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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0594-09T3

PATRICIA CHALOW, n/k/a

PATRICIA SPENCE,

Plaintiff-Respondent,

v.

WALTER GUY CHALOW, JR.,

Defendant-Appellant.

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April 29, 2011

Argued October 18, 2010 - Decided

Before Judges Grall, C.L. Miniman and LeWinn.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part,

Cumberland County, Docket No. FM-06-174-94.

Robert J. O'Donnell argued the cause for appellant.

Stacy L. Spinosi, attorney for respondent.

PER CURIAM

In this post-judgment matrimonial matter, defendant appeals from an order increasing his child support obligation and awarding counsel and expert fees to plaintiff; he also appeals from an order denying his motion for reconsideration. For the reasons that follow, we remand for recalculation of defendant's income; we affirm the counsel fee award.

The parties were married in July 1988 and divorced in January 1995. They have two children, a son born in 1989 and a daughter born in 1993. The property settlement agreement (PSA) incorporated into their final judgment of divorce designated plaintiff as the children's parent of primary residence and afforded defendant overnight visitation every other weekend as well as summer and holiday parenting time according to a schedule set forth in the PSA. Defendant's child support obligation for the two children was set at $150 per week; the PSA noted this figure was not "based on the child support guidelines because both parties are self-employed, their incomes fluctuate, and cannot be precisely determined." Defendant is the proprietor of W.G. Chalow Electrical Contractor, Inc., and plaintiff works out of her home as a "credit searcher."

In May 2007, defendant filed a motion seeking various forms of relief which are not the subject of this appeal, such as (1) designating himself as the children's parent of primary residence, (2) terminating his child support obligation effective September 1, 2006, (3) eliminating his arrears, and (4) obligating plaintiff to pay child support to him. Plaintiff filed a cross-motion seeking "full discovery of . . . [d]efendant's business and its income for purposes of calculation of support"; she also sought counsel fees.

In the ensuing two years, the parties filed various motions relating to

the children's private school and college expenses, discovery of their respective earnings, the retention of accounting experts, and counsel fees. A plenary hearing was held on four days between May 8, 2008 and May 4, 2009; the principal issue was the determination of the parties' incomes in order to calculate child support.

The judge issued a written opinion in support of his order of June 30, 2009. He determined that defendant's annual income was $153,199, and plaintiff's was $71,313. Based upon these incomes, defendant's child support obligation was set at $267 per week, pursuant to the child support guidelines. The judge further ordered defendant to pay plaintiff $10,000 in counsel fees and $6440 in fees for her accounting expert.

On appeal, defendant challenges various aspects of the judge's calculations of the parties' incomes; he also contends the judge erred in awarding counsel and expert fees to plaintiff.

Defendant raises four challenges to the trial judge's income determinations. With respect to his own income, defendant contends the judge erred in (1) imputing an additional $20,000 in income based upon the determination that there was "an unreasonable amount of fuel charges for the listed property and the way the business is done"; (2) adding back and double counting certain credit card charges; and (3) imputing an additional $21,755 in income as a "write[-]off [of] dues and other charges" connected to the Sand Barrens Club and Driftwood RV Center. With respect to plaintiff's income, defendant contends the judge erred in using only her 2006 income instead of averaging her income from 2002 through 2006.

"The scope of appellate review of a trial court's fact-finding function is limited." Cesare v. Cesare, 154 N.J. 394, 411 (1998). "[A]n 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.'" Id. at 412 (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). Moreover, we will give special deference to the factual findings of a family court because of its "expertise in the field of domestic relations." Ibid. With these standards in

mind, we turn to defendant's contentions.

The child support guidelines provide specific instructions for judges determining income "from self-employment or the operation of a business." Child Support Guidelines, Pressler Current N.J. Court Rules, Appendix IX-B to R. 5:6A at 2473 (2011) (hereinafter Guidelines). The following provisions are particularly pertinent and instructive with respect to the issues raised here:

> b. In general, income and expenses from self-employment or the operation of a business should be carefully reviewed to determine an appropriate level of gross income that is available to the parent to pay a child support obligation. In most cases, this amount will differ from the determination of business income for tax purposes.
>
> c. Specifically excluded from ordinary and necessary expenses, for the purpose of these guidelines, are expenses allowed by the I[nternal] R[evenue] S[ervice] for:
>
> . . . .
>
> (6) entertainment;
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> . . . .
>
> (9) automobile expenses; [and]
>
> . . . .
>
> (11) any other business expenses that the court finds to be inappropriate for determining gross income for child support purposes.
>
> [Ibid.]

As a preface to addressing the calculation of defendant's income, the judge noted that defendant did not testify at the plenary hearing; nor did the

certification he submitted in support of his May 2007 motion adequately address the factors identified in Appendix IX-B of the guidelines. Rather, the judge noted, his findings were based upon his assessment of the divergent analyses of defendant's income proffered by the parties' respective accounting experts.

On the issue of the fuel charges deducted from the business, the judge found that defendant's accounting expert, Larry DeSalvo, gave "flippant" answers and that there "appeared to be no desire on his part to make an accurate factual determination as to whether [defendant] used his vehicle for business or personal use." The judge observed that defendant's 2006 tax return listed "$70,232 in fuel costs," and that neither defendant nor DeSalvo "address[ed] these expenses" or "testif[ied] as to their necessity or propriety."

The judge noted that the two vehicles listed on defendant's 2006 business tax return traveled a combined total of 36,345 miles. The judge took "judicial notice that the average cost of gasoline in 2006 was approximately $2.50 per gallon[,]" and dividing that price "into $70,000.00 indicates the use of 28,000 gallons, rounded off. Assuming [ten] miles per gallon, that would mean that there w[ere] 280,000 miles of business related fuel expenses." The judge further noted that "[t]here was no explanation by [defendant] as to this number. It is also unclear . . . whether some of this expense was for heating buildings, running mechanical equipment or other rental vehicles." The judge concluded that "without adequate explanation from [defendant] as to this expense and no comment from . . . DeSalvo," he was "faced with what appears to be an unreasonable amount of fuel charges." The judge thereupon determined to add back the sum of $20,000 as additional income to defendant "because of these unwarranted deductions."

We cannot discern with any degree of confidence based on the evidence of record, how the judge arrived at this $20,000 figure. In the absence of an "adequate explanation" either from defendant or from the accounting experts, the judge had no sound basis to assess the credibility of the claimed fuel expense. In fact, as the judge himself noted, that $70,232 figure raised more questions than it answered; did it apply only to the business vehicles or to other expenses as well such as heating? In his motion for reconsideration, defendant

certified that his business in fact has nine vehicles, which he identified in a list typed on a sheet of paper bearing his business' letterhead.

In denying relief on this point, the judge noted that he thought

> the amount of income that [he] imputed to [defendant] was fit, just and warranted under the circumstances. And [he] was trying the best [he] could to do it in a logical way when there was a desire on the part of [defendant] to make sure that the facts were as hard to get as possible.

Defendant contends that because the judge's determination to add back $20,000 on the fuel charges was "not based on evidence in the record or of [sic] proven acceptance in a field of expertise" it "should be given little weight." Defendant had the burden, and the opportunity, to present evidence of his legitimate business expenses to avoid the exclusions listed in Appendix IX-B of the guidelines. He patently failed to do so. As noted, defendant did not testify at the hearing; nor did his accounting expert proffer credible testimony on this subject.

Nonetheless, under the circumstances, we can sustain neither the judge's finding that the $70,233 fuel expense listed on defendant's tax return was unreasonable, nor his decision to impute $20,000 of that amount as income to defendant. A remand is, therefore, necessary to re-visit this issue based upon a fuller record.

We turn to the $15,616.29 in credit card charges that the judge added back as income to defendant. That figure included $4,947.31 for a golf trip to Canada and $5269 for a Norwegian Cruise Line reservation. However, the judge also added the cost of those trips to defendant's income as separate add-backs. Therefore, the judge clearly made a mathematical error when he considered these two expenses as "add backs" to income in addition to the $15,616.29 figure. This constituted double counting of $10,216.31 in credit card expenses. On remand, therefore, the amount of $10,216.31 shall be deducted from defendant's income in the recalculation of his child support obligation.

Defendant further contends these two charges should not have been added back because they were never "paid by [his] business in 2006, the year in which

the [c]ourt . . . added this as income to . . . [d]efendant." The trial judge found

> this argument has no merit since basically the amount of expense that goes to personal lifestyle benefited [defendant] and essentially it was income to him and apparently is being paid by the business. In order to normalize that amount the [c]ourt will choose to consider this for this particular year. This is especially true without the testimony of [defendant] to explain when the charges were made and how they occurred.

As the judge noted, "entertainment" is "[s]pecifically excluded from ordinary and necessary expenses, for the purpose of" the child support guidelines. Guidelines, Appendix IX-B, supra, at 2473. Noting that defendant claimed these entertainment expenses were "necessary to keep clients[,]" the judge determined that "[w]ithout details from [defendant] this [c]ourt cannot jump to that conclusion[,]" adding that "when an inference is raised, it is up to [defendant] to rebut the inference and he has not done so." We defer to these findings as within the family judge's discretion and expertise. Cesare, supra, 154 N.J. at 412.

With respect to the $21,755 added back as a "write off [of] dues and other charges" at the Sand Barrens Golf Club and the Driftwood RV Center, defendant maintains this figure represents a debt that the clubs, which are related entities, refused to pay. He points to an August 12, 2008 letter from Driftwood, stating that "[b]efore making any payment related to this balance [on an enclosed statement], [the club] would appreciate the opportunity to discuss a few invoices." Contrary to defendant's assertion, this letter does not clearly constitute a refusal to pay.

Plaintiff's expert, Pelosi, had specifically requested documents supporting defendant's claim of credits he gave Sand Barrens and Driftwood "against their respective bills." Defendant responded in a cursory letter explaining various reasons for some of the credits identified by Pelosi; his only explanation regarding Sands Barrens, however, was that he "[m]ade donations to the club[,]" and he gave no explanations for credits to Driftwood. This led Pelosi to conclude that a "barter" relationship existed between defendant and these entities, and to note in his report:

> Driftwood RV Center and Sand Barrens Golf Club are related entities. During the year 2006, [defendant's business] did $108,000 worth of work for them. [Defendant] is a member of this club. [Defendant's business] paid them $1,237.00 for goods and services provided on [defendant's] behalf and [defendant's business] wrote down the Driftwood bills by $21,755.00 for dues and other charges [defendant] had incurred, as well as[] prepaying [defendant's] 2007 club dues.

At the hearing, Pelosi testified that when defendant did work for Sand Barrens, "he would debit accounts receivable and . . . would credit sales," and that defendant "did the offset for his activities at . . . Sand Barrens," by making "an entry reducing accounts receivable relieving the amount that was owed and charging an account called Credits. That Credits account ultimately was used in the preparation of a tax return to reduce his top line."

Based on Pelosi's analysis, and in the absence of any countervailing evidence from defendant other than "a dispute over a bill[,]" the judge concluded that "[t]he inference that [defendant] received a personal benefit has not been overcome," and imputed $21,755 of additional income to him. We are satisfied that these findings are supported by the evidence. Cesare, supra, 154 N.J. 411-12.

We turn to defendant's contention that the judge erred in declining to average plaintiff's income. He asserts that plaintiff's 2006 earnings of $67,273 were by far her lowest for the period from 2003 to 2006. The judge ultimately concluded that plaintiff's income was $71,313, after adding back certain expenses.

In declining to average plaintiff's income and deciding to use only her 2006 earnings, the judge took "judicial notice that there has been a substantial upheaval in the real estate market, of a magnitude that has not been seen since the Great Depression." Plaintiff had testified "that her business deals with title companies [that] are seriously affected by the real estate market." The judge found that testimony "credible." The judge rejected defendant's "suggestion" that plaintiff's income was lower "because of her wrongdoing[,]" adding:

> [B]ecause of the great fluctuations of income

> and probabilities that the real estate market will remain slow, it would be unjust to burden either party with averaging income between a highly successful real estate market with one that is in recession. . . . The [c]ourt finds that it would be inequitable to average one side and not the other.

Notwithstanding that the hearing in this matter spanned a one-year period from May 8, 2008 to May 4, 2009, neither party presented any evidence of income beyond 2006. Presumably that fact was at least partly responsible for the judge's provision that, going forward, "the parties [shall] adjust their income tax returns annually pursuant to the [c]hild [s]upport [g]uidelines and provide that information to each other. . . . That way there would be no inequity with future income utilized for child support . . . ."

We are, of course, aware that the child support guidelines provide for the averaging of income that "is sporadic or fluctuates from year to year." Guidelines, Appendix IX-B, supra, at 2473. Examples of such income include "seasonal work, dividends, bonuses, royalties, [and] commissions." Ibid. Where, as here, the judge made a specific finding that plaintiff's earnings are tied to a real estate market that "is in recession[,]" we discern no basis for disturbing the judge's determination that averaging was not appropriate. The judge's findings on this point do not "'offend the interests of justice.'" Cesare, supra, 154 N.J. at 412 (quoting Rova Farms, supra, 65 N.J. at 484).

Finally, we address counsel fees. We reject defendant's contention that the judge failed to address the factors governing an award of counsel fees set forth in Rule 5:3-5(c). The judge specifically cited the rule and addressed the various factors in his opinion.

It is clear that a primary consideration in the judge's fee award was his conclusion that "if [defendant] had presented his income accurately . . . in a forthright manner, litigation would have been considerably less and the expenses would have been greatly reduced." The judge observed that defendant "did not want the exploration of his income and therefore made it difficult to get accurate information."[1]

"[T]he award of counsel fees and costs in a matrimonial action rests in

the discretion of the court." Williams v. Williams, 59 N.J. 229, 233 (1971). We will not disturb such an award unless we are convinced there has been an abuse of that discretion. Chestone v. Chestone, 285 N.J. Super. 453, 468 (App. Div. 1995). Here, plaintiff sought approximately $35,000 in counsel fees (as compared to approximately $11,000 in fees spent by defendant). The judge determined that a counsel fee award of $10,000 was appropriate. With respect to Pelosi's fee, the judge declined to include a fee for Pelosi's appearance in court on a date when he did not testify; thus the $6440 fee awarded to him was adjusted accordingly.

Defendant contends that, in the event of a remand, this matter should be assigned to a different judge; defendant asserts that the judge's findings regarding his underreporting of income deprived him of a fair and unprejudiced hearing. We are satisfied this issue lacks "sufficient merit to warrant discussion in a written opinion." R. 2:11-3(e)(1)(E).

Affirmed in part; remanded in part for further proceedings in conformance with this opinion.

1 In fact, the judge found that defendant had "underreport[ed] . . . income on the tax returns that is not permitted such as, bartering, exchanging services for personal benefits that are not deduct[i]ble, deducting items that are club memberships or other entertainment expenses that are not deduct[i]ble . . . all of which could be considered intentional unreporting [sic] of income." Therefore, pursuant to Sheridan v. Sheridan, 247 N.J. Super. 552, 566 (Ch. Div. 1990), the judge decided to send a copy of his decision "to both the New Jersey and Federal Taxing Authorities for their consideration."