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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5421-14T3

JOLANDA T. WILLIAMS,

Plaintiff-Respondent,

v.

RICHARD MCCLOUD,

Defendant-Appellant.

Argued November 15, 2016 – Decided April 21, 2017

Before Judges Espinosa, Suter, and Guadagno.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FD-07-0335-13.

Howard B. Felcher argued the cause for appellant (Law Offices of Howard B. Felcher, PLLC, attorneys; Mr. Felcher and Sydney S. McQuade, on the briefs).

Jolanda T. Williams, respondent, argued the cause pro se.

PER CURIAM

Defendant Richard McCloud appeals from portions of a Family part order entered June 22, 2015. We affirm in part, reverse in part, and remand the matter for further proceedings.

The facts are not disputed. The parties, who never married, had one child in 2011 and separated in 2012. After mediation, the parties consented to the entry of an order on August 13, 2012, whereby they agreed to share joint legal custody of the child with plaintiff as the parent of primary residence. The order provided a schedule of defendant's parenting time but did not address child support.

In 2013, plaintiff sought child support. The parties appeared before a hearing officer on June 5, 2013, and thereafter executed another consent order whereby defendant agreed to pay plaintiff $213 per week in child support based on gross weekly incomes of $2191 for plaintiff and $3292 for defendant.

In March 2013, defendant's mother, Angeline McCloud, died. Prior to her death, Angeline had custody of defendant's nephew, H.B. After Angeline's death, H.B. moved in with defendant. On August 22, 2013, H.B.'s parents signed a Family Part consent order awarding sole legal and physical custody of H.B. to defendant. H.B. was seventeen at the time.

In 2014, plaintiff sought an increase in child support. After attempts to resolve the matter failed, defendant filed a cross-motion seeking additional parenting time and a reduction of his child support obligation based on changed circumstances.

Specifically, defendant sought an other-dependent deduction based on his obligation to support H.B.

After hearing oral argument, the motion judge denied defendant's request for increased parenting time and granted plaintiff's motion for an increase in child support. The judge rejected defendant's claim to an other-dependent deduction because defendant was not legally obligated to provide support for H.B.

On appeal, defendant challenges the judge's failure to conduct a plenary hearing on his motion for increased parenting time; the judge's failure to credit him with an "other dependent deduction" for his nephew; the judge's calculation of the parties' combined net income; and the award of counsel fees to plaintiff.

"The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). "Because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court fact[-]finding." Id. at 413. But if a judge makes a discretionary decision under a misconception of the applicable law, the appellate court need

not give the usual deference. State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966). The court, instead, must adjudicate the controversy in light of the applicable law to avoid a manifest denial of justice. Ibid.

In denying defendant's claim to an other-dependent deduction, the judge relied on our decision in A.N. ex rel. S.N. v. S.M., 333 N.J. Super. 566 (App. Div.), certif. denied, 166 N.J. 606 (2000). We find A.N. distinguishable and the judge's reliance on it misplaced.

In A.N., a maternal grandmother sued the paternal grandfather for support of his minor son's child. Id. at 569. The child and the minor mother lived with the grandmother. Id. at 571. We noted that generally, a grandparent has no legal obligation to support a grandchild, but there were "exceptions when the grandparent obtains legal custody or guardianship or where the grandparent otherwise acts in loco parentis." Id. at 572. Because the grandfather placed limitations on his son's ability to earn income and support the child, we remanded with instructions that the grandfather would pay the difference between his son's imputed income and the amount his son could pay. Id. at 577-78.

The other-dependent deduction contained in the Child Support Guidelines is "a mechanism to apportion a parent's

income to all of his or her legal dependents regardless of the timing of their birth or family association[.]" Child Support Guidelines, Pressler and Verniero, Current N.J. Court Rules, Appendix IX-A ¶10(a) to Rule 5:6A at www.gannlaw.com (2017).

> Legal dependents include adopted or natural children of either parent who are less than 18 years of age or more than 18 years of age and still attending high school or other secondary school. Stepchildren are not considered legal dependents unless a court has found that the stepparent has a legal responsibility for the stepchildren.
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> [Ibid.]

Here, the judge simply concluded without any analysis or explanation, that defendant had no obligation to support H.B. and was thus not entitled to the other-dependent deduction. While the entry of the August 22, 2013 order did not contain a provision addressing support, defendant assumed the status of in loco parentis once H.B.'s biological parents consented to the transfer of legal and physical custody of H.B. to him. A person in loco parentis may be obligated by equitable estoppel from disclaiming a previously assumed support obligation. See Miller v. Miller, 97 N.J. 154, 167 (1984).

In Miller, the mother of two children divorced the children's father and remarried. Id. at 158. During the mother's second marriage, her second husband assumed sole

responsibility for the children's financial support. Id. at 158-59. After seven years, the second marriage ended in divorce and the mother sought child support from her second husband. Id. at 158.

The Court held that where a stepparent affirmatively encouraged a child to rely and depend on the stepparent for financial support, the stepparent would be equitably estopped to deny his duty to continue to provide child support on behalf of his stepchildren, if it could be shown that the children would suffer financial harm if the stepparent were permitted to repudiate the parental obligations he had assumed. Id. at 169-70.

The Miller Court distinguished in loco parentis status from natural parenthood or adoption and noted it existed "only so long as the parties thereto, namely the surrogate parent and/or the child, desire that it exist." Id. at 162 (citation omitted). In Miller, there was no court order transferring custody of the children to the second husband.[1] Here, had defendant's voluntary agreement to support H.B. been memorialized in the August 22, 2013 order, H.B. could have been considered a legal dependent.

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[1] The second husband attempted to adopt the children, but their biological father refused to consent. Id. at 160.

We are compelled to remand to the Family Part for a determination whether defendant has a "legal responsibility" to support H.B. as H.B.'s stepparent, as a consequence of the August 22, 2013 order, and if so, whether defendant is entitled to an other-dependent deduction.

Next, we turn to defendant's contention that the judge erred in awarding counsel fees to plaintiff. In awarding plaintiff $4000 of the $4300 in counsel fees she sought, the judge found defendant had a significantly greater income and ability to pay, and "was less than forthcoming in providing evidence to [the motion judge] of his wages, bonus pay, and stock options, which resulted in further additional delay . . . of the proceedings."

Our review here is limited as an award of counsel fees in a family action rests in the sound discretion of the trial court. R. 4:42-9(a)(1); R. 5:3-5(c). Such exercise of discretion will not be disturbed in the absence of a showing of abuse. Berkowitz v. Berkowitz, 55 N.J. 564, 570 (1970). Nothing in the record suggests that we should disturb this award.

The remainder of defendant's arguments lack sufficient merit to warrant further discussion in our opinion. R. 2:11-3(e)(1)(E). With the exception of the counsel fee award, the June 22, 2015 order is vacated and the matter is remanded for

proceedings consistent with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION