SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0752-21

FERNANDO ZAPATA,

Plaintiff-Respondent/
Cross-Appellant,

v.

MONICA ZAPATA,

Defendant-Appellant/
Cross-Respondent.

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Argued December 12, 2022 – Decided April 12, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FM-16-0252-10.

Paul J. Concannon argued the cause for appellant/cross-respondent (Dario, Albert, Metz, Eyerman, Canda, Concannon, Ortiz & Krouse, attorneys; Paul J. Concannon, on the briefs).

Jessica Ragno Sprague argued the cause for respondent/cross-appellant (Jardim, Meisner & Susser, PC, attorneys; Jessica Ragno Sprague, on the briefs).

PER CURIAM

This post-judgment divorce matter returns to us from a remand. Defendant Monica Zapata appeals from three October 5, 2021 orders of the Family Part adopting the parties' settlement agreement reached in mediation with respect to child support, college expenses, and attorney's fees, and denying her motion in aid of litigant's rights, to preclude the introduction of certain statements under the mediation privilege, and for attorney's fees. Plaintiff Fernando Zapata cross-appeals from a paragraph of one of the October 5, 2021 orders denying his motion for attorney's fees. We affirm.

I.

The parties were divorced in 2011. They executed a property settlement agreement (PSA) that was incorporated into their dual judgment of divorce. Fernando[1] agreed to pay alimony as well as child support for the parties' two children until they were emancipated upon reaching the age of eighteen or completing four years of college. The PSA also addressed college expenses:

> [t]he parties have encouraged their children to obtain a college degree. In that regard, Fidelity Trust accounts were established for each child. However, since the parties were no longer financially able to contribute to those accounts, the funds were transferred to the

[1] Because the parties share a surname, we refer to them by their first names. No disrespect is intended.

> savings accounts in each child's name. The parties agree that their children's college education, including but not limited to: tuition, reasonable transportation costs, books, school activities/events shall – be funded in the following order:
>
> a) Any awarded college scholarship and/or grant;
>
> b) Any work study and/or school loans;
>
> c) The child's college (Fidelity) account until exhausted;
>
> d) Husband and Wife shall contribute according to their ability to pay.

In 2014, when the parties' daughter was enrolled in college, Fernando moved to terminate his obligation to pay child support and college expenses. The trial court ordered him to continue to pay child support for the daughter, but emancipated the parties' son, and directed that a plenary hearing be held to consider the factors set forth in Newburgh v. Arrigo, 88 N.J. 529 (1982), to determine whether, and to what extent, Fernando was responsible for his daughter's college expenses. In addition, the court ordered Fernando and his daughter to attend counselling as a condition for the continued receipt of child support and college expenses. The plenary hearing was never held.

In 2016, Fernando again moved to terminate his obligation to pay child support and college expenses. He alleged that beginning in 2015, his daughter

stopped communicating with him and through her actions demonstrated she did not want to have a relationship with him. He also argued that his daughter refused to attend the court-ordered counselling sessions, negating his financial obligations to her. Fernando sought the award of attorney's fees.

Monica cross-moved to enforce Fernando's payment of child support and college expenses. She requested the court order Fernando to pay two-thirds of the college expenses, after applying scholarships, grants, and federal loans. Monica claimed Fernando's income was double hers, affording him the ability to contribute more to their daughter's education. She also sought attorney's fees.

In 2017, the trial court denied Fernando's motion to terminate his financial obligations because he failed to show that his daughter did not comply with the order requiring her attendance at counselling. The court also granted Monica's motion to order Fernando to pay two-thirds of the daughter's college expenses. The court denied Fernando's motion for attorney's fees.

We reversed several aspects of the trial court's decisions. Zapata v. Zapata, No. A-3277-17 (App. Div. Jan. 29, 2020). While we affirmed the trial court's conclusion that Fernando did not establish that his daughter violated the order to attend counselling, we held that the trial court erred by not holding a plenary hearing on the question of whether the relationship between Fernando

and his daughter provided an equitable basis not to enforce the college expense provision of the PSA. See Ricci v. Ricci, 448 N.J. Super. 546, 579 (App. Div. 2017). In addition, we held that in the event Fernando is obligated to pay his daughter's college expenses, the trial court erred by ordering him to pay two-thirds of those expenses, given the terms of the PSA, and the absence of findings of fact and conclusions of law addressing the factors set forth in Newburgh and N.J.S.A. 2A:34-23(a).

We also held that the court erred when it found no change of circumstances warranted modification of Fernando's child support obligation because a child's attendance at college is a change of circumstances. See Jacoby v. Jacoby, 427 N.J. Super. 109, 116, 118 (App. Div. 2012). We also noted that Fernando's child support obligation was based on the child support guidelines for two children, but the parties' son had been emancipated and the daughter was living away from home at college, negating the applicability of the guidelines. Finally, we vacated the court's denial of Fernando's motion for attorney's fees because the court did not explain its decision. See R. 1:7-4(a). We remanded for a plenary hearing and other proceedings consistent with our opinion.

On remand, the trial court, after completion of discovery, directed the parties to attend mediation. At the conclusion of mediation, the parties signed a terms sheet that stated:

> At a mediation conducted on February 22, 2021, the parties agreed to the following Terms to resolve ALL pending matters between them. The terms are as follows:
>
> 1. Fernando shall pay the sum of $7,500 directly to the Company responsible for maintaining [the daughter's] student loans (within 3 months), directly to the loan company.
>
> 2. There are no other credits due and owing for Child Support from either party to the other.
>
> 3. There are no other outstanding amounts owed from one party to the other for any expenses related to the Children, including (but not limited to) college expenses (whatsoever).
>
> 4. This agreement resolves ALL matters regarding the Children and any expenses for the Children.
>
> 5. Anything in the Parties['] [PSA] which is not changed by the terms of this agreement, remain[s] in full force and effect, and neither party is waiving any other rights available to them under their [PSA], except for those which have been resolved by this agreement.
>
> 6. Each Party shall be responsible for their own individual counsel fees.
>
> The [a]ttorneys for the Parties shall circulate this [a]greement to their respective clients for them to sign,

> thereby representing their agreement to the terms set forth herein, and their intention to be bound by them.
>
> Once this agreement is signed, the terms of this agreement shall be incorporated into a form of Consent Order, by the attorneys for the Parties, and submitted to the Court.

The parties were unable to agree on a consent order adopting their agreement. Monica objected to Fernando's proposed form of order, arguing that it did not reflect that the agreement resolved all existing issues arising from the divorce, including those outside of our remand. In particular, Monica noted that several years earlier, Fernando moved to terminate alimony based on her alleged cohabitation. In 2014, the trial court directed a plenary hearing be held on the cohabitation claim. The hearing did not take place, and, in 2015, the court dismissed the claim without prejudice for lack of prosecution.[2] Monica argued that Fernando settled that claim in the agreement. In response, Fernando argued that the agreement addressed only the issues encompassed in our remand.

Monica subsequently moved for an order: (1) adopting her proposed consent order reflecting her view that the parties' agreement resolved Fernando's

[2] In 2020, the Disciplinary Review Board censured the attorney who was representing Fernando on his cohabitation claim for, among other things, allowing the claim to be dismissed, not communicating with him, and not withdrawing after Fernando discharged her.

cohabitation claim; (2) enforcing the agreement; (3) finding Fernando in violation of the agreement and compelling him to make the $7,500 payment included in the agreement; (4) preventing Fernando from introducing mediation communications under the mediation privilege, N.J.S.A. 2A:23C-4 and N.J.R.E. 519; and (5) awarding her attorney's fees. Fernando opposed the motion and cross-moved for an order: (1) adopting his proposed consent order reflecting his view that the parties' agreement was limited to the issues on remand; and (2) awarding him attorney's fees.

On October 1, 2021, the trial court issued an oral opinion. The court found that the terms sheet signed by the parties makes no reference to Fernando waiving his cohabitation claim specifically, or to alimony in general. The court also found that the cohabitation claim and alimony were not before this court or included in our remand and were not, therefore, before the mediator. Thus, the court concluded, the parties' agreement resolved only those issues listed in the terms sheet and which were subject to our remand: child support, college expenses, and attorney's fees. The court decided it would sign neither of the parties' proposed consent orders and issue its own order adopting the agreement.

The court also concluded that because no order had been entered adopting the parties' agreement, Fernando could not be in violation of the agreement and

Monica was not entitled to an order enforcing the agreement. The court also concluded that because it did not consider any mediation communications to interpret the agreement, Monica was not entitled to an order with respect to the mediation privilege.

On Fernando's cross-motion, the court concluded that because it did not sign Fernando's proposed consent order, he was not entitled to the relief. In addition, the court denied both parties' motions for attorney's fees, concluding that neither party had acted in bad faith and the award of fees was not warranted.

On October 5, 2021, the court entered orders: (1) adopting the parties' agreement as expressed in the terms sheet they signed; (2) denying Monica's motion and Fernando's cross-motion for an order adopting their respective proposed consent orders; (3) denying without prejudice Monica's motion to enforce the agreement and find Fernando in violation of the agreement; (4) denying Monica's motion with respect to the mediation privilege; and (5) denying the parties' motions for attorney's fees.

These appeals followed. Monica argues that the trial court erred by: (1) including in its order adopting the parties' agreement a recital of the record of prior proceedings in violation of Rule 4:42-1(a); (2) modifying the terms of the parties' agreement by limiting it to child support, college expenses, and

attorney's fees; (3) denying her motion to enforce the agreement and to find Fernando in violation of the agreement; (4) denying her motion to prohibit the introduction of mediation communications; and (5) denying her motion for attorney's fees. Fernando argues that the trial court erred by denying his motion for attorney's fees.

II.

Our review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). "[W]e do not overturn those determinations unless the court abused its discretion, failed to consider controlling legal principles or made findings inconsistent with or unsupported by competent evidence." Storey v. Storey, 373 N.J. Super. 464, 479 (App. Div. 2004). We must accord substantial deference to the findings of the Family Part due to that court's "special jurisdiction and expertise in family matters . . . ." Cesare, 154 N.J. at 413.

We must defer to the judge's factual determinations, so long as they are supported by substantial credible evidence in the record. Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). This court's "[a]ppellate review does not consist of weighing evidence anew and making independent factual findings; rather, [this court's] function is to determine whether there is adequate evidence to support the judgment rendered at trial."

Cannuscio v. Claridge Hotel & Casino, 319 N.J. Super. 342, 347 (App. Div. 1999) (citing State v. Johnson, 42 N.J. 146, 161 (1964)). We review de novo the court's legal conclusions. Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

The settlement of matrimonial disputes is encouraged and highly valued in our court system. Quinn v. Quinn, 225 N.J. 34, 44 (2016). "[S]uch agreements are subject to judicial supervision and enforcement." Id. at 48. When considering the meaning of a settlement, "[t]he court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the expressed general purpose." Pacifico v. Pacifico, 190 N.J. 258, 266 (2007) (internal quotations omitted). "It is not the function of the court to rewrite or revise an agreement when the intent of the parties is clear." Quinn, 225 N.J. at 45. "At the same time, the law grants particular leniency to agreements made in the domestic arena, thus allowing judges greater discretion when interpreting such agreements." Pacifico, 190 N.J. at 266 (internal quotations omitted).

We have carefully reviewed the record and find no basis on which to reverse the trial court's orders. The terms sheet, signed by both parties, is unequivocal. The parties settled "ALL pending matters between them," later

clarified as "ALL matters regarding the Children and any expenses for the Children." The only matters "pending" at the time the parties reached their agreement were child support, college expense, and attorney's fees. These are the issues encompassed in our remand order and the only three issues specifically addressed in the terms sheet. Fernando's cohabitation claim was not pending at the time the agreement was reached. It had been dismissed years earlier.

In addition, as the trial court aptly noted, neither cohabitation nor alimony were mentioned in the terms sheet, a telling omission, given the financial significance of a cohabitation claim. Moreover, the terms sheet states that "[a]nything in the [PSA] which is not changed by the terms of this agreement, remain[s] in full force and effect, and neither party is waiving any other rights available to them under their [PSA], except for those which have been resolved by this agreement." It is evident that the parties did not resolve any issue not specified in the terms sheet.

We also conclude that the trial court acted within its discretion when it denied Monica's motion to enforce the agreement and to find Fernando in violation of the agreement. Given the absence of an order adopting the agreement, on which the agreement appears to be conditioned, it was within the

trial court's discretion to determine that the relief Monica requested was not warranted. We agree, as well, with the trial court's conclusion that Monica's motion with respect to the mediation privilege was moot because the court determined the contours of the parties' agreement without considering communications made during mediation.

Finally, counsel fee determinations rest within the trial judge's sound discretion. Williams v. Williams, 59 N.J. 229, 233 (1971). "We will disturb a trial court's determination on counsel fees only on the 'rarest occasion,' and then only because of clear abuse of discretion." Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). An "abuse of discretion only arises on demonstration of 'manifest error or injustice.'" Hisenaj v. Kuehner, 194 N.J. 6, 20 (2008) (quoting State v. Torres, 183 N.J. 554, 572 (2005)).

Under Rule 4:42-9(a)(1), attorney's fees are allowable "[i]n a family action . . . pursuant to Rule 5:3-5(c)." Under Rule 5:3-5(c), when awarding counsel fees,

> the court should consider . . . the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees

> incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

Applying these principles, we are not persuaded the trial court erred when it denied the parties' applications for attorney's fees. The court determined that neither party acted in bad faith. While the court did not expressly address the other factors set forth in the rule, we do not find this oversight, in the unusual circumstances presented here, including the parties' agreement to be responsible for the attorney's fees they incurred in the mediation, to warrant reversal.

To the extent we have not specifically addressed any of the parties' remaining claims, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.