SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0955-21

SANDRA LOPEZ,

Plaintiff-Respondent,

v.

VICTOR LOPEZ,

Defendant-Appellant.

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Submitted February 15, 2023 – Decided May 4, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FM-20-1030-17.

Marianne Zembryski, LLC, attorney for appellant (Marianne Zembryski, on the brief).

Robert Ricci, Jr, attorney for respondent.

PER CURIAM

In this post-judgment dissolution matter, defendant Victor Lopez appeals from certain provisions of a November 5, 2021 order denying him: (1) mid-

week parenting time and overnights with the parties' children on alternating Sundays; (2) a reduction in his support obligations; and (3) an award of counsel fees.[1] We affirm.

I.

Defendant and plaintiff Sandra Lopez were married in 2004 and have two children, ages eleven and sixteen.[2] Plaintiff filed for divorce in December 2016 and although defendant was properly served with the complaint, he did not answer or otherwise formally respond to the pleading. Accordingly, on December 21, 2017, the trial court entered a default judgment of divorce (JOD), dissolving the marriage.[3]

Under the JOD, the parties were awarded joint legal custody of the children, with plaintiff designated as the parent of primary residence and defendant named the parent of alternate residence. The JOD also granted defendant parenting time on alternating weekends, from Friday to Sunday

[1] Because neither party appeals from other provisions of the November 5 order, we confine our discussion to the limited issues raised on appeal.

[2] Defendant also has two older children from prior relationships.

[3] The JOD reflects that prior to its entry, plaintiff "properly filed and served upon defendant a Notice of Proposed Final Judgment of Divorce pursuant to R[ule] 5:5-10."

evenings, but did not include provisions granting him mid-week, vacation, or holiday parenting time.

Additionally, the JOD compelled defendant to pay plaintiff $550 per week in alimony for twelve years, and $271 per week in child support. The support figures were based on defendant grossing $115,000 per year and plaintiff grossing $25,000 per year.

Defendant fell into arrears soon after the parties divorced. Following a February 2019 ability-to-pay hearing, he was incarcerated pending satisfaction of his arrears, which then totaled $26,000. Three months later, defendant moved to: vacate the JOD; increase his parenting time to include mid-week visits, holidays, and vacations; and decrease his support obligations. He also requested a counsel fee award. Plaintiff filed a cross-motion, opposing defendant's application, and seeking the ability to relocate with the children to Florida. She also requested a counsel fee award.

On June 21, 2019, the trial court entered an order denying defendant's request to vacate the final JOD and directing the parties to mediate their remaining differences. The June 21 order also stated that to the extent mediation was unsuccessful, the parties' "outstanding issues . . . will be subject to a plenary hearing as a prima facie case of changed circumstances has been established."

The parties were unable to resolve their differences in mediation. Accordingly, in August 2020, they returned to court for a plenary hearing to address issues of support, parenting time, counsel fees, and plaintiff's relocation request. Both parties testified during the hearing, as did two of defendant's treating doctors and his neurological expert.

During defendant's testimony, he stated he wanted to spend additional time with the children, but plaintiff refused to allow this. He claimed she often placed the children in the care of her mother or boyfriend rather than offer defendant more parenting time. Additionally, defendant testified he was concerned about the children engaging in inappropriate behavior when they were in plaintiff's care. He stated that although he lived approximately forty-five minutes away from plaintiff's home, he was willing and able to care for the children in his home when plaintiff could not care for them. Further, he testified he could transport the children for parenting time exchanges if the court awarded him additional time with the children.

Regarding his request to reduce his support obligations, defendant testified he was self-employed during the marriage, having owned a glass company called "In N Out Glass & Showers, LLC," but he no longer operated this business. He explained his job had required him to lift and install heavy

sheets of glass in commercial and residential buildings and he was currently physically unable to perform these tasks. Additionally, he testified that in 2014, he noticed some numbness in his face and right hand, and by 2018, he was suffering from several physical maladies, including tremors, thyroid disease, neck pain, carpel tunnel syndrome, and blurred vision. Defendant also stated he applied for but was denied Social Security disability benefits.

On the other hand, defendant stated he qualified for weekly unemployment benefits, and that he recertified each week he remained eligible to receive unemployment benefits.[4] Additionally, he testified his unemployment checks of $231 per week were garnished to pay down arrears he owed plaintiff and arrears owed for another child from a prior relationship.[5]

While defendant admitted during cross-examination that he no longer operated his business, had not applied for a job with another employer, and did not have a resume, he stated he was willing to have the court impute income to him at the level of $45,000 per year for the purpose of recalculating his support

[4] In an oral opinion preceding the entry of the November 5 order, the trial judge noted she did not receive a copy of defendant's "actual unemployment application," that defendant "testified his girlfriend completed [it] and he did not have [it]."

[5] As the trial court noted, by September 2021, defendant owed plaintiff over $106,000 in support arrears.

obligations to plaintiff. He denied he could work as a salesman or provide estimates for customers through In N Out Glass & Showers, LLC.

According to defendant's testimony, he lived with his girlfriend, and she made certain payments on his behalf. For example, he stated she purchased gifts for his children; allowed him to use her American Express points for a trip to see his older son in Florida, and she paid for his litigation expenses.

Defendant also produced his optometrist, Dr. Beth Rosenblatt, to testify about the treatment she provided to defendant. Dr. Rosenblatt testified she prescribed Restasis after defendant complained his eyes were blurry and dry. Defendant's neurologist, Dr. John Hanna, also testified on defendant's behalf. He stated he saw defendant in 2018, due to defendant's concerns about tremors and tingling in his hands. He diagnosed defendant with carpal tunnel syndrome and prescribed Primidone for the tremors.

Defendant's neurological expert, Dr. Nazar Haidri, also testified. Dr. Haidri stated he instructed defendant in 2019 not to return to work, due to the numbness and weakness defendant was experiencing in both of his hands. Dr. Haidri testified defendant could not "use his hands in any capacity" and that he informed defendant "he was unfit for gainful employment."

After defendant rested his case, plaintiff testified. Regarding the parties' parenting issues, she stated she invited defendant to spend additional time with the children on occasion, but he declined her offers. When asked about defendant's allegations that the children acted inappropriately while in her custody, plaintiff testified the children "always ha[d] . . . adult supervision" when she was working or otherwise not available to them. She also explained what steps she had taken to address the children's behavioral, educational, and health needs, stating defendant "never helped [her] with anything" and "only care[d] about . . . the kids . . . hav[ing] a good time" when they were with him.

Turning to defendant's ability to meet his support obligations, plaintiff testified defendant could continue operating his business "[b]ecause he had employees that used to [install] the glass" when defendant ran the business. Further, plaintiff stated defendant "was the one that used to get the measurement[s] and be the salesperson" when his business was operational, so she believed he could still perform these functions.

Once the testimonial hearing ended in August 2021, the judge granted the parties' mutual requests to submit updated affidavits of service to support their counsel fee applications. Following the judge's receipt of these submissions, she issued an oral opinion on October 19, 2021, denying defendant's request for

additional parenting time on alternating Sunday overnights and mid-weeks. But she granted defendant's request for holiday and vacation time with the children, finding the JOD was "silent" on these issues. Additionally, the judge denied: defendant's requests for a reduction in his support obligations; both parties' requests for counsel fees; and plaintiff's application to relocate with the children to Florida.

In explaining why she denied defendant's request for mid-week and alternating Sunday overnights with the children, the judge noted defendant "could have objected" to the existing parenting plan before the JOD was entered, but "[h]e chose not to do so." Further, the judge found defendant failed to demonstrate "any substantial change in circumstances for any additional [parenting] time." Next the judge stated she denied defendant's request for a reduction in his support obligations, in part, because he failed to produce a vocational expert to demonstrate he could not "work in the glass industry or in any other industry." She also stated she "had questions as to why [defendant] was collecting unemployment benefits if he couldn't work," because "there would be a certification on the unemployment questionnaire" and a person seeking benefits would have to answer "the question [about] . . . trying to look for work every week." Further, the judge found:

there's nothing presented . . . that Mr. Lopez cannot work at all. Just because . . . he can't – maybe he can't install glass, which I think is questionable from the testimony of the doctors that noted that the complaints are subjective, certainly this court is not satisfied that by a preponderance of the evidence it was established that Mr. Lopez couldn't have kept his business running, couldn't have hired somebody to install the glass, couldn't have been an estimator, couldn't have been a salesperson, or certainly at his age could not engage in any other gainful employment. There's been absolutely no evidence presented to this court of his attempt to obtain any kind of employment. He is just not working.

And the other significant thing to this court is although the claim was that he could not work since 2018, he is somehow collecting unemployment and has collected it since April of 2020. Again, Mr. Lopez conveniently stated to this court that he didn't fill out the unemployment application. His girlfriend . . . did. He didn't have a[] copy of . . . the application. No printout was presented to this court, but he did admit that he has to re-certify every week that he's been out there trying to get a job . . . . Not he's not able to work . . . but that he is entitled to unemployment because he was working and somehow can't get a job. And he applied for these benefits during the C[OVID-19] pandemic as the court already noted in April of 2020. There's nothing that suggests to this court that Mr. Lopez cannot work.

Also, . . . there w[ere] numerous subjective [health] complaints presented by Mr. Lopez. At one point it was he couldn't see, he was dizzy, but on the other hand he could drive a couple of days a week from Jackson to [plaintiff's home] unassisted . . . to pick up his kids, to take care of his kids. That testimony was certainly inconsistent at best. He could drive [forty-five] minutes one way, [forty-five] minutes the other way.

> He wanted to do so at least a couple of times a week. He can go on vacation, but he can't find gainful employment in any area.
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> It's just not credible to this court. The court does not believe that he met his burden on his inability to be gainfully employed, whether it's in the glass industry, which the court found he has not proven by a preponderance of the evidence why he could not be an estimator, why he couldn't be a salesperson, why he could not hire an employee to . . . continue the glass . . . installation while keeping his business, or why he cannot work in any other industry when he's able to drive, when he's able to make the commute back and forth consistently to visit his children, and . . . he wanted to do it more to visit his children. It is not credible to this court why he cannot hold a job, coupled with the fact that he is certifying, at least at the time of the trial, every week that he is able to work but just cannot find a job. That is completely inconsistent.
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> [T]he fact . . . he's not working does not mean that he cannot work. And he has not met his burden in that regard to the court.

Regarding the parties' counsel fee requests, the court concluded each party achieved mixed results on their respective motions, but she could not find their "applications, when looked at under the totality of the circumstances, were made in bad faith." As to the outcome of defendant's parenting time and support applications, the judge stated that while she was "not convinced that anything's changed and [defendant] does have the ability to work, by the same token, he's

certainly allowed to ask for extra time with his children . . . for holiday . . . and vacation time[]," considering the JOD was "completely silent" on these issues. Similarly, the judge found plaintiff was "certainly . . . allowed to ask the court to relocate." Accordingly, she denied both parties' counsel fee requests. A conforming order was entered on November 5, 2021.[6]

II.

On appeal, defendant contends the trial court erred by denying his motion for: mid-week and alternating Sunday overnights with the children; a reduction in support; and an award of counsel fees. We are not persuaded.

Our review of a Family Part order is limited. See Cesare v. Cesare, 154 N.J. 394, 411 (1998). "Because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Id. at 413. "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). This is so because the judge has the opportunity to see and hear the witnesses as they testify, thereby developing a "'feel of the case' that can never be realized by a

[6] Because the judge who presided over the parties' plenary hearing completed her seven-year judicial term just days after she rendered her oral decision, another judge executed the November 5 order.

review of the cold record." N.J. Div. of Youth & Fam. Servs. v. G.M., 198 N.J. 382, 396 (2009) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)). However, we review the Family Part's interpretation of the law de novo. D.W. v. R.W., 212 N.J. 232, 245-46 (2012).

We also recognize a decision concerning custody is up to the sound discretion of the Family Part judge. See Randazzo v. Randazzo, 184 N.J. 101, 113 (2005). In any custody or parenting time dispute, "it is well settled that the court's primary consideration is the best interests of the children." Hand v. Hand, 391 N.J. Super. 102, 105 (App. Div. 2007) (citing Kinsella v. Kinsella, 150 N.J. 276, 317 (1997)). Therefore, a parent seeking to modify a parenting time schedule "bear[s] the threshold burden of showing changed circumstances which would affect the welfare of the children." Todd v. Sheridan, 268 N.J. Super. 387, 398 (App. Div. 1993) (citing Sheehan v. Sheehan, 51 N.J. Super. 276, 287 (App. Div. 1958)); see also Lepis v. Lepis, 83 N.J. 139, 157 (1980). Stated differently, the party seeking to change a judgment or agreement involving a custodial arrangement bears the burden of proof to demonstrate the status quo is no longer in a child's best interest. See Bisbing v. Bisbing, 230 N.J. 309, 322 (2017). "Where there is already a judgment or agreement affecting custody in place, it is presumed it 'embodies the best interests determination' and

should be modified only where there is a 'showing [of] changed circumstances which would affect the welfare of the children.'" A.J. v. R.J., 461 N.J. Super. 173, 182 (App. Div. 2019) (quoting Todd, 268 N.J. Super. at 398).

Similarly, "[w]hether [a support] obligation should be modified . . . rests within a Family Part judge's sound discretion." Larbig v. Larbig, 384 N.J. Super. 17, 21 (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 . . . that the determination could not reasonably have been reached on sufficient credible evidence present in the record after considering the proofs as a whole.
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> [Heinl v. Heinl, 287 N.J. Super. 337, 345 (App. Div. 1996) (citation omitted).]

Support orders are subject to review and modification upon a showing of "changed circumstances." Lepis, 83 N.J. at 146. 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). "When the movant is seeking modification of an alimony award, that party must demonstrate that changed circumstances have substantially impaired the ability to support himself or herself." Lepis, 83 N.J. at 157. On the other hand, "[w]hen the movant is seeking modification of child support, the guiding principle is the 'best interests of the children.'" Ibid. (citations omitted).

"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). Thus, the premature filing of a Lepis motion will justify its denial on the ground that the change has not been shown to be a permanent condition or of lasting duration. Larbig, 384 N.J. Super. at 22-23. There is no "brightline rule by which to measure when a changed circumstance has endured long enough to warrant a modification of a support obligation." Id. at 23. "[S]uch matters turn on the discretionary determinations of Family Part judges, based upon their experience as applied to all the relevant circumstances." Ibid. Additionally, even if a payor is temporarily unemployed, a trial court has the right to examine the "potential earning capacity" versus the

actual income of a payor when assessing the payor's ability to pay support. Halliwell v. Halliwell, 326 N.J. Super. 442, 448 (App. Div. 1999).

We also review an order denying a counsel fee request for an abuse of discretion. Harte v. Hand, 433 N.J. Super. 457, 465-66 (App. Div. 2013) (citing J.E.V. v. K.V., 426 N.J. Super. 475, 492 (App. Div. 2012)). "Fees in family actions are normally awarded to permit parties with unequal financial positions to litigate (in good faith) on an equal footing." Id. at 493 (quoting Kelly v. Kelly, 262 N.J. Super. 303, 307 (Ch. Div. 1992)). And "where a party acts in bad faith[,] the purpose of the counsel fee award is to protect the innocent party from [the] unnecessary costs and to punish the guilty party." Welch v. Welch, 401 N.J. Super. 438, 448 (Ch. Div. 2008) (citing Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000)).

When addressing a counsel fee application, a judge 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.
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> [R. 5:3-5(c).]

Governed by these principles, we discern no reason to disturb the November 5 order. We add the following comments.

Regarding defendant's parenting time argument, he contends the judge abused her discretion in denying him additional mid-week and alternating Sunday overnights with the children, considering how much time has passed since the entry of the JOD, and given plaintiff's ongoing refusal to offer him more time than set forth in the JOD. This argument fails.

It was defendant's burden to show how the existing custody and parenting time arrangement no longer served the children's best interests. We agree with the judge that his proofs were lacking in this regard. Indeed, defendant failed to explain how the expanded parenting time he proposed would better serve the children's best interests, given that they lived forty-five minutes away from defendant's home, attended school where their mother lived, and, as the judge found after interviewing both children, they did not "get along with" another child in the home where defendant resided.

The judge also found defendant's testimony that "[h]e could spend more time with the children because he isn't working," and was able to make the

ninety-minute round trip drive to transport the children and physically care for them in his home was "rather inconsistent" with his testimony that he was unable to work due to his myriad health problems. Given these facts, coupled with the judge's assessment of defendant's veracity and her decision to grant defendant holiday and vacation parenting time, we cannot conclude she mistakenly exercised her discretion in denying defendant's additional requests for parenting time during the week and on alternating Sunday overnights.

Similarly, we discern no basis to disturb the judge's determination that defendant was not entitled to a reduction in his support obligations. As discussed, a "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 (quoting Martindell, 21 N.J. at 353). Also, "[a] party asserting [an] inability to work due to disability bears the burden of proving the disability." Golian v. Golian, 344 N.J. Super. 337, 341 (App. Div. 2001). And a Family Part judge may impute income to a party when that party, "without just cause, is voluntarily unemployed or underemployed." Caplan v. Caplan, 182 N.J. 250, 268 (2005). Thus, a party's "potential to generate income is a significant factor to consider when determining his or her ability to pay [support]." Miller v. Miller, 160 N.J. 408, 420 (1999) (citations

omitted). In short, a mere showing of an obligor's reduction in income is not dispositive, because current earnings are never viewed as "the sole criterion [upon which] to establish a party's obligation for support." Weitzman v. Weitzman, 228 N.J. Super. 346, 354 (App. Div. 1988) (citation omitted).

Here, the judge concluded defendant gave "rather inconsistent" testimony that he was physically able to care for his children beyond the amount of time contemplated under the JOD and could drive the ninety minutes to and from plaintiff's home if awarded extra time with the children yet was physically unable to work. Moreover, she found defendant "always worked for himself since he was [nineteen] years old" but "made the decision not to work." She added he had not "filled out any job applications or put together a resume" but still certified each week to his eligibility for unemployment benefits, which would have involved him representing he was "trying to look for work every week."

Similarly, the judge stated she was "not satisfied . . . [defendant] couldn't have kept his business running, couldn't have hired somebody to install the glass, couldn't have been an estimator, couldn't have been a salesperson, or . . . could not engage in any other gainful employment." She noted that when defendant was on the witness stand and shown bank statements and tax returns, it was

evident "he was still doing business with In [N] Out [Glass &] Showers [LLC] in 2019." Moreover, she observed defendant offered no testimony from a vocational expert to demonstrate he was unable to earn the wages imputed to him under the JOD. We are not convinced the judge's denial of defendant's motion to decrease his support obligations was erroneous.

Similarly, we decline to conclude the judge erred in denying defendant's counsel fee application. The judge was familiar with the parties' financial and personal circumstances, having conducted defendant's ability-to-pay hearing, presided over the parties' plenary hearing for several days, interviewed their children, and reviewed various financial exhibits, including defendant's August 2020 Case Information Statement. In addition, defendant continued to owe plaintiff arrears in excess of $100,000.

Moreover, while the judge did not explicitly address all the factors under Rule 5:3-5(c) when denying each party's counsel fee request, we are satisfied she implicitly considered those factors. The court reviewed the parties' affidavits of services in which counsel fully addressed the factors under the Rule. Thus, the judge was aware plaintiff historically earned far less than defendant, the parties had litigated extensively since 2019, plaintiff had incurred substantial counsel fees as a result, and she was owed substantial arrears. The

judge also understood and pointed out in her oral opinion that defendant's arrears significantly increased while the litigation was pending, he had not looked for work, had no resume, and he provided "rather inconsistent" testimony to the court. Still, she found neither he nor plaintiff acted in bad faith in pursuing their respective applications.

Under these circumstances, and mindful of our deferential standard of review, we are not persuaded the judge mistakenly exercised her discretion in denying defendant's request for counsel fees.

To the extent we have not addressed defendant's remaining arguments, we are satisfied they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirm.