

**RECORD IMPOUNDED**

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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0780-16T4

O.R.N.,

Plaintiff-Respondent,

v.

M.D.B.,

Defendant-Appellant.

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Argued February 14, 2018 – Decided March 6, 2018

Before Judges Koblitz and Manahan.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Middlesex  
County, Docket No. FV-12-0422-05.

Rajeh A. Saadeh argued the cause for appellant  
(The Law Office of Rajeh A. Saadeh, LLC,  
attorneys; Rajeh A. Saadeh and Amanda E.  
Rasheed, on the briefs).

Patricia Garity Smits argued the cause for  
respondent.

PER CURIAM

Defendant M.D.B. appeals from a trial court order awarding  
counsel fees and costs to plaintiff, O.R.N. We affirm.

The history of dispute between these parties is set forth in detail in our prior opinion and need not be restated herein. O.R.N. v. Bah, No. A-4566-13 (App. Div. Dec. 23, 2015).

In December 2015, we reversed the trial court's May 1, 2014 order awarding a retroactive reduction in child support and counsel fees to plaintiff. In light of the potential relief afforded by N.J.S.A. 2A:17-56.23a, we remanded the matter for a determination of when plaintiff filed a motion for a reduction of child support and for a statement of reasons for the counsel fee award. On remand, the trial court entered an order awarding counsel fees against defendant, along with a statement of reasons. Defendant appealed.

On appeal, defendant raises the following arguments:

POINT I<sup>1</sup>

THE SUA SPONTE ORDER OF SEPTEMBER 14, 2016,  
MUST BE REVERSED. [NOT RAISED BELOW.]

POINT II

THE MATTER SHOULD BE REMANDED TO A DIFFERENT  
JUDGE IN BURLINGTON COUNTY. [NOT RAISED  
BELOW.]

The only issue before us pertains to the counsel fee award. All other matters in dispute between the parties, not addressed

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<sup>1</sup> Defendant's brief indicates that she did not have the opportunity to raise Point I and Point II before the trial court.

on appeal, remain with the Family Part. The trial court's initial award of counsel fees in May 2014 was due to defendant's noncompliance with the court order providing for discovery. As we noted in our prior decision, it is without dispute that defendant failed to comply with the October 4, 2013 court order, which required defendant to show proof of income and work-related childcare expenses. We discern no error in the court's determination that the award of counsel fees based upon defendant's conduct was an appropriate sanction. The powers of the trial courts are "broad enough to comprehend the use of any reasonably appropriate and effective procedures designed to enforce Chancery Division judgments or orders . . . ." Lathrop v. Lathrop, 57 N.J. Super. 532, 539 (App. Div. 1959).

Pursuant to Rule 4:42-9(a)(1), "[i]n a family action, a fee allowance both pendent lite and on final determination may be made pursuant to [Rule] 5:3-5(c)." See Gotlib v. Gotlib, 399 N.J. Super. 295, 314 (App. Div. 2008). In determining the fee award, the judge must address the factors set forth in Rule 5:3-5(c):

- (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.

As noted by our Supreme Court, "[b]ecause it is fundamental to the fairness of the proceedings and serves as a necessary predicate to meaningful review . . . '[the] trial court must analyze the [relevant] factors in determining an award of reasonable counsel fees and then must state its reasons on the record for awarding a particular fee.'" R.M. v. Supreme Court of N.J., 190 N.J. 1, 12 (2007) (quoting Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004) (citing Rule 1:7-4(a)) (requiring the trial court to "find the facts and state its conclusions of law thereon in all actions tried without a jury"))).

Here, in reaching the determination of the quantum of counsel fees, the judge made the following findings:

The [p]laintiff seeks an award of counsel fees. In making an award of attorneys' fees the [c]ourt is guided by the provisions of N.J. R. 5:3-5(c). The factors the [c]ourt must consider are as follows:

a. The financial circumstances of the parties.

The [p]laintiff is employed as a medical doctor. The [d]efendant has represented to the [c]ourt in her motion filed in July 2014 that she was unemployed. It is unknown as

of this date if her employment status remains unchanged.

b. The ability of the parties to pay their own fees or to contribute to the fees of the other party. Both parties have the means and the ability to pay their own counsel fees as well as the counsel fees incurred by the other party.

c. The reasonableness and good faith of the positions advanced by the parties both during and prior to trial.

The [p]laintiff has acted in good faith by complying with all the requests of the [c]ourt. The [d]efendant has failed to produce discovery and has repeatedly failed to comply with the [c]ourt[']s [o]rders.

d. The extent of the fees incurred by both parties.

The [p]laintiff has incurred legal fees of over \$60,000[] at the trial level during the three years Ms. Smits has represented him. The [d]efendant's legal fees are unknown.

e. Any fees previously awarded.

The [c]ourt awarded all counsel fees and costs associated with the August 2, 2013 motion as well as the appearance and travel to [c]ourt on February 20, 2014.

f. The amount of fees previously paid to counsel by each party.

The [p]laintiff has not paid any counsel fees in connection with the fees awarded in this [o]rder. It is unknown what the [p]laintiff has paid his counsel with regard to the other legal fees incurred. It is unknown what the [d]efendant has paid her counsel.

g. The results obtained.

The [p]laintiff has acted in good faith by complying with all the requests of the [c]ourt. The [d]efendant has failed to produce discovery and failed to comply with [c]ourt [o]rders.

h. The degree to which fees were incurred to enforce existing orders or to compel discovery.

The [p]laintiff's legal fees incurred were as a direct result of the [d]efendant failing to comply with discovery.

i. Any other factor bearing on the fairness of the award.

The [c]ourt finds the [d]efendant repeatedly failed to comply with the [c]ourt[']s [o]rder for discovery. A factor to the extent that the [c]ourt had to draw an adverse inference from her failure to comply. Further, the [d]efendant had repeatedly appeared late and engaged the services of numerous attorney's late in the proceedings causing adjournments and delays.

Further, in his statement of reasons, the judge  
stated:

The [p]laintiff seeks an award of counsel fees. In making an award of attorneys' fees the [c]ourt is guided by the provisions of [ ] R.P.C. 1.5(a). There are factors that the [c]ourt will evaluate in determining the reasonableness of a fee[, which] include the following:

1. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.

The [p]laintiff's motion was worked on for a total of 18.65 billable hours by Patricia Garity Smits, Esq. Ms. Smits, Esq. has deducted 4.35 billable hours from her actual time spent charging for 14.3 billable hours. In addition, the [sic] Ms. Smits, Esq. spent an additional two billable hours in preparing her updated Certification that she has not billed her client. The motion filed by the [p]laintiff was for the [d]efendant to comply with discovery.

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

Not applicable.

3. The fee customarily charged in the locality for similar legal services.

Ms. Smits, Esq. bills at a rate of \$395[] per hour. The legal fees charged by her are the norm charged by other attorneys within the same

area and possessing similar background, training and professional experience.

4. The amount involved and the results obtained.

The [p]laintiff has acted in good faith by complying with all the requests of the [c]ourt. The [d]efendant has failed to produce discovery and her non-compliance with the [c]ourt [o]rders was a direct cause of the [p]laintiff's counsel fees that the [c]ourt has awarded. The result obtained was a dismissal of the [d]efendant's application and the granting of some of the [p]laintiff's relief. The [c]ourt now awards the [p]laintiff counsel fees.

5. The time limitation imposed by the client or by the circumstances.

Not applicable.

6. The nature and length of the professional relationship with the client.

Ms. Smits, Esq. has represented the [p]laintiff for three years.

7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

Ms. Smits, Esq. was admitted to the New Jersey Bar in 1978 and she is also a member of the Florida Bar. Her practice is limited to Family Law. She is a New Jersey Supreme Court [c]ertified [m]atrimonial [a]ttorney and was selected among



the first group of attorneys to be certified. She is also a trained mediator and has completed training as a [c]ollaborative lawyer. She is a trained [attorney in] arbitration of family matters conducted by the American Academy of Matrimonial Lawyers [AAML]. She served as a [j]udicial [l]aw [c]lerk for the Honorable Donald G. Collester, Jr. from 1978-[ ]79. She has worked as an associate with a firm in Somerville, New Jersey and with Schenck, Price, Smith & King. She was an equity party a Schenck, Price, Smith & King from 1984-[ ]93, when she established a firm. Ms. Smits, Esq. actively participates in numerous national, state, and local activities related to family law.

8. Whether the fee is contingent or fixed.

Ms. Smits, Esq. works at a fixed hourly rate of \$395[ ]. It is not contingent or flat.

After a review of the [p]laintiff's counsel fees, the [c]ourt has found the fees to be necessary for the [d]efendant's non-compliance in this matter. The [d]efendant's current counsel opposes the [p]laintiff's request for attorney fees by letter dated August 12, 2016, until the conclusion of discovery and if necessary a plenary hearing to decide the [p]laintiff's application for fees. The [d]efendant's counsel does not indicate in his letter that the fees charged by Ms. Smits, Esq. were unreasonable. Therefore, after the

Appellate Division's remand of the matter for the [c]ourt to address the factors for the [p]laintiff's counsel fee award ordered in [the] February 20, 2014 [o]rder, the [c]ourt has awarded the [p]laintiff the full counsel fees requested. After addressing the relevant factors outlined in R. 5:3-59(c) and R.P.C 1.5(a), the [c]ourt orders a counsel fee award in the sum of [\$5648.50] to be paid directly to Ms. Patricia Garity Smits, Esq. within thirty (30) days from the date of this [o]rder.

In reviewing the decision of a family court, 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 (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). The trial court's decision will be upheld even if there is evidence that might have resulted in a different decision by the trial court. Ibid. It is "[o]nly when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark'" that we will intervene and make our own findings "to ensure that there is not a denial of justice." E.P., 196 N.J. at 104 (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)). We discern no basis to reject the judge's factual findings which find support in the record and are not "wide of the mark."

In the final analysis, in rejecting defendant's criticisms of the court's methodology, we rely on the spirit of our Supreme Court's declaration that "there is no precise formula . . . [and that t]he ultimate goal is to approve a reasonable attorney's fee that is not excessive." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 388 (2009). We are satisfied the judge's approach ultimately produced a reasonable fee award.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION