

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0429-05T1

JUDITE COSSU (n/k/a Rosa),  
Plaintiff-Respondent,

v.

SERGIO COSSU,  
Defendant-Appellant.

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Submitted April 24, 2006 - Decided June 23, 2006

Before Judges Holston, Jr. and Gilroy.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Middlesex  
County, Docket No. FM-12-2541-95.

Jack Venturi & Associates, attorneys for  
appellant (Jef Henninger, on the brief).

Maloof, Lebowitz, Connahan & Oleske,  
attorneys for respondent (Diana LaFemina-  
Rosa, on the brief).

PER CURIAM

Defendant-husband, Sergio Cossu, appeals from the Family Part's post-judgment divorce order of August 3, 2005, increasing child support for Alexander Cossu (Alex), the single child of the marriage between defendant and plaintiff-wife, Judite (Cossu) Rosa, from \$225 per week to \$975 per week. Defendant

also appeals the Family Part's September 9, 2005 order denying reconsideration. We affirm.

The parties were married on June 30, 1985, and divorced on February 6, 1996. Alex was born on March 1, 1989. The parties entered into a Property Settlement Agreement (PSA) dated the same day as the divorce. The PSA discloses that the \$225 per week child support agreed upon was based on defendant, who had just completed a medical residency in cardiology, then earning approximately \$100,000 and the plaintiff, who was working in a sales position, earning \$42,000. In addition, the PSA provided that the parties would pay or contribute towards Alex's college education to the extent that each party was financially able.

Alex is now sixteen years old and a junior in public high school with above average grades. He is involved with soccer and track and other extra curricular activities.

Defendant is a cardiologist with a practice in Punta Gorda, Florida, where he resides with his second wife and their two children. Plaintiff remarried and moved to East Stroudsburg, Pennsylvania. Although she maintained the sales position she had at the time of her divorce from defendant while living in East Stroudsburg, plaintiff and her second husband decided to relocate to Havertown, Pennsylvania in order to increase their quality of life and Alex's educational opportunities. Before

the relocation was completed, plaintiff's marriage with her second husband deteriorated. They subsequently divorced. In the meantime, plaintiff and Alex relocated to Havertown, where Alex enrolled in high school. Because of her single-parent status, plaintiff found employment earning \$39,043, approximately \$3,000 less than at the time of her divorce from defendant, in a position that permits a flexible schedule, enabling her to transport Alex to and from various school events.

On April 19, 2005, plaintiff filed a pro se motion seeking an upward modification of Alex's child support based on changed circumstances. Defendant filed an opposition to the child support modification application but certified that he agreed an increase was necessary in accordance with the State's child support guidelines. He objected to payments being ordered to be paid through probation. Plaintiff replied to defendant's opposition and urged the court to award increased child support, in an amount greater than required by the child support guidelines, based on defendant's income being in excess of the guidelines and because "his son should be permitted to enjoy the same standard of living he would have enjoyed if a divorce did not occur." Neither party requested oral argument.

Judge Roger Daley, in an order dated June 10, 2005, granted plaintiff's motion for increase and modified the child support order to \$975 weekly, payable through the probation department. The order was made effective April 19, 2005, the date plaintiff filed the motion, with a credit on the retroactive award for the \$225 payments that defendant had maintained throughout. Judge Daley made the following findings, which are contained in the body of the August 3, 2005 order:

The new amount was calculated by averaging the Defendant's gross income over the past five years as it ranged from \$353,785.00 to \$671,962.00 annually. The average came to \$521,470.00. The Court then took the Plaintiff's salary from her 2004 W-2, which was \$39,043.00. Because this is an extreme parental income situation pursuant to paragraph 20(b) of Appendix IX-A of the New Jersey Court Rules, the Court utilized the incomes in the New Jersey Child Support Guideline calculation to get an initial figure, and then added a discretionary amount in accordance with N.J.S.A. 2A:34-23. The initial figure arrived at was \$364.00. The Court then added an additional \$611.00 weekly bringing the Defendant's child support obligation to \$975.00 weekly.

