our review of a Family Part's order is limited. Harte v. Hand, 433 N.J. Super. 457, 461 (App. Div. 2013) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). We owe substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters. Cesare, 154 N.J. at 413. Thus, "[a] reviewing court should uphold the factual findings undergirding the trial court's decision if they are supported by adequate, substantial and

[2] Plaintiff was ordered to pay $473 per week in child support effective as of the date of the filing of defendant's motion, July 15, 2021.

credible evidence on the record." MacKinnon v. MacKinnon, 191 N.J. 240, 253-54 (2007) (alteration in original) (quoting N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 279 (2007)).

We owe no special deference to the judge's legal conclusions, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). "Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark' does a reviewing court intervene." Gnall v. Gnall (Gnall II), 222 N.J. 414, 428 (2015) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). "We will reverse only if we find the trial judge clearly abused his or her discretion[.]" Clark v. Clark, 429 N.J. Super. 61, 72 (App. Div. 2012). However, "all legal issues are reviewed de novo." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019).

We begin by addressing plaintiff's argument regarding the timeliness of the appeal. Appeals from final judgments of courts must be taken within forty-five days of their entry. R. 2:4-1(a). The January 2019 DJOD was a final judgment. The trial judge directed counsel to file the amended DJOD to memorialize the decision placed on the record. Therefore, defendant's October 7, 2021 Notice of Appeal is untimely for appellate review of the January 2019

order. After entry of the AFDJOD, defendant amended her Notice of Appeal to include the August 2021 order. That appeal is timely.

After carefully reviewing defendant's' contentions in light of the record and the applicable principles of law, we affirm substantially for the reasons expressed in the motion judge's August 2021 written decision. We add only the following comments.

Although we will not consider defendant's challenge to the January 2019 DJOD, we must address aspects of the order which gave rise to the August 2021 post-judgment motion order for the reader's context.

Extension of Alimony Obligation

Defendant moved to extend plaintiff's alimony obligation to June 2025 as agreed to in the MOU, which was equal in length to the parties' marriage. Defendant asserted plaintiff made the "last alimony payment in June 2021 pursuant to the DJOD." Defendant cited numerous reasons needed for the extension, including a loss of employment due to COVID-19 which left her with no income other than alimony; the COVID-19 lockdowns prevented her from obtaining employment for at least nineteen months; the possible loss of her home to foreclosure; and an increase in plaintiff's income.

In considering defendant's arguments regarding the MOU, the motion judge concluded "the court does not give [the MOU] any weight as the trial court held the MOU, despite being abided by for several years, was not binding on the parties and established a set term of limited durational alimony of ten years and four months, specifically setting forth on the record that this is not a case where open durational alimony is necessary or appropriate."

"Whether [a support] obligation should be modified based upon a claim of changed circumstances rests within a Family Part judge's sound discretion." Larbig v. Larbig, 384 N.J. Super. 17, 214 (App. Div. 2006) (citations omitted); see also Storey v. Storey, 373 N.J. Super. 464, 470 (App. Div. 2004). Each individual motion for modification is particularized to the facts of that case, and "the appellate court must give due recognition to the wide discretion which our law rightly affords to the trial judges who deal with these matters." Larbig, 384 N.J. Super. at 21 (quoting Martindell v. Martindell, 21 N.J. 341, 355 (1956)). The trial court's decision on support obligations should not be disturbed unless we

> conclude that the trial court clearly abused its discretion, failed to consider all of the controlling legal principles, or must otherwise be well satisfied that the findings were mistaken or that the determination could not reasonably have been

> reached on sufficient credible evidence present in the record after considering the proofs as a whole.
>
> [Heinl v. Heinl, 287 N.J. Super. 337, 345 (App. Div. 1996) (citation omitted).]

The moving party must demonstrate a permanent change in circumstances from those existing when the prior support award was fixed. See Donnelly v. Donnelly, 405 N.J. Super. 117, 127 (App. Div. 2009) (finding a party moving for alimony modification must demonstrate changed circumstances since the preceding alimony order). "When the movant is seeking modification of an alimony award, that party must demonstrate that changed circumstances have substantially impaired the ability to support . . . herself." Lepis v. Lepis, 83 N.J. 139, 157 (1980).

"Courts have consistently rejected requests for modification based on circumstances which are only temporary or which are expected but have not yet occurred." Id. at 151 (citations omitted). After a party makes a showing of changed circumstances relating to alimony, the trial judge must determine if a plenary hearing is required. Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007). In short, the necessity of a plenary hearing must be demonstrated by the movant. Id. at 106. We review a trial court's denial of a plenary hearing for an abuse of discretion. See Costa v. Costa, 440 N.J. Super. 1, 4 (App. Div. 2015).

Governed by these principles, we discern no reason to disturb the denial of defendant's request for a modification of alimony. We are persuaded the motion judge aptly determined defendant's request under the heightened standard articulated in N.J.S.A. 2A:34-23(c), which provides:

> An award of alimony for a limited duration may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the award. The court may modify the amount of such an award, but shall not modify the length of the term except in unusual circumstances.

