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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-2981-16T3

J.S.,

Plaintiff-Appellant,

v.

K.S.,

Defendant-Respondent.

Argued May 8, 2018 — Decided May 17, 2018

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FM-04-1503-15.

Jonathan E. Ingram argued the cause for
appellant (Borger Matez, PA, attorneys; Gary
L. Borger, on the briefs).

John B. Kearney argued the cause for
respondent (Kearney, Burns & Martone, PC,
attorneys; Scott D. Burns, on the brief).

PER CURIAM

Plaintiff J.S. appeals from a February 7, 2017 amended Final
Judgment of Divorce. Plaintiff argues the trial judge unfairly
limited her from testifying about the marital standard of living,

resulting in an insufficient alimony award. She also argues the judge erred in denying counsel fees. We affirm.

The parties married in 1987. Defendant worked throughout the marriage and continues to work at an annual salary of \$75,400. Plaintiff worked during most of the marriage until she was laid off in 2013; at that time, she earned an annual salary of \$33,000. Plaintiff did not seek employment following her layoff. She claims to suffer from hearing loss and back, neck, and knee pain, which prevent her from working.

Plaintiff's initial attorney failed to file a completed Case Information Statement (CIS), and apparently requested little, if any, discovery from defendant. After the close of discovery, but three months before the trial began, plaintiff retained her current counsel. At trial, plaintiff's counsel attempted to elicit testimony from plaintiff regarding the marital standard of living and her current living expenses. Plaintiff's counsel attempted to use a statement of expenses prepared for litigation in order to refresh plaintiff's memory as to her expenses. However, defense counsel objected, stating plaintiff failed to provide the information during discovery or in her CIS. Plaintiff's counsel argued he did not wish to enter the statement into evidence, but just to use it to refresh plaintiff's memory. The judge ruled,

"[D]iscovery is over. . . . We're at trial. . . . If you didn't provide it to the defendant, it doesn't come in."

Notwithstanding this ruling, the judge did allow plaintiff to testify about tax returns, who paid household expenses, home improvements, an inheritance from her mother, automobiles, vacations, and going out to dinner. Plaintiff also testified about her hearing loss and surgeries. However, on cross-examination, she provided confusing and contradictory testimony about who paid the household bills and the mortgage, and when the bills were paid.

Six days later, when the trial continued, plaintiff's counsel requested the judge reconsider the ruling that "precluded [plaintiff] from testifying about living expenses." The judge replied that he did not bar plaintiff's testimony about living expenses; instead, he ruled "that no new CIS could be admitted as evidence." He clarified that plaintiff could not read into the record a statement of expenses, and he barred "the documents that [plaintiff] wants to admit into evidence, but not testimony." However, when plaintiff's counsel requested permission to reopen plaintiff's testimony after the judge clarified his previous ruling, the judge denied the request, stating, "Nope. She testified."

In his findings and conclusions regarding alimony, the trial judge went through each of the statutory factors set forth in N.J.S.A. 2A:34-23(b). Significantly, the judge found plaintiff lacked credibility. He found plaintiff was "voluntarily underemployed," and imputed an annual income of \$33,000, her last earned salary. In terms of plaintiff's health, the judge found plaintiff offered no evidence that she is unable to work. The judge found the parties maintained "a modest middle class lifestyle" during the marriage and both parties will be able to continue a comparable standard of living given the alimony and equitable distribution. The judge further noted plaintiff's failure "to comply with [c]ourt [r]ules requiring a completed CIS and full financial disclosure," as well as the fact that she currently shares living expenses with her adult daughter. Nevertheless, the judge awarded plaintiff open durational alimony of \$350 per week. In addition, the judge found both parties had the ability to pay their own attorney fees.

On appeal, plaintiff argues the trial judge erred in not allowing her to testify as to the marital standard of living; due to this error, she contends the judge did not fully consider her support needs and the marital standard of living in setting alimony, requiring a remand. Plaintiff also argues her financial and health conditions entitle her to an award of counsel fees.

We accord deference to the factual findings of the Family Part "[b]ecause of the family courts' special jurisdiction and expertise in family matters" Cesare v. Cesare, 154 N.J. 394, 413 (1998). We reverse only if the Family Part judge's conclusions are "clearly mistaken" or "wide of the mark," to "ensure that there is not a denial of justice." Parish v. Parish, 412 N.J. Super. 39, 48 (App. Div. 2010) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)).

I

Our review of an alimony award is limited. On appeal,

[a] trial court's findings regarding alimony should not be vacated unless the court clearly abused its discretion, failed to consider all of the controlling legal principles, made mistaken findings, or reached a conclusion that could not reasonably have been reached on sufficient credible evidence present in the record after considering the proofs as a whole. Substantial weight should be given to the judge's observations of the parties' demeanor and credibility.

[J.E.V. v. K.V., 426 N.J. Super. 475, 485 (App. Div. 2012) (citation omitted).]

N.J.S.A. 2A:34-23(b) sets forth factors to consider in the trial court's award of alimony. "The goal of alimony is to assist the supported spouse in achieving a lifestyle 'reasonably comparable' to the one enjoyed during the marriage." J.E.V., 426

N.J. Super. at 485 (quoting Steneken v. Steneken, 183 N.J. 290, 298-99 (2005)).

Here, the trial judge reviewed each factor of N.J.S.A. 2A:34-23(b). However, he acknowledged that plaintiff's failure to file a completed CIS impeded his analysis of plaintiff's needs. Plaintiff testified to some household expenses, who pays the mortgage, vacations and dinners out during the marriage. However, the judge prohibited plaintiff's counsel from asking additional questions and did not allow plaintiff to continue her testimony after testifying the first day.

The initial question presented is whether the trial judge should have allowed plaintiff to testify further as to the marital standard of living and current expenses. A witness is permitted to use a document to refresh his or her memory while testifying; however, it is improper to simply read a document used for recollection into testimony. Lautek Corp. v. Image Bus. Sys. Corp., 276 N.J. Super. 531, 546 (App. Div. 1994).

Here, plaintiff's counsel attempted to use a document to refresh plaintiff's memory. However, counsel's method for refreshing her memory was to ask plaintiff a question and then have her repeatedly read the answer from the document. The trial judge properly sustained objections to that method because it essentially amounted to reading the document into the record. See

Lautek, 276 N.J. Super. at 546 ("A witness may not merely parrot a statement used to refresh recollection, thus making admissible a portion of a document that itself may be inadmissible.").

Six days later when the trial continued, plaintiff's counsel requested the judge reconsider his ruling precluding plaintiff from testifying about living expenses. The judge clarified his ruling as barring only the admission of documents into evidence that plaintiff failed to provide in discovery, but not testimony. However, the judge then refused to allow plaintiff to testify further.

Based upon our review of the record, including the confusion regarding the judge's initial ruling, we conclude the denial of the request to reopen plaintiff's testimony did not result in harmful error. We therefore discern no basis to remand, as requested by plaintiff. The critical determination affecting alimony was the judge's adverse credibility findings regarding plaintiff's claimed inability to work. On the first day of trial, plaintiff did provide considerable testimony about vacations, dinners out, and household expenses; however, the judge concluded, "Plaintiff's testimony regarding living expenses is simply not credible." Plaintiff tried to claim she spent \$31,000 since June 2015 on medical bills, but the judge found that "when she was pressed for a specific amount, she conceded it was only \$1200."

Based upon our review of the trial record, it is unlikely further testimony from plaintiff would have affected the alimony award. In the end, the judge considered all the information admitted into evidence, followed the statute, and properly determined alimony. Accordingly, we find no basis to disturb the judge's alimony award.

II

A family judge's assessment of legal fees in a divorce action is discretionary. We "will disturb a trial court's determination on counsel fees only on the 'rarest occasion,' and then only because of clear abuse of discretion." Slutsky v. Slutsky, 451 N.J. Super. 332, 365-66 (App. Div. 2017) (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)).

N.J.S.A. 2A:34-23 authorizes the trial court to award counsel fees in matrimonial actions. The court "shall consider the factors set forth in the court rule on counsel fees, the financial circumstances of the parties, and the good or bad faith of either party." N.J.S.A. 2A:34-23. Rule 5:3-5(c) provides factors to consider in awarding counsel fees. In a matrimonial action, a court

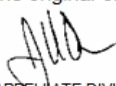
must consider whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature and extent of the services rendered; and the reasonableness of the fees.

[Mani v. Mani, 183 N.J. 70, 94-95 (2005)
(emphasis omitted).]

Plaintiff argues she is entitled to an award of counsel fees because she is "in a much worse financial position than defendant," and is unable to work due to her health; however, those reasons are contrary to the trial judge's findings. The judge found plaintiff has the ability to pay her own attorney fees using the money withdrawn from her IRA or money inherited from her mother. The judge also found plaintiff has the ability to work. There is no indication in the record or the judge's opinion that defendant acted in bad faith, or caused plaintiff to incur excessive fees in the case. Accordingly, we find no abuse of discretion in the judge's denial of plaintiff's request for counsel fees.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION