SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4616-14T2

DARYL LYNCH,

Plaintiff-Respondent,

v.

JENIFER LYNCH,

Defendant-Appellant.

Submitted November 9, 2016 – Decided April 7, 2017

Before Judges Suter and Guadagno.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FM-08-0727-14.

Jenifer Lynch, appellant pro se.

Smedley & Lis, L.L.C., attorneys for respondent (Mary Cay Trace, on the brief).

PER CURIAM

Defendant Jenifer Lynch appeals an order dated April 25, 2015, which reduced the amount of child support paid by plaintiff, Daryl Lynch, her former husband. We reverse and remand for further proceedings consistent with this opinion.

Defendant and plaintiff were divorced after marrying in 1995 and again in 2003. The parties entered into a Property Settlement Agreement (PSA) in October 2010, which was incorporated into their November 2011 Final Judgment of Divorce. The parties have three children, all of whom were minors in 2015.

Under the PSA, the parties shared joint legal custody of the children, and defendant was the parent of primary residence. Plaintiff had parenting time with the children, including certain overnights.

Plaintiff paid defendant child support of $2400 per month, which was inclusive of "any possible daycare costs, lessons and/or the children's other expenses." The New Jersey Child Support Guidelines (Guidelines) were not used to calculate child support. The PSA's agreed-upon child support exceeded a Guidelines-based calculation.

The PSA made provision for the termination of child support upon any of five enumerated events including the death of the wife, husband or child or a child's marriage or entry into the military. It also made provision for changes in child support, setting forth that if there were issues about "desired changes in

the amount or duration of child support," then the parties were to submit to mediation[1] before "resorting to other action."[2]

Under the PSA, plaintiff agreed to provide health insurance for the children. He was entitled to take the children as deductions on his taxes. The parties each agreed to contribute equally to the children's post-secondary education costs and expenses. Defendant received $1020 per month in alimony, but that would stop when the youngest child reached eighteen, she or her ex-husband died or she remarried. The PSA provided for equitable distribution.

In February 2015, defendant filed a post-judgment motion requesting sole custody of the children because by that time, parenting time with plaintiff was no longer exercised. Defendant also sought an increase in child support to reflect her request to change custody, and the enforcement of litigant's rights, requiring plaintiff to pay the cost of the children's reunification therapy.

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[1] Neither party asked for mediation nor objected to the fact it was not utilized here.

[2] Under the PSA, when a child reached age eighteen, child support was reduced by $800 per month. When the youngest child reached eighteen, child support would no longer be paid. However, as each child reached eighteen, plaintiff was to pay $800 per month into a separate account for the child until age twenty-four, but only if the child lived at home and was in college full time. Otherwise, he had no such obligation.

Plaintiff filed opposition and a cross-motion asking to modify child support, and for other relief not part of this appeal. Plaintiff noted that he no longer had overnight visitation with his children, defendant was not incurring any daycare costs and he had not been advised about any "lesson costs or 'other expenses'" the children might be incurring. In her opposition to the cross-motion, defendant requested a cost of living increase in the child support because the amount had been the same for four years, and she reiterated further support for her motion.

On March 27, 2015, the motion judge denied defendant's motion for sole custody, but reserved on her motion for an increase in child support, ordering the parties to submit updated financial information, and relisting that issue for April 24, 2015.[3] The judge did issue a tentative decision on March 27, 2015, however, that proposed to recalculate child support using the Guidelines, and included a draft worksheet, which reflected child support of $314 per week.[4]

On April 24, 2015, the court issued an order that reduced child support to $294 per week. When calculated monthly, this was

[3] Defendant did not appeal the March 27, 2015 order.

[4] There is no indication in the record that either party accepted the tentative decision.

about half of the $2400 per month included in the PSA.[5] The court found there was a substantial change in circumstances because plaintiff no longer had overnight visitation with the children and now incurred a cost for their health insurance. In the Guidelines-based calculation, the court used plaintiff's 2014 income, which had increased from $91,844 in 2012 to $122,322, and imputed income to defendant of $335 per week.[6] He also included in the worksheet plaintiff's mandatory retirement contribution, alimony obligation and health care premium payment. When defendant stated that this was half of the child support called for in the PSA, the judge said "[y]ou two may have agreed to an off-[G]uideline amount in your divorce but that's off the table now." He stated that he was required to follow the Guidelines and this amount reflected the Guidelines-based calculation. The judge characterized as "equitable arguments" defendant's testimony that she had stayed home with the children during the marriage while her husband obtained his education, and that the child support under the Guidelines would not be enough for three children.

[5] Multiplying $294 per week by 4.3 weeks to reflect a monthly figure yields $1264.20 per month.

[6] Although this was imputed income, defendant testified the income was "exactly right" because she made $15,000 per year.

Defendant appealed the April 24, 2015 order, contending that the trial court erred in ordering a reduction in child support given the increase in plaintiff's salary, the increase in the children's expenses, the prior level of child support, and the lack of a cost of living increase. She asserts the reduction places the children in "severe financial distress." Defendant argues for the first time on appeal that the PSA listed only five reasons to reduce child support, and plaintiff's obligation to pay health insurance was not among them.

Plaintiff responds that the reduction in child support conformed with the Guidelines. Noting that there had been a change in circumstances, plaintiff contends the parties contemplated there would be changes in child support because Article II, § 2.4 of the PSA made reference to changes in "amount or duration" of child support and that such disputes could be submitted to mediation. Plaintiff contends that requests to modify child support did not require a showing of changed circumstances. In any event, plaintiff argues defendant failed to show any reason to deviate from the Guidelines. Defendant had "no barrier" to her ability to work because the children now were older, plaintiff had no parenting time, he must pay for the children's health insurance,

the children did not need daycare and defendant did not submit any information about the children's expenses.[7]

The issue on appeal is whether the trial court erred in ordering a reduction in child support to conform with the Guidelines where there were changed circumstances, even though the parents previously had agreed in their PSA to an amount of child support that exceeded the Guidelines-based amount.

Generally, we "defer to the factual findings of the trial court," N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008), in recognition of the "family courts' special jurisdiction and expertise in family matters." N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). However, "[a] trial court's interpretation of the law and the legal consequences that

[7] In a separate motion that we reserved to hear in connection with this appeal, plaintiff contends defendant's brief and appendix failed to comply with the Rules by including documents that were not before the trial court and by making new arguments. Based on these alleged errors, plaintiff has asked to dismiss defendant's appeal or, in the alternative, to strike the new submissions and arguments from this record. This application was opposed by defendant, who alleges she was responding to allegations plaintiff made in his appellate brief. She asks that plaintiff's opposing brief be dismissed because it disclosed her personal identifying information. In light of our opinion reversing and remanding this matter to the trial court, we deny both motions, but instruct the parties that any future submissions should conform with the Rules by redacting personal identifying information in conformity with those Rules.

flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (citations omitted).

"A settlement agreement is governed by basic contract principles." Quinn v. Quinn, 225 N.J. 34, 45 (2016) (citing J.B. v. W.B., 215 N.J. 305, 326 (2013)). In interpreting and enforcing a settlement agreement, a court is to "discern and implement the intentions of the parties." Ibid. (citation omitted). "Agreements between separated spouses executed voluntarily and understandingly for the purpose of settling the issue of [alimony and child support] are specifically enforceable, but only to the extent that they are just and equitable." Id. at 48 (alteration in original) (quoting Berkowitz v. Berkowitz, 55 N.J. 564, 569 (1970)). An agreement will not be enforced if it was the product of "unconscionability, fraud or overreaching in the negotiations of the settlement[.]" Id. at 47 (alteration in original) (quoting Miller v. Miller, 160 N.J. 408, 419 (1999)).

In a post-judgment matrimonial matter, a court can modify an agreement for alimony or child support where there is a showing of changed circumstances. Id. at 49 (citing Berkowitz, supra, 55 N.J. at 569). See Lepis v. Lepis, 83 N.J. 139, 146 (1980); N.J.S.A. 2A:34-23(a). Changed circumstances in the context of an application to modify child support requires an "examination of

the child's needs and the relative abilities of the spouses to supply them." Lepis, supra, 83 N.J. at 152. "When children are involved, an increase in their needs — whether occasioned by maturation, the rising cost of living, or more unusual events — has been held to justify an increase in support by a financially able parent[.]" Id. at 151 (citations omitted). The changed circumstances need not have been "unforeseeable" at the time of the parties' divorce. Id. at 152.

We agree with the trial court there was a change in circumstances that warranted a review of the amount of child support. Plaintiff's salary had increased and overnights with the children were not being exercised. Plaintiff now had to pay for the children's health insurance, where previously this was paid for by his employer.

