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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4724-16T3

T.M.,

Plaintiff-Appellant,

v.

R.M.,

Defendant-Respondent.

Submitted March 13, 2018 – Decided April 5, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-0107-10.

Stuart J. Moskovitz, attorney for appellant.

R.M., respondent pro se.

PER CURIAM

Plaintiff appeals from a June 1, 2017 order denying his motion to modify alimony and child support. We reverse and remand for a plenary hearing.

The following facts are taken from the record. The parties were married on September 12, 1992. Two children were born of the marriage, who were twenty-three and twenty years of age at the time of the motion hearing.

The parties entered into a comprehensive matrimonial settlement agreement (MSA), and were divorced on May 5, 2010. At the time, plaintiff was earning a salary of $100,000 per year as a limited partner with OTR. In 2011, plaintiff lost his job and was unemployed for eighteen months. Plaintiff became employed again in 2012, at Rose Hill Capital earning $38,400 per year. At the time of divorce, defendant was attending nursing school.

Pursuant to the MSA, plaintiff agreed to pay defendant $3000 per month in permanent alimony, and "$1000 per month payable . . . twice a month in child support." The MSA stipulated these figures were based on plaintiff's yearly income of $100,000, and no income for defendant. The MSA also obligated plaintiff to pay defendant seventeen percent of his annual gross earnings exceeding $100,000, and maintain medical insurance for the children. In addition, the MSA required the parties to each pay fifty percent of the children's unreimbursed medical expenses, extracurricular activities, private school tuition, and college expenses.

The MSA stated defendant was working toward her nursing degree, and was expected to graduate in December 2013. The MSA

anticipated defendant would become employed because it stipulated a review of spousal support would occur one year after defendant's graduation. The MSA stated if defendant did not complete her education, an income would be imputed to her.

In 2015, plaintiff filed a motion seeking modification of his alimony and child support obligation. Plaintiff argued he had a permanent change in circumstances as a result of the change in his income. Specifically, plaintiff stated he earned $38,400 in 2014, $43,000 in 2015, and expected to earn $50,000 at the time of the hearing. Plaintiff also argued the parties' MSA provided for a built-in review period tied to defendant's attainment of a college degree and job. In addition, plaintiff argued a reduction in child support was warranted because one son had completed college, was employed full time, and thus emancipated, and the other son had entered college.

Plaintiff's motion was addressed before the court on four separate occasions. On October 3, 2016, the motion judge requested the parties to submit documentation in lieu of testimony. Plaintiff indicated a desire to testify, but later agreed to have the judge decide the case on the documents alone. On January 4, 2017, the motion judge stated he was unable to render a decision at that time because of the volume of documents submitted by the parties. Again, plaintiff expressed a desire to testify stating

"[t]hat's why I wanted to have verbal arguments the last time we spoke, because I thought that all of this paperwork could bog down the whole process . . . ." On February 15, 2017, the parties appeared for a third time before the judge. Defendant claimed plaintiff had not paid alimony or child support for two months, and sought enforcement of both obligations. Plaintiff reiterated he could not pay the support set forth in the MSA, and that child support should be modified on account of the elder son's graduation from college. The motion judge stated he was unable to decide these issues without a plenary hearing, and scheduled a date for the hearing.

On May 23, 2017, the parties appeared for trial before the same judge, and were informed he would only be hearing summations and no testimony. After hearing from plaintiff and defendant, the judge denied plaintiff's motion in an oral opinion, concluding plaintiff had not established changed circumstances warranting modification of alimony or child support. This appeal followed.

On appeal, plaintiff argues a plenary hearing to modify alimony and child support should have occurred because there were material facts in dispute regarding his ability to pay, and defendant's ability to earn an income. Plaintiff also reiterates his argument the parties' MSA stipulated there would be a review

of spousal support once defendant obtained her degree and employment, which the motion judge ignored.

We begin with our standard of review. In general, "[a]ppellate courts accord particular deference to the Family Part because of its 'special jurisdiction and expertise' in family matters." Harte v. Hand, 433 N.J. Super. 457, 461 (App. Div. 2013) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). The Supreme Court has stated: "[w]e do 'not disturb the "factual findings and legal conclusions of the trial judge unless . . . convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice."'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (alterations in original) (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Therefore, "'[o]nly when the trial court's conclusions are so "clearly mistaken" or "wide of the mark"' should we interfere . . . ." Ibid. (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). However, "all legal issues are reviewed de novo." Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017) (citing Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

Generally, because marital agreements are voluntary and consensual, they are presumed valid and enforceable. See Massar

v. Massar, 279 N.J. Super. 89, 93 (App. Div. 1995). Therefore, "[d]espite an agreement to provide spousal support without limitation as to time, '[t]he duties of former spouses regarding alimony are always subject to review or modification by our courts based upon a showing of changed circumstances.'" Glass v. Glass, 366 N.J. Super. 357, 370 (App. Div. 2004) (quoting Miller v. Miller, 160 N.J. 408, 419 (1999)); see also N.J.S.A. 2A:34-23 (Support orders "may be revised and altered by the court from time to time as circumstances may require.").

"The party seeking modification has the burden of showing such 'changed circumstances' as would warrant relief from the support or maintenance provisions involved." Lepis v. Lepis, 83 N.J. 139, 157 (1980). A court is required to hold a plenary hearing where the moving party has demonstrated a prima facie change in circumstances. Ibid. "[P]rima facie . . . [evidence is] evidence that, if unrebutted, would sustain a judgement in the proponent's favor." Baures v. Lewis, 167 N.J. 91, 118 (2001).

A supporting party's decline in income and a dependent spouse's employment may constitute a change in circumstances. Lepis, 83 N.J. at 151. Indeed, "a payor spouse is as much entitled to a reconsideration of alimony where there has been a significant change for the better in the circumstances of the dependent spouse as where there has been a significant change for the worse in the

payor's own circumstances." Stamberg v. Stamberg, 302 N.J. Super. 35, 42 (App. Div. 1997). The proper inquiry is "whether the change in circumstance is continuing and whether the agreement or decree has made explicit provision for the change." Lepis, 83 N.J. at 152.

> A determination of emancipation is a legal issue, imposed when the fundamental dependent relationship between parent and child ends. See Dolce v. Dolce, 383 N.J. Super. 11, 17 (App. Div. 2006) (stating emancipation is "the conclusion of the fundamental dependent relationship between parent and child"). It is not automatic and "need not occur at any particular age . . . ." Newburgh [v. Arrigo], 88 N.J. [529,] 543 [(1982)]. When circumstances surrounding the parent-child relationship support a finding the child is emancipated, "the parent relinquishes the right to custody and is relieved of the burden of support, and the child is no longer entitled to support." Filippone v. Lee, 304 N.J. Super. 301, 308 (App. Div. 1997).
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> Deciding whether a child is emancipated requires a fact-sensitive analysis. Newburgh, 88 N.J. at 543. "[T]he essential inquiry is whether the child has moved 'beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status of his or her own.'" Filippone, 304 N.J. Super. at 308 (quoting Bishop v. Bishop, 287 N.J. Super. 593, 598 (Ch. Div. 1995)). A court's emancipation "determination involves a critical evaluation of the prevailing circumstances including the child's need, interests, and independent resources, the family's reasonable expectations, and the parties' financial ability, among other things." Dolce, 383 N.J. Super. at 18 (citing Newburgh, 88 N.J. at 545).

[Ricci, 448 N.J. Super. at 571-72.]

Additionally, a child's admission to and residence away at college constitutes a changed circumstance that may require the modification of child support upward or downwards. Jacoby v. Jacoby, 427 N.J. Super. 109, 122-23 (App. Div. 2012). Child support for a child residing away at college requires the motion judge to consider the factors enumerated in N.J.S.A. 2A:34-23(a), absent an agreement to the contrary. Ibid.

We are satisfied plaintiff established a prima facie showing of changed circumstances caused by his inability to gain comparable employment over the past seven years, defendant's graduation from nursing school, and the MSA's explicit provision requiring review of spousal support. Plaintiff submitted objective evidence of his unemployment and subsequent reductions in income. He also submitted considerable evidence of his attempts to seek higher-earning employment. He objectively demonstrated his financial distress evidenced by the premature withdrawal of funds from his retirement account to meet his obligations. Therefore, plaintiff's submissions, at a minimum, raised material questions of fact concerning his present income level, which necessitated a plenary hearing.

Furthermore, the parties' MSA clearly contracted for a review of plaintiff's alimony obligation one year after defendant obtained her nursing degree and had an opportunity to become employed. The MSA also provided for an imputed income to defendant after December 2013, regardless of defendant's graduation from nursing school. However, the trial judge failed to address this changed circumstance and made no findings. R. 1:7-4(a).

Lastly, plaintiff represented the parties' eldest son was twenty-three years of age, had graduated from college, and was employed full time, and the parties' younger son had entered college and was no longer living at home. These representations were unrebutted by defendant, and constituted a change in circumstance requiring a plenary hearing to establish the present needs of the child in college utilizing the factors set forth in N.J.S.A. 2A:34-23(a). However, the motion judge failed to make the required statutory findings regarding child support.

For these reasons, we reverse and remand for the motion judge to conduct a plenary hearing and make findings of fact and conclusions of law as to whether and how plaintiff's alimony and child support obligation should be modified. 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