

## RECORD IMPOUNDED

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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-4567-15T1

Q.J.,

Plaintiff-Appellant,

v.

I.L.-J.,

Defendant-Respondent.

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Submitted January 17, 2018 – Decided February 20, 2018

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Middlesex  
County, Docket No. FM-12-0357-15.

Keith, Winters & Wenning, LLC, attorneys for  
appellant (Brian D. Winters, on the briefs).

Hoagland, Longo, Moran, Dunst & Doukas, LLP,  
attorneys for respondent (Brian McFadden-  
DiNicola, of counsel and on the brief).

PER CURIAM

Plaintiff Q.J. appeals from a May 13, 2016 final judgment of  
divorce. He challenges the alimony, child support, equitable  
distribution, and counsel fee awards. We affirm.

I.

The following facts are taken from the record. The parties were married on February 23, 1992, in Australia. Two children were born of the marriage, and were seventeen and fifteen years of age at the time of trial.

After residing in Australia, then Israel, the parties settled in New Jersey where they purchased a single family residence. Both children attended a private Jewish day school.

Throughout the marriage, both parties were employed and pursued higher education. Plaintiff earned a Ph.D. in information systems from the University of Haifa. Defendant assisted plaintiff in obtaining his doctorate by moving to Israel and then back to the United States, and working full-time while he obtained his degrees. Defendant earned a Masters Degree in library science from Rutgers University in 2006. During this time, plaintiff supported defendant for approximately two years while she earned her degree.

The parties' relationship deteriorated and plaintiff filed a complaint for divorce in July 2014, terminating the parties' twenty-two year marriage. At that time, plaintiff was employed as a tenured professor at the New Jersey Institute of Technology earning approximately \$140,000 per year. Plaintiff also owned Coo-E, LLC, an application based start-up he created in 2011,

which generated limited income. Defendant, who had been employed for the Robert Wood Johnson Foundation for a substantial portion of the marriage, gained employment with Daimler North America Corporation after the complaint, substantially increasing her income to approximately \$102,500 per year.

The trial occurred over five days and each party testified. The trial judge rendered a comprehensive written decision and signed a dual final judgment of divorce on May 13, 2016.

The trial judge addressed the parties' credibility at the outset of her opinion, noting that, although "both parties were similarly defensive and evasive, providing short, curt, one word responses[,] . . . [plaintiff] was consistently argumentative to [defendant's] counsel in an attempt to frustrate counsel rather than provide clear answers." The judge found plaintiff "not to be a credible witness in much of his testimony."

Defendant sought an alimony award. Plaintiff argued the court should not award alimony. The trial judge awarded defendant open durational alimony payable at a rate of \$325 per week and ordered plaintiff to maintain his \$200,000 life insurance policy to secure his alimony obligation. Each party sought a credit for pendente lite expenses paid retroactive to the complaint date, arguing a lack of financial support by the other. However, the judge denied the claims, holding "the [c]ourt is not persuaded

that the actions of either party clearly financially prejudiced the other."

The parties had modest assets, namely, the marital residence, two automobiles, plaintiff's business, and retirement accounts. The parties also had credit card debt, specifically one joint credit card. Plaintiff also had a credit card in his name.

The trial judge determined the equity in the marital residence was \$88,000, and ordered defendant could retain the residence and pay plaintiff his fifty percent share of the equity or sell the residence and equally divide the sales proceeds. Plaintiff operated an Audi, which the judge determined had a value of \$9,500, and defendant operated a Ford Freestyle with a value of \$3,025. The judge calculated the difference in the value of both vehicles and ordered plaintiff to pay defendant one half of the difference.

The judge valued plaintiff's business at \$35,000 based on its "Founders Agreement." The judge awarded defendant \$10,000 as her share of equitable distribution of the business.

Each party owned a TIAA-CREF retirement account. Plaintiff's account was valued at \$317,220, and defendant's was \$177,171. The judge ordered the marital portion of the accounts divided equally by way of a qualified domestic relations order. Defendant was permitted to retain a 401k account with a nominal value with her current employer.

The trial judge ordered the parties to equally divide a joint bank account in Israel, and permitted the parties to keep their individual accounts without an offset. The judgment memorialized the parties' agreement to permit defendant to maintain custodial accounts for the children's benefit. Plaintiff was ordered to pay defendant one-half the value of his unused sick time as of the date of complaint.

The trial judge equally divided the parties' joint credit card debt totaling \$22,000. Plaintiff had sought a judgment requiring defendant to share a Chase credit card debt in his name, but the trial judge denied the request and noted he did not supply records regarding the account.

The trial judge ordered joint legal custody of the children pursuant to the parties' agreement. The parties did not ask the court to establish a parenting time schedule with the elder child because of his age and because he had been traveling to Israel as a high school senior for several months out of the year.

Pursuant to a pendente lite order, the court had established a shared parenting time schedule whereby each party enjoyed a week-on/week-off arrangement with the children. After considering the testimony and applying the custody statutory factors, the trial judge maintained the schedule, but permitted defendant to keep the younger child for an additional overnight in the event

plaintiff was not home from work by 9:00 pm on the evening during his alternating week of parenting time.

Based on the custody determination, the trial judge ordered plaintiff to pay defendant \$88 per week in child support. The judge calculated child support utilizing the New Jersey Child Support Guidelines.

Each party sought a judgment for counsel fees against the other. However, plaintiff failed to provide the court with the amount of counsel fees he had incurred and the amount of fees he had paid to his attorney. Through counsel, defendant certified she incurred \$70,000 in fees and had paid over \$27,000.

The trial judge addressed the factors in Rule 5:3-5(c) and awarded defendant \$7,602.50 in counsel fees representing the fees she incurred at trial. The judge concluded plaintiff had created "repeated obstacles," which had hampered settlement of the case. The judge concluded plaintiff unreasonably "refused to execute any agreement simply because it was drafted by [defendant's counsel]." The judge found plaintiff's conduct "made settlement impossible."

The judge noted plaintiff's pre-trial conduct was mirrored by his behavior at trial. Even though plaintiff had counsel for the trial, the judge recounted how plaintiff "himself objected to questions rather than answering. On one occasion [plaintiff] even rul[ed] on his own objection . . . . Regrettably, [plaintiff]

often appeared more interested in attempting to challenge opposing counsel's intellect than in simply providing transparent responses to legitimate questions."

## II.

With this background, we address the issues raised in plaintiff's appeal. We begin by reciting our standard of review.

[F]indings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence. Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). We defer to the credibility determinations made by the trial court because the trial judge "hears the case, sees and observes the witnesses, and hears them testify," affording it "a better perspective than a reviewing court in evaluating the veracity of a witness." Id. at 412 (citing Pascale v. Pascale, 113 N.J. 20, 33 (1988)).

If the trial court's conclusions are supported by the evidence, we are inclined to accept them. Ibid. We do "not disturb the 'factual findings and legal conclusions of the trial judge unless . . . convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid. (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark'" should we interfere to "ensure that there is not a denial of justice." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)).

[Gnall v. Gnall, 222 N.J. 414, 428 (2015).]

"Appellate courts accord particular deference to the Family Part because of its 'special jurisdiction and expertise' in family matters." Harte v. Hand, 433 N.J. Super. 457, 461 (App. Div. 2013) (quoting Cesare, 154 N.J. at 412). However, "[t]his court does not accord the same deference to a trial judge's legal determinations." Rather, "all legal issues are reviewed de novo." Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017) (citing Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

### III.

Plaintiff argues the trial judge erroneously analyzed the statutory factors for alimony and entered an award that exceeds the sum necessary to maintain the marital lifestyle. Plaintiff also claims the judge ignored the fact the marital lifestyle was "artificially inflated and maintained through contributions from family and by incurring debt."

Family Part judges have broad discretion when fashioning an alimony award. Steneken v. Steneken, 367 N.J. Super. 427, 435 (App. Div. 2004). As a result, an appellate court should

reverse only if [it] find[s] the trial judge clearly abused his or her discretion, such as when the stated "findings were mistaken[,]  
. . . the determination could not reasonably have been reached on sufficient credible evidence present in the record[,]" or the judge "failed to consider all of the controlling legal principles[.]"



[Clark v. Clark, 429 N.J. Super. 61, 72 (App. Div. 2012) (alterations in original) (quoting Gonzalez-Posse v. Ricciardulli, 410 N.J. Super. 340, 354 (App. Div. 2009)).]

Open durational alimony "reflects 'the important policy of recognizing that marriage is an adaptive economic and social partnership.'" Glass v. Glass, 366 N.J. Super. 357, 369-70 (App. Div. 2004) (quoting Cox v. Cox, 335 N.J. Super. 465, 479 (App. Div. 2000)). An alimony award should consider the fact that "[t]he supporting spouse's obligation hinges on the parties' economic life during the marriage." Id. at 370. In addition, the dependent spouse and children's needs should be considered so that they may continue to live "at the standard of living they had become accustomed to prior to the separation." Ibid. Therefore, "the supporting spouse has a continuing responsibility 'to contribute to the maintenance of the dependent spouse at the standard of living formerly shared.'" Ibid. (quoting Lepis v. Lepis, 83 N.J. 139, 152 (1980)).

Pursuant to N.J.S.A. 2A:34-23(c), "[i]n any case in which there is a request for an award of alimony, the court shall consider and make specific findings on the evidence about all of the statutory factors . . . ." The trial court should consider the evidence in light of the factors and fashion an award which "properly balances each party's needs, the finite marital

resources, and the parties' desires to commence their separate futures[.]" Gnall v. Gnall, 432 N.J. Super. 129, 149 (App. Div. 2013), rev'd on other grounds, 222 N.J. 414 (2015).

Although plaintiff concedes the trial judge addressed all of the statutory factors in fashioning an alimony award, he claims the analysis was erroneous. This argument lacks merit.

The trial judge addressed each statutory factor and referenced the testimony and evidence adduced at trial, ultimately drawing a conclusion that the factors supported an alimony award. The judge noted plaintiff had outearned defendant throughout the marriage and even after the complaint, when defendant gained better paying employment.

The judge concluded the parties maintained a middle class lifestyle. In addition to describing the accoutrements of the parties' lifestyle, the trial judge noted the initial Case Information Statement (CIS) of plaintiff and defendant had approximately similar monthly expenses of \$15,369 and \$13,781, respectively. Defendant alone submitted an updated CIS for the trial. The judge noted defendant's CIS reported monthly expenses of \$8,444, which the judge noted was "approximately \$6,900 per month less than the marital standard asserted by [plaintiff]."

The trial judge determined the parties' monthly marital standard of living to be approximately \$13,000. She found

plaintiff's income net of taxes was \$100,800 per year and defendant's net income was \$75,000. Thus, together the parties' combined net incomes could meet their marital standard of living. However, living separately post-divorce the judge reasoned "[she would] be unable to craft an alimony award that will permit both parties to meet [the parties'] ongoing expenses or to maintain the marital standard of living."

Therefore, with the remainder of the statutory factors supporting an award of alimony, the trial judge awarded open durational alimony totaling \$16,900 per year, tax deductible to plaintiff, and taxable to defendant. In light of the trial judge's extensive analysis, we fail to see how the award was erroneous.

Moreover, we reject plaintiff's unsupported claim the alimony award permits defendant to live in excess of the marital lifestyle. As demonstrated above, mathematically, this was clearly not so.

Also, plaintiff's claims the trial judge failed to take into account the parties' marital lifestyle was "artificially inflated and maintained through contributions from family and by incurring debt" is also without merit. Beyond asserting this claim, plaintiff's brief does not point us to objective evidence proving the contributions from family to the marital lifestyle. Also, the trial judge acknowledged the debt funded aspect of the marital lifestyle, and fashioned an alimony award that does not require

the incurrence of more debt in order to pay support. For these reasons, we reject plaintiff's challenge to the alimony award.

#### IV.

Plaintiff argues the trial judge erred in the calculation of child support because she used the incorrect number of overnights for each parent. Specifically, plaintiff asserts the trial judge calculated child support based on 199 overnights for defendant and 166 overnights for plaintiff instead of allotting each party an equal amount of overnights to reflect their equal parenting time schedule. Plaintiff claims if the trial court had used the correct number of overnights and equalized the controlled expense portion of the child support between the parties pursuant to Wunsch-Deffler v. Deffler, 406 N.J. Super. 505 (Ch. Div. 2009), the child support awarded would have been nominal.

We are satisfied the trial judge did not abuse her discretion in calculating the child support award. As we noted, although the trial judge awarded equal parenting time of the parties' younger child, the judge found the child may spend more time with defendant because of plaintiff's late night teaching obligations. In addition the judge found "[plaintiff] has to travel for his employment on occasion." Therefore, the judge's decision to designate the number of overnights as 199 and 166 for defendant

and plaintiff, respectively, was based on the adequate, credible evidence in the record.

In addition, we note the trial court decision in Wunsch-Deffler was not binding on the trial court. Also, plaintiff had an opportunity to raise the applicability of the Wunsch-Deffler calculation at trial, but failed to do so. Moreover, plaintiff has not convinced us how the failure to award him the child support credit was "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice" to warrant reversal. Indeed, the trial judge awarded \$80 per week in child support. Notwithstanding the parties' disparate earnings history and earning capacity, plaintiff argues the appropriate child support award for a child who is now sixteen years of age should be \$12 per week. Contrary to plaintiff's argument, reducing child support to such a negligible amount would constitute an unjust result.

V.

Plaintiff next challenges the trial judge's equitable distribution of the value of his business, the joint marital debt, and the parties' vehicles. Specifically, plaintiff claims there was no evidence to support the value of the business or the trial judge's award of \$10,000 to defendant as her share of it. Plaintiff asserts there should have been expert testimony to

properly value the business. Plaintiff also argues the trial judge failed to distribute all of the credit card debt, and ignored a Chase credit card debt in his name. Plaintiff argues there was insufficient evidence for the value of the parties' automobiles to support the equitable distribution award made by the judge.

A trial court's decision regarding equitable distribution of marital assets is reviewed under an abuse of discretion standard. Borodinsky v. Borodinsky, 162 N.J. Super. 437, 443-44 (App. Div. 1978). Therefore, "we will affirm an equitable distribution as long as the trial court could reasonably have reached its result from the evidence presented, and the award is not distorted by legal or factual mistake." La Sala v. La Sala, 335 N.J. Super. 1, 4 (App. Div. 2000).

[T]o make an equitable distribution of marital assets, a trial judge enters upon a three-step proceeding. Assuming that some allocation is to be made, he must first decide what specific property of each spouse is eligible for distribution. Secondly, he must determine its value for purposes of such distribution. Thirdly, he must decide how such allocation can most equitably be made.

[Rothman v. Rothman, 65 N.J. 219, 232 (1974).]

Additionally, a trial judge must consider the sixteen factors set forth in N.J.S.A. 2A:34-23.1 in awarding equitable distribution.

Generally, the parties bear responsibility to establish proofs of value of marital assets for purposes of equitable

distribution. Painter v. Painter, 65 N.J. 196, 214 (1974). When one party controls an asset, we have stated "it would be unreasonable to place the burden of proof on a party not having access to the evidence necessary to support that burden of proof." Ozolins v. Ozolins, 308 N.J. Super. 243, 249 (App. Div. 1998) (quoting Frantz v. Frantz, 256 N.J. Super. 90, 93 (Ch. Div. 1992)).

We find no error in the trial judge's identification, valuation and distribution of the marital assets and liabilities. Regarding the business, the trial judge stated,

[Plaintiff] established Coo-E business during the marriage. Neither party provided a valuation of Coo-E at the trial. [Plaintiff] continues to operate the business but failed to provide discovery regarding the business during the litigation. [Plaintiff] testified that he would consent to valuing [defendant's] interest in the business at \$10,000. [Defendant] provided the Coo-E founders Agreement . . . which stated an agreed value of \$35,000.

At the outset, we agree that plaintiff's trial testimony could not be construed as a consent to an equitable distribution of \$10,000 of the value of Coo-E to defendant. The trial transcript reflects plaintiff began to explain that he "was happy with" a value, which had been communicated in a settlement offer defendant made prior to trial, but defendant's counsel objected to the disclosure of settlement negotiations, which the trial judge sustained.

However, there was adequate evidence in the record to refute plaintiff's testimony the business had no value for equitable distribution purposes. Indeed, plaintiff's pre-trial submission contained a section entitled "The parties' business Coo-E." In his submission plaintiff stated the following: "The parties appear to be in agreement that the value of same is \$15,000 and that [plaintiff] will keep same and pay [defendant] \$7,500." Moreover, on cross-examination plaintiff conceded he and his business partner had valued Coo-E at \$35,000, and that plaintiff had invested this sum in the business, which the agreement stated would be repaid to plaintiff.

Plaintiff also argues the trial judge had no basis to conclude the business had a value because it had no earnings. However, as the trial judge noted, plaintiff's own conduct deprived the court of the ability to evaluate the business. The trial judge found it was plaintiff's "failure to fully comply with discovery demands regarding the Coo-E business [which] prejudiced [d]efendant's ability to fairly assess the amount of income [p]laintiff derives from Coo-E."

Similarly, we reject plaintiff's argument the valuation of the business was erroneous because there was no forensic valuation. Plaintiff did not seek or raise the issue of a forensic valuation before the trial judge. The trial judge's equitable distribution



of the value of Coo-E was supported by adequate credible evidence in the record.

With regard to the marital debt and marital vehicles, the court held:

The parties agreed that the marital debt consisted of the mortgage on the former marital home and an Affinity Credit Card of approximately \$22,000. . . . In addition, [plaintiff] testified to a credit card in his name but did not supply records regarding said account. Moreover, [plaintiff] confirmed that there were numerous expenses incurred in connection with his employment at NJIT, including but not limited to travel, for which [plaintiff] would have received reimbursement.

. . . .

The parties own two . . . cars; a 2005 Ford Freestyle used by [defendant] and a 2008 Audi . . . used by [plaintiff]. [Defendant] introduced evidence of the vehicles' respective fair market value at trial with the Ford Freestyle having a value of \$3,025 and the Audi . . . having a value of \$9,500.

. . . .

[Plaintiff] shall retain sole use and possession of the 2008 Audi . . . and [defendant] shall retain sole use and possession of the 2005 Ford Freestyle. [Plaintiff] shall provide [defendant] with one-half . . . the difference in the values established at trial ( $\$9,563 - \$3,025 = \$6,538$  divided by 2 =  $\$3,269$ ) . . . to equalize values within thirty . . . days.

Again, plaintiff failed to supply the trial judge with objective evidence of the Chase credit card debt. This evidence was required, given the trial judge's findings that plaintiff's testimony generally was not credible and therefore not reliable.

In addition, the trial judge's decision to value the parties' vehicles using the Kelley Blue Book values submitted by defendant without objection from plaintiff was not an abuse of discretion. Plaintiff's failure to object to the admission of defendant's evidence of the vehicles' values coupled with his failure to adduce objective evidence of value does not render the trial judge's decision erroneous. For these reasons, the trial judge's equitable distribution determinations are affirmed.

#### VI.

Plaintiff argues the counsel fee award was an abuse of discretion because the trial judge concluded both parties acted with unclean hands. Therefore, he argues the trial judge had no basis to award counsel fees.

N.J.S.A. 2A:34-23 provides: "The court may order one party to pay a retainer on behalf of the other for . . . legal services when the respective financial circumstances of the parties make the award reasonable and just." Rule 5:3-5(c) lists nine factors the court must consider in making an award of counsel fees in a family action. Essentially,

in awarding counsel fees, the 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).]

Even when there is not a financial disparity between the parties, "where a party acts in bad faith the purpose of a counsel fee award is to protect the innocent party from unnecessary costs and to punish the guilty party." Welch v. Welch, 401 N.J. Super. 438, 448 (Ch. Div. 2008) (citing Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000)).

Fees in family actions are normally awarded to permit parties with unequal financial positions to litigate (in good faith) on an equal footing. With the addition of bad faith as a consideration, it is also apparent that fees may be used to prevent a maliciously motivated party from inflicting economic damage on an opposing party by forcing expenditures for counsel fees. This purpose has a dual character since it sanctions a maliciously motivated position and indemnifies the "innocent" party from economic harm.

[J.E.V. v. K.V., 426 N.J. Super. 475, 493 (App. Div. 2012) (citation omitted) (quoting Kelly v. Kelly, 262 N.J. Super. 303, 307 (Ch. Div. 1992)).]

An award "of counsel fees is discretionary, and will not be reversed except upon a showing of an abuse of discretion." Barr

v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011). The award here was not an abuse of discretion.

The trial judge analyzed all nine factors as enumerated in Rule 5:3-5(c). The judge concluded:

In light of the foregoing and with particular attention to Factors 3, 7 and 9, the Court orders that [plaintiff] shall pay \$7,602.50 in [defendant's] attorney's fees within sixty . . . days of this Judgment of Divorce. The [c]ourt arrives at this figure upon review of actual trial time billed and limited consideration of trial preparation. [Defendant's] counsel's certification in support of [defendant's] request for fees meticulously details the repeated obstacles encountered in attempting to reach settlement. While the [c]ourt recognizes [plaintiff's] right to retain counsel of his choosing or to represent himself, [plaintiff's] use of three . . . attorneys and intermittent self-representation hampered settlement negotiations. Moreover [defendant's] attorney's represented that [plaintiff] flatly refused to execute any agreement simply because it was drafted by her rings true in light of [plaintiff's] behavior at trial. Despite [plaintiff's] repeated representa[tion] that he wanted to settle the case, his inability to commit to any specific and global terms made settlement impossible.

Given these findings, there is no evidence of an abuse of discretion or a failure to consider the evidence. Even though the judge expressed difficulty with the behavior of each party in the litigation, plaintiff's conduct during the trial supports the award of fees to defendant for the trial. Our review of the record

confirms plaintiff's behavior demonstrated a lack of self-control and a combativeness that made the trial difficult.

In this context, the trial judge awarded defendant only ten percent of the total fees she incurred. We disagree with plaintiff's argument that such an award constituted a punishment or that the award was not supported by the credible evidence in the record.


VII.

Lastly, plaintiff argues the trial judge failed to make appropriate findings of fact and conclusions of law. This argument lacks sufficient merit to warrant discussion in a written opinion.

R. 2:11-3(e)(1)(E).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION