SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0020-21

GREGORY D. ROTH,

Plaintiff-Appellant/
Cross-Respondent,

v.

ANNA KARPMAN,

Defendant-Respondent/
Cross-Appellant.

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Argued April 25, 2023 – Decided August 22, 2023

Before Judges Gilson, Rose, and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Hudson County, Docket No. FD-09-1733-15.

Jodi Argentino argued the cause for appellant/cross-respondent (Offit Kurman, PA, attorneys; Jodi Argentino, of counsel and on the briefs; Brian Giardina, on the briefs).

Anna Karpman, respondent/cross-appellant pro se.

PER CURIAM

After plaintiff Gregory D. Roth moved for a modification of his child-support obligation, the trial judge conducted a three-day plenary hearing during which both parties testified. The judge issued orders reducing plaintiff's child-support obligation, modifying his initial order to attribute additional income to plaintiff, and awarding plaintiff attorneys' fees. Plaintiff appeals and defendant Anna Karpman cross-appeals from those orders. Because the judge failed to apply the Child Support Guidelines,[1] we reverse and remand with instructions the judge recalculate child support under the Guidelines. Because substantial credible evidence in the record supports the judge's factual findings and the judge did not in any other aspect misapply the law, we otherwise affirm.

I.

The parties, who never married, lived together from 2009 to 2015 and have two sons, one born in 2011 and the other in 2013. In 2015, plaintiff filed a complaint regarding custody and child-support issues; defendant filed an answer and counterclaim. On April 28, 2015, a Family Part judge entered an order stating the parties had reached an agreement regarding "parenting time, custody, relocation, and vacation arrangement" and that plaintiff would pay

[1] See Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-A to R. 5:6A, www.gannlaw.com (2023).

defendant $1,500 monthly in child support. In the order, the judge directed the parties' attorneys to "submit an addendum with respect to child support, vacation, and holiday schedules." The parties executed a consent order, which was submitted to the judge on June 1, 2015, containing provisions regarding custody, parenting time, child support, child-related expenses, and other issues. The parties subsequently executed an amendment to the consent order, which was submitted to the judge on July 29, 2015, addressing a clerical error and parenting-time issues.

In the consent order, the parties agreed plaintiff would pay defendant $1,500 monthly in child support. As memorialized in the consent order, that amount was based on plaintiff's annual income of $230,000, which included a one-time signing bonus of $30,000, and defendant's annual base income of $180,000 and annual discretionary bonus of $35,000. Plaintiff had been working as head of communications at BMI Research since December 2014; defendant was a lawyer employed by BNP Paribas. The parties acknowledged their income was above "the Child Support Guidelines amount" and that "the amount to be paid include[d] an additional discretionary amount to the Child Support Guidelines amount."

The parties attached to the consent order a copy of a completed "Child

Support Guidelines – Sole Parenting Worksheet." As set forth on line seven of the worksheet, plaintiff earned 51.03% and defendant earned 48.97% of the parties' total combined income. According to plaintiff, based on the information in the worksheet, his child-support obligation under the Child Support Guidelines would have been $1,183 per month, but the parties agreed to a $1,500 monthly obligation.

The parties agreed to pay the cost of the children's preschool and day-care tuition, summer camp, and extracurricular activities "in proportion to their respective incomes as listed in line 7 of the Child Support Guidelines." As for unreimbursed medical expenses, the parties agreed defendant would pay the first $250 per child annually and, thereafter, the parties would pay those costs "in proportion to their respective incomes as listed in line 7 of the Child Support Guidelines."

The consent order also included a provision for determining defendant's "rental income," specifying it would be calculated as the "total rental income for [c]ondos minus the total cost of mortgages, real estate taxes, homeowner's insurance, and condominium association fees for [c]ondos." The consent order did not contain a provision for determining plaintiff's rental income.

On November 30, 2015, plaintiff lost his job with BMI Research, and

about two months later, moved to reduce his child-support obligation. Defendant opposed the motion and cross-moved to enforce the child-support, camp, and extracurricular-activities provisions of the consent order. In a March 4, 2016 order, a Family Part judge denied plaintiff's motion and granted defendant's cross-motion, directing the parties to "communicate via email as to the children's activities [and] cost" and authorizing defendant to make decisions regarding a particular extracurricular activity if plaintiff did not respond to her email within two days.

On August 10, 2020, plaintiff moved to reduce his child-support obligation, asserting the parties' financial circumstances had "changed significantly" since the 2015 consent order. Plaintiff certified his annual salary then was $150,000 and defendant's income had increased to nearly $270,000. Contending he had 104 overnights in parenting time annually, plaintiff asserted that under the Child Support Guidelines his monthly child-support obligation should be $347 and his "percentage contribution" should be thirty-eight percent. Plaintiff also moved for an order requiring the parties' mutual consent for the children's extracurricular activities and payment of the agreed-on activities based on the parties' "line 7 percentage allocation." He certified defendant usually enrolled the children in activities without his consent or financial

contribution and he had paid entirely for some agreed-on activities.

In opposition to the motion, defendant certified under the consent order plaintiff had seventy-two overnights of parenting time annually but actually used fifty-two overnights annually, some with only one child. She acknowledged her compensation had increased since 2015 but certified her expenses, including the expenses she had paid for the children, also had significantly increased. She asserted plaintiff frequently had ignored her requests to enroll the children in activities and, consequently, she had enrolled them unilaterally, consistent with the March 2016 order, and had paid the cost herself.

After an initial hearing, a Family Part judge issued an order on November 20, 2020, stating the parties had agreed to require "written consent" to enroll or re-enroll the children in any extracurricular activities and that defendant had "consented to [plaintiff's] application to recalculate child support based upon the parties' current financial circumstances." After additional briefing and another hearing, the judge issued an order on December 14, 2020, ordering a plenary hearing to determine the recalculation of child support in light of the parties' income because plaintiff had met his burden of demonstrating a substantial change in circumstances.

A different Family Part judge denied defendant's motion to quash subpoenas served by plaintiff on defendant's former husband and Charles Conroy, who had had a relationship and a daughter with defendant after her relationship with plaintiff ended, and denied plaintiff's cross-motion for fees. That judge conducted a three-day plenary hearing, during which plaintiff, defendant, and Conroy testified. Plaintiff testified that his parenting time was consistent with the parties' parenting-time agreement set forth in the consent order, with the children spending each weekend with him, alternating between full weekends and single overnight visits. He also testified he currently earned a base salary of $150,000 and a discretionary bonus of up to $30,000 and admitted his rental properties yielded approximately $24,000 per year, though he showed a loss on his tax returns due to depreciation.

Plaintiff also called Conroy as a witness. Conroy testified about his relationship with defendant, their "upper middle-class lifestyle," his child-support obligations for their daughter, and defendant's "substantial addition" to her house, where she, the three children, and her parents resided.

Defendant testified that as of March 2021, her salary was $230,250, plus she had received a bonus of approximately $111,000 and profit sharing of approximately $5,000 and estimated her total income was approximately

$355,000 in 2021. She acknowledged that in 2015, her adjusted gross income was $207,302. According to defendant, her rental properties operated at a loss, irrespective of depreciation. Defendant also testified her expenses had increased significantly since the parties' relationship ended and provided detailed information regarding their expenses, including expenses she had paid for the children.

In an order entered on July 16, 2021, the judge rejected defendant's assertion that plaintiff was underemployed and found plaintiff's job search had been "significant and extensive." He determined that, since the execution of the 2015 consent order, "the balance between the parties' incomes ha[d] significantly changed" such that plaintiff was entitled to a reduction in child support. He held that, for purposes of recalculating plaintiff's child-support obligation, plaintiff's annual income was $180,000 and defendant's annual income was $365,125, apparently reflecting her salary and maximum bonus, plus $24,000 in rental income. He acknowledged the parties' combined income exceeded the maximum tabled amount in the Child Support Guidelines.

Citing Strahan v. Strahan, 402 N.J. Super. 298, 307-08 (App. Div. 2008), the judge held he was "compelled to apply the factors set forth in N.J.S.A. 2A:34-23" because "even in the case of high income families, the standard

applied is the reasonable needs of the children according to their circumstances." The judge concluded "the standard of living that [defendant] has accustomed the children to by virtue of her own dramatically increased income . . . is beyond the means of [plaintiff] to equally support" and held:

> If the [c]ourt were to apply the same formula applied to the [c]onsent [o]rder's existing child support obligation, the calculation would result in [plaintiff] having an obligation of $884.75 per month. However, this calculation assumes no change in costs associated with the two minor children since entry of the [c]onsent [o]rder. It is in the [c]ourt's discretion to make a determination that serves the needs of the children, while at the same time allocating a fair distribution as to each parent. While the minor children have become by and large accustomed to a higher standard of living due to the income of [defendant], both parties in general earn significant incomes. Accordingly, child support shall be reduced to $1,150.00 per month, effective the date of this order.