The Court finds that at the time of the parties' Property Settlement Agreement, which was executed February 6, 1996, the Defendant was directed to pay \$225.00 weekly for child support. This was in contemplation of the Defendant earning a gross income of \$100,000. There has never been a modification. The Defendant has earned an average of \$521,470.00 over the past five years. This is more than five times his income at the time of the Property

Settlement agreement. Therefore, coupled with the fact that the Defendant earns an average of \$10,028 weekly, the Court finds that \$975.00 weekly is within his means based on his standard of living, all sources of income, earning capacity, and what the parties' child, Alexander would be privy to had the parties remained married, pursuant to N.J.S.A. 2A:34-23.

The Court notes that it gave the Defendant a credit for his payment of health insurance costs by taking the monthly amount (\$85.00) and dividing it by 4.2 to get the weekly amount and included it into the calculation as requested by Defendant.

On August 8, 2005, defendant filed a motion to reconsider the judge's August 3, 2005 order. In support of his motion for reconsideration, defendant made the following arguments: (1) The guidelines-based award was improperly calculated as it did not include the correct figures; (2) calculating a weekly income of \$10,028 for defendant was improper in assessing a "guidelines-based award"; (3) the judge erred in failing to impugn income to plaintiff as she is voluntarily underemployed; (4) defendant's income was improperly averaged because it failed to be reduced by hurricane expenses that resulted in decreased income from defendant's medical practice during one of the recent prior years, when a hurricane destroyed parts of Florida where defendant resides; (5) the judge's supplement to the guidelines-based award beyond the combined net income of \$150,800 per year was improper because it was not based on the factors set forth

in N.J.S.A. 2A:34-23; (6) Alex does not have any needs that require a substantial increase in the child support obligation because defendant has always provided him with more than he needs; and (7) the final child support award should be reduced due to a lower cost of living in Pennsylvania.

Judge Daley entered an order denying defendant's motion for reconsideration on September 9, 2005. In his opinion, which was made part of the September 9, 2005 order, the judge relied in significant part on this court's decisions in Isaacson v. Isaacson, 348 N.J. Super. 560, 579-85 (App. Div. 2001), certif. denied, 174 N.J. 364 (2002) and Loro v. Del Colliano, 354 N.J. Super. 212, 221-24 (App. Div.), certif. denied, 174 N.J. 544 (2002). The judge emphasized the well-recognized principles stated in those cases that (1) "'where the parties have the financial wherewithal to provide for their children, the children are entitled to the benefit of financial advantages available to them . . . as reflecting a parent's 'good fortune' and . . . are entitled to have their needs accord with the current standard of living of both parents, which may reflect an increase in parental good fortune[,]" Id. at 221 (quoting Isaacson, supra, 348 N.J. Super. at 579-80); and (2) that "'the law is not offended if there is some incidental benefit to the

custodial parent from increased child support.'" Id. at 224 (quoting Isaacson, supra, 348 N.J. Super. at 584).

In Judge Daley's September 9, 2005 order denying reconsideration of the modified child support award of \$975 weekly, the judge addressed all of defendant's arguments. We restate the judge's findings verbatim.

I. The Defendant first asserts that the guidelines based award was improperly calculated because it used a weekly income of \$10,028 for Dr. Cossu. The Defendant correctly points to Paragraph 20(b) of Appendix IX-A of the New Jersey Court Rules, which states that "If the combined net income of the parents is more than \$150,800 [which is \$2,900 weekly], the Court shall apply the guidelines up to \$150,000 [to arrive at the initial guidelines-based award] and supplement the guidelines-based award with a discretionary amount based on the remaining family income (i.e. in excess of \$150,800) and the factors specified in N.J.S.A.2A:34-23. Thus, the maximum guidelines award in Appendix IX-F represents the minimum award for families with net incomes of more than \$150,000 per year."

Appendix IX-F, sets the highest initial guidelines based award at \$452.00 weekly in such a situation. Therefore, hypothetically, even if the annual income was \$1 million for a noncustodial parent with no parenting time and zero for the custodial parent, the highest initial award would still be \$452.00 weekly. There is a mechanism in the program used by this Court to provide for same.

The initial award in this case was \$364.00 weekly. The guidelines took the maximum amount \$452 weekly and added \$20 weekly for the child's share of the health

insurance premium. The sum (now the total amount to be put into "the pot" to be allocated to each parent) was then allocated by proportionate shares of the earnings of each party so that the Plaintiff would contribute \$43.00 (9% of \$472.00) and the Defendant would pay \$429.00 (91% of \$472). Then the \$20 weekly for the health insurance premium was subtracted out of the Defendant's share because he pays for the health care: Finally, an adjustment was made for parenting time. This leaves the Defendant with an initial award of \$364.00 weekly to which the Court added its discretionary amount. So although the Court entered the Defendant's actual weekly income, the initial calculation did not exceed the figure given in Appendix IX-A and was actually lowered to take the above factors into account. Thus, the calculation was neither illegal nor improper as asserted by the Defendant as the guidelines already took the statutory limitations into account.

Furthermore, the Defendant asserts that the guidelines-based award was improperly calculated because it did not include the Plaintiff's imputed income. The Defendant's letter, dated July 27, 2005, wherein the Defendant suggested that the Court impute income to the Plaintiff because "she was making more several years ago than she is making now" was taken into consideration when the Court recalculated child support. However, Paragraph 12 of Appendix IX-A of the New Jersey Child Support Guidelines mandates that the Court make an initial finding "that [the] parent is, without just cause, voluntarily underemployed" before it imputes income to that parent. In this case, the mere fact that the Plaintiff was earning "approximately \$42,000" at the time of the Property Settlement Agreement, which was 1995, and now earns \$39,043 according to her 2004 W-2, does not lead this Court to make a

finding that the Plaintiff is without just cause, voluntarily underemployed. The Court notes that since such a finding is a prerequisite to considering the factors on how to impute income as listed in Paragraph 12 (a)-(c) of Appendix IX-A of the New Jersey Court Rules, and such a prerequisite was not met in this case, the Court did not analyze the factors on which the Defendant asserts the Court should have relied.

Therefore, the Defendant's request that the Court reconsider its Order based on the fact that the Order was based on incorrect figures is hereby DENIED

II. The Defendant next asserts that Dr. Cossu's income was improperly averaged because it did not include Loss of Business Income because of hurricane expenses. First, the Court finds it worthy of note that it had to make numerous requests of the Defendant to provide a complete Case Information Statement because the Defendant made a unilateral determination that all of his assets were exempt from the Court's inspection. When the Defendant finally supplemented the incomplete Case Information Statement, he requested in the cover sheet that the Court average his earnings from 2000 through 2004 because they were so disparate, i.e. earning \$671,962.00 in 2001 after having earned \$353,785.00 in 2000. The Court could have omitted the amount earned in 2000 and only averaged the last four years because in the last four years, the lowest earning reported was \$447,000.00, and these higher amounts are more reflective of the Defendant's escalating and current earning capacity. However, the Court granted the Defendant's request to factor the lowest and oldest figure into the equation despite his coming to the Court with unclean hands. (A court should not grant relief to a wrongdoer with respect to

the subject matter in suit. Schmidt v. Schmidt, 220 N.J. Super. 46 at 51.)

Furthermore, the Defendant noted on the cover sheet of his financial documents that "the amount reflected in 2004, which was \$595,192, was inflated due to 'Loss of Business Income.' This was the extent of the information he provided at that time. There was no proof that there was any hurricane damage nor any indication as to how much the Loss of Business Income amounted to. Furthermore, the Defendant reported as *income* on his 2004 Federal Tax Return the amount of \$595,192 and made no mention [of] any loss. However, the Defendant now, in this motion for reconsideration asserts that he received \$146,354.04 as a result of Loss of Business and that this amount should be deducted from the \$595,192.

Like the Defendant's cover letter to his submission of financial documents, this Court accordingly finds that a six-sentence letter from the Defendant to his attorney dated August 7, 2005, in contemplation of this motion, which simply reiterates the supposed Loss of Business Income equally insufficient as proof of the damages his business sustained. Thus, this Court is not inclined to deduct the amount the Defendant deems should be omitted from income includable in the child support guidelines.

Alternatively, even if the Court took that amount into consideration, it would bring that year's income down to \$448,838, bringing the average earnings for the past five years down to \$492,199, making the Defendant's weekly gross earnings \$9,465.00. In this instance, the Court would have added the same discretionary amount to the initial calculation as it too comports with the factors set out in N.J.S.A. 2A:34-23 as set forth below.

Therefore, the Defendant's request that the Court reconsider its Order based on the fact that the averaging of his annual incomes did not include hurricane expenses is hereby DENIED

III. The Defendant next asserts that the supplemental award was improper as it was not based on the factors set forth in N.J.S.A. 2A:34-23. The Defendant asserts that the Court "guessed" what the needs of the child are, a factor that must be analyzed under the above referenced statute. The Court finds that the needs of the child in this case are evidenced by several factors. First, that the needs of an infant child are distinctly different from the needs of teenage children. Isaacson v. Isaacson, 348 N.J.Super. 560, 581 (App. Div.2002). In this case, the parties' son was six years old when the original support order was entered, which was at the time of the parties Dual Judgment of Divorce. When the Plaintiff filed this motion, the parties child is sixteen years old. As such, the child is now embarking on college preparation, i.e. SATs and a related preparation course. Furthermore, Alex is involved in numerous sporting activities. All have costs associated therewith. These are indicia of needs beyond that of a six-year-old.

Furthermore, this child was raised for seven years on an outdated support figure. The Plaintiff was entitled to a recalculation in 1998 based on a presumptive change in circumstances since three years had passed since the initial obligation was awarded. This was never done. While the Defendant's career and earnings flourished, the parties' child continued to reside with the Plaintiff whose income had decreased slightly. This is a second indication of the needs of this child.

Finally, the Court recognizes the discussion in Isaacson, wherein the Court distinguished between needs (essential and non essential included) and overindulging the child. However, children are entitled to not only bare necessities, but a supporting parent has the obligation to share with his children the benefit of his financial achievement. Isaacson v. Isaacson, 348 N.J. Super. at 579-580. As such, the Court finds that it would be short-sighted to question whether \$975.00 per week exceeds the child's essential needs. On its face, this may seem like an extraordinary amount. However, to delve into such an inquiry would be to limit all children to a support amount that the Court objectively finds to be "enough." This would be to put a cap on all child support obligations, which this Court finds contrary to the public policy of this state as well as the best interest of children. This Court finds that the needs of a child of a non-custodial parent, who earns an average of \$10,028 on a weekly basis, are much higher than a child of a non-custodial parent with a more conventional earning capacity in light of the idea that children are entitled to have their needs accord with the current standard of living of both parents, which may reflect an increase in parental good fortune. Isaacson v. Isaacson, 348 N.J. Super. 560 at 579. (emphasis added). Stated another way, the dominant guideline for consideration among the factors listed in the statute, in the case where "ability to pay" is not at issue, as here, is the reasonable needs of the children, which must be addressed in the context of the standard of living of the parties. Id. at 581. Furthermore, though the Defendant asserts that the fact that the Plaintiff waited a decade to ask the Court for an increase in child support indicates that there is no "need," the Plaintiff certified that she has

"struggle[d] while raising [their] son." The Court finds that silence on the part of the pro se Plaintiff, if that can be indicated by the failure to file a motion when she was entitled to a recalculation, did not indicate that the needs of the child are being met in this case.

The Defendant makes further assertions that such an award is an "improper windfall" for the Plaintiff since she did not ask for the supplemental award. However, the Plaintiff asked for a recalculation of child support. The supplemental amount is a mandatory amount the Court must add pursuant to Paragraph 20(b) of Appendix IX-A of the New Jersey Court Rules. Therefore, the mere fact that the Plaintiff did not request the supplemental award does not mean that the award was an "improper windfall" as asserted by the Defendant. In fact, the Court has complied with the statutory prescription by doing so.

The Defendant next asserts that the Plaintiff will "lavish herself in luxury" upon receipt of the new child support obligation. However, pursuant to Paragraph 7(j) of Appendix IX-A of the New Jersey Court Rules, the guidelines assume that the obligee is spending the support award for the benefit of the child. The Defendant has not overcome the assumption in this case. Furthermore, the Appellate Division has held that the law is not offended if there is some incidental benefit to the custodial parent from increased support so long as it is not overreaching in the name of benefiting the child. Loro v. Del Colliano, 354 N.J.Super. 212 (App. Div. 2002). There has been no indication of same in this case.

Finally, the Defendant asserts that the parties' child is capable of working. The child is sixteen years old. Though the Court appreciates the fact that the child

may be able to work a minimum wage job, because he is a minor, the Court will not, in essence, require the child to support himself. The needs of the child, based on the standard of living of the parties is the overarching factor to be taken into consideration as stated above. However, the fact that the Defendant earns in excess of \$10,000 on a weekly basis cannot be ignored.

Therefore, the Defendant's request that the Court reconsider its Order based on the fact that it was not based on the factors set forth in N.J.S.A. 2A:34-23, specifically, the needs of the child as asserted by the Defendant is hereby DENIED.

IV. The Defendant next asserts that the child does not have any needs that require a substantial increase in the child support obligation because Dr. Cossu has already provided him with more than he needs. The Court notes that although Defendant in this case went beyond the minimum, the minimum being an outdated child support award, the new award includes incidental expenses that were once separate that the Defendant took on. Therefore, the Defendant's request that the Court reconsider its Order based on the fact the Defendant has provided beyond the minimum child support obligation is hereby DENIED.

V. The Defendant finally asserts that the child support obligation should be reduced due to the lower cost of living in Pennsylvania. However, pursuant to New Jersey Court Rule 5:6A, the guidelines set forth in Appendix IX of these Rules shall be applied when an application to establish or modify child support is considered by the Court. Because the Plaintiff filed an application to modify child support before this Court, it applied the guidelines set forth in Appendix IX. Therefore, the Defendant's request that the Court

reconsider its Order based on the fact that the Plaintiff lives in Pennsylvania is hereby DENIED.

Defendant presents the following arguments for our consideration:

POINT I

THE TRIAL COURT ERRED BY CALCULATING THE SUPPLEMENTAL AWARD AS THE PLAINTIFF DID NOT ARTICULATE ANY OF THE CHILD'S NEEDS WHICH WOULD NECESSITATE A SUPPLEMENTAL CHILD SUPPORT AWARD.

POINT II

THE TRIAL COURT ERRED IN CALCULATING THE GUIDELINES-BASED AWARD BECAUSE IT DID NOT USE THE CORRECT FIGURES.

POINT III

THE PLAINTIFF OFFERS NO CASE LAW OR FACTS TO SHOW THAT THE TRIAL COURT PROPERLY DETERMINED THE NEED FOR AND AMOUNT OF A SUPPLEMENTAL CHILD SUPPORT AWARD.

POINT IV

THE IMPROPER CALCULATION OF THE BASIC CHILD SUPPORT AWARD IS NOT DISPUTED BY THE PLAINTIFF.

POINT V

THE PLAINTIFF'S SALARY CHANGE AND HER OWN EXPLANATIONS SHOWS THAT SHE IS VOLUNTARILY UNDEREMPLOYED WITHOUT JUST CAUSE.

We have considered defendant's contentions in light of the record and applicable principles of law and we reject them. We affirm substantially for the reasons thoroughly set forth by Judge Daley in his orders of August 3, 2005 and September 9,

2005, as repeated verbatim herein. See Cesare v. Cesare, 154  
N.J. 394, 411-12 (1998).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION