SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A 005004 0072

Arlene Owens,

Plaintiff / Respondent

vs.

Martin Owens,

Defendant / Appellant

Civil Action

On Appeal from a Final Judgment of the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County

Sat below:

Hon. Edward J. Ryan, J.S.C.

Respondent's Brief

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Procedural History

Plaintiff adopts defendant's procedural history except to note that a subsequent motion was filed to reinstate the appeal and to either remand the matter to the trial court or to issue a new briefing schedule. The appeal was reinstated. The application for remand was denied and a new scheduling order was issued.

Counter-statement of Facts

The parties were married for seventeen years (Da 54). They are the parents of three children, Maria, born April 26, 1983, Sean, born January 22, 1985, and Michael, born April 7, 1987. Defendant was the breadwinner during the parties long-term marriage, earning $70,000 at the time of divorce. The parties stipulated (Da 13) at trial that Mrs. Owens, a stay-at-home parent, is severely disabled, suffering from muscular dystrophy, hypertensive heart disease, fibro myalgia, and Ehler's Danlos syndrome (Da 13). At trial, the Court below determined that Mrs. Owens has "no prospects of obtaining employment in the future" and had noted that she had not worked outside the home in nearly fifteen years (Da 13).

The parties' children are also seriously disabled. Maria suffers from muscular dystrophy, Ehler's Danlos syndrome, and a heart arrhythmia. Sean has been diagnosed as having a central auditory processing disorder, and is hyper-aggressive with

Attention Deficit Hyperactivity Disorder. Michael Owens also suffers from muscular dystrophy, Ehler's Danlos syndrome, Attention Deficit Disorder and an auditory processing disorder (Da 13).

In a seventeen page opinion following two days of trial, the Court found that the support provisions of the judgment would permit each party to maintain the approximate standard of living attained during the marriage, taking into account that plaintiff would continue to be responsible for the support of the parties' three children and herself.

After meticulously reviewing the factors applicable to an interspousal counsel fee award, the trial court determined that defendant should pay 49.96% of Mrs. Owens' fees. No dollar amount of fees was set by the trial court, rendering this issue interlocutory.

As demonstrated below, the trial court's ruling was well rooted in the record and completely equitable. Same should be affirmed in its entirety.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE SUPPORT AWARD IN THIS MATTER.

As our Supreme Court recently reaffirmed in Cesare v. Cesare, 154 N.J. 394 (1998):

The scope of appellate review of a trial court's fact-finding function is limited. The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence. Rova Farms Resort Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974). Deference is especially appropriate "when the evidence is largely testimonial and involves questions of credibility." In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997). Because a trial court " 'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J.Super. 1, 5 (App.Div.1961)) (alterations in original). Therefore, an appellate court should not disturb the "factual findings and legal conclusions of the trial judge unless [it is] 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." Rova Farms, 65 N.J. at 484.

The trial's court exhaustive ruling is well-grounded in the

record and does not in any way "offend the interests of justice." Defendant's argument to this Court and the calculations as to the parties' respective incomes is fundamentally flawed in that it fails to take into account the tax consequences of defendant's support obligations. Moreover, these obligations are not as high as defendant contends to this Court and are subject to modification and decrease as each of the children becomes emancipated.[1]

The judgment of divorce requires defendant to pay 50.04% of the expenses relating to the former marital residence: the mortgage, taxes, insurance, utilities, and maintenance (Da 31). It does *not* rely on plaintiff's CIS in establishing this obligation and, contrary to defendant's assertion to this Court, it does *not* set this amount at "$2,770 monthly." (Db 13). If, as defendant contends to this Court, Ms. Owens overstated these costs, defendant could certainly request the production of a bill prior to contributing his share.

The judgment requires defendant to pay $425 per week, or $1,827.50 per month, in permanent alimony. Defendant's brief

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[1] The parties youngest child is now 15. Upon his emancipation, defendant will be obligation to pay a post-tax net only about $306.00 per week of his approximately $1,000 per week net income.

completely ignores that this is deductible; in defendant's income bracket the alimony will end up costing him approximately $1,096.20 per month. As he is paying 50.04% of the $1,377.00 per month mortgage (and later receiving a large portion of the equity), he will be entitled to the deduct the interest paid as well.

Defendant claims that the trial court's judgment leaves him with $644.00 per month to meet all his expenses (Db 14) are fiction.[2] When the deductibility of the alimony is calculated in, his income rises to at least $1,375.00 per month. If even 50% of the mortgage payment is toward interest, his monthly income rises to at least $1,600.00 per month.[3] If the payments to the Special Needs Trust are also considered alimony, he ends up with well over $2,500.00 per month. In no case is he left with "$644.00 per month."

Similarly, the result of the court's judgment as to Ms. Owens is not accurately portrayed to this Court. Ms. Owens will have tax liability on the alimony received and, assuming a 28% tax bracket, she will clear $1,315.80 per month. Additionally, Ms.

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[2] The alleged income numbers provided by defendant are not contained in the record below.

[3] As these issues were not raised nor explored below, it is impossible to determine exactly what portion of the mortgage payment is interest. The salient fact is that defendant's claims as to the effect of the judgment below are completely inaccurate as they ignore all the tax consequences.

Owens receives a gross amount of $1,552.28 from social security for herself and the children. The SSD[4] is taxable under the IRS guidelines as Ms. Owens' other household income (alimony and child support) exceed $22,000 per year. Again assuming a 28% tax bracket, she nets $1,117.64 from SSD. Finally, she receives $546.00 per month in nontaxable child support, for a net monthly income of $2,979.44 from which she must pay half the mortgage and other roof expenses as well as providing for herself and the parties' three children.

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[4] Contrary to defendant's assertions, Mrs. Owens does not currently receive SSI. As the trial Court notes, this needs-based aid was terminated prior to trial; the only social security plaintiff receives is SSD (Da 14).

Ms. Owens has been completely disabled and unemployed since 1985[5] and was receiving SSD for several years prior to the separation of the parties. Mr. Owens earned about $60,000 gross, or a monthly net of $3,600.00. Accordingly, the combined household income prior to separation was a net of 6,033.00 per month. The court's judgment leaves Ms. Owens, completely dependant on defendant during their seventeen year marriage, totally disabled and left to care for the parties' three children, with well under 50% of the income upon which the marital lifestyle was based.[6] This was a long term marriage, with a completely disabled dependant spouse. A permanent alimony award in the amount

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[5] Defendant's assertion that Mrs. Owens stopped working in 1987 (Db 4) is incorrect. Both parties testified, and the trial Court found as fact that Mrs. Owens had been unable to work since 1985, when she was declared disabled (Da 13).

[6] Defendant claims that plaintiff's CIS was massively inflated in that it claims approximately $6,500 (Db 11) per month in expenses. A litigant completing a CIS is required to estimate expenses based on the marital lifestyle. Appendix V, New Jersey Court Rules, 2002 Edition, Pressler, at page 2250. The record fully support the trial court's determination that her CIS was credible.

entered by the Court was fully justified by the record below. Scherzer v. Scherzer, 136 N.J.Super. 397 (App.Div. 1975), certif. den., 69 N.J. 391 (1976), Guglielmo v. Guglielmo, 253 N.J.Super. 531 (App.Div. 1992). The net effect of the alimony award after tax considerations is completely equitable; it does not in any way "offend the interests of justice." Same should be affirmed. Pascale v. Pascale, 113 N.J. 20, 33, (1988) (citing Gallo v. Gallo, 66 N.J.Super. 1, 5, (App.Div.1961)), Rova Farms Resort Inc. v. Investors Ins. Co., 65 N.J. 474 at 484.

II. TO THE EXTENT THIS ISSUE CAN BE ADDRESSED, THE TRIAL COURT'S COUNSEL FEE AWARD SHOULD BE AFFIRMED.

An interlocutory Order is one that does not dispose of all issues as to all parties. No actual counsel fee award was entered by the court below. Until an Order setting a precise dollar amount is entered, this issue is interlocutory and not ripe for consideration by the Appellate Division. Sharp v. Sharp, 336 N.J.Super. 492 (App.Div. 2001), Greco v. Zecchino, 285 N.J.Super. 418 (App.Div. 1995).

In the event the Appellate Division addresses this issue, the counsel fee award should be affirmed.

Initially, the claims on this issue concerning compliance with R. 4:42-9 were not presented below and are therefore waived. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to

the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.' " Skripek v. Bergamo, 200 N.J.Super. 620, 629, (App.Div.) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, (1973)), certif. denied, 102 N.J. 303 (1988); see also Chalef v. Ryerson, 277 N.J.Super. 22, 28-29 (App.Div. 1994). Moreover, the trial court conducted a two day trial during which all aspects of the parties' finances were discussed and explored in detail. The trial court's 17 page opinion explicitly states that it considered every aspect of R. 4:42-9 and R. 5:3-5(c) when considering the fee award. Defendant's claims to the contrary are frivolous.

Finally, defendant argues that "the lower court's conclusion [as to counsel fees] is flawed because it ignores **plaintiff's** contribution to **Mr. Owens**' counsel fees." (Emphasis in original). The judgment below states "Defendant shall be responsible for his own counsel fees and costs. In addition, defendant shall be responsible for 49.96% of plaintiff's counsel fees." (Da 34). The proposition that Mrs. Owens, disabled and completely dependant on defendant, was ordered to contribute to Mr. Owens' counsel fees is preposterous and directly contradicted by the record.

The court below tried this matter over a two day period and was

well familiar with the assets, incomes, and debts of the parties. Its reasonable counsel fee award should be affirmed. R. 4:42-9(a)(1); N.J.S.A. 2A:34-23; Williams v. Williams, 59 N.J. 229 (1971), Chestone v. Chestone, 322 N.J.Super. 250 (App. Div. 1999).

Conclusion

For the above reasons, this Court should affirm the trial court's decision in all respects.

Respectfully submitted,

David Perry Davis, Esq.