Limited-duration alimony (LDA), also known as term alimony, has been expressly authorized by the Legislature as a permitted form of alimony payable for a specified period of time. N.J.S.A. 2A:34-23(c). LDA is generally appropriate in cases involving marriages of intermediate or shorter length, in which the spouse seeking support has an economic need, but also possesses "the skills and education necessary to return to the workforce" at some time in the immediate future. Gordon v. Rozenwald, 380 N.J. Super. 55, 66 (App. Div. 2005) (citing Cox v. Cox, 335 N.J. Super. 465, 483 (App. Div. 2000)). Following the 2014 amendments to the alimony statute, "[f]or any marriage or civil union less than [twenty] years in duration, the total duration of alimony

shall not, except in exceptional circumstances, exceed the length of the marriage or civil union." N.J.S.A. 2A:34-23(c).

The trial judge determined plaintiff's alimony obligation would terminate in June 2021. Based on the record developed at trial, the judge concluded this was not a case where "open durational alimony [was] necessary or appropriate." Nor did the judge find any "exceptional [circumstances] that would justify any alimony longer than the actual marriage" as contemplated under N.J.S.A. 2A:34-23(c).

In considering the DJOD and the parties' submissions, the motion judge found defendant "need not find a job commensurate with her previous work experience" as a graphic designer. The judge also stated, "While graphic design involves creative, non-essential work likely impacted by the pandemic, such job opportunities continue to exist, as evidenced by the myriad of open positions defendant has unsuccessfully applied for." The judge further explained, "The court envisioned defendant would be employed full time by the time [the eldest child] graduated; however, while circumstances may have changed due to the COVID-19 pandemic, same does not equate to 'unusual circumstances,' especially because limited durational alimony should not be conditioned upon whether defendant has been able to obtain full-time employment."

We are satisfied the motion judge aptly concluded defendant had not demonstrated exceptional circumstances. The motion judge's factual findings and legal conclusions regarding the modification of alimony are amply supported by the record.

Life Insurance to Secure Child Support Obligation

Defendant argues plaintiff should have been obligated to maintain life insurance to secure his support obligation. We disagree.

It is well-settled that the trial court has the discretion to order a supporting spouse to purchase life insurance to secure alimony payments or child support. Jacobitti v. Jacobitti, 135 N.J. 571, 573 (1994). The purpose of life insurance is to assure a sufficient fund for the payor's support obligation should he die before fulfilling that responsibility. Id. at 580. N.J.S.A. 2A:34-23 permits the court to "require reasonable security for the due observance" of child support orders. "Reasonable security" is often provided by the payor spouse maintaining life insurance in an amount appropriate to secure the support obligation for the benefit of the child. Grotsky v. Grotsky, 58 N.J. 354, 361 (1971). Defendant relies again on language from the nonbinding MOU to support her argument.

The motion judge noted life insurance to secure plaintiff's child support obligation was not ordered as part of the DJOD. The judge found defendant "did

not demonstrate any particular need to secure plaintiff's obligations, especially in the requested amount of $500,000." Additionally, the judge found "[s]uch additional expense and security are unwarranted at the present time" and subsequently denied defendant's motion.

The record lacks a basis to order plaintiff to procure $500,000 in life insurance. Plaintiff was not in arrears in his child support obligation. Defendant has not demonstrated the motion judge mistakenly exercised his discretion in denying the motion to require plaintiff to provide life insurance.

Tax Exemption

We reject defendant's argument the motion judge abused its discretion in denying defendant's request to claim the three children as dependents on her tax return. It is well settled that the Family Part has "the power to exercise authority to effectively allocate exemptions through use of its equitable power." Gwodz v. Gwodz, 234 N.J. Super. 56, 62 (App. Div. 1989). Generally, the goal of maximizing the net income of the parties drives the allocation of tax exemptions. Heinl, 287 N.J. Super. at 353.

However, in designating which parent shall claim the exemption, the trial judge must "consider or . . . quantify the effect of [the allocation] upon each party" and its effects on child support. Gwodz, 234 N.J. Super. at 62. The judge

must "consider evidence and make findings respecting the extent of child support actually provided by each parent," determine whether "a change in tax exemptions is deemed warranted," and ascertain "whether change in the existing support orders is required to reflect the benefits achieved by the change." Id. at 62-63.

Defendant argues the trial judge made no such findings and conducted no analysis regarding the allocation of the tax exemptions. We find the record shows a different result. First, the judge established plaintiff's child support obligation utilizing the child support guidelines based on the then-present income of the parties, which specifically considered the parties' tax status and exemptions, and addressed the children's needs in reference to N.J.S.A. 2A:34-23(a).

The motion judge found defendant "disregarded" the tax exemption provision of the January 2019 DJOD because she was "dissatisfied." Notwithstanding the unambiguous terms of the DJOD, defendant claimed all three children in tax year 2018, and again in 2020. The motion judge stated: "Willful disregard of the court's prior decision will not be tolerated. Defendant's contumacious conduct has caused plaintiff to incur economic penalties . . . ."

The motion judge properly denied defendant's request for sole tax exemptions. We see no error.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION