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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2511-09T3
A-3723-09T3

JONATHAN BOND,

Plaintiff-Appellant,

v.

WENDY BOND,

Defendant-Respondent.

Argued September 13, 2011 - Decided December 22, 2011

Before Judges Carchman, Fisher & Baxter.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FM-07-2060-00.

Patricia M. Barbarito argued the cause for appellant (Einhorn, Harris, Ascher, Barbarito & Frost, P.C., attorneys; Bonnie C. Frost and Christopher J. Roman, on the brief).

Paul A. Rowe argued the cause for respondent (Greenbaum, Rowe, Smith & Davis, L.L.P., attorneys; Mr. Rowe and Lisa B. DiPasqua, on the brief).

PER CURIAM

This appeal addresses the issue of whether creation of a special needs trust can justify the elimination of the obligation to pay child support to the primary residential

parent of a special needs child. We conclude that while a party may utilize a special needs trust to take advantage of government programs to lessen the burden on the parent to provide support and medical assistance, the facts of this case do not support a concurrent application to eliminate child support, and the motion judge correctly denied the application for relief.

Here, plaintiff Jonathan Bond appeals from a December 15, 2009 order of the Family Part that denied his request to eliminate child support payable to defendant Wendy Bond and establish a special needs trust for the educational and living expenses of A.B.[1], the parties' autistic son. The motion judge also denied plaintiff's request to appoint a parent coordinator to establish the special needs trust. Although the application was advanced to establish a special needs trust, integral to that application was plaintiff's request for termination of direct child support to defendant, as well as a request to require the parties to contribute toward the educational and living expenses of A.B. on a proportional basis, based upon the income and assets of each party. The application was denied, along with plaintiff's application for counsel fees.

[1] To protect his identity, initials are being used in this opinion.

The judge ordered plaintiff to pay ninety-nine percent of the post-secondary educational expenses for the parties' other son, Matt, with defendant being responsible for one percent of the expenses. Concluding that plaintiff had acted in bad faith, the judge awarded $27,397 in counsel fees and costs to defendant.

In a related appeal, which we consolidate for the purposes of this opinion, plaintiff appeals from a March 17, 2010 order that he pay $5335 in counsel fees and costs because he had violated litigant's rights for failing to comply with the court's December 15, 2009 order.

On appeal, plaintiff argues that the motion judge erred by not: ordering the establishment of a special needs trust; appointing a parent coordinator; and compelling defendant to cooperate. Plaintiff contends that the judge should have appointed a guardian ad litem for A.B., or alternatively, A.B. should have been joined as an indispensable party. Plaintiff further maintains that Vista Vocational & Life Skills Center (Vista), A.B.'s present school, is not "special education" under the terms of the property settlement agreement (PSA), and the judge erred when he ordered plaintiff to pay for A.B.'s costs at Vista. Plaintiff also challenges the allocation of Matt's college expenses as well as the award of counsel fees.

We affirm the December 15, 2009 order in its entirety (A-2511-09); as to the award of counsel fees in the March 17, 2010 order, we remand for findings of fact (A-3723-09).

I.

Our consideration of the issues raised on appeal requires an expansive recitation of the relevant facts. Plaintiff and defendant were married on October 19, 1985. Two children, A.B., now twenty-three, and Matt, now twenty, were born of the marriage. Both parties acknowledge that A.B. is autistic and has special needs requiring special schooling and ancillary assistance.

In January 2001, after separating, the parties entered into a parenting agreement. The parties agreed defendant would maintain physical custody of both children, and plaintiff would have parenting time with the children on alternate weekends and midweek for dinner.

The parties were divorced by judgment of October 10, 2002. The final judgment of divorce incorporated the terms of an oral settlement agreement reached by the parties, which was superseded on December 23, 2004, by a carefully crafted and comprehensive PSA. The earlier parenting agreement was incorporated by reference into the PSA. On October 12, 2005, the

court entered a consent order modifying the dual final judgment of divorce and incorporating the PSA.

Among other issues, the PSA addressed alimony, child support, emancipation, as well as the continued educational costs of the children. Under the terms of the PSA, plaintiff agreed to pay defendant $29,583.33 in alimony per month, commencing September 1, 2001, until December 31, 2004. Thereafter, alimony was terminated, and defendant waived any right to seek further alimony from plaintiff.

As to child support, plaintiff agreed to pay $4166.66 per month, or $50,000 per year, for each child in child support. Of critical importance, the PSA provided that "[i]ncome earned by the [d]efendant (if any) will not alter or have any impact on the amount of the [p]laintiff's child support obligation." In addition, plaintiff agreed to maintain the "current medical, hospital and dental insurance or comparable insurance for the benefit of the children until each child is emancipated as defined" in the PSA, such as the completion of undergraduate college, marriage or "[p]ermanent residence away from the residence of both custodial parents, which does not include residence while away at college." The child support obligations "shall terminate upon [Matt's] emancipation as defined" in the

PSA. With regard to A.B., the PSA recognized his special needs and provided:

> both [parties] recognize that [A.B.] is autistic, has special needs, and probably will never be emancipated. Both parties are committed to a course of action which preserves, promotes and protects [A.B.'s] best interest. The [p]laintiff has paid and shall continue to pay for [A.B.'s] unreimbursed and uncovered medical, dental, hospital, surgical, psychiatric, psychological, special education, and other similar expenses which are reasonable and appropriate for [A.B.] . . . . Both parties will consult with each other regarding such expenses and neither party will unreasonably withhold his or her consent to such expenses.
>
> [(Emphasis added).]

The parties also addressed the issue of plaintiff's demise. Under the terms of the PSA, plaintiff agreed to maintain $1,500,000 in life insurance coverage for the children's benefit until the emancipation of both children. The life insurance coverage amount increased to $2,500,000 after plaintiff paid his equitable distribution obligation. The PSA also contained the following provision: "[t]he sole [t]rustee of any [t]rust created to receive the [life insurance] proceeds on behalf of the children shall be the [d]efendant."

Both parties agreed that each of their children ought to "attend and accomplish the highest level of schooling/education possible for that child." Although the parties had not made

"specific arrangements" in the PSA "for the payment of each child's post high school education," if the parties disagreed as to the payment of the educational costs and expenses, either party could apply to the court for appropriate relief.

In 2006, defendant established a special needs trust for A.B. The trust was funded by a gift to A.B. from A.B.'s maternal grandfather.

In a subsequent proceeding in the Probate Part, the probate judge adjudged A.B. "an incapacitated person, and [he] is unfit and unable to govern himself and manage his affairs." The judge appointed plaintiff and defendant as co-guardians of A.B.'s person and property.

A.B. completed the program at The Children's Institute in Verona in June 2009, and in July of that year, he enrolled at Vista in Connecticut. Vista is a residential facility for young adults with special needs. It "is a unique, community-based educational program for young adults with neurological disabilities" that offers residents "hands-on training in vocational and life skills." The annual cost is $63,360.

Thereafter, plaintiff filed a post-judgment motion seeking an order to 1) establish a special needs trust to fund A.B.'s educational and living expenses at Vista; 2) appoint Shirley B. Whitenack, Esq. as a parent coordinator, or any person the court

would deem appropriate to serve as a parent coordinator; 3) compel defendant to cooperate with plaintiff and the parent coordinator in establishing a special needs trust for A.B.; 4) determine how the cost of the parent coordinator would be shared; 5) eliminate plaintiff's direct child support obligation; 6) determine the financial contributions of plaintiff and defendant toward A.B.'s educational and living expenses on a proportionate basis based upon income and assets; 7) modify the PSA by adjusting downward the amount of life insurance coverage required for the benefit of the children; 8) compel defendant to pay counsel fees and costs; and 9) award other relief as the court deemed equitable and just.

Defendant filed a cross-motion and sought an order to: 1) determine the parties' financial contributions toward A.B.'s educational and living expenses at Vista; 2) determine the parties' financial contributions toward the payment of counsel fees and costs for establishing a special needs trust for A.B.; 3) determine the parties' financial contributions toward Matt's post-secondary educational expenses; and 4) compel plaintiff to pay defendant's legal fees and costs.

In his certification in support of his motion, plaintiff argued that the parties needed to "work together to ensure the future happiness and financial security for [their] son in the

most effective way[,]" and presently, "[A.B.] is not set up for a time when [plaintiff] [is] earning less income and [has] fewer available resources[.]" Plaintiff argued that defendant ought to "listen [to] and heed the advice of [the] special needs attorneys" and agree to establish a special needs trust, separate from the one A.B.'s maternal grandfather had already established. Adopting this strategy "would allow [A.B.] to become eligible to receive government benefits, such as Supplemental Security Income (SSI) and Medicaid." Plaintiff requested that the court decrease life insurance coverage for the benefit of A.B. so the amount would "not [be] considered an asset or unearned income attributable to [A.B.]." Plaintiff recommended the court appoint Ms. Whitenack, an expert in disability law, as a parent coordinator.[2]

Further, with regard to A.B., plaintiff noted that defendant "wants [plaintiff] to continue to pay direct child support to her, notwithstanding the fact that [A.B.] is presently residing away from home at Vista on a full-time basis, and notwithstanding the fact that [he] h[as] been responsible for all expenses relating to Vista on behalf of [their] son." Plaintiff contended that he "assume[d] much of the initial financial burden for Vista, as [he] ha[d] with all of the

[2] Neither party disputed the expertise of Ms. Whitenack.

extraneous children-related expenses not mandated by a [c]ourt [o]rder[.]" Plaintiff had only agreed to enroll A.B. at Vista because plaintiff had

> the understanding that [he] would not pay direct child support of $50,000 per year to the [d]efendant for [A.B.] in view of the fact that [A.B.] no longer resides in the home of the [d]efendant; that any and all expenses related to Vista would be shared by the [d]efendant and [him] in some manner; and that the [d]efendant and him [sic] would be involved in establishing a proper [s]pecial [n]eeds [t]rust for the future financial security for [A.B.], which would also allow [A.B.] to become eligible to receive the maximum level of government aid to support a very costly, long-term proposition.

Regarding Matt, plaintiff noted that he paid the cost of Matt's car and college tutoring "above and beyond [his] child support obligation." Plaintiff maintained that his "financial circumstances have declined in the recent years," and his "annual gross salary ha[d] declined from approximately $2,000,000 to $800,000." He urged the court to award counsel fees and costs because defendant "refused" to "cooperate with [him] and [their] special needs attorney."

A review of the parties' finances is appropriate.[3] Plaintiff was the founder of the New York-based advertising agency, Kirshenbaum Bond & Partners (KBP), and as of January 11, 2011, he was the Chief Executive Officer of Big Fuel Communications, a social media marketing firm. Plaintiff's case information statement, dated September 21, 2009, established plaintiff's 2008 gross earned income as $4,924,469. Plaintiff owns a home in New York City valued at $6 million[4] and a beach house in Bridgehampton valued at $3 million. Plaintiff reported his net worth as $8,089,338.

In her certification, defendant maintained that plaintiff "earned approximately $5 million per year" for the past two years. Plaintiff's 2008 adjusted gross income was $4,464,021; in 2007, his adjusted gross income was $7,827,802.

Defendant is a self-employed psychotherapist who re-entered the workforce seeking to rebuild her psychotherapy practice. Defendant's case information statement revealed that her gross earned income in 2008 was $9,218, but that her unearned income was $253,539. Her home in Short Hills is valued at $1,900,000.

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[3] Despite plaintiff's assertion that "circumstances had changed" and child support should be terminated, plaintiff failed to provide a full and comprehensive disclosure of his financial affairs.

[4] Plaintiff's home in Greenwich Village is described as a 4800 square foot, three-story townhouse with five bedrooms, a playroom, library, eat-in kitchen and backyard.

Defendant urged that she was the party who "shouldered the responsibility for A.B.'s care since [the parties'] divorce." In detailing her expenses, plaintiff claimed that she contributes $600 each month to A.B. for his participation in extracurricular activities and social events at Vista; she continues to pay for his medication, clothing and toiletries; she transports him to and from Vista, and she travels to Vista several weekends per month to visit him. When she visits A.B., she incurs the cost of traveling to Connecticut, hotels, and meals, as well as the cost of taking A.B. to lunch or dinner and other activities such as a movie or bowling. She visits him frequently to ensure that he does "not feel as though he has been abandoned by his family now that he is attending Vista." Defendant also maintains a home for A.B.'s return for holidays and weekend visits and provides A.B. with family vacations. Although A.B. is doing well at Vista, his "needs are greater than some of the other young adults in the program," and it is "unlikely that [A.B.] will advance to the next phase of the entrance program . . . in the typical two year time period."

Defendant did not oppose the establishment of a special needs trust for A.B. Instead, she objected to plaintiff's request to terminate child support because the PSA recognized that A.B. might never be emancipated and because it would be

unfair for her to be "solely responsible for [A.B.'s] expenses." Furthermore, there is little clarity as to if and when A.B. would receive the public assistance plaintiff sought on A.B.'s behalf.

While defendant expressed concern about retaining Ms. Whitenack as a parent coordinator because Ms. Whitenack met with plaintiff and plaintiff's current wife to discuss A.B., she agreed to retain Ms. Whitenack, or another parent coordinator, provided the coordinator communicate with only plaintiff and defendant regarding A.B.

Defendant agreed that the parties may want to revisit the life insurance provision of the PSA as it relates to A.B. but cautioned that any changes should not "jeopardize the life insurance coverage" for Matt.

At the time of plaintiff's motion, Matt was a senior at Millburn High School and expected to attend college in the fall of 2010.[5] According to defendant, plaintiff suggested that Matt "pursue financial aid and/or student loans for college" to cover the cost of his college expenses. Defendant maintained that she was solely responsible for Matt's college application fees and college visits. Although plaintiff established college funds

[5] The record indicates that at the time of this appeal, Matt was attending the University of Texas.

for the three children from his second marriage, he did not establish a college fund for Matt.

In a reply certification, plaintiff contended that his income of $5 million reflected proceeds from the sale of his share of KBP,[6] and that his actual earned income was $1,174,470 in 2008 and $872,858 in 2007. Plaintiff explained that he was removed from his positions as a member of the board of directors and as a manager of the board. Because he is a "highly[-]paid 52-year[-]old advertising executive in this depressed economy," he had no offers for employment. He speculated that "going forward," his salary would be $800,000. Plaintiff explained that the "increase [in his taxable wages for 2007 and 2008] was attributable to the significant earn-out payments that [he] received as a result of the sale of 60 percent of [KBP]" in 2004 and from his sale of the remaining forty percent in 2007.

Following argument, the judge concluded that there was no question that Vista "is reasonable and appropriate for [A.B.]" and that plaintiff "agreed that he would be responsible for such payment." The judge did not find a change in circumstances "because the parties absolutely knew that [A.B.] was not going to be emancipated[,]" and this was contemplated by the parties.

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[6] Plaintiff notes that defendant received her equitable share of the company in 2004 as detailed in the PSA.

He observed that A.B. is "entitled to live in any way contemplated or equivalent to [sic] the father, the father's lifestyle, the mother and the mother's lifestyle, all without the income from the mother, earned or unearned from her equitable distribution." Critical to his reasoning, the judge commented that he did not "see [how] the supplemental [security] income, Medicaid, or any other advantage from the Special Needs Trust [would] offset what these parties have and [their] ability to provide . . . for [A.B.]." In order to qualify for government benefits, A.B. cannot have any income or be beneficiary of child support payments or life insurance policies. The judge did not see the "nexus" justifying termination of the child support payments or the life insurance policy "in order [for the parties to] get the government to provide some supplemental income." He denied the application for a special needs trust and denied the request to appoint a parent coordinator. Moreover, plaintiff failed to present any evidence to demonstrate that defendant was not appropriately using the child support for A.B.

Relying on the case information statements and the financial information presented by the parties on the motion, the judge established the parties' financial contributions to Matt's education. The judge observed that defendant had $9000 in earned income and ruled that her responsibility for Matt's

college expenses was one percent. Citing the terms of the PSA, the judge found that defendant's unearned income, which was "income earned from equitable distribution[,] . . . will not alter or have any impact in [sic] the plaintiff's obligation with regard to both children." The judge ruled that plaintiff was responsible for ninety-nine percent of Matt's college expenses.

As to the parties' financial contributions toward Vista, the judge determined that defendant should have no financial responsibility because it was evident from the PSA that the parties contemplated that plaintiff would be responsible for all of A.B.'s special education needs.

With regard to attorney's fees, the judge concluded that plaintiff had acted in bad faith. The judge perceptively concluded that this was primarily an application to terminate child support. He noted that plaintiff urged the termination of support "[by] making the really unsupportable claim that [defendant is] using that $50,000 to support a third party . . . ." The judge also found that plaintiff's position, that defendant should "support [A.B.] out of her own funds[,] . . . is unconscionable for the purposes of good faith" because their agreement contemplated that defendant would receive $50,000 per

year for A.B. The judge awarded defendant counsel's fees and costs in the amount of $27,397.

This appeal followed.

II.

A.

On appeal, plaintiff asserts that the judge's denial of his various prayers for relief "was unsupported by the record" and was an abuse of discretion. He further argues that Vista is a residential post high school facility and does not fall within the definition of "special education" as that term is defined in the PSA; moreover, he claims that defendant "did not substantiate" the need for $50,000 in child support, because A.B. was living full-time at Vista. Plaintiff also challenges the allocation of Matt's college expenses, as he argues the judge utilized incorrect data regarding plaintiff's income and failed to consider all of defendant's income. Finally, he challenges the counsel fee award, arguing that his application was not in "bad faith."

Before addressing the merits of plaintiff's appeal, we briefly recite additional facts reflecting events that

transpired subsequent to the entry of the December 15, 2009 order but that form the basis of the consolidated appeal.

Despite the entry of an order awarding counsel fees, plaintiff failed to comply with the order and satisfy its terms. Defendant filed a motion to enforce litigant's rights. In response, plaintiff filed a motion for defendant to pay attorney's fees as well as child support into escrow[7] pending disposition of the appeal, in effect fashioning a de facto stay of the orders. The motion judge[8] found plaintiff in violation of litigant's rights, ordered the payment of the $27,397 in counsel fees into escrow and awarded an additional $5335 in counsel fees on the motion. She also denied plaintiff's request to pay the child support into escrow.

Thereafter, plaintiff filed a motion before this court seeking a temporary remand for the appointment of a guardian ad litem for A.B. as well as a readjudication of all issues related to A.B. We denied the application.

Finally, on defendant's motion, plaintiff was found in violation of litigant's rights for failure to pay the $5335 in counsel fees.

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[7] The payment was to be made to the attorney's trust account.
[8] The motion judge was not the same judge who denied the earlier relief or the one who awarded the counsel fees.

Plaintiff then appealed March 17, 2010, order awarding counsel fees.

In August 2010, while both appeals were pending, plaintiff attempted to expand the litigation and filed yet another action, this time in the Probate Part, seeking to compel defendant, as A.B.'s guardian, to account for the monthly child support payments paid to defendant on behalf of A.B.; to return the money in the special needs trust established by defendant's father to A.B.'s co-guardians (plaintiff and defendant); to compel defendant to make distributions from the special needs trust to Vista for A.B.'s tuition, room and board; to compel an accounting of A.B.'s existing special needs trust; and to appoint a guardian ad litem to represent A.B.'s interest in the matter pending before us.

Judge Koprowski, sitting in the General Equity Part, correctly observed that this case "start[ed] out as a family matter . . . [and] continues to be a family matter" because it involves family issues such as custody, child support and property settlement. Furthermore, he stated that the "issues with respect to guardianship or with respect to planning for Medicaid eligibility . . . are issues that should have and could have been raised with respect to this property settlement

agreement." He ordered that the matter be transferred from the Probate Part to the Family Part.

B.

In addressing the primary issue raised on appeal, we acknowledge certain principles related to matrimonial disputes and agreements that inform our decision. Matrimonial settlement agreements are "'entitled to considerable weight with respect to their validity and enforceability' in equity, provided they are fair and just" because they are "'essentially consensual and voluntary in character[.]'" Dolce v. Dolce, 383 N.J. Super. 11, 20 (App. Div. 2006) (quoting Petersen v. Petersen, 85 N.J. 638, 642 (1981)); see also Lepis v. Lepis, 83 N.J. 139, 153 (1980). However, courts retain the equitable power to modify support provisions at any time. Id. at 145.

The child support provisions of a matrimonial settlement agreement are subject to review and modification on a showing of "changed circumstances." Id. at 146. Under the standard for "changed circumstances," the judge determines whether the agreement is fair and equitable; if it is, it "should receive continued enforcement without modification." Id. at 148-49. "Courts have consistently rejected requests for modification based on circumstances which are only temporary or which are expected but have not yet occurred." Id. at 151.

A party seeking modification of a child support obligation has the burden to demonstrate "that its terms, in light of changed circumstances, are unfair and unjust." Id. at 148-49, 157. "When the movant is seeking modification of child support, the guiding principle is the 'best interests of the children.'" Id. at 157 (citation omitted).

Moreover, children of divorced parents have the right "to be supported at least according to the standard of living to which they had grown accustomed prior to the separation of their parents." Pascale v. Pascale, 140 N.J. 583, 592 (1995) (internal citations and quotations omitted). See also Loro v. Colliano, 354 N.J. Super. 212, 221 (App. Div.), certif. denied, 174 N.J. 544 (2002) (recognizing that "children are entitled to the benefit of financial advantages available to them") (quoting Isaacson v. Isaacson, 348 N.J. Super. 560, 579-80 (App. Div. 2002)). "In addition, an increase in those children's needs, whether by maturation of those children, rising cost of living, or a more unusual event, must be met by an increase in support by financially-able parents." Pascale, supra, 140 N.J. at 592 (internal citations and quotations omitted).

A trial court's determination of child support will be sustained unless we conclude that the award is "manifestly arbitrary, unreasonable or contrary to the evidence." Loro,

supra, 354 N.J. Super. at 220. "Findings by the trial court are considered binding on appeal when supported by adequate, substantial and credible evidence." Raynor v. Raynor, 319 N.J. Super. 591, 605 (App. Div. 1999) (citation omitted).

This standard of review is predicated upon the principle that child support decisions in this fact-sensitive area of divorce litigation are to be left to the sound discretion of the trial court, as that court is in the unique position of having the greatest familiarity with the matter. See Cesare v. Cesare, 154 N.J. 394, 413 (1998) (stating that, because of a family court judge's expertise in family matters, we will defer to the judge's factfinding).

While plaintiff ostensibly sought to establish a special needs trust, he tempered his altruism with the condition that child support be terminated. He asserts that the special needs trust will reduce A.B.'s reliance on plaintiff to provide funds for A.B.'s well-being. Moreover, argues plaintiff, in the event of plaintiff's death or adverse fortune, A.B. would already be enrolled in these governmental programs and would have significant assets in the special needs trust for his benefit. In addition, because A.B. will never be able to manage his financial affairs, establishing a special needs trust allows his

parents to ensure that a qualified independent trustee will manage his assets.

Plaintiff contends that any money attributable as child support would be paid into the special needs trust so A.B. could qualify for government benefits. According to plaintiff, A.B. needs a special needs trust because A.B. is currently "reliant on plaintiff for financial support, and the court's order for child support has eradicated an opportunity for [A.B.] to diversify his sources of support." Again, according to plaintiff, these government benefits

> would be important to [A.B.] in a situation where the plaintiff is unable to support [A.B.], such as if [plaintiff] filed [for] bankruptcy or had a judgment filed against him, both of which would deplete his assets; or the care of [A.B.], Matt, and his three other young children simply depleted his assets over time; or [if] plaintiff died leaving all of his assets to his current wife who has no duty to support [A.B.].[9]

Plaintiff argues that A.B.'s care is "increasingly expensive," and plaintiff could run out of money to support A.B. "if he does not replicate his phenomenal success [in advertising] before [A.B.] reaches his mid-30's." Finally, plaintiff contends that if he "were to die tomorrow," the life insurance proceeds would

[9] We are perplexed as to why plaintiff characterizes the potential testamentary disposition to his current wife as an unforeseen contingency because presumably, plaintiff is in a position to control such disposition.

be paid to A.B., the result being that A.B. would be excluded from government benefits, while the proceeds would offer "an ever diminishing return."

At present, A.B.'s needs are provided for by contributions by plaintiff for his schooling expenses, as well as by his mother, in good measure, based on the child support paid by his father. There is no dispute that A.B. may never be able to manage his own financial affairs. Also, there is no dispute that a special needs trust is a helpful financial planning tool that allows beneficiaries to invest money in a trust so that they are not disqualified from government benefits. See N.J.S.A. 3B:11-36.

Missing from plaintiff's analysis, however, is recognition that he entered into the PSA with a full understanding of A.B.'s needs and future and with the further understanding that A.B.'s day-to-day needs, exclusive of his schooling, would be provided by defendant through child support. The amount struck by the parties of $50,000 per year in child support reflected that understanding. Moreover, plaintiff understood that he would remain responsible for the cost of A.B.'s special education as well as a $2.5 million life insurance policy for A.B.'s benefit. Little that plaintiff has provided suggests that the facts and circumstances have been altered such that there are changed

circumstances sufficient to warrant a finding that the PSA is unfair and unjust. See Lepis, supra, 83 N.J. at 148-49.

Plaintiff's arguments are mired in hypotheticals. He queries what if he "filed for bankruptcy"; what if he "had a judgment filed against him"; what if his other children depleted his assets; or what if he died prematurely and left his assets to his current wife -- none of which has actually occurred or is by any measure imminent. Plaintiff also argues that his salary has decreased since he signed the PSA, and "going forward," his salary will only be $800,000. His current case information statement reflects $4,924,469 as his gross income; his 2008 tax return reported an adjusted gross income of $4,464,021; and his 2007 tax return reported an adjusted gross income of $7,827,801. Except for plaintiff's statement that his salary will be decreased to only $800,000, plaintiff failed to present any documentation that his decrease in income was permanent.

Moreover, the possibility that plaintiff might die prematurely and leave his assets to his current wife was contemplated by the PSA. Plaintiff agreed to maintain a $2.5 million life insurance policy for A.B.'s benefit. In the event of plaintiff's untimely death, A.B. would be entitled to the proceeds from that policy. Plaintiff argues that because the policy would be paid to A.B., A.B. would be excluded from

government benefits, and the proceeds would have "an ever diminishing return."

Although the parties did not do so, they could have established a special needs trust for A.B. in the PSA. Legislation providing for special needs trusts recognizes the need "to encourage persons to set aside amounts to supplement and augment assistance provided by government entitlements to persons with severe chronic disabilities." N.J.S.A. 3B:11-36(a). For whatever reason, the parties chose not to avail themselves of this financial opportunity. The parties were fully aware of A.B.'s circumstances and the fact that he would need ongoing care. When the parties divorced in 2002, they had reached an oral agreement, and two years later, that agreement was superseded by the written PSA that is now in effect. The parties had ample time to discuss and consider the needs of their children, particularly A.B., and to contemplate how they would address A.B.'s special needs. They eschewed the option of a special needs trust for A.B. at that time. They chose the option of naming A.B. as the beneficiary of a $2.5 million life insurance policy, which would provide A.B. with an asset were plaintiff to die leaving "all of his assets" to his current wife.

Our role is not to judge the wisdom of the parties' decision, but we recognize that were A.B. to receive the proceeds from the life insurance policy, defendant could, on A.B.'s behalf as his guardian, invest the proceeds from the life insurance policy in a trust so that A.B. would receive interest income from the investment. Although the cost of A.B.'s care is expensive, if A.B. were to deplete his assets, there would be no reason why he would not qualify for governmental benefits at that time.

Plaintiff also argues that A.B.'s care is "increasingly expensive." He contends that while A.B. was attending The Children's Institute, A.B.'s costs were paid by his school district and the State of New Jersey until he reached twenty-one. We do not deem the cessation of these benefits to be a changed circumstance. The parties contemplated that at some point in time, they would be responsible for A.B.'s continual needs and education. The PSA reflects this understanding and contains a provision allocating education and support costs to plaintiff. We again note that the PSA provided that the parties understood that A.B. "probably will never be emancipated," and they would be obligated to provide him with care for the duration of his life. Plaintiff has not demonstrated that A.B.'s "needs have increased to an extent for which the original

arrangement [did] not provide." Lepis, supra, 83 N.J. at 157. Moreover, even if A.B.'s care is increasingly expensive, that cost must be borne by financially-able parents. See Pascale, supra, 140 N.J. at 592-93.

There are other relevant considerations that warrant comment. Plaintiff relied in good measure on the report of Ms. Whitenack, an acknowledged expert in special needs trusts and related benefits. A review of her opinion is helpful. In a carefully crafted memo addressed to the parties, Ms. Whitenack described some of the benefits that may be available to A.B. She did not describe with any certainty that A.B. would be able to avail himself of those benefits, and she raised significant issues as to present-day availability of programs such as Real Life Choices. She also raised the issue, without providing an answer, that A.B. might have to establish residency in Connecticut, an issue not addressed by the parties on the motion. The report was descriptively helpful but not dispositive with any degree of certainty, that A.B. would qualify for the described benefits.

Another issue arose at oral argument that warrants comment. At argument, plaintiff's counsel conceded that if the child support were terminated as a condition of establishing a special needs trust, defendant would have to "apply" to the trustee for

any funds to pay for her costs in supporting A.B., and the trustee would then decide whether to make the funds available to defendant. This is hardly the agreement for which defendant bargained when she entered into the PSA. Moreover, our policy of encouraging and fostering settlements, especially in matrimonial proceedings, would be compromised significantly if such a circumstance resulted from our granting plaintiff relief.

Finally, we take note of the absence of a proffer of a proposed special needs trust accompanying the underlying application seeking leave to establish such a trust. We suggest that the better practice would be to present to a motion judge the form of trust proposed rather than to leave to speculation, and perhaps further dispute, the terms and conditions of any such trust.

In sum, we conclude that plaintiff failed to demonstrate any "changed circumstances" that would warrant a modification of the PSA. Lepis, supra, 83 N.J. at 148-49. The motion judge did not err in refusing to consider modifications based on speculation and hypothetical circumstances that may never occur.

Ultimately, plaintiff's motion was a self-serving effort to revise the terms of the PSA to make them more favorable to him. In this case, the motion judge correctly adhered to the

general rule that PSAs be enforced as written. Pacifico v. Pacifico, 190 N.J. 258, 266 (2007).

Our decision sustains that principle.

C.

We likewise reject plaintiff's argument that the judge erred by failing to, sua sponte, appoint a guardian ad litem. See R. 4:26-2(a).

Plaintiff urges that a guardian should have been appointed so that A.B.'s interests could be represented as they relate to child support and special needs planning. Plaintiff concedes that appointing a guardian ad litem "to represent a child's interest in his parents' matrimonial action may not be common, [but] this case presents special facts that required such an appointment." Alternatively, plaintiff argues that if the court is not required to appoint a guardian ad litem, A.B. is an "indispensable party" and ought to be joined in the matter.

Rule 4:26-2(a) provides that "a minor or mentally incapacitated person shall be represented in an action by the guardian of either the person or the property, . . . or if . . . a conflict of interest exists between guardian and ward[,] . . . by a guardian ad litem appointed by the court . . . ." This rule applies to incapacitated persons who are parties to a legal action. A.B. is not a party to this action; his parents are the

parties here. Rule 4:26-2(a) does not mandate that A.B. be represented by a guardian ad litem.

In family matters, the court may appoint a guardian ad litem to represent a child's best interests in custody or parenting time disputes. See R. 5:8A, 5:8B. Under those circumstances, the court has the discretion to appoint a guardian to represent the child. At its core, this is a dispute about child support. Plaintiff argues that this matter "presents special facts that require such an appointment," but plaintiff fails to articulate how this matter is different from other similar disputes in which the parties must provide for the long-term needs of a child with a disability.

Plaintiff also maintains that A.B. is an indispensable party because he "has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting [his] interests." Allen B. Dumont Labs, Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). We disagree. Although A.B.'s best interests are at issue in the matter, A.B. is not an indispensable party.

Here, plaintiff's attempt to initiate an action in which A.B. is alleged to be an indispensable party (or to initiate an action in the Probate Part to compel an accounting of the child

support payments made to defendant) creates the "tug of war" we eschewed in Segal v. Lynch, 413 N.J. Super. 171, 188-89 (App. Div), certif. denied, 203 N.J. 96 (2010). Such a conflict is not in A.B.'s best interests. The judge did not err by failing to appoint a guardian ad litem for A.B.

D.

Plaintiff next asserts that Vista does not provide "special education," as the term is used in the PSA, and instead, it is a full-time residential facility where A.B. lives with other adults who have similar needs. Plaintiff maintains that Vista is "post high school education," as the term is used in the PSA, and the parties need to agree as to the payment of their son's "post high school education" or apply to the court for appropriate relief.

New Jersey has a strong public policy favoring the enforcement of property settlement agreements. These agreements are approached with the presumption that they are valid and enforceable, and they will be enforced if they are fair and equitable. Massar v. Massar, 279 N.J. Super. 89, 93 (App. Div. 1995). In interpreting a property settlement agreement,

> [t]he basic contractual nature of matrimonial agreements has long been recognized. At the same time, the law grants particular leniency to agreements made in the domestic arena, thus allowing

> judges greater discretion when interpreting such agreements.
>
> As a general rule, courts should enforce contracts as the parties intended. Similarly, it is a basic rule of contractual interpretation that a court must discern and implement the common intention of the parties. The court's role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the expressed general purpose.
>
> [Pacifico, supra, 190 N.J. at 265-66 (internal quotations and citations omitted).]

In addition to the court's responsibility for interpretation of these agreements, the "equitable authority" of the courts to modify orders incorporating property settlement agreements is "well established." Conforti v. Guliadis, 128 N.J. 318, 323 (1992). However, we will not draft new agreements for the parties, Massar, supra, 279 N.J. Super. at 93, and we will not insert new terms into an agreement merely "because one party later suggests that a few changes would have made the agreement fairer." Dworkin v. Dworkin, 217 N.J. Super. 518, 523 (App. Div. 1987) (citation omitted).

Plaintiff asserts that when the parties contemplated "special education" for A.B. in the PSA, they did not contemplate a full-time residential facility like Vista. According to plaintiff, when A.B. reached the age of twenty-one

and was no longer enrolled in The Children's Institute, he would attend a "post high school" program. Plaintiff reasons that Vista is "the equivalent of college experience and training." He contends that if Vista were special education, and not "post high school" education, it would render the "post high school" provision superfluous. The agreement, by its terms, provides otherwise.

When the parties entered into the PSA, A.B.'s special education was paid for by his school district and the State. The parties anticipated that once he reached twenty-one years of age, and the school district and the State no longer covered the cost of his special education, the parties would be responsible for that cost. As such, in the PSA, the parties allocated the cost of A.B.'s special education to plaintiff. At times, plaintiff has conceded that Vista is an educational facility, such as when he filed the original post-judgment motion and sought an order to establish a special needs trust to fund A.B.'s "educational" and living expenses at Vista and when he agreed that Vista calls its residents "students."

Before the motion judge, plaintiff argued that when the parties entered into the PSA, they did not contemplate that A.B.'s "special education classes" "would be in a residential living facility" such as Vista. The PSA was broad and provided

that plaintiff would be responsible for A.B.'s "special education, and other similar expenses which are reasonable and appropriate for [A.B.]." Plaintiff does not argue that Vista is not "reasonable and appropriate," only that it was not "special education." Vista is "a unique, community-based educational program for young adults with neurological disabilities." Vista is not a traditional educational institution, but it was never contemplated that A.B. would attend a traditional institution. Vista was designed for students with special needs, such as A.B. Vista is a special education facility.[10]

Plaintiff also argues that there has been a change in defendant's circumstances because A.B. is living at Vista, and plaintiff's child support obligations should be reduced accordingly. From the time "[A.B.] . . . moved out of his mother's home to reside full-time at Vista," defendant's

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[10] Plaintiff argues for the first time on appeal that Vista is "post high school" education. We "will decline to consider questions or issues not properly presented to the trial court . . . unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

Even considering the issue, we find no error. Apparently, Vista does not require that students admitted to the program have a high school diploma, and many students attend Vista after they have "aged out" of the school they were attending. It is unclear from the record if A.B. received a high school diploma or equivalent from The Children's Institute, but it is clear that he began attending Vista once he reached the maximum age, twenty-one, for attendance at The Children's Institute. Vista is not a "post-high school" educational institution.

expenses for A.B. have totaled $25,200 per year, and plaintiff presumes that the remaining amount is "spent on defendant's fixed costs associated with her home." First, by the terms of the PSA, plaintiff's child support obligations are to continue until the children are emancipated. Even if we were to accept plaintiff's assertion, that Vista is the equivalent of "college expertise and training," A.B. would not be emancipated until he completed his college-equivalent schooling. Child support payments would continue during his enrollment at Vista. It is unclear how long A.B. will remain at Vista. Moreover, A.B. has costs not covered by Vista, such as his extracurricular activities, toiletries, clothing, weekend activities, and transportation to and from Vista. Defendant provides A.B. with money for these expenses from the child support payments she receives from defendant.

Finally, we again note that children have the right "to be supported at least according to the standard of living to which they had grown accustomed prior to the separation of their parents." Pascale, supra, 140 N.J. at 592. See also Isaacson, supra, 348 N.J. Super. at 579. Defendant remains the parent with whom A.B. lives when he is not at Vista, and defendant's home is where A.B. stays when he comes home from Vista for the weekend or holidays. He is entitled to live in the home in which he was

already living and according to the same standard of living enjoyed prior to the separation. In addition, as we previously noted, plaintiff's submissions fail to meet any semblance of the proofs necessary to establish a change of circumstances warranting termination of child support. Among other things, plaintiff failed to provide his financial information. His application was properly denied.

E.

Plaintiff next argues that the judge erred when he allocated the cost of Matt's college expenses because the judge did not consider that plaintiff must also provide support to his other unemancipated children. Plaintiff contends that the judge erred when he found that plaintiff's annual income was $10 million and defendant's annual income was $9000. Plaintiff maintains that the judge considered the proceeds from the sale of plaintiff's business as part of plaintiff's income, but not as part of defendant's, which proceeds she had already received.

"The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare, supra, 154 N.J. at 411-12. The trial judge is afforded substantial discretion to determine child support awards and other support obligations. See

Pascale, supra, 140 N.J. at 594; Foust v. Glaser, 340 N.J. Super. 312, 315 (App. Div. 2001). "If consistent with the law, such an award will not be disturbed unless it is manifestly unreasonable, arbitrary, or clearly contrary to reason or to other evidence, or the result of whim or caprice." Id. at 315-16 (internal quotation and citation omitted).

The judge carefully considered the parties' case information statements and their most recent tax returns. He noted inconsistencies in plaintiff's submissions, such as a representation in an earlier unrelated hearing that he no longer had any interest in a drilling company, despite the fact that his most recent tax statements showed a reported loss and earned interest from that same drilling company. Also, as a result of the equitable distribution of his business, plaintiff received a $5 million tax deduction. Plaintiff's attorney stated that the business actually received the deduction, but the judge observed that it was plaintiff who used the deduction on his tax return, not the business.

The judge's decision that plaintiff would be ninety-nine percent responsible for expenses and defendant would be one percent responsible was not "unreasonable, arbitrary, or clearly contrary to reason or to other evidence, or the result of whim or caprice." Foust, supra, 340 N.J. Super. at 316. The judge

may have exhibited some Solomonic wisdom by requiring defendant to contribute a nominal sum to the child's college expenses. The one-percent contribution gives her a stake in the child's success. The decision was appropriate.

F.

In awarding counsel fees, the judge determined that plaintiff's application was in bad faith. Plaintiff disputes this finding. "[T]he award of counsel fees and costs in a matrimonial action rests in the discretion of the trial court." Gotlib v. Gotlib, 399 N.J. Super. 295, 314-15 (App. Div. 2008); Addesa v. Addesa, 392 N.J. Super. 58, 78 (App. Div. 2007). See also Guglielmo v. Guglielmo, 253 N.J. Super. 531, 544-45 (App. Div. 1992) (application of R. 5:3-5(c) and decision to award counsel fees rest within the court's sound discretion).

Rule 5:3-5(c) allows the court to award counsel fees to "any party successful in the action, on any claim for divorce, nullity, support, alimony, custody, parenting time, equitable distribution, separate maintenance, enforcement of agreements between spouses, domestic partners, or civil union partners and claims relating to family type matters." In making a determination as to whether to award attorney's fees to a party, the court should consider 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; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (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.
>
> [R. 5:3-5(c) (emphasis added). See also Addesa, supra, 392 N.J. Super. at 78.]

The judge found that plaintiff acted in bad faith, R. 5:3-5(c)(9), when plaintiff failed to provide "an alternate means upon which [defendant] would be able to provide support for [A.B.]."

Plaintiff argued that child support should be terminated, and defendant should pay and support A.B. out of her own funds, because defendant "has a great deal of money, and she can support herself, and she can help provide for [A.B.] as well." Without factual support, plaintiff accused defendant of "utilizing that 50,000 bucks to support her boyfriend who's [sic] been living with her for ten years." Plaintiff argued for a special needs trust but failed to provide the documentation necessary to review a form of trust necessary to make a considered decision. We conclude that the judge did not abuse his discretion in awarding counsel fees, given a finding of bad

faith. Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010), aff'd o.b., ___ N.J. ___, ___ (2011) (slip op. at 1). While couched in terms of special needs trusts and A.B.'s best interests, this was a well-crafted application to terminate child support in disregard of an equally well-crafted PSA designed to address the unique circumstances presented here. We again find no error. Addesa, supra, 392 N.J. Super. at 77.

III.

In the consolidated appeal, plaintiff asserts that the motion judge[11] erred when she awarded counsel fees and costs to defendant because she did not make findings of fact. We agree.

In her order of March 17, 2010, the judge said, "Plaintiff shall pay $5,335.00 directly to [defendant's attorneys] within seven (7) days of the entry of this Order, representing Defendant's counsel fees and costs in connection with this enforcement application." No reasons were set forth for such an order.

"Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Salch v. Salch,

[11] The judge who awarded these fees was not the same judge who heard the child support motion.

240 N.J. Super. 441, 443 (App. Div. 1990). Rule 1:7-4(a) requires the trial court to "find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of right . . . ." When a trial court fails to express its reasons and does not provide evidence of its analysis, this court should remand "for further consideration and explanation." Boardman v. Boardman, 314 N.J. Super. 340, 349-50 (App. Div. 1998). Because the motion judge did not state her reasons on the record nor in the written order as to why she awarded $5335 in counsel fees and costs, we remand to the Family Division for a statement of reasons. The remand shall be completed no later than February 1, 2012.

As to the issues raised in A-2511-09, we affirm.

As to A-3723-09, we remand for a statement of reasons and retain jurisdiction for that limited purpose.