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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3541-20**

JANICE COUNTESS,

Plaintiff-Appellant/
Cross-Respondent,

v.

WILLIAM H. COUNTESS,

Defendant-Respondent/
Cross-Appellant.

Submitted November 28, 2022 — Decided December 9, 2022

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Burlington County,
Docket No. FM-03-6002-99.

Janice Countess, appellant/cross-respondent pro se.

Puff & Cockerill LLC, attorneys for respondent/cross-
appellant (Christine C. Cockerill, on the brief).

PER CURIAM

Plaintiff Janice Countess appeals and defendant William H. Countess cross-appeals from a June 25, 2021 order adjudicating the parties' competing requests regarding defendant's alimony obligation and counsel fees. We reverse and remand for the reasons expressed in this opinion.

The parties were divorced in April 2000, following a long-term marriage. They had three children, one of whom died post-judgment. Plaintiff was fifty and defendant was fifty-two years of age at the time of divorce. Defendant was self-employed in the trucking business and drove a trucking route for Melitta Coffee (Melitta), earning approximately \$100,000 per year. Plaintiff owned and operated a mediation business earning approximately \$30,000 per year.

The parties' property settlement agreement (PSA) required defendant to pay plaintiff permanent alimony at a rate of \$425 per week for two years, and then \$400 per week. The agreement stated defendant's "obligation to pay alimony to [plaintiff] . . . shall continue for the natural lives of the parties, unless terminated" due to plaintiff's death, remarriage, cohabitation, or if the parties modified the agreement in writing. However, a separate PSA provision stated: "Other than upon a showing of substantially changed circumstances, neither party . . . shall seek alimony or support contrary to the provisions of this [a]greement."

To insure alimony, the PSA required defendant to maintain life insurance coverage of \$150,000 and increase the death benefit to \$250,000 once the children were emancipated. The parties agreed life insurance would be subject to review upon defendant "reaching normal retirement age defined as the age at which [defendant] shall be entitled to receive full social security benefits."

The PSA memorialized plaintiff had received equitable distribution payments from defendant totaling \$100,000. In exchange, defendant kept the former marital residence and was responsible for its expenses. Plaintiff also retained a 7.5 acre tract. Each party retained their business as well as bank, stock, and retirement accounts held in their individual names. Specifically, defendant retained a business account, checking account, and an IRA. Plaintiff retained a bank account, brokerage account, and an IRA. The remainder of the equitable distribution was modest and not pertinent to our discussion.

In November 2020, defendant's attorney wrote to plaintiff, informing her of defendant's retirement and requesting she sign a consent order terminating alimony. The letter noted defendant was seventy-three years of age. Plaintiff responded through counsel, declining to terminate alimony. The parties exchanged case information statements (CISs) and disputed: Defendant's ability to pay; plaintiff's need for continued support; each party's income and assets,

including a home plaintiff inherited; and the nature of their daughter's estate, which plaintiff claimed defendant received.

Unable to resolve their dispute, defendant filed a motion in April 2021 to terminate alimony retroactive to his retirement in November 2020, terminate life insurance, and sought counsel fees. He certified Melitta terminated his contract, he reached the social security retirement age, and he could no longer handle the physical rigors of truck driving.

Defendant also certified plaintiff was living a better lifestyle than the one enjoyed during the marriage, and resided alone in a four bedroom, three bath home he claimed was worth \$600,000. He alleged plaintiff had significant assets, whereas he relied on social security income. He asserted he would have to invade his assets to continue paying alimony. He certified the life insurance obligation should also terminate because, at his age, the premiums were cost-prohibitive.

Defendant, who had since remarried, filed a CIS showing a budget of \$9,500 per month. Less the alimony and life insurance obligation, defendant's budget was \$7,181 per month. He listed six stock accounts which totaled \$1,474,242 and three retirement accounts totaling \$316,214—all solely in his name.

Plaintiff filed a cross-motion to increase alimony, compel defendant to furnish proof of life insurance and the daughter's estate, and sought counsel fees. She claimed the PSA did not enumerate retirement as an alimony termination event. She pointed to the life insurance provision, which permitted a review, but not a termination of the insurance obligation upon defendant's retirement, as evidence the parties intended alimony to continue into retirement. Plaintiff acknowledged inheriting property from her parents, but stated she earned only \$2,329 per month in rental income from the property, before expenses. She claimed she could no longer work because she suffered a traumatic brain injury in 2009 and was diagnosed with Babesiosis¹ in 2015. As a result of these conditions, she certified she could not adequately save for retirement and still required support.

Plaintiff's CIS showed an unearned income of \$32,772, comprised of social security and alimony. She had no retirement assets, and her bank and stock accounts totaled \$29,864. Plaintiff had eight credit cards bearing a total debt of \$84,491. Her monthly budget totaled \$6,482.

¹ "Babesiosis is a disease caused by microscopic parasites that infect red blood cells." Babesiosis FAQs, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/parasites/babesiosis/gen_info/faqs.html (last updated May 19, 2020).

The motion judge adjudicated the parties' dispute based on their submissions. He examined the alimony issue by recounting the facts applicable to the factors set forth in N.J.S.A. 2A:34-23(j)(3), namely, N.J.S.A. 2A:34-23(j)(3)(e)-(g). The judge concluded as follows:

Based on the foregoing, the [c]ourt finds it was the parties' intention that [d]efendant's retirement would not be a basis for terminating his alimony obligation. The court recognizes that [d]efendant's retirement is in good faith, and that he has deferred retirement until well past full retirement age, however this is not a sufficient basis to terminate what both parties expected would be an ongoing support obligation. This is particularly true where [d]efendant's financial circumstances as reflected in his CIS evidence an ability to pay. The court notes that [p]laintiff also has significant assets, and that her preference to retain ownership of real estate does not take precedence over [d]efendant's arguments for termination. Nevertheless, taking all of the factors into consideration, the court does not find termination is appropriate at the present time.

The motion judge then stated: "Although not requested in [d]efendant's [n]otice of [m]otion, the [c]ourt determines that modification of [d]efendant's alimony obligation is appropriate." After recounting the court's authority to modify alimony, the judge found "[d]efendant has made a prima facie showing of changed circumstances for modification" due to his good faith retirement and reduced alimony to \$200 per week. The judge stated: "In making this

determination, the [c]ourt finds that application of the following N.J.S.A. 2A:34-23[(j)(3)] factors to the facts of this case, supports the [c]ourt's conclusion: . . . to N.J.S.A. 2A:34-23[(j)(3)](a-d) and (f)."

Reciting the PSA's provision regarding the review of life insurance upon defendant's retirement, the judge concluded "[d]efendant has already maintained his life insurance obligation for an extended period beyond normal retirement age, and given the financial position of the parties, termination of this obligation at this time is appropriate." Regarding the parties' requests for counsel fees, the judge recited the applicable rules and law and concluded "[a]fter a review of these factors, the [c]ourt will not award any counsel fees at this time, as the [c]ourt had not been presented with sufficient evidence to establish that either party acted in bad faith in bringing an[d]/or opposing the various applications."

I.

Alimony is an "economic right that arises out of the marital relationship and provides the dependent spouse with 'a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage.'" . . . "The basic purpose of alimony is the continuation of the standard of living enjoyed by the parties prior to their separation."

[Quinn v. Quinn, 225 N.J. 34, 48 (2016) (citations omitted).]

"Courts have the equitable power to establish alimony . . . orders . . . after a judgment of divorce or maintenance, and to revise such orders as circumstances may require." Crews v. Crews, 164 N.J. 11, 24 (2000) (citing Lepis v. Lepis, 83 N.J. 139, 145 (1980)). Indeed,

the parties cannot bargain away the court's equitable jurisdiction. However, . . . the parties can with full knowledge of all present and reasonably foreseeable future circumstances bargain for a fixed payment or establish the criteria for payment to the dependent spouse, irrespective of circumstances that in the usual case would give rise to Lepis modifications of their agreement.

[Morris v. Morris, 263 N.J. Super. 237, 241 (App. Div. 1993).]

In reviewing an alimony decision, we defer to the trial judge's findings. Overbay v. Overbay, 376 N.J. Super. 99, 106 (App. Div. 2005). We will not overturn an alimony award unless the judge "clearly abused [their] discretion or failed to consider all of the controlling legal principles, or . . . the findings were mistaken[,] or that the determination could not reasonably have been reached on sufficient credible evidence present in the record after considering all of the proofs as a whole." Gonzalez-Posse v. Ricciardulli, 410 N.J. Super. 340, 354 (App. Div. 2009). However, a trial judge must articulate the reasons for their

opinion for us to meaningfully review their exercise of discretion. See R. 1:7-4(a); Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990).

On appeal, plaintiff argues the judge erred in modifying alimony because the PSA is unambiguous and grants her alimony for life. She asserts there was no change in circumstances warranting a modification, and the judge did so without a plenary hearing and a "full accounting" of defendant's financial situation, including his assets.

On the cross-appeal, defendant asserts the judge misread the PSA to include an anti-Lepis provision and should have terminated alimony. He argues the judge should have considered testimony regarding whether the provision continuing life insurance past retirement age signaled the parties' intent to never terminate alimony. He further claims the continuation of alimony after a payor's retirement contravenes the law. Defendant argues a plenary hearing was necessary to determine: Plaintiff's earning capacity; defendant's ability to pay; "which assets were immune from consideration for alimony purposes[;]" and the parties' financial circumstances.

Although a hearing is not required in every disputed case, one is required where there is a dispute in material fact. Murphy v. Murphy, 313 N.J. Super. 575, 580 (App. Div. 1998); Lepis, 83 N.J. at 159. A material factual dispute

"bear[s] directly on the legal conclusions required to be made and [such] disputes can only be resolved through a plenary hearing." Spangenberg v. Kolakowski, 442 N.J. Super. 529, 540 (App. Div. 2015).

A court's task in interpreting a settlement agreement is to discern the parties' common intent. Quinn, 225 N.J. at 45.

[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written, unless doing so would lead to an absurd result. See Sachau v. Sachau, 206 N.J. 1, 5-6 (2011). . . . To the extent that there is any ambiguity in the expression of the terms of a settlement agreement, a hearing may be necessary to discern the intent of the parties at the time the agreement was entered and to implement that intent. Pacifico[v. Pacifico], 190 N.J. 258, 267 (2007)].

[Quinn, 225 N.J. at 45.]

Pursuant to these principles, we are constrained to reverse and remand the alimony determination for discovery and a plenary hearing for several reasons. On this record, we are not convinced the PSA barred a modification of alimony in the event of defendant's retirement, or that defendant's retirement warrants a downward modification or termination of alimony. While we appreciate the judge's efforts to surmise the parties' common intent by comparing the PSA's, alimony, and life insurance provisions, those obligations, while interrelated, have separate legal considerations. The former is governed by statutory factors

and the latter is not. Compare N.J.S.A. 2A:34-23(j)(3), and S.W. v. G.M., 462 N.J. Super. 522, 534-36 (App. Div. 2020). Discovery and a plenary hearing were necessary before the judge could decide what the parties intended regarding alimony post-retirement.

Similarly, discovery and a hearing were necessary because of the several disputes in material facts regarding the parties' financial circumstances, earning capacity, ability to pay, and needs.² Also, while the judge recited the parties' contentions and the alimony statutory factors, he did not explain his reasoning for halving the alimony by applying the facts to the law as required by Rule 1:7-4(a), and we cannot discern how he reached the modified alimony figure.

II.

Plaintiff claims the judge should have awarded her counsel fees. She asserts he made a cursory review of the parties' finances and failed to analyze their respective good faith and reasonableness.

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

² Although neither party has challenged the termination of defendant's life insurance obligation, the judge is free to reassess this aspect of his decision since a plenary hearing will aid him in deciding these disputed issues and determine whether defendant can afford to maintain insurance to secure his alimony obligation in the event alimony continues.

(App. Div. 2011) (citing Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)). Rule 5:3-5(c) lists nine factors the court must consider when deciding to award fees.

We are constrained to reverse the counsel fee determination because the judge misapplied the law. Although the judge recited the factors in the Rule, he did not apply them to the facts. The only substantive finding was that counsel fees were not warranted because neither party had acted in bad faith. However, Rule 5:3-5(c) requires a consideration of more than just a party's good faith. Indeed, aside from good faith, Rule 5:3-5(c)(3) requires a judge to assess the reasonableness of a party's position, and the balance of the Rule sets forth eight other factors unrelated to good or bad faith. See R. 5:3-5(c)(1)-(2), (4)-(9).

Recently, we reversed counsel fees awarded on the grounds of bad faith where the defendant contested the cause of action for divorce, and ultimately lost the issue. Steiner v. Steiner, 470 N.J. Super. 112, 131-32 (App. Div. 2021). We held an award of counsel fees predicated on bad faith required a "more compelling showing" because the defendant was entitled to defend the grounds for the divorce "without having to bear the cost of being wrong." Id. at 132. Implicit in our finding was that bad faith and unreasonableness have different characteristics. The former has been defined as a party acting with an improper

motive, whereas the latter is characterized as asserting a mistaken, unreasonable, or frivolous position. Kelly v. Kelly, 262 N.J. Super. 303, 308 (Ch. Div. 1992).

Setting aside the issue of bad faith, we also note counsel fees may be awarded "to enable the parties to litigate on an even playing field 'irrespective of [a] party's success in the matrimonial action.'" Fattore v. Fattore, 458 N.J. Super. 75, 90 (App. Div. 2019) (citation omitted). Therefore, considering the gradations of conduct that might warrant an award of counsel fees, and because counsel fees may be awarded for economic reasons beyond a party's conduct, the motion judge was mistaken to adjudicate this issue on bad faith alone.

Reversed and remanded. 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