SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5556-15T3

L.M.O.

Plaintiff-Respondent,

v.

J.B.O.

Defendant-Appellant.

Argued December 21, 2017 – Decided April 3, 2018

Before Judges Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FM-08-0868-05.

Ted M. Rosenberg argued the cause for appellant.

Peter M. Halden argued the cause for respondent (Borger Matez, PA, attorneys; Peter M. Halden, on the brief).

PER CURIAM

Defendant (father) appeals from the May 6 and July 25, 2016 Family Part orders, which, among other things, increased his child support obligation and awarded counsel fees to plaintiff (mother).

For the reasons that follow, we are constrained to reverse and remand for further proceedings.

We summarize the relevant facts as follows. Plaintiff and defendant divorced on June 1, 2006. Pursuant to a supplemental Final Judgment of Divorce (FJOD) entered January 25, 2007, incorporating a Property Settlement Agreement (PSA), the parties share joint legal custody of their three minor children, with plaintiff designated the parent of primary residence and defendant the parent of alternate residence. Based on a shared parenting-time schedule, defendant's presumptive entitlement to 104 overnights per year, defendant's gross weekly income in 2005 of $1423, and plaintiff's imputed weekly income of $375, defendant was ordered under the FJOD to pay weekly child support of $187, retroactive to June 1, 2006.

Thereafter, the parties engaged in extensive post-judgment motion practice focused primarily on child support and involving mutual accusations that each party failed to truthfully reveal their finances. In a June 12, 2009 order, the trial judge recalculated child support due to the termination of alimony and increased defendant's weekly child support obligation to $282, effective May 13, 2009, based on defendant's annual gross income as reported in his 2008 W-2 of $92,783.24.

In an August 7, 2009 order, the judge denied defendant's motion for reconsideration. However, in a December 10, 2010 order, a different judge granted defendant's motion to modify his child support obligation based on his unemployment. Defendant had been employed as either a chief financial officer (CFO) or corporate controller by various corporations from 1988 to 2009, when he was terminated from his job. Noting that defendant was "doing the best he can to find employment in the current market[,]" the judge reduced defendant's weekly child support obligation to $202, effective October 26, 2010, with an additional $25 per week towards arrears, for a total of $227 per week, based on an imputed annual income of $75,000.

In February 2012, defendant again moved for a child support reduction or suspension based on his continued unemployment. The judge found that defendant had been unemployed for three years while actively seeking employment in his prior industry, that defendant had exhausted his unemployment benefits averaging $29,000 per year, and that defendant's only source of income was profits from a petroleum company and $22,000 in annual gross rental income from his New Jersey townhome. After granting defendant's motion and imputing annual income to defendant of $45,000, in an April 20, 2012 order, the judge ordered defendant to pay a total

of $204 per week in child support, retroactive to February 29, 2012.

Defendant appealed the April 20, 2012 order, challenging the income imputed to him and the child-care costs deducted from plaintiff's imputed income. We reversed and remanded for a plenary hearing, Olt v. Olt, No. A-4629-11 (App. Div. March 27, 2013), which was conducted on October 31, 2013. Following the plenary hearing, the judge increased defendant's weekly child support obligation to $217 for the period February 29 to June 8, 2012, based on gross weekly income of $923, and to $293 thereafter based on gross weekly income of $1538. The judge calculated defendant's income based on his actual earned income at the time of approximately $26,000 per year, imputed income from the rental property of $10,000 per year, and imputed profits from the petroleum business of $12,000 per year, for a total of $48,000 per year. Paragraph four of the October 31, 2013 order expressly provided that

> Although the [c]ourt heard no testimony in this hearing regarding income subsequent to the time frame of October 2012, it is the [c]ourt's intention that the parties may file motions to adjust child support in accord with the parties['] present employment status as they deem fit with retroactivity to be established as appropriate, but no further back than November 1, 2012, in any event.

In 2014, defendant again moved for a child support reduction to $161 per week, retroactive to November 1, 2012. Defendant asserted that in the October 31, 2013 order, the judge mistakenly used fifty-two overnights in calculating the child support, instead of 104 overnights, and that paragraph four of the order permitted retroactivity back to November 1, 2012. In a December 19, 2014 order, a different judge granted defendant's request and reduced his weekly child support obligation to $161, allowing for 104 overnights, but found "no justification to retroactively modify the support award to November 1, 2012" because the "preservation" of a November 1, 2012 retroactivity date was "for a stated, narrow and specific reason." Instead, the reduced award was effective October 30, 2014.

In 2015, defendant moved for reconsideration of the December 19, 2014 order and recalculation of his child support obligation, retroactive to November 1, 2012, based upon a substantial change in circumstances. In a March 13, 2015 order, the judge denied his reconsideration motion, but granted his motion to recalculate child support. The judge accepted defendant's certification that he no longer received rental income from his New Jersey property and dissolved his petroleum company on February 19, 2014. Thus, absent the rental income and business profits, the judge determined that "defendant may be in the midst of changed circumstances," as

"he is currently in a salaried position earning approximately $25,000.00" per year as a pizza-maker.[1] Accordingly, the judge reduced defendant's child support obligation to $55 per week, with an arrears payment of $30 per week.

On July 7, 2015, plaintiff moved for reinstatement of the weekly $161 child support award and for an order authorizing her to obtain discovery regarding defendant's recent purchase of a home and business in Florida. In an August 28, 2015 order, the judge denied plaintiff's motion for reinstatement of the prior child support award, finding no changed circumstances, but allowed plaintiff to undertake discovery to develop facts establishing changed circumstances.

At the close of the discovery period, plaintiff again moved to reinstate the weekly $161 child support award, based on information she uncovered during discovery, and for counsel fees associated with the motion. According to plaintiff, defendant was listed on a deed to a home in Florida, owned part of a liquor

[1] Defendant submitted a spreadsheet of job applications he had submitted to accounting firms in 2012 and 2013, but did not supply the actual job applications. He claimed he was employed as a pizza-maker for a local pizzeria until that company went out of business. The judge accepted defendant's annual income as $25,000 based on the income established by the prior judge following the plenary hearing.

store in Florida, and continued to hold himself out on LinkedIn[2] as CFO for a company involved in the home health care industry from which he had purportedly been terminated back in March 2009. In her supporting certification, plaintiff stated that on February 20, 2015, the sum of $99,999 was deposited via FIA CSNA direct deposit into defendant's TD bank account in Florida, account no. 5808. The following month, $13,501 via FIA CSNA was deposited into the same account, $76,500 was transferred from account no. 6707 to account no. 5808, and another $5,000 was deposited into account no. 5808, totaling $95,001 in deposits for that month.

Ultimately, $195,001.46 was withdrawn from account no. 5808, of which $76,500 was transferred back to account no. 6707. Plaintiff certified that account no. 6707 was owned by defendant and his prospective business partner, Kenneth Wittkop. During the same time period, a $50,000 wire transfer from Wittkop and "Pamela A" was deposited into account no. 6707. In addition, defendant withdrew $27,607.66 from account no. 6707 on March 19, 2015, and deposited the same amount back into account no. 6707 on April 27, 2015.

Plaintiff also produced a printout of defendant's American Express card statements for the period January 1, 2015 to June 22,

[2] LinkedIn is a professional social networking platform.

2015. The printout revealed that during this five-and-one-half month period, defendant spent $33,947.64, which is higher than his alleged $25,000 income as a "pizza-maker[.]" Plaintiff also showed that in March 2015, defendant received $8,350 as an escrow refund for the planned purchase of a liquor store, "Dixie Wine & Spirits." Plaintiff asserted that "[w]hile literally pleading poverty, the defendant was simultaneously moving hundreds of thousands of dollars through various bank accounts in two states, . . . buying a home in Florida and making escrow deposits on the purchase of a liquor store, none of which was disclosed to the [c]ourt."

In opposition, defendant submitted a certification disputing plaintiff's allegations. First, defendant averred the Florida home belonged to his mother. Although he was originally put on the deed for estate planning purposes, he since executed a quitclaim deed. Defendant supplied the mortgage loan application and the deed to support his claim. Defendant also explained that the pizzeria position he was offered was rescinded because the business was failing and ultimately closed in 2015. Rather than do nothing, defendant looked into acquiring a business and obtained cash advances from his credit cards to finance a business venture.

According to defendant, the $99,999 and $13,501 reflected as direct deposits into his TD Bank account no. 5808 were cash advances from his Merrill Lynch credit cards, identified as FIA

CSNA, for accounts he had since 1998. Likewise, the $5,000 deposit was a cash advance from his Chase credit card. Defendant averred that account no. 6707 was opened with Wittkop for a potential business opportunity in Florida, and the $76,500 he withdrew from account no. 5808 and deposited into account no. 6707 was financed by the original $99,999 cash advance from Merrill Lynch for use in the business venture. The $50,000 deposited into account no. 6707 was Wittkop's investment in the business venture wired from his trust account. However, after the business venture fell apart, defendant returned the $76,500 to account no. 5808, returned the $50,000 to Wittkop[3] and closed the joint business account. Defendant certified that "[n]one of these funds . . . [came] from any earned or unearned income" but rather came "from either the Merrill Lynch or Chase cash advances." Defendant accused plaintiff of deception by failing to attach the supporting credit card statements he provided in discovery, which statements were supplied to the court.

As to the purchases reflected in the American Express card statements, defendant indicated that the majority of the purchases were to renovate his mother's home in Florida because he could not

[3] Defendant submitted a supporting certification by Wittkop confirming that the $50,000 wire transfer to account no. 6707 from his personal trust account was later returned to him plus interest when their business plans fell through.

use his mother's credit cards. He asserted that he charged a total of $33,947.54, and had $17,064.27 in return credits, leaving a balance due of $16,883.27. According to defendant, during that period, only $3,618.76 in payments were made on the account, all of which came from his mother's personal checking account. As to the escrow refund, defendant claimed that he paid $10,000 from a Chase credit card cash advance as a down payment to purchase a business. However, when the sale never materialized, he received a refund check for $8,350 on March 11, 2015, from the attorney's trust account, representing his down payment less deductions for various fees.

On May 6, 2016, after oral argument, the judge granted plaintiff's motion and reinstated the weekly child support award of $161, effective February 17, 2016. In a memorializing order, the judge explained:

> Defendant's child support obligation was originally reduced based on [d]efendant's apparent loss of both rental [income] and business profits which had been imputed. The [c]ourt recognizes that [d]efendant's ability to secure a loan in excess of $99,999 implies the existence of an asset, income or business venture to successfully apply for and secure the loan. Additionally, the [c]ourt noted in the March 13, 2015 [o]rder that [d]efendant still listed the [New Jersey] condominium on his CIS while not listing any income from the property and also listing a different current

> address from the condominium.[4] Defendant has not supplied the [c]ourt with the current CIS. Therefore, based on the foregoing, the [c]ourt reinstates [d]efendant's child support obligation . . . based on the imputed incomes used in the December 19, 2014 [o]rder as it appears as likely as not that [d]efendant continues to engage in real estate investments and ventures which are profitable to him, providing at least fluctuating income in addition to his "base" imputed income.

During oral argument, the judge noted that she was "really undoing what [she] did" in the March 13, 2015 Order based on the information she now has. The judge rejected defendant's explanations regarding the cash advances and indicated that "[c]redit card companies don't loan people $99,000 in cash without being confident that they've checked out either income or assets . . . ." Emphasizing that she was "not treating that $99,000 loan as income[,]" the judge stated:

> My decision isn't so much that all these thousands of dollars are moving around . . . but mainly that I've never heard of anybody getting a $99,000 unsecured loan unless somebody is convinced that they are a very good investment. There's got to be some credit applications there that show some earning, that show some enterprises.
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> . . . .
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> There's enough there . . . without opening up all kinds of discovery and starting all over again with what [defendant] actually does for

[4] In his certification, defendant indicated that "[i]n April of 2014, [he] was forced to sell [his] house."

> a living, which is a Plenary Hearing . . . I don't think it's necessary . . . .

Turning to the issue of counsel fees, the judge granted plaintiff's application for counsel fees and denied defendant's, noting that if defendant had provided "more transparency with financial information in the first place[,]" this whole matter could have been resolved inasmuch as this divorce was finalized almost a decade ago. The judge also examined defendant's life style, finding that "he appears to be able to travel, . . . dress very well, . . . [own] a smart phone, . . . [and] make escrow deposits and get them back . . . ." In an amended order entered on July 25, 2016, the judge considered the "[c]ourt [r]ule factors," balanced "the unreasonableness of [d]efendant's position regarding child support calculation[,]" and awarded plaintiff $1000 in counsel fees finding that "[t]he entire amount [was] attributable to [p]laintiff's effort to secure appropriate child support . . . ." This appeal followed.

On appeal, defendant argues that the judge abused her discretion by modifying child support without "any express finding of a 'change in circumstances'" to justify the modification, and made factual findings regarding defendant's "income or assets to justify the extension of credit" that were not supported by the record. Defendant argues further that the judge erred in not

"set[ting] a discovery schedule[,]" conducting a plenary hearing, and "ma[king] new findings as to the current incomes of the parties." Finally, defendant argues that the judge erred in awarding counsel fees without "delineat[ing] the relevant factors" and urges us to remand the case to "a different judge" as "the prior judge . . . will be unable to render an impartial and fair decision in view of the reversal and remand." We agree with defendant that a plenary hearing with appropriate discovery should have been conducted.

Our analysis must begin with a brief restatement of certain applicable principles of law. Orders for child support "may be revised and altered by the court from time to time as circumstances may require." N.J.S.A. 2A:34-23. We review the trial judge's decision to modify child support under an abuse of discretion standard. J.B. v. W.B., 215 N.J. 305, 325-26 (2013). "An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Jacoby v. Jacoby, 427 N.J. Super. 109, 116 (App. Div. 2012) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Child support orders are subject to modification upon a showing of changed circumstances. Lepis v. Lepis, 83 N.J. 139, 146 (1980). The motion judge may revise child support when the

party seeking modification satisfies the burden of making a prima facie showing of changed circumstances warranting relief or alteration of the prior order. Id. at 157. "Only if such a showing is made does the court have the right to order full discovery regarding the financial circumstances of the other parent." Isaacson v. Isaacson, 348 N.J. Super. 560, 579 (App. Div. 2002). "A plenary hearing is necessary to adjudicate the matter only if there are genuine issues of material fact." Ibid.

Significant changes in the income or earning capacity of either parent may result in a finding of changed circumstances. W.S. v. X.Y., 290 N.J. Super. 534, 539-40 (App. Div. 1996). "[T]he changed-circumstances determination must be made by comparing the parties' financial circumstances at the time the motion for relief is made with the circumstances which formed the basis for the last order fixing support obligations." Beck v. Beck, 239 N.J. Super. 183, 190 (App. Div. 1990).

Here, when defendant's child support obligation was reduced to $55 per week, the judge found that defendant was no longer receiving rental income from his New Jersey property, nor profits from any business ventures. However, the information plaintiff uncovered, mainly the movement of large sums of money in defendant's accounts, showed that defendant was actively pursuing business ventures requiring access to capital. The judge thus

implicitly found a change in circumstances warranting a modification of child support. The judge could not reconcile how defendant obtained such large loans without an underlying—and yet undisclosed—asset or continuous income stream, and rejected defendant's explanations. Because the judge questioned defendant's candor, she made critical credibility determinations about defendant's proofs without conducting a plenary hearing.

However, a plenary hearing is necessary where, as here, there are genuine issues of material fact that bear on a critical question. Lepis, 83 N.J. at 159. A trial judge may not resolve material factual disputes, including credibility determinations arising from the parties' conflicting affidavits and certifications, solely from those affidavits or certifications. Instead, when a genuine issue of fact is raised by the parties' respective assertions, a plenary hearing must be held. Tretola v. Tretola, 389 N.J. Super. 15, 20-21 (App. Div. 2006).

We are mindful that the judge was attempting to avoid a costly trial and, based on the extensive motion practice, found that defendant lacked transparency in his finances. However, the judge should not have resolved material factual disputes on the papers without conducting a plenary hearing and ordering discovery. "[W]e deem the quantum of discovery on modification applications to be governed by proper application of discretion by the motion judge."

Isaacson, 348 N.J. Super. at 586. However, ordinarily the production of an updated CIS "is necessary for the judge to have full appreciation of asset structure and lifestyle. Where such issues are in dispute, absent compelling reasons, a CIS should be filed by a responding party once the moving party has established a prima facie case warranting the motion to proceed." Ibid. We therefore reverse and remand for a plenary hearing with discovery within the judge's discretion. In light of our determination, we also vacate the award of counsel fees as premature.

As to defendant's request that the case be assigned to a different judge, we acknowledge that appellate courts have the authority to direct that a case be assigned to a new judge upon remand. N.J. Div. of Youth & Fam. Servs. v. A.W., 103 N.J. 591, 617 (1986). "That power may be exercised when there is a concern that the trial judge has a potential commitment to his or her prior findings." Graziano v. Grant, 326 N.J. Super. 328, 349 (App. Div. 1999). However, appellate courts should exercise this authority "sparingly[.]" Id. at 350. "In addition, consideration must be given to the fact that, to some extent, it would be counterproductive to require a new judge to acquaint himself or herself with the litigation." Ibid. Here, we discern no basis to remand this matter to a different judge. Thus, we direct the presiding judge to assign the case as he or she sees fit.

Reversed and remanded for further proceedings. We do not retain jurisdiction.