SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5538-13T4
A-1020-14T4
A-4572-14T4
A-5442-14T4

JOSEPHINE PENZA,

Plaintiff-Appellant,

v.

ROBERT PENZA,

Defendant-Respondent.

Argued November 30, 2016 – Decided February 28, 2017

Before Judges Alvarez and Accurso.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FM-04-687-02.

Julie R. Burick argued the cause for appellant (Adinolfi & Packman, P.A., attorneys; Robert J. Adinolfi, of counsel and on the briefs; Ms. Burick, Thomas A. Roberto, Allison H. Lamson, and Robin M. Hauth, on the briefs).

Robert Penza, respondent, argued the cause pro se (Bruce P. Matez, Lauren E. Hagovsky, and Deena L. Betze, on the briefs).

PER CURIAM

Plaintiff Josephine Penza appeals from four Family Part orders that were in the main intended to reinstate defendant Robert Penza's parenting time with the parties' now seventeen-year-old daughter. Back on February 17, 2012, we issued our third appellate decision related to the parties' post-divorce judgment disputes. In that decision, also focused on reinstating the father's parenting time, we specified that a plenary hearing on the subject should be conducted immediately. An expert, not the child's treating therapist, would be appointed to testify during the hearing. Penza v. Penza, No. A-2491-10 (App. Div. Feb. 17, 2012) (slip op. at 18). Despite our 2012 decision, no therapeutic intervention has occurred. No plenary hearing has been conducted.

We affirm the orders issued by the Family Part, with a slight modification as to a financial order. The plenary hearing in this matter shall be conducted within sixty days.

I.

The parties married in 1995 and divorced in 2003. The final judgment of divorce (FJD) granted defendant parenting time on alternate Wednesdays from 5:00 to 7:00 p.m., and alternate weekends from 6:30 p.m. Friday to 6:30 p.m. Sunday.

It is not clear from the record what caused the initial post-divorce disruption of parenting time. Post-judgment litigation regarding parenting time began in 2010. Since our last decision,

visitation has been limited, if enjoyed at all, to Wednesday evenings only.

It is unnecessary to detail the extensive post-judgment litigation the parties have pursued since our last opinion. Suffice it to say that the Family Part judge, among other things, unilaterally selected a reunification therapist after years of disagreements regarding the selection process.

Since the process did not advance, the judge interviewed the child. He concluded that although she was willing to attend reunification therapy, she did not wish to see the psychologist he initially chose. The judge then asked for the parties to submit names of possible therapists. After more delay, on May 1, 2015, he simply named one neither party had suggested——Dana Goode, Psy.D.

Plaintiff appeals from the October 15, 2014 order appointing a reunification therapist. Plaintiff also appeals from the May 1, 2015 order appointing Dr. Goode specifically.

The court granted defendant's request for the appointment of a guardian ad litem (GAL) by order dated June 16, 2014, which also made plaintiff responsible for one-half the fees charged for the GAL's services. Plaintiff unsuccessfully sought reconsideration of that appointment. As a sanction for her failure to comply with prior orders, defendant was awarded $400 as attorney's fees. Plaintiff appeals these orders.

Also included in that June 16, 2014 order was a prohibition from plaintiff using Colontonio-Penza as the child's name, instead of her legal name of Penza. Plaintiff appeals that provision in the order.

Defendant's child support obligation was increased three times since the entry of the FJD. On July 18, 2008, it was increased to $671 per week based on plaintiff's weekly gross income of $692 per week (annualized to $35,984) and defendant's weekly gross income of $6685 (based on annual earnings of $347,620). Defendant filed a motion to reduce child support based on a reduction in annual income. His 2013 gross income was $280,595.27, the result of his move to a new firm. He also asserted that plaintiff's annual earnings had increased and that she had received a $700,000 inheritance.

In her response, plaintiff acknowledged her mother's death in April 2013, but did not disclose the amount of the inheritance. She also did not respond to defendant's claim that she was earning more from her business. Instead, plaintiff attached to her certification a spread sheet regarding defendant's bank accounts as disclosed in his case information statements (CIS), which he supplied with the motion, from 2007, 2008, 2011, and 2012, along with his bank statements from December 2011 to December 2013, tax returns, and W-2s from 2009 to 2012.

On the motion, the judge concluded defendant had made a prima facie showing of changed circumstances based on plaintiff's inheritance. The judge used the 2011 figures when the last modification was denied as a baseline, as opposed to the circumstances in 2008 when support was last modified. Acknowledging that defendant's income was higher than had been the case in 2011, the judge also noted that plaintiff was earning more income from her business.

The parties were directed to exchange 2013 tax returns, W-2s and 1099s; a list of all income-producing assets; and "full and complete [CISs] to the extent not already produced as part of the motion papers." The court denied both parties' requests for counsel fees, finding that defendant's modification motion was not brought in bad faith, as there were "substantial, legitimate disagreements" as to child support.

Accordingly, defendant produced his 2013 tax return, W-2, and 1099, but did not complete an updated CIS. In an April 3, 2014 letter, his counsel asserted defendant did not have "any income producing assets" and stated that his January 2014 CIS fully disclosed his assets. The record includes a 2012 deed conveying a condominium in Margate from Penza Investments, L.P. to defendant for $10.

Plaintiff produced an April 17, 2014 CIS, to which she attached her 2013 federal tax return showing $14,854 in gross earnings and investment income. Her CIS stated she was self-employed and earned gross wages of $360 per week, but also that she had zero gross earned income in 2014 year-to-date. Her CIS listed an IRA with a value of $35,000 and an account at "PNC" in an unspecified amount. Plaintiff did not produce any W-2s or pay stubs.

After the June 16, 2014 oral argument, the judge first found defendant had total income of $282,986, comprised of $257,795 in wages, $24,100 from "Robert Penza Legal Services," and $1091 from Medford Associates. He did not include distributions defendant had received from his pension accounts, and declined to use income averaging, as he found defendant's income had steadily increased over the past four years.

Additionally, the judge found that plaintiff had $71,000 in total income. Because she had not disclosed the balances of her investment accounts, he drew an adverse inference that the accounts were worth $700,000 with a 5% return, yielding $35,000 in annual income. Her submission reflected $22,569 in annual income, but the judge could not determine from her submissions whether this was in fact an accurate total. Therefore, he imputed $36,000 in income to her, the same figure imputed to her in the July 2008

child support worksheet, reasoning that the fact she was spending more than $20,000 in child care suggested a substantially higher income than she had disclosed.

The judge concluded there was a significant change in circumstances based solely on the increase in plaintiff's income. He systematically applied the factors in N.J.S.A. 2A:34-23(a) to determine the amount of support. Lacking information about plaintiff's assets and her anticipated 2014 income, the judge nonetheless found she had received a substantial inheritance from her mother. He observed that "[n]o significant information" had been provided regarding the child's needs, and that the parties already shared the cost of her private school tuition.

The judge stated that the guidelines figure "would come in somewhere in the 400 to 450 range" but that "this is clearly not a guidelines case." Because the child was accustomed to a higher standard of living, the judge modified child support only to $600 per week, down from $671. He also modified the parties' responsibility for various expenses to 80% for defendant and 20% for plaintiff, based on the incomes he had calculated. The judge denied requests for counsel fees with respect to the modification motion, finding both parties had acted in good faith. By way of a separate order, also entered on June 16, 2014, the judge reduced defendant's child support payment from $671 weekly to $600 weekly.

We add additional facts and procedural history in the relevant sections of this decision as necessary.

A-5538-13

I. STANDARD OF REVIEW.

II. ALTHOUGH PLAINTIFF MAINTAINS THE TRIAL COURT ERRED IN ENTERING THE JUNE 16, 2014 "LONG" ORDER, PLAINTIFF'S APPEAL AS TO PARAGRAPH 1 IS MOOT AS A RESULT OF SUBSEQUENT EVENTS.

III. THE COURT'S ORDER OF JUNE 26, 2014 APPOINTING A MARYANN J. RABKIN, ESQUIRE AS VICTORIA'S GUARDIAN AD LITEM WAS IN ERROR, WITHOUT BASIS AND MUST BE VACATED.

A. Ms. Rabkin's Selection As A Guardian Ad Litem Was Inappropriate Based Upon Conflict Of Interest.

IV. THE TRIAL COURT ERRED IN MODIFYING DEFENDANT'S CHILD SUPPORT OBLIGATION BECAUSE THE COURT HAD ALREADY DETERMINED DEFENDANT FAILED TO MEET THE PROCEDURAL AND SUBSTANTIVE PREREQUISITES NECESSARY FOR THE TRIAL COURT TO CONSIDER HIS REQUEST FOR THE RELIEF.

A. The Defendant Failed To File A Completed Case Information Statement As Required By [Rules] 5:5-2 and 5:5-4(a).

B. In Addition To Failing To Establish A Change In Circumstances, Defendant Failed To Provide Two (2) Years Of Complete Financial Records As Required By The May 6, 2011 Order.

C. The Trial Court Erred In Modifying Defendant's Child Support Obligation After Already Finding Defendant Failed To Establish a Prima Facie Showing of a Substantial Change in Circumstances.

D. The Trial Court Erred In Finding Plaintiff's Potential Change In Income Constituted A Substantial Change In Circumstances Such That Discovery Was Ordered And Defendant's Child Support Was Modified.

E. The Trial Court Erred Not Only In Modifying Defendant's Child Support, But In Its Calculations Of The Support As Well.

F. The Trial Court Erred in Calculating Defendant's Income.

G. The Trial Court Erred In Failing To Impute An Investment Return Date To Defendant Based On The Condo He Obtained From Penza [] Investments And His Interest In Medford Village.

H. The Trial Court Erred in Calculating Plaintiff's Income.

I. The Trial Court Erred in Deviating from the Child Support Guidelines, Reversing Prior Orders of the Court and Modifying the Work-Related Child Care Component of the Child Support Guidelines.

J. The Trial Court Erred in its Analysis In This Above-Guidelines Case per [Rule] 5:6A and Appendix IX-A, Considerations in the Use of the Child Support Guidelines and Appendix IX-B, Use of the Child Support Guidelines.

K. The Trial Court Erred in Making Defendant's Relief Retroactive Contrary to [N.J.S.A.] 2A:17-56.23a.

V. THE TRIAL COURT ERRED IN RESTRAINING THE PLAINTIFF FROM USING ON HER DAUGHTER'S SCHOOL

RECORDS PLAINTIFF'S MAIDEN NAME IN CONJUNCTION WITH HER DAUGHTER'S OFFICIAL LAST NAME.

A-1020-14

I. STANDARD OF REVIEW.

II. THE TRIAL COURT HAD NO AUTHORITY OR JURISDICTION TO TAKE ANY ACTION WHILE AN APPEAL IS PENDING ON SUBSTANTIALLY THE SAME CASE AND CONTROVERSY AS THAT WHICH IS CURRENTLY PRESENTED.

III. THE TRIAL COURT HAD NO APPLICATION PENDING BEFORE IT WHEN IT ENTERED THE OCTOBER 15, 2014 ORDER, THUS CONSTITUTING ERROR.

IV. THE TRIAL COURT HAD NO LEGAL OR FACTUAL BASIS UPON WHICH TO RELY IN ENTERING THE OCTOBER 15, 2014 ORDER.

V. ALTHOUGH PLAINTIFF MAINTAINS THE TRIAL COURT'S CONDUCT AND COMMENTS ON THE RECORD ON OCTOBER 15, 2014 REQUIRED THE RECUSAL OF THE [judge hearing the motion], PLAINTIFF'S APPEAL AS TO THE RECUSAL ISSUE IS MOOT AS A RESULT OF SUBSEQUENT EVENTS.

A-4572-14

I. STANDARD OF REVIEW.

II. THE TRIAL COURT ERRED IN SUA SPONTE APPOINTING DR. GOODE IN A MANNER CONTRADICTORY TO THE LAW OF THE CASE SET FORTH IN THE NOVEMBER 18, 2014 AND APRIL 23, 2015 ORDERS AS WELL AS THE APRIL 28, 2015 CONFERENCE CALL.

III. THE TRIAL COURT ERRED IN FAILING TO PROVIDE NOTICE, HOLDING A HEARING ON THE RECORD AND FAILING TO PUT THE COURT'S FINDINGS ON THE RECORD PRIOR TO APPOINTING DR. GOODE.

IV. BECAUSE THE MAY 1, 2015 ORDER WAS ENTERED SUA SPONTE WITHOUT A HEARING AND WITHOUT A

RECORD, THERE IS NO FINDINGS OF FACT OR CONCLUSIONS OF LAW SUPPORTING THE COURT'S ORDER.

A-5442-14

I. STANDARD OF REVIEW.

II. THE TRIAL COURT ERRED IN FAILING TO STRICTLY ADHERE TO THE MANDATORY TERMS OF [RULE] 1:6-2(A) AND DEEMING PLAINTIFF'S APPLICATION UNOPPOSED AND BARRING DEFENDANT FROM ORAL ARGUMENT AS WAS REQUIRED BY [RULE] 1:6-2(A) WHERE NO OPPOSITION WAS FILED.

III. THE TRIAL COURT ERRED IN CONSIDERING DEFENDANT'S LEGAL BRIEF IN VIOLATION OF [RULE] 1:6-5 WHERE NO UNDERLYING FACTUAL CERTIFICATION WAS FILED BY DEFENDANT AS PER [RULE] 1:6-6 AND THE PURPORTED FACTS RELIED UPON IN DEFENDANT'S BRIEF WERE NEITHER OF THE EXISTING RECORD OR JUDICIALLY NOTICEABLE IN NATURE.

IV. THE TRIAL COURT ERRED IN MISAPPLYING [RULE] 4:49-2 TO THE FACTS PRESENTED AND IN FAILING TO GRANT PLAINTIFF'S MOTION FOR RECONSIDERATION AS TO THE TERMINATION OF THE GAL'S SERVICES, PAYMENT THEREFORE AND COUNSEL FEES.

V. THE TRIAL COURT'S ANALYSIS OF THE COUNSEL FEE ISSUE ON JUNE 5, 2015 SUCH THAT THE COURT GRANTED DEFENDANT FEES, BUT DENIED THEM TO PLAINTIFF VIOLATED [RULES] 4:42-9(a)(1), 5:3-5(c), AND [RPC] 1.5.

VI. THE TRIAL COURT ERRED IN THE SUA SPONTE IMPOSITION OF SANCTIONS AGAINST PLAINTIFF WHERE NO APPLICATION WAS PENDING AND NO FACTS EXISTED IN THE RECORD, OR WERE JUDICIALLY NOTICEABLE IN NATURE, THAT SUPPORTED SUCH A FINDING, THE SANCTIONS WERE IMPOSED WITHOUT A HEARING AND WITHOUT A RECORD AND THERE ARE NO FINDINGS OF FACT OR CONCLUSIONS OF LAW SUPPORTING THE COURT'S ORDER.

II.

"[W]e accord great deference to discretionary decisions of Family Part judges." Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012). This deference is warranted because of their specialized training and expertise. Avelino-Catabran, supra, 445 N.J. Super. at 587 (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)). The trial court's legal conclusions are reviewed de novo. Kieffer v. Best Buy, 205 N.J. 213, 222-23 (2011); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A decision to modify child support is reviewed for abuse of discretion. J.B. v. W.B., 215 N.J. 305, 325-26 (2013). An abuse of discretion occurs 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) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

A trial court's decision on an application for attorney fees "will not be reversed absent a showing of an abuse of discretion involving a clear error in judgment." Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010), aff'd, 208 N.J. 409 (2011). The abuse of discretion standard also applies to the court's decision

on a motion for reconsideration. Cummings v. Bahr, 295 N.J. Super. 374, 384, 389 (App. Div. 1996).

III.

Rule 2:9-1 states that the filing of an appeal relieves a trial court of authority or jurisdiction to act. The exception, however, is the trial court's continuing jurisdiction "to enforce judgments and orders pursuant to [Rule] 1:10 and as otherwise provided." R. 2:9-1(a). Thus, the judge's October 15, 2014 order was proper. It merely enforced the June 16, 2014 order.

The October 15 order issued because the reunification therapy had failed to occur and the child never attended. Hence the court had the authority to enforce its earlier order and was not deprived of jurisdiction. See Savage v. Weissman, 355 N.J. Super. 429, 435 (App. Div. 2002). Plaintiff's point of error is based on a mistaken understanding of the law and lacks merit.

Plaintiff, also incorrectly, asserts that the trial court had no authority to act in the absence of a formal motion to enforce reunification. This case is memorable because of the multiple court orders that have gone unheeded, all intended to benefit the child by strengthening her relationship with her father. Courts have the inherent authority to enforce their orders, particularly in a case involving the emotional welfare of a child. D'Angelo v. D'Angelo, 208 N.J. Super. 729, 731 (App. Div. 1986).

Specifically, the Family Part has broad equitable powers to enforce its own orders. Saqi v. Saqi, 386 N.J. Super. 517, 526 (App. Div. 2006). Therefore, plaintiff's reliance on Rule 1:6-2 in support of her argument that the court could not act in the absence of an application is misplaced. Although the rule prescribes the form of motions and orders, it does not limit the court's power to issue orders.

The October 15 order stated that plaintiff "has done everything in her power to stop [the child]" from attending therapy. That was not, as plaintiff contends, either a finding of contempt or the imposition of sanctions. It was merely the conclusion the judge drew based on his years-long familiarity with the matter.

During the October 15 hearing, the GAL answered questions from the court. She said that plaintiff had not cooperated with reunification therapy. By responding to questions and providing the judge with the information she gathered in fulfilling her role, the GAL did nothing but meet her court-appointed responsibilities. See R. 5:8B(a)(1), (5). In no way was her conduct a violation of Rule 5:8B as plaintiff alleges.

Included in Appeal No. A-1020-14 is the argument that the Family Part judge should be recused because his comments regarding plaintiff's conduct were improper. The point is raised despite

counsel acknowledging that the judge's transfer to another division makes the argument moot. We see nothing improper about his conclusions and observations during the October 15, 2014 proceeding. We have expressed similar concerns, as have other judges regarding this case. Since the issue is acknowledged to be moot, plaintiff's motivation in pursuing the point on appeal is unclear.

IV.

From 2014 when the court replaced the first reunification therapist, and requested that the parties suggest other names, through May 1, 2015, the parties could not agree on anyone. In Appeal No. A-4572-14, plaintiff challenges the court's manner of appointment of Dr. Goode as a replacement for the first reunification therapist, with whom plaintiff refused to cooperate.

Although unclear, plaintiff appears to be arguing that the selection of a reunification therapist only from names submitted by the child's therapist was the law-of-the-case. The law-of-the-case doctrine, however, simply does not apply when "the same judge is reconsidering his own interlocutory ruling." Lombardi v. Masso, 207 N.J. 517, 539 (2011). There never was a prior order, nor could there have been, that limited the judge to the three names offered by the child's therapist. A judge is always entitled to

adjust a discretionary selection process as a result of subsequent events.

Plaintiff also contends that the judge's decision to appoint Dr. Goode somehow violated her due process rights in that no "notice," "hearing," or "findings on the record" were made. In circumstances such as these, nothing in the law required the judge to do other than he did. The selection was merely an eminently reasonable exercise of discretion on the part of the Family Part judge.

Nor does the judge's failure to make findings regarding his reasons for selecting Dr. Goode violate Rule 4:52-1(a), as plaintiff asserts. That rule refers to hearings on orders to show cause with temporary restraints. Citation to the rule is inapposite. The judge was well within his authority in attempting to adjust to the continuing wrong that has occurred in this case.

V.

As plaintiff argues in several of her appeals, she contends in Appeal No. A-5538-13 that the Family Part judge's routine decisions, involving a necessary and reasonable exercise of authority and discretion, were improper. Appeal No. A-5538-13 includes the judge's appointment of a GAL and plaintiff's obligation to pay her share of the GAL's costs and pay counsel fees to defendant.

Plaintiff appeals from the June 26, 2014 order selecting the GAL on the basis that the process violated Rule 5:8B because the attorney had a disqualifying conflict (that the GAL's office formerly employed an associate who moved to plaintiff's attorney's office), the court did not explain why it did not choose one of the parties' candidates, and the parties had no opportunity to be heard on the court's final selection. We reiterate that Rule 5:8B authorizes the discretionary appointment by a judge of a GAL in a dispute between parents as to custody and parenting time. Isaacson v. Isaacson, 348 N.J. Super. 560, 573 (App. Div.), certif. denied, 174 N.J. 364 (2002).

A GAL "acts on behalf of the court for the benefit of the child and serves as an independent factfinder, investigator, and evaluator of what furthers the best interests of the child." Id. at 574 (citing Pressler, Current N.J. Court Rules, comment on R. 5:8B (2002)); see also In re M.R. 135 N.J. 155, 173 (1994). The appointment of a GAL is reviewed for an abuse of discretion. See In re Adoption of Child by J.D.S., 353 N.J. Super. 378, 402 (App. Div. 2002), certif. denied, 175 N.J. 432 (2003).[1]

Because the GAL acts on behalf of the court, he or she has "no perceived bias in favor of one parent's position[.]" Milne,

[1] Rule 5:8B(b) also allows a party "to object to the person appointed as [GAL] for good cause shown."

supra, 428 N.J. Super. at 201. Further, a GAL's role is merely advisory, as the court is not bound by a GAL's recommendations. Id. at 202. And as with any other expert, the parties may present evidence to refute the GAL's assertions. Ibid. A court may not abdicate its decision-making to a GAL, although the court will only run afoul of the rule, and abuse its discretion, if it "summarily adopt[s] the recommendations of the GAL." See id. at 203.

The appointment of a GAL may be an abuse of discretion if a disqualifying conflict of interest would result. In Isaacson, for example, we concluded that the same person may not serve as GAL and as mediator for economic issues, because those roles "are so inherently conflicting that fulfillment of one role necessarily precludes serving in the other." Isaacson, supra, 348 N.J. Super. at 575-76. The mediator's "obligation to respect the confidences of the parties" is in "inherent conflict" with the GAL's duty "to serve as an officer of the court in the interests of the children[.]" Id. at 577; see also Fawzy v. Fawzy, 199 N.J. 456, 484 (2009) (GAL cannot also serve as arbitrator of custody and parenting time disputes). The movement of an associate from the GAL's office to another in no way constituted a conflict. The appointment process is not, as plaintiff suggests, one in which judicial discretion is abdicated to either parent.

The GAL met with the child, and informed the court that the child did not object to meeting with the first reunification therapist. She neither submitted a report nor gave sworn testimony. This GAL represented the child, whose interests are not materially adverse to either parent.

A court need not explain its reasons for selecting one person over another; the phrase "discretionary appointment" means exactly that. See Isaacson, supra, 348 N.J. Super. at 573. The court solicited names, and chose a name from the list the parties provided. There is no merit to plaintiff's objections to the judge's orders regarding the GAL.

VI.

In No. A-5442-14, plaintiff also appeals from the denial of her motion for reconsideration of prior orders, and the court's $200 award of counsel fees to defendant. Her motion for reconsideration sought to terminate the services of the GAL, and to relieve her from the obligation to pay half of the GAL's fees as previously ordered. In support of her position, plaintiff argues that defendant's opposition to the motion, and his cross-motion, failed to meet the requirements of Rules 1:6-2(a), 1:6-5, and 1:6-6, and that therefore her motion should have been granted for that reason alone.

To the contrary, judges must, even if a motion is unopposed, decide it on its merits. See Allstate Ins. v. Fisher, 408 N.J. Super. 289, 300-01 (App. Div. 2009) ("[B]oth Rule 1:7-4 and Rule 2:5-1(b), specificially state that the court 'shall' set forth the facts and make conclusions of law to support the order or judgment . . . . Neither rule exempts the court from this obligation where the motion has not been opposed."). The basis for plaintiff's challenge is that defendant's response consisted of a cross-motion seeking counsel fees, a certification of services provided by his attorney, and a brief.[2] She argues that since defendant did not more directly oppose the application, the judge was compelled to grant it.

Apart from a judge's self-evident responsibility to decide even an uncontested motion on the merits with an eye to a just result, Rule 1:6-2(a) does not define opposition in the manner plaintiff suggests. Defendant's filings sufficed.

Plaintiff further claims that Rule 1:6-5 required defendant's brief to rely only upon facts based on personal knowledge. Since the brief was not included, we cannot consider the argument. See R. 2:6-1(a)(1) (requiring appellant's appendix to include those parts of the record that "are essential to the proper consideration

[2] The brief is not included in the appellate record.

of the issues"); In re Zakhari, 330 N.J. Super. 493, 494-95 (App. Div. 2000) (dismissing appeal where an incomplete record made it "impossible" for the court to properly review the issues).

On the reconsideration motion, the judge determined that plaintiff failed to meet her burden to show that the earlier decision was based on a palpably incorrect or irrational basis, or that the significance of probative, competent evidence was ignored. See Cummings, supra, 295 N.J. Super. at 384 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). We agree.

In rendering his decision, the judge observed that plaintiff just reiterated prior arguments, including prior arguments about the law. Since there was nothing "different or new over and above" the original motion, the judge properly denied reconsideration. See id. at 384.

Plaintiff never paid any portion of the GAL's retainer as required by the June 2014 order. That obligation was reiterated in October 2014. By April 2015, plaintiff still had not paid any part of the retainer, "a clear and direct violation" of the June and October 2014 orders.

Plaintiff's complaints regarding the amounts sought by the GAL are disingenuous. She was liable for half. The court did not abuse its discretion in denying reconsideration.

The modest fee award to defendant was a sanction for plaintiff's violation of the earlier orders. That the judge did not more formally analyze the issues in deciding to award $200 borders on a frivolous argument.

VII.

The fees awarded as a result of the reconsideration motion were also properly granted. Defendant had requested an amount far in excess of the $400 actually ordered. In light of the parties' comfortable financial circumstances, the counsel fee awarded was an appropriate sanction and did not require more explanation than the court gave. The judge did not err in denying plaintiff's application for fees given that he held the motion for reconsideration was unwarranted, a conclusion with which we agree.

Plaintiff also objects to the statement in the court's order denying reconsideration stating that if plaintiff failed to comply with the June 5, 2015, and June 12, 2015 orders, she would be sanctioned $2000. The judge warned plaintiff, in essence, of a potential consequence if she continued to ignore her obligations. Plaintiff's characterization of the issue is not accurate.

The rule that plaintiff cites in support of her argument, Rule 4:52-1, is inapplicable. No temporary restraint or interlocutory injunction was imposed.

VIII.

Plaintiff contends that the downward modification of child support, a reduction of $71 weekly, was error because defendant failed to establish changed circumstances, the court erred in its calculations, the court abused its discretion, and the court should not have made the reduction in support retroactive. We disagree.

Plaintiff argues that since defendant's January 2014 CIS did not comply with Rules 5:5-2(a) or 5:5-4(a), as it did not include all the attachments listed in part G, the judge should not have considered his application. Defendant, however, between his modification motion, a January 9, 2014 letter to the court with a copy to counsel, and his reply certification, provided tax returns and W-2s from 2009 to 2012, CISs for prior years in which applications were made, 2007, 2008, 2011, and 2012, and pay stubs from March 2012 to January 2014. Hence, both rules were satisfied by virtue of his later submissions. He provided all attachments necessary pursuant to part G. That there was a brief delay between the filing of defendant's motion and the submissions in no way prevented the judge from considering the information.

Similarly, plaintiff contends that defendant failed to comply with a May 6, 2011 order requiring that any modification motions be accompanied by two years of bank statements, two years of pay stubs, and records regarding all his income in the two prior years.

Defendant in fact complied with that obligation as well. Whether he did so on the initial application or shortly afterwards is inconsequential. Before the judge rendered his decision, defendant supplied all the information required by the rules and the prior order.

Plaintiff asserts that defendant's disclosures were incomplete by offering her "breakdown" of his financial records. Nothing in this breakdown in any way demonstrates that the 2014 CIS violated the terms of the May 6, 2011 order or the requirements of Rule 5:5-4(a).

We are further satisfied that defendant established a baseline change of circumstances in his application. This includes the allegation that since the last support order was entered plaintiff inherited $700,000 clearly established a prima facie change of circumstances. This allegation warranted discovery. J.B. v. W.B., 215 N.J. 305, 327 (2013). The court found that plaintiff's income had in fact increased based on her inheritance and the income from her business.

Plaintiff's argument that defendant did not make full disclosures of his finances is troubling in the face of her refusal to accurately and fully disclose her earnings from her business or the amount of her inheritance. The contention that she had no

obligation to disclose her inheritance because it did not produce income is specious.

Turning to the June 16, 2014 modification decision, plaintiff first argues the court incorrectly calculated defendant's income because (1) it did not include retirement income defendant claimed in tax year 2013 and (2) it used the wrong taxable wages figure from defendant's 2013 W-2. She relies on "Sources of Income" in Appendix IX-B of the Guidelines, specifically categories a. (wages, fees, tips, and commissions) and j. (distributions from government and private retirement plans). Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-B to R. 5:6A (2017) ("Appendix IX-B").

Appendix IX-B states that "gross income" only includes "that [which] is recurring or will increase the income available to the recipient over an extended period of time." One component of gross income is distributions from public and private retirement plans. Ibid. Here, the court excluded a $196,598 liquidation of defendant's 401K account and a $78,755 distribution from his IRA based on defendant's counsel's representation that these were one-time distributions used to pay counsel fees and other court-ordered

obligations.[3] Since this was not "recurring" income, the court excluded these amounts from gross income.[4]

With respect to defendant's 2013 taxable wages, the court found that his wages were $257,795, the amount stated in Box 1 of his W-2, instead of $274,595 (Box 5), which included $16,800 in deferred compensation. Because bullet point j. under "Sources of Income" states that gross income includes "deferred compensation," the court should have used the Box 5 amount and found that defendant's gross income was $274,595.

Next, plaintiff argues the court should have imputed a rate of return to the condo defendant owns in Margate. Defendant stated in a certification supporting his motion that the condo was "gifted" to him by his mother in December 2012, but nothing in the record indicates that the condo generates any rental income. His counsel represented that the condo is not an income-producing asset. We are not clear as to why plaintiff believes the condo should have been characterized as a rental income property when defendant does not earn inform from it and she takes the position

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[3] Defendant's reply certification did not explain the reasons for the IRA and 401K distributions.

[4] A different line in the worksheet accounts for mandatory retirement contributions. Appendix IX-B does not state, as plaintiff contends, that only mandatory contributions may be excluded from gross income. It simply directs courts to enter mandatory contributions on a different line on the worksheet.

that her $700,000 inheritance should not affect her financial status.

Appendix IX-B excludes "non-income producing assets" from gross income "unless the court finds that the intent of the investment was to avoid the payment of child support." There is no evidence in the record that defendant receives any income from the condo, and the court made no finding that defendant used the property to avoid paying child support. Accordingly, the Margate condo was properly excluded from defendant's gross income.

Finally, plaintiff argues the court should have imputed income to defendant based on his partnership interest in the Medford Village Country Club. This partnership is apparently the same entity as "Medford Associates," from which defendant received $1091 in partnership income that he reported on his 2013 federal return. The court included this income in defendant's gross income.

In sum, the only actual shortcoming in the judge's calculations was his failure to include $16,800 in deferred compensation in gross income. Thus the court erroneously calculated defendant's income as $282,986 instead of $299,786. This was not a guidelines case. The omission of $16,800 in annual income when nothing is known about plaintiff's inheritance does not alone warrant a remand for reconsideration. As we discuss

below, should plaintiff elect to fully and completely disclose her financial assets and liabilities as required by the court rules and caselaw, including her business income and the receipt and subsequent disposition of her inheritance, she has the right to file a motion for modification of child support. Should she elect to do so, she must attach a complete CIS. We assume, of course, that she would file such an application, and make such disclosures, only if she in good faith believed the difference between her actual financial situation and the judge's imputations were significantly different.

Plaintiff's principal complaint is that the court imputed income to her of $71,000 per year, which included $35,000 in investment income based on the $700,000 in inheritance that she did not deny receiving. The remaining $36,000 in income was the amount imputed to her in 2008 as her own earnings.

"When calculating child support payments, the court may impute income to a parent whose income cannot be determined." Ibrahim v. Aziz, 402 N.J. Super. 205, 210 (App. Div. 2008). Imputation is appropriate where, as here, a party fails "to provide adequate financial information." Tash v. Tash, 353 N.J. Super. 94, 99 (App. Div. 2002).

Imputation necessarily involves some guesswork. "Imputation of income is a discretionary matter not capable of precise or

exact determination but rather requiring a trial judge to realistically appraise capacity to earn and job availability." Storey v. Storey, 373 N.J. Super. 464, 474 (App. Div. 2004). The "decision to impute income of a specified amount will not be overturned unless the underlying findings are inconsistent with or unsupported by competent evidence." Id. at 474-55. Competent evidence includes "data on prevailing wages from sources subject to judicial notice[,]" ibid., or an average of past earnings, Elrom v. Elrom, 439 N.J. Super. 424, 437-38 (App. Div. 2015).

Here, it was appropriate to impute income to plaintiff, as her financial disclosure was incomplete. The parties were ordered to produce 2013 tax returns, W-2s and 1099s, and a list of income-producing assets. Plaintiff produced no pay stubs or W-2s, even though her April 2014 CIS stated that she was self-employed and had current gross income of $360 per week. Nor did she disclose the balances of the investment accounts she inherited from her mother. The court calculated that the $700,000 inheritance would yield a five percent rate of return. This imputation of income also seems reasonable.

The court's decision to impute $36,000 in primary income to plaintiff was also supported by the fact that she was spending at least $20,000 in child care costs. This would suggest that she earned significantly more than $36,000. We are not clear as to

the reason the child would require such substantial child care costs given her age.

Because this family has total net income exceeding the maximum amount accounted for by the Child Support Guidelines, a special analysis applies. Under the Guidelines, when the parents' combined net income exceeds $187,200:

> the court shall apply the guidelines up to $187,200 and supplement the guidelines-based award with a discretionary amount based on the remaining family income (i.e., income in excess of $187,200) and the factors specified in N.J.S.A. 2A:34-23. Thus, the maximum guidelines award in Appendix IX-F [$571/week] represents the minimum award for families with net incomes of more than $187,200 per year.
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> [Pressler & Verniero, supra, Appendix IX-A to R. 5:6A ¶ 20(b) ("Appendix IX-A"); see also Caplan v. Caplan, 182 N.J. 250, 266 (2005).]

Thus for purposes of setting the child support in this case, it does not matter whether defendant's true earnings were $257,795 or $274,595. Either way, the parties' combined net income exceeded $187,200, such that support had to be at least $571 per week, with the supplemental amount to be determined by applying the statutory factors. Therefore, while the judge erred in saying that the guidelines figure was "somewhere in the 400 to 450 range," he nonetheless correctly applied the N.J.S.A. 2A:34-23(a) factors.

Since the judge did not have plaintiff's complete financial information, his analysis of the third and fourth factors, "all

sources of income and assets of each parent" and "earning ability of each parent . . ." was necessarily impaired. See N.J.S.A. 2A:34-23(a)(3), (4). Certainly, the failure to include $16,800 in deferred compensation in defendant's income is less problematic, as it is doubtful this would have affected the judge's finding that defendant "does have significant income."

While judges exercise discretion when calculating the amount of supplemental support, Caplan, supra, 182 N.J. at 272, an abuse of discretion occurs when the award is "contrary to the evidence." Isaacson, supra, 348 N.J. Super. at 589 (citing Raynor v. Raynor, 319 N.J. Super. 591, 605 (App. Div. 1999)). The award was not contrary to the evidence.

We reiterate that plaintiff has the option of providing a full and complete disclosure not only of her earnings but of the amount of inheritance that she received, beginning from the date of receipt to the time of any application. The child's needs are to be amplified, which they were not here. Because plaintiff did not provide complete information, even regarding the child's needs, the judge lacked the opportunity to include them in the balance, an important factor in setting child support for the families of high income parents. See Strahan v. Strahan, 402 N.J. Super. 298, 307 (App. Div. 2008).

Plaintiff contends the judge erred in employing November 20, 2013 as the effective date for the reduction in child support. That he did so did not violate N.J.S.A. 2A:17-56.23a. The statute allows for retroactive reduction "with respect to the period during which there is a pending application for modification, but only from the date the notice of motion was mailed. . . ." Ibid. If the motion is not filed within forty-five days after notice is sent, modification is permitted "only from the date the motion is filed with the court." Ibid.

Here, defendant's counsel sent plaintiff's counsel a letter on November 20, 2013, stating that defendant would file a motion to modify child support within forty-five days. Forty-five calendar days from November 20, 2013 was January 4, 2014, a Saturday. Defendant filed his motion on January 6, 2014, a Monday. Since the forty-fifth day after November 20 fell on a Saturday, the court correctly treated defendant's filing as being within the forty-five-day period, as he filed his motion on the next business day after January 4. See R. 1:3-1. We do not agree with plaintiff that the judge's child support decisions were erroneous.

Plaintiff also claims that the judge erroneously apportioned child care costs. Her appeal is out of time on that point. R. 2:4-1(a).

IX.

Plaintiff also appeals from the June 16, 2014 order restraining her from using the surname "Colontonio-Penza" for the child. She argues that the court erred in requiring her to meet the burden for a name change established by Emma v. Evans, 215 N.J. 197 (2013), as she did not make a formal application. Alternatively, she argues that she did satisfy her burden under Emma.

Emma held that a parent seeking to change a child's birth surname must show by "a preponderance of the evidence that the name change is in the child's best interest." Id. at 222. The best-interest analysis is fact-sensitive, and courts should "not give weight to any interests that are unsupported by evidence in the record." Ibid. In evaluating whether the name change is in the child's best interest, courts consider this non-exhaustive list of factors:

> (1) The length of time the child has used her given surname. (2) Identification of the child with a particular family unit. (3) Potential anxiety, embarrassment, or discomfort that may result from having a different surname from that of the custodial parent. (4) The child's preference if she is mature enough to express a preference. (5) Parental misconduct or neglect, such as failure to provide support or maintain contact with the child. (6) Degree of community respect, or lack thereof, associated with either paternal or maternal name. (7) Improper motivation on the part of

> the parent seeking the name change. (8) Whether the mother has changed or intends to change her name upon remarriage. (9) Whether the child has a strong relationship with any siblings with different names. (10) Whether the surname has important ties to family heritage or ethnic identity. (11) The effect of a name change on the relationship between the child and each parent.
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> [Id. at 222-23.]

The court appropriately held plaintiff to this burden. She unilaterally changed the child's name on her school registration. Plaintiff cannot have it both ways: if she wishes to use a different name, she must first make an application pursuant to Emma. Because she did not do so, the court was justified in ordering her to only use the child's legal name.

Although plaintiff now argues she meets her burden under Emma, her argument is supported only by assertions in her brief which she apparently did not make to the trial court. See id. at 222 (courts should not give any weight to interests unsupported by record evidence); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (appellate courts should not consider issues not presented to the trial court). Plaintiff has the right to present her arguments to the trial court in a formal application under Emma. She does not have the right to change the child's name in the absence of such an application.

Affirmed, except that should plaintiff elect to document her receipt of her inheritance, and track the disposition of the funds since that date, she may file a motion for the court to revisit child support. Such an application requires full and complete financial disclosure called for by the rules on the part of both parties.