However, we reject plaintiff's interpretation of the PSA that would permit an application to modify child support without showing changed circumstances. Section 2.4 of the PSA only addressed when an application could be made; it said nothing about the grounds upon which to make an application. There is nothing in the PSA indicating the parties rejected the standard that an application to modify child support must first show a change in circumstances that would warrant a modification.

Similarly, we disagree with defendant's assertion that child support under the PSA could only be terminated and not modified. Section 2.4 of the PSA shows the parties contemplated "changes" to child support.

We agree with the trial court that, as an initial matter, it was required to use the Guidelines to calculate a Guidelines-based amount of child support. However, that was the beginning of the analysis, not the end.

The "[G]uidelines must be used as a rebuttable presumption to establish and modify all child support orders." Pressler & Verniero, Current N.J. Court Rules, Appendix IX-A "Considerations In Use of Child Support Guidelines" (Appendix IX-A), subpart 2 (2017). They "must be applied in all actions, contested and uncontested, in which child support is being determined." Ibid. A judge should consider the Guidelines when modifying child support, even where the amount of child support was agreed to in the parties' property settlement agreement. See Italiano v. Rudkin, 294 N.J. Super. 502, 506-07 (App. Div. 1996) (remanding for consideration of the Guidelines where there had been changed circumstances, and the support amount was set forth in a property settlement agreement).

Under the Rules, "[a] rebuttable presumption means that an award based on the [G]uidelines is assumed to be the correct amount

of child support unless a party proves to the court that circumstances exist that make a [G]uidelines-based award inappropriate in a specific case." Appendix IX-A, subpart 2 (emphasis omitted). See Ordukaya v. Brown, 357 N.J. Super. 231, 239 (App. Div. 2003). The Guidelines-based award can be disregarded or that amount "adjusted" where the court finds the child support amount conflicts with certain enumerated rules, or "due to the fact that an injustice would result due to the application of the [G]uidelines in a specific case." Appendix IX-A, subpart 2. Thus, under the Guidelines, the trial court is to determine "whether good cause exists to disregard or adjust a [G]uidelines-based award in a particular case." Ibid. (emphasis omitted).

"If the court finds that the [G]uidelines are inappropriate in a specific case" and either disregards the calculation or modifies it, "the reason for the deviation and the amount of the [G]uidelines-based award . . . must be specified in writing." Id., subpart 3. See Ordukaya, supra, 357 N.J. Super. at 239. Then, in that case, the trial court "should consider the factors set forth in N.J.S.A. 2A:34-23 or N.J.S.A. 9:17-53 when establishing the child support award." Appendix IX-A, subpart 3.

Any deviation or modification must be in the best interests of the children. Ordukaya, supra, 357 N.J. Super. at 239. "It

is a fundamental princip[le] of the Family Division that the right to child support belongs to the child or children, not to the custodial parent." Id. at 241 (quoting Monmouth Cty. Div. of Soc. Servs. for D.M. v. G.D.M., 308 N.J. Super. 83, 95 (Ch. Div. 1997)).

There was no error in the manner that the Guidelines-based child support was calculated and, indeed, no one argues that information was included in the sole parenting worksheet that should not have been, or that the worksheet excluded information that should have been included. Defendant agreed that her imputed salary was accurate. The plaintiff's income was based on his 2014 tax return. The Guidelines-based calculation also appropriately included the alimony payment and contributions toward pension and health insurance.

However, the trial court erred in not considering whether defendant had shown good cause to deviate from the Guidelines-based award. "Good cause shall consist of a) the considerations set forth in Appendix IX-A, or the presence of other relevant factors which may make the [G]uidelines inapplicable or subject to modification, and b) the fact that injustice would result from the application of the [G]uidelines." R. 5:6A. Determining the existence of good cause is "within the sound discretion of the court." Ribner v. Ribner, 290 N.J. Super. 66, 73-74 (App. Div. 1996).

In cases where the amount of child support deviated from the Guidelines because of an agreement between the parties, we have made clear the Guidelines must be considered. If a deviation is ordered, it must be explained in writing, taking into consideration the factors in N.J.S.A. 2A:34-23(a) and the best interests of the children.

In Chobot v. Chobot, 224 N.J. Super. 648, 651 (App. Div. 1988), defendant signed a divorce agreement without the advice of counsel. She later sought an increase in child support based on changed circumstances. The Guidelines-based support was more than the parties had agreed to in their PSA. We held the Guidelines applied to motions to increase child support. Id. at 654. We also agreed that the trial court "properly reviewed the current circumstances of the parties according to the Guidelines, despite a prior agreement. Plaintiff had no vested contract right which might defeat his obligation to meet the needs of his dependents." Ibid.

In Ordukaya, supra, 357 N.J. Super. at 232, the parties agreed to child support that was below the Guidelines-based figure and incorporated that amount into their Judgment of Divorce. We reversed the trial court's denial of a motion to increase child support. Ibid. Although noting that the moving party may have "compromised support for her children" to avoid a challenge when

she moved the children out of state, we held that "the parties failed to comply with [Rule 5:6A], the judge did not consider the [G]uidelines nor whether the best interests of the children were served by deviating from the [G]uidelines." Id. at 241. We remanded for a hearing on the enforceability of that provision of the settlement agreement. Id. at 242.

In Winterberg v. Lupo, 300 N.J. Super. 125 (App. Div. 1997), we reversed a trial court's order that set child support below the Guidelines-based amount because "the judge did not make specific findings that would explain why the Guidelines were disregarded. . . . Nor did he consider and apply N.J.S.A. 2A:34-23." Id. at 132. Although that case involved a change in custody, we held that "[t]he motion judge was required to resolve the gross and net income dispute, determine the appropriate support level based on the Guidelines and the statutory factors enumerated in N.J.S.A. 2A:34-23, and then, based on those findings, explain why the order deviated from the Guidelines." Ibid.

In the present appeal, the parties agreed to child support in their PSA that was above the Guidelines-based amount. We observed in Chobot "that a finding that child support as agreed upon was inadequate when compared with the [G]uidelines is distinguishable from a finding that agreed upon child support exceeds the [G]uidelines. We do not suggest that the same

principles there apply." Chobot, supra, 224 N.J. Super. at 650 n.1.

Although we have not addressed the issue, in a Chancery case, Musico v. Musico, 426 N.J. Super. 276 (Ch. Div. 2012), the parties' agreement made "express reference" to the Guidelines-based calculation and then added "the cost of plaintiff's health insurance" to the Guidelines' figure "to create an aggregate above-[G]uideline obligation." Id. at 290. The defendant father then sought a modification based upon increased parenting time, arguing that his obligation should automatically reset to the Guideline level. Id. at 281. The court determined there was "no equitable basis to void defendant's prior commitment to pay above-[G]uideline support." Id. at 291. The court noted "the main problem with defendant's contention [that the changed circumstance should automatically cause a decrease to the level of the Guidelines] is that there are many changes of circumstances which do not in any way equitably require a decrease in child support at all." Id. at 293. The trial court in Musico observed that a court must do more than simply "apply a rote formula." Id. at 294.[8]

[8] The Musico court also distinguished its facts from the "all-too-common occurrence" where the PSA does not reference the Guidelines, as in this case. "In such cases, it is difficult for a reviewing

> [W]hen parties have previously and knowingly entered into an above-[G]uideline child support agreement, and when there is a subsequent change of circumstances warranting a child support review, the [G]uidelines must initially be applied. However, the support analysis does not automatically end with the [G]uidelines alone. Rather, the prior agreement and present status quo may serve as additional equitable factors for the court to consider in determining a new child support figure, which may remain above the [G]uidelines as equity requires.
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> [Id. at 279.]

Here, the trial court did not consider whether defendant showed good cause for a deviation from the Guidelines, evaluate the nature of the change in circumstances or the equitable factors that defendant articulated, consider the factors set forth in N.J.S.A. 2A:34-23(a) or the child support amount agreed upon in the PSA. The PSA's child support figure was almost double the Guidelines-based figure. Although the PSA did not explain why the parties agreed on $2400 per month, the PSA expressly provided it was to take into consideration daycare and other expenses. That day care was no longer an issue did not mean there were no other expenses. Further, two of the three "changed circumstances" financially favored plaintiff. His salary had increased and the

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court to determine informed consent and whether the parties exceeded [G]uidelines intentionally or accidentally by picking a child support figure out of the air." Id. at 291.

overnights were not being exercised. The court then entered the child support order without an updated Case Information Statement from defendant that would have showed the children's current expenses. The trial court should have considered these factors to determine whether defendant showed good cause in light of the PSA to maintain the amount of child support above the Guidelines.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.