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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1563-15T2

DONNA S. SECK,

Plaintiff-Respondent,

v.

THEODORE R. SHALACK,

Defendant-Appellant.

Submitted May 2, 2017 – Decided May 31, 2017

Before Judges Yannotti and Gilson.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex
County, Docket No. FM-12-1303-11.

Law Office of Edward Fradkin, LLC, attorneys
for appellant (Edward P. Fradkin, of counsel
and on the briefs).

George G. Gussis, PA, attorneys for respondent
(George G. Gussis, of counsel and on the
brief; Puya Joseph Nili, on the brief).

PER CURIAM

Defendant appeals from provisions of an order entered by the
Family Part on June 16, 2015, which determined defendant's share

of plaintiff's retirement account, and gave plaintiff credits for the value of a discarded household rug, and her share of defendant's retirement accounts. Defendant also appeals from an order entered by the court on November 16, 2015, which awarded plaintiff attorney's fees. We affirm in part, reverse in part, and remand the matter to the trial court for further proceedings.

I.

The parties were married on October 6, 1996, and no children were born of the marriage or legally adopted. On December 20, 2010, plaintiff filed a complaint for divorce. The trial court entered a dual final judgment of divorce dated October 25, 2011, which dissolved the marriage and incorporated the parties' matrimonial settlement agreement (MSA).

Article VII of the MSA addresses equitable distribution. Section 7.4 of the MSA states in pertinent part that the parties had certain pension, retirement, or deferred-income accounts, which would be distributed or retained solely by one party in the manner specified. The MSA provides that the marital portion of plaintiff's TIAA/CREF account would be split on a fifty-fifty basis.¹ Section 7.4 states that the marital portion of this account consists of the funds accumulated through the date upon which

¹ "TIAA-CREF" is the Teachers Insurance and Annuity Association, College Retirement Equities Fund.

plaintiff filed her complaint for divorce, plus or minus any fluctuation in value due to the market, "less [plaintiff's] premarital portion of \$39,444.92 (plus/minus any fluctuation in value attributable to the premarital portion)."

Section 7.4 of the MSA further provides that defendant had an E-Trade Roth Individual Retirement Account (IRA) and a Wells Fargo IRA. The MSA states that plaintiff was entitled to one-half of the contributions to the E-Trade IRA made from the date of the marriage to the date upon which the divorce complaint was filed, "together with the market gains and losses thereon." In addition, the MSA states that plaintiff is entitled to "the marital coverture" portion of the Wells Fargo IRA "together with market gains and losses thereon."

Section 7.4 also states that plaintiff's TIAA/CREF account, and defendant's E-Trade and Wells Fargo IRAs each would be distributed in accordance with a Qualified Domestic Relations Order (QDRO). The MSA states that pension appraisers would prepare the QDROs, and the parties would equally share the costs of preparing the QDROs.

In addition, Section 7.3 of the MSA provides that the parties would each keep the household furnishings and personalty in their possession, but plaintiff would be entitled to certain items listed on Exhibit A to the MSA. Exhibit A states that, among other items,

plaintiff was to keep possession of a "multi-color rug" with a size of approximately five-by-seven feet.

On March 17, 2014, plaintiff filed a motion in the trial court which sought, among other relief, a determination that defendant's share of plaintiff's TIAA/CREF account is \$144,037.17; application of plaintiff's portion of defendant's E-Trade and Wells Fargo IRAs as an offset to defendant's share of the TIAA/CREF account; a credit of \$2395 for a "Persian Rug" defendant had discarded; and the award of attorney's fees.

In support of her motion, plaintiff submitted a certification in which she stated that a pension valuation had been performed, which indicated that as of December 27, 2013, the value of the TIAA/CREF account was \$524,366.41, of which \$327,519.26 was eligible for distribution based upon application of a .6246 "reduction for marital coverture." Plaintiff asserted that the equitable distribution amount of the TIAA/CREF account was \$327,519.26, less \$39,444.92 for her premarital contributions, or \$288,074.34. Plaintiff stated that defendant's share of the account was one-half of this amount, or \$144,037.17.

Plaintiff noted that defendant had objected to this calculation and stated that he believed plaintiff's premarital portion of the account was limited to \$39,444.92. Plaintiff stated

that defendant claimed that he was entitled to \$242,460.75, which is one-half of \$524,366.41, minus \$39,444.92, or \$484,921.49.

Plaintiff noted that she began her employment at a university on April 4, 1988, and married defendant on October 6, 1996. She stated that she had contributed to the TIAA/CREF account for eight years before the marriage, and her premarital contributions were "substantially more than \$39,444.92." She asserted that defendant would be unjustly enriched if he was entitled to \$242,460.75, as he claimed.

In addition, plaintiff stated that defendant's E-Trade IRA was "all marital" and had a value of \$7659.91. She asserted that her share of the account was \$3829.96. She also said that defendant's Wells Fargo IRA was "all marital" and had a value of \$43,239.80. She stated that her share of this account was \$21,619.90.

Plaintiff further asserted that defendant had not turned over the "Persian Rug" to her, as required by the MSA. She noted that defendant had acknowledged he discarded the rug. Plaintiff stated that she went to the department store where the rug was purchased and obtained an estimate of "the approximate value of the rug." According to plaintiff, the store had provided a note indicating the rug "was worth" \$2395.

Defendant opposed plaintiff's motion, and filed a pro se cross-motion seeking an order finding that he was entitled to 47.94 percent of plaintiff's TIAA/CREF account. In a certified statement dated June 4, 2014, defendant asserted that plaintiff was bound by the terms of the MSA, which stated that her premarital portion of the TIAA-CREF account was \$39,444.92. He stated that this provision of the MSA had been negotiated, reviewed, and agreed upon by the parties and their attorneys.

Defendant also stated that as of December 31, 2010, the marital portion of the TIAA/CREF account was \$484,921.49, which was the balance of \$524,366.41, less the agreed-upon premarital portion of \$39,444.92. He asserted that his share of the account was one-half of the marital portion of the account, or \$242,460.74. Defendant asserted that he would be entitled to 46.24 percent of the account.

He noted, however, that a QDRO had been prepared and submitted to the TIAA/CREF using the "transfer percentage" of 46.24, but this was "problematic." Defendant said plaintiff's account consisted of a Transfer Payout Annuity (TPA) in the amount of about \$18,000, plus six other non-TPA certificates. Defendant stated that the TPA had certain restrictions that affected its division. Defendant therefore asserted that plaintiff should be

permitted to retain 100 percent of the TPA, and he should be awarded 47.94 percent of the other six certificates.

Defendant also asserted that market fluctuations had increased the account balance by forty percent as of February 28, 2014. He asserted that this increase would apply to the marital and premarital portions of the account. He said the increase in value would not affect the percentage of his share of the TIAA/CREF account as of the date of distribution.

The court entered an order dated July 8, 2014, which granted plaintiff's motion and determined that defendant's share of plaintiff's TIAA/CREF account was \$144,037.17. The court deducted plaintiff's premarital portion of \$39,444.92 from the equitable distribution amount of \$327,519.26, leaving \$288,074.34 to be divided equally between the parties.

The court also gave plaintiff a credit of \$2395 for the "Persian Rug" that defendant had discarded, noting on the order that plaintiff's application for this credit had been unopposed. In addition, the court denied without prejudice plaintiff's motion to apply her share of the E-Trade and Wells Fargo IRAs to defendant's share of the TIAA/CREF account. The court ordered defendant to prepare QDROs regarding these accounts within ten days.

Thereafter, defendant retained counsel, and on July 28, 2014, defendant's attorney filed a motion for reconsideration of the court's determination of defendant's share of the TIAA/CREF account, and the decision to grant plaintiff a credit of \$2395 for the rug. In support of the motion, defendant submitted a statement from TIAA/CREF, which indicated that as of September 30, 1996, plaintiff's account had a value of \$39,444.92.

Defendant also stated he did not know the rug that plaintiff identified for the department store's salesperson. He pointed out that the note provided to the court indicated that a five-by-eight-foot rug had a price of \$995. In response, defendant submitted a certified hand-written note from the salesperson, who wrote that when plaintiff came to the store, she did not have a receipt for the rug. The salesperson wrote that plaintiff did not have his permission to use the price quote in a court filing.

Plaintiff opposed the motion and filed a cross-motion seeking, among other relief, attorney's fees for responding to the motion. In her certification, plaintiff asserted that the provision of the MSA regarding the TIAA/CREF account might be ambiguous, but it could only be interpreted in one of two ways. She asserted that

[t]he equitable distribution portion is either \$327,519.26 minus \$39,444.92 or \$288,074.34, or merely [one-half] of \$327,519.26. It is

clearly not more than one-half of the marital share of \$327,519.26. Therefore, [d]efendant's share is either \$144,037.17 or \$163,759.63. Either way, it is significantly less than what the [d]efendant is trying to receive.

Plaintiff further asserted that her premarital contributions to the TIAA/CREF account had grown over twenty-two years, and those contributions were worth substantially more than \$39,444.92. In addition, plaintiff noted that defendant had not submitted the QDROs for the E-Trade and Wells Fargo IRAs, as required by the court's order.

Plaintiff also addressed the court's decision giving her a credit for the rug. She stated that the rug mentioned on the list in the MSA was the rug she had previously referred to as a "Persian Rug." Plaintiff said defendant had discarded the rug after the divorce, and she went to the department store to find a similar rug.

Plaintiff stated that the rug was on sale the day she went to the store, but there was "no guarantee that it would be on sale if [she] were to purchase it again in the future." She said the rug that defendant discarded was in good condition. She stated that the court should adhere to the prior decision, giving her a credit of \$2395 for the rug.

The court entered an order dated June 16, 2015, which granted defendant's motion in part. The order states that defendant's share of the TIAA/CREF account was \$163,759.63, less the credit to plaintiff of \$2395 for the "Persian Rug," or \$161,364.63. The court directed defendant to provide copies of statements related to the E-Trade and Wells Fargo IRAs within five days after the date of the order. The court reserved the decision on plaintiff's application for attorney's fees.

The court entered another order dated July 27, 2015. The order states that defendant had not provided the court with the statements regarding the E-Trade and Wells Fargo IRAs, as required by the prior order. The July 27, 2015 order authorized plaintiff's counsel to obtain copies of the statements with a power of attorney.

Defendant then filed a notice of appeal from the June 16, 2015 order. The clerk of this court advised defendant's attorney that, because the trial court had not ruled on plaintiff's application for attorney's fees, the order was not a final order and not appealable as of right pursuant to Rule 2:2-3(a). Defendant withdrew his appeal.

In October 2015, plaintiff's attorney provided the trial court with copies of the statements he had obtained for the E-Trade and Wells Fargo IRAs. The court then entered an order dated

November 16, 2015, which granted plaintiff's motion for a fifty percent share of the E-Trade and Wells Fargo accounts. The court determined that plaintiff's share of these accounts totaled \$25,573.01, which would be deducted from defendant's share of the TIAA/CREF account. The court also awarded plaintiff counsel fees. This appeal followed.

On appeal, defendant argues that the trial court erred in the equitable distribution of plaintiff's TIAA/CREF account. He argues that the court should not have given plaintiff a credit for her share of his IRAs because these accounts should have been divided by QDROs. He further argues that the court erred by giving plaintiff credit of \$2395 for the rug. In addition, defendant argues that the court erred by awarding plaintiff attorney's fees.

II.

We turn first to defendant's contention that the trial court erred in the equitable distribution of plaintiff's TIAA/CREF account and defendant's E-Trade and Wells Fargo IRAs. Defendant contends the court erred by failing to enforce the relevant provisions of the MSA with regard to these assets. We disagree with these arguments.

Generally, decisions allocating marital assets in equitable distribution are committed to the sound discretion of the trial court. La Sala v. La Sala, 335 N.J. Super. 1, 6 (App. Div. 2000),

certif. denied, 167 N.J. 630 (2001). We will not reverse a trial court decision on equitable distribution unless shown to be a mistaken exercise of discretion. Ibid. We will affirm the trial court's decision if it "could reasonably have reached its result from the evidence presented, and the award is not distorted by legal or factual mistake." Ibid.

A. The TIAA/CREF Account

As we have explained, the record shows that as of December 27, 2013, plaintiff's TIAA/CREF account had a present value of \$524,366.41. The appraisal determined that the marital portion of the account was \$327,518.26. In its order of June 16, 2015, the trial court found that defendant's share of the account was fifty percent of \$327,518.26, or \$163,364.53. In reaching that decision, the trial court accepted the calculation in the pension appraisal, which determined the marital portion of the account using a coverture percentage of .6246.

It is well established that a coverture fraction can be employed to determine the portion of a marital asset that is subject to equitable distribution. Barr v. Barr, 418 N.J. Super. 18, 34 (App. Div. 2011). The coverture fraction is

the proportion of years worked during the marriage to total number of years worked. The numerator represents that portion of the benefit, enhanced or not, that was "legally and beneficially acquired" during the

marriage. The denominator is the total number of years worked up to retirement. The coverture fraction insures that the equitable distribution pot includes only that portion of the working spouse's labor which constitutes a "shared enterprise." It also assures the employee spouse the benefits of his or her pre and post coverture labors.

[Eisenhardt v. Eisenhardt, 325 N.J. Super. 576, 580-81 (App. Div. 1999) (citations omitted).]

On appeal, defendant contends the court erred by failing to enforce the provision of the MSA pertaining to the distribution of the TIAA/CREF account. He argues that under the MSA, plaintiff's premarital contributions to the account are limited to \$39,444.92, plus or minus fluctuations due to the market.

The MSA states that the marital share of the TIAA/CREF account would be subject to equitable distribution. The pension appraisal reasonably determined the marital share of the account using a coverture fraction. By using the coverture fraction, and applying it to the present value of the account, the appraisal reasonably determined the amount of plaintiff's premarital contributions and amount by which those contributions had increased in value, due to market fluctuations.

We reject defendant's contention that by using the coverture fraction in the pension appraisal, the trial court erroneously failed to enforce the relevant provision of the MSA. Defendant

argues that plaintiff's contributions were limited to \$39,444.92, but he failed to give plaintiff any credit for any increase in value attributable to market fluctuations. The court reasonably based its analysis on the evidence before it, and defendant provided the court with no credible evidence to determine the marital portion of the account differently.

Accordingly, we affirm the trial court's finding that defendant's share of the TIAA/CREF account is \$163,759.63.

B. The E-Trade and Wells Fargo IRAs

We turn to defendant's contention that the trial court erred by giving plaintiff a credit for her share of the E-Trade and Wells Fargo IRAs, rather than having the parties prepare and submit QDROs for later distribution of these assets. Defendant argues that the court erred by departing from the distribution scheme spelled out in the MSA.

We reject these arguments for several reasons. The record shows that the trial court ordered defendant to prepare QDROs for the distribution of these accounts, and he failed to comply with the court's order. The court then ordered defendant to provide statements for these accounts. Defendant again failed to comply with the court's order. The court ultimately authorized plaintiff's counsel to obtain the information about the accounts, with a power of attorney.

We conclude that, by repeatedly failing to comply with the court's orders regarding these accounts, defendant waived any right he may have had to enforce the provision of the MSA requiring division of the IRAs using QDROs. Furthermore, granting plaintiff a setoff for the present value of the accounts was appropriate because it would eliminate further disagreements between the parties concerning these accounts, and avoid the need for the parties to return to court to address any issue that may arise.

Defendant argues that giving plaintiff a credit for her share of the IRAs could have unintended tax consequences, but defendant never raised that issue in the trial court. Defendant also asserts that at the very least, the trial court should have conducted an evidentiary hearing on this issue. However, defendant did not request such a hearing, and he did not provide the trial court with any evidence regarding the alleged adverse tax consequences that may result by granting plaintiff the setoff.

We conclude that, in determining the amount of defendant's share of the TIAA/CREF account, the trial court did not abuse its discretion by granting plaintiff a credit for her share of the E-Trade and Wells Fargo IRAs.

III.

We next consider defendant's contention that the trial court erred by giving plaintiff a credit of \$2395 for the so-called

"Persian Rug." Defendant contends there was insufficient credible evidence to support the court's finding that the rug had a value of \$2395. We note that, when plaintiff first sought compensation for the rug, defendant did not oppose her application.

Indeed, the record shows that defendant did not raise this issue until he filed a motion seeking reconsideration of the July 8, 2014 order, which granted plaintiff the \$2395 credit. We nevertheless conclude that the decision to grant plaintiff this credit was erroneous.

The trial court's findings of fact "are binding on appeal when supported by adequate, substantial credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). The trial court's finding that plaintiff was entitled to a credit of \$2395 for the discarded rug is not supported by sufficient credible evidence in the record.

It is undisputed that in the MSA, the parties agreed that plaintiff could retain a household rug, which was described in the MSA as a "multi-color rug" with a size of approximately five-by-seven-feet. The parties agree that defendant was required to turn over the rug to plaintiff, and he failed to do so. It is also undisputed that defendant discarded the rug.

In granting plaintiff the credit of \$2395 for the rug, the court relied upon a handwritten note prepared by a salesperson in the store where the rug was purchased. There is no evidence showing the date when the rug was purchased, or the price paid for the rug. The salesperson's note indicates that some rug cost \$2395, but it was on sale at a sixty percent reduction, for \$995. The trial court erred by basing its finding on this submission.

First, there is no indication in this record that the rug referred to in the salesperson's note is the same or similar to the parties' household rug. Indeed, the note indicates that the salesperson provided a price for a rug of a different size. Moreover, the price that the salesperson provided apparently was for the purchase of a new rug. Plaintiff did not establish that she is entitled to the cost to replace the rug, rather than the value of the household rug that was thrown out.

In addition, the salesperson's price quote indicates that a new rug could have been purchased on sale for \$995. Plaintiff asserted that there was no assurance the rug would have been on sale when she went to purchase it, but the price quote makes clear that plaintiff could have acquired the rug in the store at a price substantially less than \$2395.

We therefore conclude that the trial court's finding that plaintiff is entitled to a credit in the amount of \$2395 for the

discarded rug is not supported by sufficient credible evidence in the record. We reverse the provision of the order granting plaintiff the credit for the rug and remand the matter to the trial court for reconsideration of this determination.

On remand, the court should afford the parties the opportunity to present further evidence regarding the value of the discarded rug. If plaintiff fails to present additional evidence on this issue, her claim should be denied. If the parties present further evidence that raises a genuine issue of material fact, the court should conduct a plenary hearing to determine the amount, if any, that should be awarded to plaintiff for the discarded rug.

IV.

Defendant also argues that the trial court erred by awarding plaintiff attorney's fees. Defendant contends the trial court failed to consider the factors enumerated in N.J.S.A. 2A:34-23 and Rule 5:3-5(1)(c), and did not make adequate findings of fact.

In its order of November 16, 2015, the court awarded plaintiff a total of \$3795, which represents the award of \$2153 to Veronica Norgaard, and \$1642 to Kostantin Feldman and George G. Gussis. In March 2014, Ms. Norgaard submitted a certification of services seeking \$4425 for plaintiff's initial motion. In August 2014, Ms. Norgaard sought an additional \$4223.50 for responding to defendant's motion for reconsideration. It appears that Mr.

Feldman and Mr. Gussis later substituted for Ms. Norgaard, and in October 2015, sought attorney's fees and costs in the amount of \$3284.50 for the time they devoted to the case.

The court did not award plaintiff all of the fees sought, and did not explain the reasons for the award. Furthermore, the court did not relate the award to specific tasks or results, and did not make the necessary findings required by N.J.S.A. 2A:34-23 and Rule 5:3-5(c). In view of our decision reversing the court's order in part, we are convinced that the award of counsel fees must be reversed as well. On remand, the trial court should reconsider the award.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings in conformity with this opinion. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION