

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5753-14T1

BARBARA HENNEBERRY,

Plaintiff-Respondent,

v.

RICHARD HENNEBERRY,

Defendant-Appellant.

Submitted April 5, 2017 — Decided July 10, 2017

Before Judges Alvarez and Lisa.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Union County,
Docket No. FM-20-1195-06.

Saminski, Rodriguez & Papadopoulo, L.L.C.,
attorneys for appellant (Stephanie O'Neill, on
the briefs).

Haber Silver & Simpson, attorneys for
respondent (Karin Duchin Haber, of counsel;
Jani Wase Vinick, on the brief).

PER CURIAM

Defendant, Richard Henneberry, appeals the Family Part order of July 10, 2015¹ denying his motion to eliminate his alimony obligation or, alternatively, to reduce the obligation or conduct a plenary hearing. The order also granted relief sought by plaintiff, Barbara Henneberry, in her cross-motion, requiring defendant to maintain a \$300,000 life insurance policy naming her as the beneficiary pursuant to the parties' Interspousal Settlement Agreement (ISA). The order also ordered defendant to pay \$2000 to plaintiff's attorney.

Defendant argues that the trial court erred in failing to grant his application for termination of alimony by making inadequate findings under N.J.S.A. 2A:34-23j(3), and by erroneously considering assets he received as part of the equitable distribution of property contrary to N.J.S.A. 2A:34-23j(4). Defendant also argues that, in light of his good faith retirement and the terms of the ISA, the court erred in requiring him to continue to maintain a \$300,000 life insurance policy. Defendant further argues that the court erred in awarding a counsel fee to plaintiff. Finally, he argues that the court abused its discretion by failing to conduct a plenary hearing involving the issues of

¹ After the appeal was filed, the trial court entered an amended order on September 21, 2015, which did not make any substantive changes, but which had annexed to it a supplemental statement of reasons for its decision.

alimony, life insurance and counsel fees. We are unpersuaded by defendant's arguments and affirm.

The parties were married on February 7, 1970. They were divorced on June 29, 2007. At the time of their divorce, they had two emancipated children. Both parties were represented by counsel in the divorce action. Through negotiations, they arrived at the agreement memorialized in the ISA, which was attached to and incorporated in the Final Judgment of Divorce.

Both parties were employed full time during the marriage. At the time of the divorce, defendant was a firefighter earning a yearly salary of approximately \$95,000. He also had a side business in construction, which included the occasional purchasing, improving and reselling of homes. Plaintiff worked as a teacher from 1987 to 2015, earning approximately \$52,000 per year at the time of the divorce.

Defendant retired in March 2014 upon his attainment of age sixty-five, the mandatory retirement age in the fire department in which he was employed. Plaintiff attained age sixty-five in March 2015, and retired on June 30 of that year, at the end of the school term. When they retired, defendant's salary as a firefighter was approximately \$125,000, and plaintiff's teacher's salary was approximately \$63,000.

Plaintiff had been diagnosed in June 2012 with stage four ovarian cancer. The cancer metastasized, requiring surgical intervention and a continuing course of chemotherapy. Although she required medical absences from work totaling several months in the years following her diagnosis, plaintiff continued her full time employment as a teacher. This was a necessity for her because the ISA required each party to be responsible for their own medical insurance. By remaining employed full time, plaintiff continued to receive medical insurance through her employer. Upon attaining age sixty-five, she became eligible for Medicare.

Defendant also experienced a health issue. He was diagnosed in 2011 with papillary urothelial carcinoma, a form of bladder cancer. Defendant asserted this diagnosis in a certification in support of his motion, in which he also stated that he required chemotherapy treatment every three months. Plaintiff did not dispute defendant's diagnosis. However, defendant failed to submit any medical documentation to establish that the condition debilitated him or impeded his ability to continue working. Indeed, defendant continued working full time in the very demanding occupation as a firefighter for several additional years until his mandatory retirement.

The ISA requires defendant to pay permanent alimony of \$1750 per month and to maintain \$300,000 of life insurance coverage with

plaintiff as the beneficiary for as long as he continues to pay alimony. If alimony is terminated, his insurance obligation would be reduced to \$225,000 until either party dies. In the event of a reduction of alimony, "the life insurance on the alimony portion (\$75,000.00) will be modified in proportion to said [alimony] modification." The ISA also designated sixty-three years of age as the agreed-upon age for defendant's "good faith" retirement.

After defendant retired, he filed a motion asking the court to terminate his alimony obligation and seeking reimbursement for alimony he had paid after his retirement. He also sought counsel fees. Defendant had unilaterally reduced the amount of his life insurance coverage to \$225,000, based upon his belief that his alimony obligation would automatically terminate upon his retirement. Plaintiff cross-moved to enforce her litigant's rights under the ISA, requesting that the life insurance coverage be restored to the \$300,000 level required by the ISA, and for counsel fees.

Defendant failed to provide with his motion a prior or updated Case Information Statement (CIS). For that reason, the court denied defendant's motion without prejudice. The court also concluded that the provisions of the ISA required continued life insurance coverage in the amount of \$300,000, notwithstanding defendant's retirement, and ordered enforcement of that provision.

On April 24, 2015, defendant filed a second motion. He sought termination of his alimony obligation, reimbursement of alimony paid since retirement, and authorization to reduce his life insurance obligation to \$225,000. He provided the court with only his current CIS.

Plaintiff again filed a cross-motion. She sought to sanction defendant until he complied with the court's prior order by providing proof that the life insurance had been restored to the \$300,000 level. Plaintiff included her own current CIS and her prior CISOs, and she also included defendant's prior CISOs. Together with her motion, plaintiff filed a certification pointing out many items that were missing from the information submitted by defendant. Significant among these omissions were that defendant had inherited two properties. One was a condominium on a golf course in Virginia. The other was a home near a college campus in North Carolina. Apparently, the estate also included other valuable assets. Defendant acknowledged that he was the beneficiary of the estate, but contended that the homes and other assets continued to be titled to the estate and that no distribution had been made to him. He was the executor. However, he failed to disclose why no distributions had been made to him or to reveal the value of the assets, their income production or

income producing potential, or other information relevant to the effect this inheritance had on his financial condition.

Plaintiff also pointed out that defendant's CIS, which he had not initially submitted, revealed that he had \$232,091 in his bank accounts, two vehicles with a combined value of \$19,000, deferred compensation accounts valued at \$110,000, and no debt. Further, it showed he was receiving \$4587 per month in pension benefits and \$325 per month in Social Security benefits.

At the time of the divorce, the parties' principal asset was the marital home valued at approximately \$700,000, and debt free. The home eventually sold for \$740,000. After the divorce, plaintiff moved into a condominium, which she purchased for \$392,000, financed by a mortgage with a monthly obligation of \$1407. Conversely, defendant purchased a home for \$243,000 in cash, which he sold four years later for \$640,000. He contended that he spent more than \$400,000 in making improvements and converting the home to a two-family residence. He said it was his intention to live there long-term and retire there, renting out the second unit to supplement his retirement income. He contended that an unsolicited and unexpected offer came along, so he sold the home for \$640,000. He provided no explanation as to the source of the \$400,000 spent on the home. He provided no documentation to verify these asserted expenditures. It appears that he made a

substantial profit because he used these proceeds to purchase another home for \$522,000 in a cash transaction. The remainder of the proceeds from the sale of the previous home was deposited into a savings account.

The parties agreed to waive oral argument and allow the judge to decide the cross-motions on the papers. The court entered its order on July 10, 2015, denying defendant's motion in its entirety, granting plaintiff's requested relief regarding the life insurance, and ordering defendant to pay \$2000 in attorney's fees on behalf of plaintiff.

Defendant's claim that he is entitled to termination of alimony based upon his good-faith retirement stems from his reading of the ISA. However, as the trial court found, "nothing was contained therein to indicate that alimony would automatically terminate upon the Defendant reaching the age of 63." The trial court was correct. The good-faith retirement age was inserted in the ISA to confirm the acknowledgment by plaintiff that, if defendant would continue working until at least age sixty-three, his retirement would not be premature, but would be accomplished in good faith, based upon his years of service and the customary retirement age for firefighters. Indeed, defendant continued working for two additional years until reaching age sixty-five, when he was required to retire. There is no dispute that this was

a good-faith retirement. However, under the clear terms of the ISA, a good-faith retirement did not trigger an automatic right to termination of alimony or even a reduction in alimony.

Under long established precedent, spousal support agreements are subject to modification at any time upon a showing of substantial and permanent changed circumstances. Lepis v. Lepis, 83 N.J. 139, 146 (1980). Alimony obligations "are always subject to review and modification on a showing of 'changed circumstances.'" Ibid. (quoting Chalmers v. Chalmers, 65 N.J. 186, 192 (1974)). When a modification application is made, the court should examine evidence of the paying spouse's financial status in order "to make an informed determination as to 'what, in light of all of the [circumstances] is equitable and fair.'" Id. at 158 (quoting Smith v. Smith, 72 N.J. 350, 360 (1977) (alteration in original)).

A party seeking modification of a prior order bears the burden of making a prima facie showing of changed circumstances. Id. at 157. In a case such as this, where the supporting spouse seeks a downward alimony modification, "the central issue is the supporting spouse's ability to pay." Miller v. Miller, 160 N.J. 408, 420 (1999). Defendant's assets, whether acquired through inheritance or accumulated through his own earnings, must be considered in this analysis. In Miller, the Court explained:

Although the supporting spouse's income earned through employment is central to the modification inquiry, it is not the only measure of the supporting spouse's ability to pay that should be considered by a court. Real property, capital assets, investment portfolio, and capacity to earn by "diligent attention to . . . business" are all appropriate factors for a court to consider in the determination of alimony modification. We have never suggested that the supporting spouse's income earned from investments should be barred from this calculus.

[Id. at 420-21 (alteration in original) (citations omitted).]

Further, the current alimony statute sets forth guidance and factors to be considered when a modification of alimony application is made. Pertinent here is N.J.S.A. 2A:34-23j(3) pertaining to modification applications upon retirement when the obligor has reached full retirement age, and where, as in this case, the enforceable written agreement was established prior to the 2014 amendment to the alimony statute. This section requires consideration of the obligee's ability to have saved adequately for retirement, as well as eight specified factors to consider in determining "whether the obligor, by a preponderance of the evidence, has demonstrated that modification or termination of alimony is appropriate." N.J.S.A. 2A:34-23j(3).

The trial court gave full consideration to each of the eight factors. The court noted that defendant had not been forthcoming

in submitting information and withheld critical information until it was brought forward by plaintiff. This included, for example, the inherited properties and substantial bank accounts. The court listed in detail the basis for determining defendant's overall financial status, and thus, his ability to continue paying the alimony provided for in the ISA. The court also considered plaintiff's financial circumstances and determined she had a continuing need for the full amount of alimony provided for in the ISA. The court concluded as follows:

After reviewing the submissions of the parties including: the case information statements, parties' certifications as well as defendant's 2014 Income Tax Returns, and applying the factors pursuant to the new alimony statute, the Court finds that the defendant has not demonstrated by preponderance of the evidence that a modification or termination of alimony is appropriate in this case.

If the Court were to grant a downward modification of alimony, or in the alternative terminates alimony, the Plaintiff would not be able to meet her living expenses, including her medical expenses and health insurance premium so desperately needed for her medical condition. The Plaintiff, unlike the Defendant, cannot resort to other sources of income that can be derived from other properties or businesses.

The Court finds the plaintiff to be more credible than the defendant as he deliberately omitted information on both his original and amended case information statement[s] regarding his unearned income and assets.

Moreover, the defendant did not deny plaintiff's assertions about his assets. Thus, based on the information provided to the Court, we find that the defendant has the ability to continue paying spousal support in the amount of \$1,750 a month to the Plaintiff.

Therefore, because the defendant is financially capable to continue paying spousal support and his financial circumstances upon retirement did not substantially change as to warrant a termination or modification of his alimony obligation to the plaintiff, the defendant's motion is hereby DENIED.

We are satisfied from our review of the record that the court's analysis of the relevant factors, as set forth in the precedents we have mentioned and the current alimony statute, was thorough and based upon competent evidence in the record. Likewise, we are satisfied that the court's conclusion is well grounded, supported by the evidence, and not an abuse of discretion. We reject defendant's contention that the court failed to properly weigh the factors required by N.J.S.A. 2A:34-23j(3).

We also reject defendant's contention that the court erroneously considered defendant's assets acquired through equitable distribution in violation of N.J.S.A. 2A:34-23j(4). These assets, although listed among the many other factors the court considered, were only partially acquired through equitable distribution. It was incumbent upon defendant to distinguish between the portions so acquired and the portions acquired after

the divorce. Further, in the overall scope and magnitude of the factors appropriately considered, these factors were relatively minor, thus rendering harmless any potential error on this point.

Reduction of the \$300,000 life insurance obligation is tied, by the terms of the ISA, to a termination or reduction in alimony. Because we have determined that the trial court did not err in refusing to terminate or reduce the amount of alimony, it follows that the \$300,000 life insurance obligation must remain in effect.

We next address whether the court erred in refusing to conduct a plenary hearing. Initially, we reject out of hand defendant's contention that, based on language in Silvan v. Sylvan, 267 N.J. Super. 578, 582 (App. Div. 1993), he is automatically entitled to a plenary hearing based on his good faith retirement. In Silvan, we observed "that in certain circumstances, good faith retirement at age sixty-five may constitute changed circumstances for purposes of modification of alimony and that a hearing should be held to determine whether a reduction of alimony is called for." Id. at 581 (emphasis added). We do not read Silvan as establishing a bright line exception to the Lepis standard. A good faith retirement is merely one factor to be considered in determining whether a prima facie showing of substantial and permanent changed circumstances has occurred, which would give rise to a discretionary decision by the trial court of whether or not to

conduct a plenary hearing. Further, under the current alimony statute, the relevant provision, N.J.S.A. 2A:34-23j(3), does not provide for an automatic plenary hearing upon retirement.

Family Part judges are accorded broad discretion in determining whether to conduct a plenary hearing in modification applications. The movant bears the burden of making a prima facie showing of the required changed circumstances. Lepis, supra, 83 N.J. at 157. A plenary hearing is not required "when the material facts are not in genuine dispute." Id. at 159. The moving party "must clearly demonstrate the existence of a genuine issue as to a material fact before a hearing is necessary." Ibid.

Defendant contends that a genuine dispute existed with respect to material facts, and the court erred by resolving these disputes without hearing testimony. For example, defendant points to several instances in the court's statement of reasons referring to plaintiff as being more credible than defendant. Of course, credibility determinations require live testimony. However, in context, it is clear to us that the court was referring to the fact that defendant was less forthcoming in the submission of required information and withheld information that was readily available to him, such as the value of the inherited properties. We are therefore unpersuaded that the court improperly made "credibility" determinations based on the papers alone.

Most importantly, a disagreement as to certain facts does not necessarily constitute a genuine issue of material fact. See Barblock v. Barblock, 383 N.J. Super. 114, 124-25 (App. Div.), certif. denied, 187 N.J. 81 (2006). In that case, we held that the trial court did not err in refusing to conduct a plenary hearing because the contradictory information provided in the moving party's certification consisted of bald, conclusory statements not supported by any documentation. Ibid. Accordingly, those statements did not create a "genuine" issue of material fact. Ibid. (citation omitted). Those principles apply in this case. For example, defendant baldly denied that he continued to be engaged in the house-flipping business and asserted, without documentation, that he spent more than \$400,000 improving the home he purchased in 2010, and sold in 2014 for a substantial profit when an unsolicited offer was made, and then turned around and purchased for cash a much more expensive home, placing the balance of the proceeds into a savings account. On the papers, such a bald assertion was not worthy of constituting a genuine issue of a material fact. The same can be said of the inheritance information.


We find no abuse of discretion in the court's refusal to conduct a plenary hearing in these circumstances. The record evidence, taken as a whole, supported the court's conclusion that

defendant failed to make the required prima facie showing of substantial and permanent changed circumstances under the Lepis standard.

Finally, we address the \$2000 counsel fee award. Contrary to defendant's contention, the court considered all relevant factors and rendered a very modest award. The court did not abuse its discretion.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION