NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4136-09T3

JAMES JOSEPH MCGINLEY,

Plaintiff-Appellant/
Cross-Respondent,

v.

PATRICIA N. MCGINLEY,

Defendant-Respondent/
Cross-Appellant.

Argued May 17, 2011 – Decided June 30, 2011

Before Judges Carchman, Messano and Waugh.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-569-98.

Edward P. Fradkin argued the cause for appellant/cross-respondent.

Amy Sara Cores argued the cause for respondent/cross-appellant (Hoffman, Schreiber & Cores, attorneys; Ms. Cores, on the brief).

PER CURIAM

Defendant Patricia N. McGinley moved to terminate her child support for the parties' son, James, and to require plaintiff James Joseph McGinley to pay child support. The trial judge

granted her application, initially fixing plaintiff's child support obligation at $704.16 per month, an amount agreed upon — but later deviated from — in the parties 1998 property settlement agreement (PSA). Defendant moved for reconsideration, and the trial judge ordered that the modification be retroactive to the date of the filing of the motion, May 8, 2009. The next day, the judge also modified the support amount, multiplying it by the percentage increase in plaintiff's income, and arrived at a child support amount of $3,154.64 per month.

We reverse and remand. We conclude that under the facts presented here, a simple mathematical calculation does not comply with the mandates of N.J.S.A. 2A:34-23(a), Caplan v. Caplan, 182 N.J. 250, 271 (2005), and Pascale v. Pascale, 140 N.J. 583, 595 (l995). While the percentage increase in defendant's income is an important factor in determining plaintiff's support obligation, it is not exclusive and does not relieve the trial judge of performing the required analysis prescribed by the statute and case law.

We review the procedural and factual background to place the issue in context. The parties were married on June 25, 1988, and two children were born of the marriage: Megan, born on September 25, 1989, and James, born on October 30, 1991. The

parties were divorced on December 4, 1998, and the Judgment of Divorce incorporated a PSA. Pursuant to the PSA, defendant was the primary residential custodian of the children. The PSA also provided:

> 10. Commencing October 1, 1998 and continuing until each of the children are fully emancipated, the plaintiff shall pay child support in the sum of $1,408.33 per month, payable one-half on the first (1st) of each and every month and one-half on the fifteenth (15th) of each and every month. Said child support shall be allocated one-half for each child.
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> 11. The alimony and child support referred to above is based upon the plaintiff representing that he has gross earned income of $130,000[] per year.
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> . . . .
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> 22. Each of the parties shall be obligated to contribute toward the children's college education consistent with their respective financial ability to do so at the time each of the children are ready to attend college. There are certain custodial accounts set up for the benefit of the children. Those accounts shall be utilized specifically toward the children's college education and the custodian of said accounts shall be the defendant.

On August 30, 2004, custody of both children was transferred to plaintiff. Defendant was required to pay child support to plaintiff in the amount of $54 per week.

In March 2008, James began residing with defendant, and on May 8, 2009, defendant filed a motion seeking custody of James

and modification of child support. On June 24, 2009, the motion judge determined that James was to "remain at Defendant's residence" and that "[e]ither party may file a renewed Notice of Motion to address child support once there has been a full exchange of financial data that is to be done by August 1, 2009." The judge also ordered plaintiff to pay eighty-three percent of Megan's future college expenses, and defendant to pay seventeen percent.

In November 2009, defendant moved to terminate her child support obligation and require plaintiff to pay child support. Defendant also moved to enforce litigant's rights under Rule 1:10-3, seeking to have defendant found in contempt of court, incarcerated, and ordered to pay counsel fees. The judge denied counsel fees and fixed plaintiff's child support obligation at $704.16 per month, retroactive to June 25, 2009. The judge calculated this amount by dividing in half the agreed-upon child support from the PSA, $1,408.33 per month. The judge also noted that this award deviated from the Child Support Guidelines, Pressler and Verniero, Current N.J. Court Rules, Appendix IX-A to R. 5:6A at 2429 (2011), which would have been $458 per week. The judge declined to use the guidelines because James was eighteen years old, and "we are told by the guidelines that

they're to be utilized when calculating a support award for a child . . . 17 years old of age or under."

Defendant filed a motion for reconsideration, seeking a recalculation of plaintiff's child support obligation. On April 21, 2010, the trial judge placed findings of fact and conclusions of law on the record and noted that

> I'm satisfied here that I did make an error. The original date of retroactivity is the focus of the error. The defendant's monthly child support obligation is terminated and it is made retroactive to May 8th of 2009, which is the filing date of the defendant's original notice of motion.

The judge also denied counsel fees requested by both parties.

The next day, the judge amended his ruling and said, "To the extent that I placed anything on the record yesterday, I vacate all of that and begin anew." The judge again terminated defendant's child support obligation retroactive to May 8, 2009. The judge then stated:

> I turn now to another error in the original determination. What I had done in the earlier proceeding was to reconsider the decision to set plaintiff's child support obligation of $704.16 per month, payable one-half on the 1st of each and every month and one-half on the 15th of each and every month. I now recognize that I failed to appreciate the significance of probative, competent evidence. And that relates to the plaintiff's substantial increase in income since the entry of the judgment of divorce, which had incorporated within it a property settlement agreement.

> I compare the plaintiff's 2008 income, and that is listed as $582,500. It is part of the case information statement filed in this proceeding dated December 2 of 2009 and contrast it with the income of, annually of $130,000, which was the premise of the support obligation according to Paragraph 11 found on Page 5 of the property settlement agreement. Using the comparison between the two incomes, income of $130,000 per year back in 1998 and the income as noted in the current case information statement of $582,500.
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> I'm satisfied that the income has increased 448 percent since the time of the entry of the judgment. I take the sum of $704.16 and multiply it by the percentage increase and calculate a new child support figure of $3,154.64 monthly, payable one-half, which would be $1,577.32 on the 1st of each and every month and the remaining one-half $1,577.32 on the 15th of each and every month.

A written order followed the same day.

Plaintiff appealed from that order, and defendant cross-appealed. Plaintiff moved before us for a stay, which was denied. Defendant subsequently moved before the trial judge, seeking contribution from plaintiff for James's college expenses. Citing Rule 2:9-1, and noting that he no longer had jurisdiction because of the pending appeal, the trial judge denied plaintiff's motion.

Defendant then moved before us seeking a limited remand on the issue of college contribution. We granted defendant's

motion for a limited remand, noting that the trial judge was "permitted to adjust child support to the extent warranted by college award." After limited discovery on the issue, the trial judge concluded that child support would not be modified, finding that "the child support payment of $3,154.64 per month includes [plaintiff's] contribution towards James' college expenses. The Court makes this finding for interim relief without prejudice. This decisions is subject to revision if a plenary hearing is ultimately required." Defendant then amended her cross-appeal to raise the issue of college contribution.

We begin our analysis by setting forth basic but relevant principles regarding child support above the guidelines. Where family income exceeds the maximum amount under the guidelines, the court has discretion to calculate child support using the maximum support under the guidelines and "combin[e] that preliminary figure with a supplemental award subject to the provisions of N.J.S.A. 2A:34-23(a) . . . ." Pascale, supra, 140 N.J. at 595.

N.J.S.A. 2A:34-23(a) directs a court to consider, but not be limited to, the following factors in determining child support in high income cases:

> 1. Needs of the child;
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> 2. Standard of living and economic circumstances of each parent;

> 3. All sources of income and assets of each parent;
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> 4. Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;
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> 5. Need and capacity of the child for education, including higher education;
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> 6. Age and health of the child and each parent;
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> 7. Income, assets and earning ability of the child;
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> 8. Responsibility of the parents for the court-ordered support of others;
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> 9. Reasonable debts and liabilities of each child and parent; and
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> 10. Any other factors the court may deem relevant.

The trial judge "must consider" the statutory factors in determining the supplemental award. Caplan, supra, 182 N.J. at 271. The judge must also provide "clearly delineated and specific findings addressing the statutory factors relevant to any award or modification of child support." Loro v. Colliano, 354 N.J. Super. 212, 220 (App. Div.), certif. denied, 174 N.J. 544 (2002).

The Supreme Court has also directed that while the parties' respective income percentages are to be considered for calculating child support under the guidelines, those percentages cannot be used to determine the supplemental child support component. The Court elaborated:

> [B]ecause the income and assets of each party are only two of the many statutory factors the trial court must consider in determining a fair and just child support award, the allocation equation utilized under the guidelines-based award has little or no application to the amount of additional support determined through analyzing the N.J.S.A. 2A:34-23 factors.
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> [Caplan, supra, 182 N.J. at 271.]

In Isaacson v. Isaacson, 348 N.J. Super. 560, 581 (App. Div.), certif. denied, 174 N.J. 364 (2002), we explained that a judge should not extrapolate above the threshold using the respective incomes because "the extrapolation undermines the statistical basis of the guidelines."

Here, the trial judge correctly determined the preliminary support figure under the guidelines. However, the judge failed to follow the strictures of Pascale, supra, and apply the statutory factors in determining the support amount. Rather, the judge relied upon the amount determined under the PSA, initially dividing that figure in half, then multiplying that figure by the percentage increase in plaintiff's income.

Such a calculation fails to account for any of the statutory factors except the income of the parents, and even then, only considers plaintiff's income. This ruling fails to "clearly delineate[] and . . . address[] the statutory factors relevant to any award or modification of child support." Loro, supra, 354 N.J. Super. at 220.

We remand this matter to the trial court for calculation of plaintiff's child support obligation using the guidelines and statutory factors. See N.J.S.A. 2A:34-23(a). In addition, the trial court's previous finding – that college contribution was already accounted for in the current support obligation – must be revisited based upon the recalculation of the obligation. See Newburgh v. Arrigo, 88 N.J. 529, 545 (1982) (noting that one factor to consider is "the ability of the parent to pay"); Gac v. Gac, 186 N.J. 535, 546-47 (2006) (highlighting the importance of "initiat[ing] the application to the court before the [college] expenses are incurred" so that both parents can "participate in [the child]'s educational decision as well as to plan for [their] own financial future").

Because we remand the child support and college contribution calculation to the trial court, we need not address plaintiff's argument regarding the judge's vacation of his April 21, 2010 decision.

On her cross-appeal, defendant disputes the retroactive termination date of her child support obligation. An obligation to pay child support does not automatically end when a child moves from the home of the supported parent into the home of the supporting parent. Ohlhoff v. Ohlhoff, 246 N.J. Super. 1, 8 (App. Div. 1991). In addition, retroactive child support is limited by statute to the date of the filing of the motion.

> No payment or installment of an order for child support, or those portions of an order which are allocated for child support . . . shall be retroactively modified by the court except with respect to the period during which there is a pending application for modification, but only from the date the notice of motion was mailed either directly or through the appropriate agent.
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> [N.J.S.A. 2A:17-56.23a.]

Defendant's avers that the de facto change in custody on March 10, 2008 requires retroactivity to that date. However, as we stated in Ohlhoff, "[U]nless the parties are able to agree upon a termination or modification of child support, the supporting parent is required to obtain court approval before terminating or reducing support for a child who presently resides with that parent." Ohlhoff, supra, 246 N.J. Super. at 7.

Here, there was no agreement to modify the child support arrangement. Defendant's motion could have been filed at any

time after March 10, 2008; under N.J.S.A. 2A:17-56.23a, defendant bears the burden of her failure to do so. We affirm the order of the trial court terminating defendant's child support obligation on May 8, 2009.

Finally, defendant argues that the trial judge erred in failing to award counsel fees because there was evidence that plaintiff's actions forced defendant to litigate to enforce her rights, there was a large disparity of income, defendant had financial need, and plaintiff acted in bad faith.

"[A] reviewing court will disturb a trial court's award of counsel fees '"only on the rarest of occasions, and then only because of a clear abuse of discretion."'" Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (in turn quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995))).

Here, the remand as to college contribution and child support will require a searching financial analysis, and the revised support and college obligations could also dramatically alter the Rule 5:3-5(c) factors. On remand, the issue of counsel fees may be revisited by the trial judge.

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.