The judge did not otherwise reference the Child Support Guidelines or explain how he had reached the $1,150 figure. The judge found he could not "hold [plaintiff] responsible to contribute to existing costly extracurricular activities that he has not agreed to pay for." He held the parties must agree in writing on the children's extracurricular activities and that plaintiff would pay forty percent and defendant would pay sixty percent of the agreed-on activities.

In a July 23, 2021 letter, plaintiff's counsel sought corrections to the order

pursuant to Rule 1:13-1, referencing among other things, the judge's failure to provide a Child Support Guidelines worksheet. Defendant objected to plaintiff's requests, asserted the judge had erred in attributing rental income to her instead of plaintiff, and requested a correction of that error. The judge issued an August 18, 2021 "addendum" to the July 16, 2021 order. The judge changed the effective date for the reduction in plaintiff's child-support obligation to the date plaintiff had filed the motion. He modified the order "to attribute the $24,000.00 per year in rental income to [plaintiff]" but found that modification did not "give cause for modification of the currently ordered child support obligation" because "the court in its discretion [had] determined the $1,150.00 obligation to be fair, equitable, and in the best interests of the minor children." The judge stated the "sample guideline" would be provided to the parties but noted "as indicated by this court in the [o]rder, the [G]uidelines were not applicable as the parties' incomes exceeded their application to this matter."

In a September 30, 2021 order, issued as another addendum to the July 16, 2021 order, the judge granted in part plaintiff's fee application, awarding him $7,753.75 of the over $120,000 he had requested. In making that award, the judge considered RPC 1.5(a) and the factors enumerated in Rule 5:3-5(c). The judge "reject[ed plaintiff's] position that the entirety of the litigation and

ultimately trial occurred because of [d]efendant's bad faith refusal to settle the matter." The judge awarded $7,753.75 in fees, based on the fees plaintiff had incurred as a result of defendant's "frivolous" motion to quash the third-party subpoenas.[2]

Plaintiff appeals from the July 16, 2021 order, the August 18, 2021 addendum, and the September 30 2021 order. Specifically, he appeals "the calculation of the child support award," "the percentage allocation as and between the parties," and the fee award.[3] He argues the judge erred by imposing a greater child-support obligation than provided under the Child Support Guidelines, failing to provide adequate analysis or calculation supporting his conclusion, improperly using the "same percentage increase" the parties used in the 2015 consent order, failing to provide an actual Child Support Guideline

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[2] In the September 30, 2021 order, the judge stated he had found after the plenary hearing that plaintiff earned $204,000 and defendant earned $365,125. In fact, in the July 16, 2021 order, the judge found plaintiff earned $180,000. In the August 18, 2021 addendum, he modified the July 16, 2021 order to attribute $24,000 in rental income to plaintiff, which he mistakenly had attributed to defendant. Thus, in the September 30, 2021 order, the judge should have described his ultimate finding regarding the parties' earnings as plaintiff earning $204,000 and defendant earning $341,125.

[3] Plaintiff did not brief his contention that he was entitled to a greater fee award. Accordingly, we conclude he waived that issue. N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) (finding "[a]n issue that is not briefed is deemed waived upon appeal").

worksheet, failing to provide an income-based pro-rata percentage for contribution to the children's expenses beyond agreed-on extracurricular activities; and assigning certain rental income to plaintiff in the August 18, 2021 addendum.

Defendant cross-appeals from the same orders and addendum. Contending the Child Support Guidelines were not applicable in this high-income case, defendant argues the judge erred by reducing plaintiff's child-support obligation, finding defendant had failed to obtain consent for certain extracurricular activities and that she had unilaterally enhanced the children's standard of living to a level beyond plaintiff's means to equally support, awarding plaintiff counsel fees, and failing to recalculate plaintiff's child-support obligation and extracurricular-activity contribution after correcting in the August 18, 2021 addendum the prior finding regarding rental income.

II.

Our review of an order issued by a Family Part judge after a plenary hearing is limited. Cesare v. Cesare, 154 N.J. 394, 411-13 (1998). We "afford substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters." W.M. v. D.G., 467 N.J. Super. 216, 229 (App. Div. 2021). A finding based on "[e]vidence derived from testimony is

given great deference since the trial judge is better suited to evaluate the credibility of the witnesses." Gormley v. Gormley, 462 N.J. Super. 433, 442 (App. Div. 2019). Factual findings are binding on appeal when "supported by adequate, substantial, credible evidence." Ibid. (quoting Cesare, 154 N.J. at 411-12). "Reversal is warranted only if the findings were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Amzler v. Amzler, 463 N.J. Super. 187, 197 (App. Div. 2020) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)); see also Tannen v. Tannen, 416 N.J. Super. 248, 278 (App. Div. 2010) (finding a child-support determination will not be set aside unless shown to be unreasonable, unsupported by substantial evidence, or "the result of whim or caprice." (quoting Foust v. Glaser, 340 N.J. Super. 312, 315 (App. Div. 2001))).

We review questions of law de novo. Amzler, 463 N.J. Super. at 197. An order concerning a child-support modification is subject to reversal if the Family Part judge who issued it "failed to consider controlling legal principles." Spangenberg v. Kolakowski, 442 N.J. Super. 529, 536 (App. Div. 2015) (quoting Storey v. Storey, 373 N.J. Super. 464, 479 (App. Div. 2004)).

A judge must apply the Child Support Guidelines when establishing or modifying child support. See R. 5:6A ("The [G]uidelines set forth in Appendix IX of these Rules shall be applied when an application to establish or modify child support is considered by the court."). For calculation of child support when the litigants are higher earners, the Guidelines set forth the following procedure:

> If the combined net income of the parents is more than $187,200 per year, 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.
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> [Child Support Guidelines, Pressler & Verniero, Appendix IX-A to R. 5:6A at ¶ 20(b) (emphasis added).]

"If a court determines deviation from the [G]uidelines is appropriate, it must nevertheless calculate the [G]uidelines-based support award and state the specific findings justifying its deviation therefrom." Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 594 (App. Div. 2016); see also Ordukaya v. Brown, 357 N.J. Super. 231, 239-40 (App. Div. 2003) (holding that any deviation from the Child Support Guidelines "must be accounted for").

A family court has some "discretion" regarding "the choice of the methodology to employ in arriving at a child-support award when the total income of the parties exceeds the [G]uidelines." Caplan v. Caplan, 182 N.J. 250, 272 (2005). However, "the [family] court's goal is to calculate a child support award that is in the best interest of the child after giving due consideration to the statutory facts and the [G]uidelines." Ibid. Thus, a trial judge must consider the Guidelines and explain his or her consideration of the Guidelines in "a clear statement of his [or her] reasons for the court's award." Avelino-Catabran, 445 N.J. Super. at 594.

Given the parties' admitted incomes and other evidence regarding the children's needs, we perceive no error or abuse of discretion in the judge's decision to require an amount of child support that exceeds the Guidelines or that plaintiff contribute to the children's agreed-on extracurricular activities. See, e.g., Accardi v. Accardi, 369 N.J. Super. 75, 89 (App. Div. 2004) (finding some expenses associated with extracurricular activities "may, in the discretion of the trial court . . . be added to the support obligation of a high income earner" after consideration of factors in N.J.S.A. 2A:34-23). The judge, however, did not explain adequately the basis of his decision to establish $1,150 as plaintiff's monthly child-support obligation.

Reviewing the July 16, 2021 order, it is unclear whether the judge considered or in any way applied the Guidelines, and if he did, why and how he deviated from the Guidelines and how he determined by what amount to deviate from the Guidelines. Accordingly, we vacate the provision of the July 16, 2021 order setting $1,150 as plaintiff's child-support obligation and remand the case as to that one issue so the judge may recalculate child support based on the Child Support Guidelines, making an adjustment given the parties' income levels, and issue a new order and opinion, providing an analysis and detailed explanation of how and why he deviated from the Guidelines. See Elrom v. Elrom, 439 N.J. Super. 424, 443 (App. Div. 2015) (holding "[t]he omission of critical factual findings, supporting the basis to supplement the Guidelines support award, impedes our review and requires a remand limited to this issue"). On remand, the judge must also file a completed Child Support Guidelines worksheet as required by Rule 5:6A.

Plaintiff faults the judge for "failing to provide an income-based pro-rata percentage for contribution for the children's other agreed-upon or necessary expenses beyond agreed-upon extracurricular activities," specifically referencing "medical expenses and other shareable expenses." Plaintiff concedes he did not raise this issue in the family court. In fact, in his notice of

motion, he sought a "recalculation of child support" and "an order stating that our children's activities must be mutually agreed upon and that, if mutually agreed upon, each party pay their line 7 percentage allocation of the cost." He did not ask for a modification of the parties' agreement set forth in the 2015 consent order concerning payment of the children's unreimbursed medical expenses or relief concerning other expenses. Because plaintiff did not seek that relief in the family court, we decline to consider it on appeal. See Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 145 (App. Div. 2018) (applying "well-settled" principle that an appellate court will not consider an issue that was not raised before the trial court).

Plaintiff complains the judge "increased" his income by $24,000 "to $204,000.00 by way of supplemental order, but without explanation." The reason the judge reconsidered the finding regarding plaintiff's income in the July 16, 2021 order and revised it in the August 18, 2021 addendum is clear: in the July 16, 2021 order, the judge erred by attributing to defendant plaintiff's testimony about owning real estate that had generated $24,000 in rental income. The judge did not err by correcting that mistake. Lombardi v. Masso, 207 N.J. 517, 534 (2011) (finding "the trial court has the inherent power . . . to review, revise, reconsider and modify its interlocutory orders at any time prior to the

entry of final judgment." (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987))).

Plaintiff contends his testimony about $24,000 of rental income "was outside the formula agreed to by the parties for calculating real estate income, which formula was included in the 2015 [c]onsent [o]rder." The consent order, however, did not contain a provision for calculating the parties' rental income; it contained a provision for calculating only defendant's rental income. Because the judge's finding in the August 18, 2021 addendum regarding plaintiff's rental income was supported by plaintiff's own testimony, we have no basis to disturb it. See Moynihan v. Lynch, 250 N.J. 60, 90 (2022) (explaining that an appellate court is "bound to uphold a finding that is supported by sufficient credible evidence in the record"). The judge should consider that rental income on remand when recalculating child support and not disregard it, as he apparently did in the August 18, 2021 addendum.

Relying on Miller v. Miller, 160 N.J. 408 (1999), plaintiff argues the judge could have imputed real estate investment income to defendant. Plaintiff's reliance on Miller, which concerned the former husband's alimony obligation, not his child-support obligation, was misplaced. Moreover, plaintiff's speculative argument was not supported by any testimony – expert or otherwise

– or other evidence during the plenary hearing. We perceive no abuse of discretion in the judge's consideration of and credibility determinations about the parties' testimony regarding their actual rental income. See Gormley, 462 N.J. Super. at 442 (recognizing a "trial judge is better suited to evaluate the credibility of the witnesses").

Defendant argues the judge abused his discretion or erred by disregarding evidence concerning the children's needs, in reducing child support and plaintiff's contribution to the costs of the children's extracurricular activities, and finding defendant unilaterally had increased the children's standard of living to a level beyond which plaintiff could equally support and had not obtained plaintiff's consent for the children's activities. Regardless of whether defendant previously obtained plaintiff's consent, we perceive no abuse of discretion in the judge's determination that, going forward, the parties must agree on the children's extracurricular activities. Given our remand for consideration of the Child Support Guidelines and a recalculation of child support, we do not otherwise address defendant's arguments regarding plaintiff's child-support obligation or contribution to the cost of the children's extracurricular activities.

Finally, we address defendant's contention the judge abused his discretion by awarding counsel fees to plaintiff. "We will disturb a trial court's

determination on counsel fees only on the 'rarest occasion,' and then only because of clear abuse of discretion." Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011) (quoting Strahan, 402 N.J. Super. at 317); see also Slutsky v. Slutsky, 451 N.J. Super. 332, 365-66 (App. Div. 2017). N.J.S.A. 2A:34-23 authorizes a judge to award counsel fees in a family matter after the judge considers "the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good faith or bad faith of either party." Chestone v. Chestone, 322 N.J. Super. 250, 255-56 (App. Div. 1999) (quoting N.J.S.A. 2A:34-23). Rule 5:3-5(c) states that a court should consider nine factors, including "reasonableness and the good faith of the positions advanced by the parties."

The judge identified the factors enumerated in the court rules and found those factors supported a $7,753.75 award based on the fees plaintiff had incurred as a result of defendant's motion to quash the third-party subpoenas. That the judge previously denied plaintiff's cross-motion for fees filed in response to the motion to quash did not preclude the judge, when reviewing the entirety of the parties' conduct after the conclusion of the plenary hearing, from issuing a limited fee award. We discern no abuse of discretion in his determination to do so.

Affirmed in part; reversed in part; and remanded for a recalculation of child support based on the Child Support Guidelines and issuance of a new order, opinion, and Guideline worksheet addressing and explaining that recalculation. 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