Anderson v. Anderson

Superior Court of New Jersey, Appellate Division

April 30, 2007, Argued; May 17, 2007, Decided

DOCKET NO. A-4859-05T5

JAMES H. ANDERSON, Plaintiff-Appellant, v. GAIL ANN ANDERSON, Defendant-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, FM-12-18085-88.

Core Terms

parties, financial aid, loans, factors, lessen, student loan

Counsel: Elliot H. ***Gourvitz*** argued the cause for appellant (Elliot H. ***Gourvitz***, attorneys; Ari H. ***Gourvitz***, on the brief).

Carolyn T. Hendler argued the cause for respondent (Marcia L. Hendler, attorneys; Ms. Carolyn T. Hendler, on the brief).

Judges: Before Judges LINTNER, SELTZER and C.L. MINIMAN.

Opinion

PER CURIAM

We again review a decision of the Family Part judge assigned responsibility for determining an application of defendant Gail Ann Anderson ("the mother") to enforce the Property Settlement Agreement ("PSA") into which the parties entered on November 6, 1989. The judge determined that plaintiff James H. Anderson ("the father") was responsible to pay fifty percent of the student loans incurred by his children, James Michael, born August 10, 1980, and Michelle Ann, born August 10, 1985. We reverse.

The procedural history and relevant facts are concisely set forth in our unreported decision of September 1, 2005, [1] and need not be repeated here. We reversed the order before us at that time because the Family Part judge refused oral argument without setting forth the reason for this refusal. **[*2]** We noted that such an error might not normally trigger a reversal, but it was required in this case because the record was not sufficiently developed to permit us to review the substantive result.

Additionally, we noted that the judge had not supported his order with findings of fact and conclusions of law until a statement of reasons was filed pursuant to *R. 2:5-1(b)*. As to that statement, we noted:

> [T]he statement filed pursuant to *Rule 2:5-1(b)* concerns us from a more substantive perspective. Although we do not prejudge the merits of defendant's application, we simply note that to the extent the court referred to some of the *Newburgh* [2] factors, the basis for its reliance is not readily apparent from the record, nor, for that matter, is its omission from consideration of other *Newburgh* factors such as the "availability of financial aid in the form of college grant and loans," "the financial resources of the child . . .," "the ability of the child to earn income . . .," and "the financial resources of both parents . . . ." *88 N.J. at 545*. And, to the extent the court relied on the language of the PSA itself, nowhere does the PSA expressly provide for the obligation defendant **[*3]** now seeks to impose on plaintiff for the first time since the inception of the loans back in 1998. On the contrary, *the PSA explicitly contemplates that the children seek financial aid to lessen each party's obligation*. Any ambiguity, therefore, as to whether the children's college loans are included within the term "college expenses" as used in the PSA must be resolved by reference not only to all relevant *Newburgh* factors, but, as importantly, to the entire text of the PSA, as well as the intent of the parties at the time of their agreement. We find such an analysis wanting in this case and the record insufficiently developed to

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[1] No. A-1172-04.

[2] *Newburgh v. Arrigo, 88 N.J. 529, 443 A.2d 1031 (1982)*.

allow for a proper resolution (emphasis added).

Paragraph 9, Post-High School Education, of the PSA provides:

> If either of the unemancipated children of the marriage is capable of and has the ability to attend post-high school education subsequent to his or her graduation from high school, the Husband and Wife, to the extent that each shall be financially able, shall pay for or contribute to said post-high school education, which shall include, but not be limited to, room, board, tuition, travel expenses to and from custodial **[*4]** parent's residence for major vacations, and all other miscellaneous fees. The choice of the institution is to be agreed upon between the Husband, the Wife and the child involved. If there is any dispute as to whether either party is financially able, or the extent of either party's financial ability to contribute or pay for said education, such dispute may be submitted to a Court of competent jurisdiction with respect to a decision in connection therewith. Both parties agree that the child shall obtain all financial aid available so as to lessen each party's obligation.

The PSA also provided that the trust funds being held for the children were to be used for their education.

On remand, the Family Part judge conducted a plenary hearing on March 7, 2006, after which he issued a May 2, 2006, amended order containing his findings of fact and conclusions of law and, again, requiring the father to pay one-half of the student loans. The judge found that "[a]lthough the PSA does provide for the children to make contributions by way of 'financial aid,' the exact form of this contribution is not apparent from the text. There is also an absence of language regarding the parents' obligation to **[*5]** pay off student loans." The judge then recited the parties' opposite positions: the father, that the children were responsible for the loans, and the mother, that the parents were responsible for the loans. The judge concluded that the language of the PSA was ambiguous because it could reasonably be interpreted to have two alternative meanings. Relying on the doctrine of *contra proferentum* to construe the PSA against the father on the ground that his attorney drafted the PSA, the judge held that "the PSA is construed to require the children to obtain financial aid but not loans." The judge then applied the factors set forth in *Newburgh* and came to the same conclusion as previously reached respecting the proportional shares of the loans to be paid by the father, the mother, and the son.

The judge's reliance on the doctrine of *contra proferentum* was mistaken. In *Pacifico v. Pacifico, 190 N.J. 258, 268, 920 A.2d 73 (2007)*, our Supreme Court held that this doctrine of last resort, which has only been employed when the parties have unequal bargaining power, may not be used to interpret a PSA negotiated by husband and wife. As a result, the judge erred when he used this doctrine of last **[*6]** resort to interpret the PSA.

Having reached that conclusion, we exercise our original jurisdiction to construe the PSA here at issue because no further fact findings need be made nor is any determination of credibility required. *R. 2:10-5*. We also do so because the interpretation of the PSA will eliminate the need for any further litigation. *AAA Mid-Atl. Ins. of N.J. v. Prudential Prop. & Cas. Ins. Co., 336 N.J. Super. 71, 78, 763 A.2d 788 (App. Div. 2000)*. There can only be one reasonable interpretation of the PSA, and thus, remand would be pointless, especially since, as we shall later discuss, no party here claims the meaning of the phrase was discussed. *See, e.g., Ladenheim v. Klein, 330 N.J. Super. 219, 224, 749 A.2d 387 (App. Div. 2000)*.

We do not find the language of the agreement to be ambiguous. The term "financial aid" in the context of a college education is commonly understood to refer to any financial assistance provided to a student other than by the student's family. It is a general term that includes scholarships, grants, loans, and work-study programs to assist the student to pay for higher education. [3]

In drafting property settlement agreements, attorneys are presumed to be familiar with the law. *In re Kasson, 141 N.J. 83, 87, 660 A.2d 1187 (1995)*. This PSA was prepared seven years after the Supreme Court's decision in *Newburgh*. There, the Court included among the factors to be considered by trial courts in determining parental responsibility for higher education "the availability of financial aid in the form of college *grants and loans*." *Newburgh, supra, 88 N.J. at 545* (emphasis added). Presumably, both attorneys who participated in negotiating the PSA were familiar with *Newburgh*. If the parties had agreed that only grants were to lessen their financial obligations for the higher education of their children, the attorney would have used the more specific term "grants" (or "scholarships") rather than the general term "financial aid." Of course,

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[3] *See, e.g.*, *http://essc.unt.edu/finaid/glossaryf.htm*, *http://dictionary.reference.com/browse/financial%20aid*, **[*7]** and *http://www.gcc.mass.edu/resources/ds/students/glossary.html*.

the parties' mutual intention would override the language used by the attorney if that intention diverged from the actual language.

Matrimonial agreements are basically contractual in nature. *Petersen v. Petersen, 85 N.J. 638, 642, 428 A.2d 1301 (1981)*; *Harrington v. Harrington, 281 N.J. Super. 39, 46, 656 A.2d 456 (App. Div.)*, **[*8]** *certif. denied*, *142 N.J. 455, 663 A.2d 1361 (1995)*. As such, the intention of the parties controls the meaning of the PSA.

> In the quest for the common intention of the parties to a contract the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain. An agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose.
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> Even where the intention is doubtful or obscure, the most fair and reasonable construction, imputing the least hardship on either of the contracting parties, should be adopted so that neither will have an unfair or unreasonable advantage over the other.
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> [*Tessmar v. Grosner, 23 N.J. 193, 201, 128 A.2d 467 (1957)* (citations omitted).]

Here, both parties express a different *understanding* of the meaning of Paragraph 9 of the PSA fifteen years after it was prepared. However, it is undisputed that they never discussed the issue of responsibility for student loans prior to or during the time the PSA was being negotiated. Nor did they do so at any time between 1989 and 2004 when the mother first sought to compel the father to contribute **[*9]** to the payments the son was required to make on his college loans. Thus, the parties themselves had no *common intention* with respect to the meaning of the requirement "that the child shall obtain all financial aid available so as to lessen each party's obligation." The mother's unexpressed understanding of the term "financial aid" is no more than a secret intent which cannot bind the father. *Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191, 814 A.2d 1108 (App. Div. 2002)*; *Domanske v. Rapid-American Corp. 330 N.J. Super. 241, 246, 749 A.2d 399, (App. Div. 2000)*. As a consequence, we are satisfied that the phrase "the child shall obtain all financial aid available so as to lessen each party's obligation" means that each child is to obtain all scholarships, grants and loans available to the child so as to lessen each parent's financial burden in educating the child. The mother's application to compel the father to pay a portion of the son's student loans must be denied.

We are also constrained to reverse the award of counsel fees to the mother. Once again, the trial judge failed to make findings of fact and state his conclusions of law with respect to the award of $ 16,257.55 to the mother.

> The trial court must **[*10]** clearly state its factual findings and correlate them with relevant legal conclusions, so that parties and the appellate courts may be informed of the rationale underlying the conclusion. *Monte v. Monte, 212 N.J. Super. 557, 564, 515 A.2d 1233 (App. Div. 1986)*; *see also State v. Singletary, 165 N.J. Super. 421, 424-25, 398 A.2d 576 (App. Div.)*, *certif. denied*, *81 N.J. 50, 404 A.2d 1150 (1979)*. Without the benefit of such findings, it is impossible for an appellate court to perform its function of deciding whether the determination below is supported by substantial credible proof on the whole record. *Monte, supra, 212 N.J. Super. at 565*. As we stated in *Monte, supra*, "[t]rial judges should always state their reasons so that counsel and an appellate tribunal may be fully informed." *Ibid.*
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> [*Ribner v. Ribner, 290 N.J. Super. 66, 77, 674 A.2d 1021 (App. Div. 1996)*.]

This requirement is just as important in fee awards as it is in substantive decisions. In Family Part matters,

> the court should consider, in addition to the information required to be submitted pursuant to *R. 4:42-9*, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; **[*11]** (3) the reasonableness and good faith of the positions advanced by the parties; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.
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> [*R. 5:3-5(c)*.]

Because none of these factors was apparently considered, the award of fees is reversed and remanded to a different Family Part judge for a hearing

on the allowance of fees. *R. 1:12-1(d)*. Any application for an award of fees in connection with this appeal shall by decided by the Family Part judge to whom this matter is reassigned as it necessarily involves fact finding.

Reversed and remanded for proceedings consistent with this opinion.

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