SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0550-20

EDWARD D. CLEMENTI,

Plaintiff-Respondent,

v.

AJA CLEMENTI,

Defendant-Appellant.

Submitted October 25, 2022 – Decided February 16, 2023

Before Judges Messano, Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FM-13-1020-19.

Townsend, Tomaio & Newmark, LLC, attorneys for appellant (Paul H. Townsend, of counsel; Jessica S. Swenson, of counsel and on the briefs).

Deitch & Perone, PC, attorneys for respondent (Tanis B. Deitch, of counsel and on the brief).

PER CURIAM

Following a bench trial, the Family Part judge rendered an oral opinion finding defendant Aja Clementi was cohabitating with her paramour, Anthony Gorda. Nevertheless, the judge awarded defendant open durational alimony of $165,000 per year. During trial, plaintiff Edward D. Clementi had suggested that amount, which he was willing to pay for a limited duration, even after he successfully asserted defendant and Gorda were cohabitating. The judge also directed plaintiff to pay $40,000 per year in child support and to maintain life insurance to secure these obligations, and she equitably distributed the parties' marital assets. Plaintiff agreed to pay the children's supplemental expenses, such as college costs, major medical expenses, and car and credit card payments.

Defendant now appeals from those provisions of the amended dual judgment of divorce (JOD) that fixed plaintiff's alimony obligations, set his child support obligations, provided for life insurance policies as security for both, equitably distributed the parties' marital assets, and denied defendant counsel fees.

Having considered the record in light of applicable legal standards, we affirm substantially for the reasons expressed by the trial judge in her comprehensive oral decision. However, because the JOD does not conform to the judge's oral decision regarding any future reduction of child support upon a

child's emancipation, we remand solely for the judge to correct the JOD or alternatively clarify her decision and amend the JOD, if necessary.

I.

At the outset, we set some guideposts for our review. Appellate courts accord the judge's factual findings after a bench trial substantial deference when "'supported by adequate, substantial, credible evidence' in the record." Landers v. Landers, 444 N.J. Super. 315, 319 (App. Div. 2016) (quoting Gnall v. Gnall, 222 N.J. 414, 428 (2015)). "We also note proper factfinding in divorce litigation involves the Family Part's 'special jurisdiction and expertise in family matters,' which often requires the exercise of reasoned discretion." Slutsky v. Slutsky, 451 N.J. Super. 332, 344 (App. Div. 2017) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (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.'" Gnall, 222 N.J. at 428 (quoting Cesare, 154 N.J. at 412). But "[a]ll 'legal conclusions, and the application of those conclusions to the facts, are subject to our plenary review.'" Slutsky, 451 N.J. Super. at 344–45 (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

Plaintiff, defendant, and Gorda were the only witnesses at trial. In her oral opinion, the judge determined "there's a lot that is undisputed." The judge found both plaintiff and defendant were "candid . . . forthright . . . [and] credible." However, the judge also found defendant was not "remorseful for what happened in [her] relationship [with plaintiff] and the impact that it had on [her] family." The judge said defendant "tried to downplay [her] relationship with . . . Gorda" and found "her testimony . . . about [Gorda] to be somewhat . . . staged."

The parties were married in 1998 and had five children together: a son born in 1998; three daughters born in 2000, 2003 and 2009, respectively; and another son born in 2010. When the marriage broke down in 2016, plaintiff briefly moved out of the marital home but returned when the parties attempted to reconcile. In May 2018, plaintiff permanently left and filed a complaint for divorce in January 2019.

Plaintiff was the sole wage earner, working as a managing director at Morgan Stanley and earning more than $1 million annually from 2015 through 2019. Defendant was not employed outside the home, except for a brief period early in the marriage when she worked for a record company and earned $18,000 annually.

The family spent almost all of plaintiff's annual net earnings living lavishly — dining out on nearly a daily basis, purchasing expensive cars and jewelry, taking expensive family vacations and charging hundreds of thousands of dollars per year on credit cards. Plaintiff continued to pay all of the family's expenses prior to and throughout the trial and deposited money on a monthly basis into the parties' joint checking account for defendant to use as needed.

The marital home in Monmouth County was appraised at $1.325 million but had a mortgage balance of $991,000. Plaintiff purchased a townhouse in which he lived after leaving the marital home and during the divorce trial; it was appraised at $485,000 but had a mortgage balance of $400,503. Earlier, plaintiff had purchased a home for his mother, which was appraised at $350,000 but had a mortgage balance of $291,900.[1] At the outset of trial, the parties also stipulated that plaintiff's 401(k) would be valued as of the date of the complaint at $238,444, and it would be divided equally. They also agreed to joint legal custody of the children, with plaintiff providing medical insurance for all the children through his employer.

Defendant's relationship with Gorda developed in late 2016. He worked as a personal trainer at a nearby gym; plaintiff, defendant, and their children all

[1] The parties stipulated to the appraised values of the three homes.

used his services. At the time, Gorda was married and had a young child. In June 2019, shortly after Gorda had divorced, defendant and Gorda had a daughter. Plaintiff's employee health plan paid for the expenses of the pregnancy and birth, and what was not covered was charged to the marital credit cards.

Plaintiff testified in detail about the entries on his July 2020 Case Information Statement. He proposed paying defendant alimony of $165,000 annually plus child support, for a total of $193,380 per year. Plaintiff proposed that his alimony obligations cease after twelve years, when the parties' youngest child would likely graduate from college. He agreed to pay for any extra expenses, including college costs, credit card bills and car expenses for his five children.

Plaintiff introduced proof that defendant and Gorda had been involved in a significant intimate relationship before plaintiff left the marital home. He described checking the marital home's security cameras while away on business trips and seeing Gorda entering the home and occasionally staying overnight. Plaintiff described a situation in which his oldest son confronted Gorda in the home, and an altercation ensued requiring a police response.

Plaintiff said Gorda received mail at the marital home and produced an envelope addressed to Gorda as proof. Gorda and defendant had also attended a wedding together as a couple and in 2019 spent important holidays at Gorda's parents' home with their newborn daughter. Plaintiff described frequent charges on the marital credit cards for defendant's meals with Gorda and a charge for a hotel stay in New York City. Plaintiff claimed defendant spent "tens of thousands" of dollars supporting her child with Gorda, noting charges on the marital credit cards for baby clothing and furniture, and other baby products.

Plaintiff also called Gorda as a witness. At the time, he was living with his parents and brother and did not pay any rent or contribute anything to expenses. Gorda's gross income in 2019 was $28,321. He admitted staying overnight on occasion with defendant in the marital home, sometimes bringing his daughter from his prior marriage with him. Gorda said he had purchased gifts for defendant, paid for hotel stays with her, and together with defendant had hosted a birthday party for their daughter in the marital home with both his and defendant's extended families in attendance.

Defendant reviewed her CIS during her testimony. She said there were no spending limits on her use of two marital credit cards during the marriage. Although defendant had no personal bank accounts, she had access to shared

checking and savings accounts. As of the filing of the divorce complaint, the combined balance of the two accounts was less than $11,000. Defendant asserted that an appropriate alimony award would be $385,000 per year, and she sought $3,000 per month in child support.

Defendant denied cohabitating with Gorda, although she acknowledged using marital funds during the course of the litigation to provide for most of the food, clothing, and diapers for their child. Defendant admitted using marital funds to cater her daughter's first birthday party. Although defendant acknowledged spending holidays and special occasions with Gorda, she testified they had no joint assets or debts, nor did they provide each other with spending money. According to defendant, she and Gorda took turns paying for dates and hotel stays together, and she estimated that she had paid only $2,500 toward these expenses using marital funds. Defendant asserted her relationship with Gorda was not "anything remotely close to a marriage."

II.

Two of defendant's arguments relate to the judge's finding that she and Gorda were cohabitating and the impact of that finding on the alimony award.

A.

Defendant challenges the judge's finding that she and Gorda were cohabitating. She argues the finding was based upon "improper reasoning and facts not contained in the record," particularly because the court "ignored" testimony that she and Gorda were in a mere dating relationship, not a relationship tantamount to marriage. We disagree.

N.J.S.A. 2A:34-23(n) provides:

> Alimony may be suspended or terminated if the payee cohabits with another person. Cohabitation involves a mutually supportive, intimate personal relationship in which a couple has undertaken duties and privileges that are commonly associated with marriage or civil union but does not necessarily maintain a single common household.
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> When assessing whether cohabitation is occurring, the court shall consider the following:
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> > (1) Intertwined finances such as joint bank accounts and other joint holdings or liabilities;
> >
> > (2) Sharing or joint responsibility for living expenses;
> >
> > (3) Recognition of the relationship in the couple's social and family circle;
> >
> > (4) Living together, the frequency of contact, the duration of the relationship,

> and other indicia of a mutually supportive intimate personal relationship;
>
> (5) Sharing household chores;
>
> (6) Whether the recipient of alimony has received an enforceable promise of support from another person within the meaning of [N.J.S.A. 25:1-5(h)]; and
>
> (7) All other relevant evidence.
>
> In evaluating whether cohabitation is occurring and whether alimony should be suspended or terminated, the court shall also consider the length of the relationship. A court may not find an absence of cohabitation solely on grounds that the couple does not live together on a full-time basis.

Enacted in 2014, the statute essentially codified the factors identified by the Court in Konzelman v. Konzelman, 158 N.J. 185 (1999), to be considered in determining whether two people are cohabitating. See, e.g., Reese, 430 N.J. Super. at 570 (discussing Konzelman's indicia of cohabitation). The judge addressed each statutory factor.

Although defendant and Gorda did not live together, the judge found they had been romantically involved for several years, since 2017, and they had a child together. They were in a "very strong" "intimate romantic relationship." The judge found the two "regularly dine together . . . go to hotels together . . . go to concerts together, [and] they take their children out to different places

together." The judge also found that Gorda received mail at defendant's home, frequently visited and stayed overnight in the marital residence, and defendant and Gorda interacted extensively as a couple with their extended families.

Defendant specifically challenges the judge's finding that she and Gorda had intertwined finances. In this regard, the judge concluded that defendant spent "a lot of money" on Gorda, who has very limited financial resources. The judge found that Gorda was unable to afford on his own the "wining and dining that he was doing with [defendant]," including meals, concerts, and hotel stays. The judge determined defendant paid for these expenses, and for the expenses of her and Gorda's infant child, with money she received from plaintiff. She noted that support for the infant was an obligation that would "otherwise at least partially belong to . . . Gorda." The judge concluded that the parties' finances were intertwined because defendant "was constantly paying for . . . Gorda," and he in turn spent much of what little disposable income he had on her. Finding no evidence that Gorda contributed to defendant's living expenses, the judge recognized the unusual facts presented, stating, "[Defendant] is not paying any bills and that's the reason why this case is so unique."

The judge considered all the other statutory factors and concluded defendant and Gorda were engaged in a "mutually supportive intimate personal

relationship" involving "duties and privileges that are commonly associated with marriage or civil union."[2] Some of the judge's factual findings were based on undisputed evidence, and the balance were supported by adequate, substantial, credible evidence at trial. Landers, 444 N.J. Super. at 319. We find no basis to disturb the judge's legal determination that defendant and Gorda were cohabitating.

B.

In her oral opinion, the judge noted the case presented a "very new novel and unique issue" involving the effect of cohabitation at the time of divorce on alimony yet to be awarded, rather than cohabitation occurring post-judgment and its effect on alimony already awarded. The judge observed that N.J.S.A. 2A:34-23(n) provides that alimony may be suspended or terminated if the payee cohabits with another; the statute "doesn't say reduced, it doesn't say modified. It says suspended or terminated if the payee is cohabitating."

[2] As she did before the trial judge, defendant cites to an unpublished case from our court which held that even though the plaintiff-wife had a child with another man, the defendant-husband had not proven cohabitation and was not entitled to termination of his alimony obligations. Unpublished decisions are not binding precedent. R. 1:36-3. Moreover, we agree with the judge that that decision is distinguishable, because in that case there was no evidence of intertwined finances.

Noting the lack of any case law precisely on point, the judge said that a finding of cohabitation would typically "end the alimony question." However, despite asserting and prevailing on the cohabitation issue, plaintiff remained willing to pay defendant alimony because "there would be no way for [defendant] to survive" otherwise. The judge concluded denying defendant alimony would be inequitable and proceeded to consider the evidence in light of the factors contained in N.J.S.A. 2A:34-23(b). Citing defendant's "extramarital affair and having a child with another person," and referencing our opinion in Clark v. Clark, 429 N.J. Super. 61 (App. Div. 2012), the judge said, "[M]arital misconduct can be taken into account in determining the amount of and awarding alimony."

Defendant's challenge to the alimony award is two-fold. Defendant first contends that the judge erred by failing to consider whether the alleged cohabitation reduced defendant's financial needs in maintaining the lifestyle she enjoyed during the marriage. Secondly, defendant argues the judge failed to properly consider the statutory factors in fashioning the award and was "monetarily sanctioning" defendant for engaging in an extramarital affair by mistakenly relying on Clark.

"[A]n alimony award is a discretionary determination based on the economic facts and other circumstances defined in N.J.S.A. 2A:34-23." Reese, 430 N.J. Super. at 576; see also N.J.S.A. 2A:34-23(b) (noting the court "may award" alimony and "[i]n doing so . . . shall consider, but not be limited to" the statutory factors). "We will reverse only if . . . the . . . 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, 429 N.J. Super. at 72 (alterations in original) (quoting Gonzalez-Posse v. Ricciardulli, 410 N.J. Super. 340, 354 (App. Div. 2009)). Among the many factors a court must consider are: "[t]he actual need and ability of the parties to pay"; "[t]he duration of the marriage"; "[t]he standard of living established in the marriage . . . and the likelihood that each party can maintain a reasonably comparable standard of living, with neither party having a greater entitlement to that standard of living than the other"; and "[a]ny other factors which the court may deem relevant." N.J.S.A. 2A:34-23(b)(1), (2), (4) and (14).

The 2014 amendments to the statute were "designed to more clearly quantify considerations examined when faced with a request to establish or

modify alimony. . . . [T]he amendments include[d] provisions regarding modification of alimony and the effect of a dependent spouse's cohabitation." Spangenberg v. Kolakowski, 442 N.J. Super. 529, 536–37 (App. Div. 2015) (citation omitted). In Spangenberg, the issue was whether the 2014 amendments should apply retroactively to marital agreements or orders "adopted prior to [the amendments'] enactment." Id. at 537. We concluded "the new cohabitation provisions," N.J.S.A. 2A:34-23(n), "do not apply or otherwise impact the alimony determination." Id. at 539. Nevertheless, in dicta, we implied the "statute's [new] cohabitation amendments[] require[ed] alimony to be terminated or suspended" upon a finding of cohabitation. Id. at 537.

All available precedent considers the effect of cohabitation in the context of the supporting spouse's request to modify or terminate alimony, i.e., in the context of the words employed by the Legislature in subsection (n), that "[a]limony may be suspended or terminated if the payee cohabits with another person." N.J.S.A. 2A:34-23(n) (emphasis added). These words reflect two well-established principles: "cohabitation does not terminate alimony in all instances," Quinn v. Quinn, 225 N.J. 34, 49 (2016) (citing Gayet v. Gayet, 92 N.J. 149, 153–54, (1983)); and post-judgment modification or termination of

alimony because of cohabitation is premised on "changed circumstances." Gayet, 92 N.J. at 151 (citing Lepis v. Lepis, 83 N.J. 139, 151 (1980)).

Neither party has brought to our attention any post-2014 precedent that squarely addresses whether a finding of cohabitation presumptively prohibits an initial award of alimony. However, in this case, plaintiff remained willing to pay defendant alimony even though he asserted and prevailed on his claim that she was cohabitating with Gorda. Plaintiff has not cross-appealed from the judge's decision to award open durational alimony as opposed to limited duration alimony. But, in our view, the judge's decision to award open durational alimony was certainly within the sound exercise of her discretion under the facts of the case. Under the particular and unusual circumstances of this appeal, it is unnecessary for us to decide whether a finding of cohabitation presumptively prohibits an initial award of alimony.

Defendant's first argument regarding the insufficiency of the alimony award is that the judge failed to consider the financial consequences of her cohabitation in terms of the marital lifestyle she previously shared with plaintiff. See Quinn, 225 N.J. at 48 ("Alimony . . . 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.'" (quoting Mani v. Mani, 183

N.J. 70, 80 (2005))); Gayet, 92 N.J. at 154 ("The extent of actual economic dependency, not one's conduct as a cohabitant, must determine the duration of support as well as its amount."). Defendant also contends that the judge failed to consider all the statutory factors in N.J.S.A. 2A:34-23(b) and her reliance on Clark resulted in defendant being sanctioned for her extra-marital affair with Gorda.

Plaintiff argues that the relevance of Gayet and its progeny have been significantly affected because economic dependency is not a factor listed in N.J.S.A. 2A:34-23(n), which permits the court to modify or terminate alimony upon a finding of cohabitation. At least one trial court has reached that conclusion. See Mills v. Mills, 447 N.J. Super. 78, 93 (Ch. Div. 2016) ("The amended alimony statute . . . substantively departed from Gayet on cohabitation by permitting the possibility of termination or suspension of alimony even without proof of economic interdependency . . . ."). Plaintiff also contends the judge carefully considered all the statutory factors in fashioning an appropriate alimony award.

It is unnecessary for us to accept plaintiff's interpretation of the effect of the enactment of N.J.S.A. 2A:34-23(n) to affirm the judge's alimony award. In the context of an existing alimony obligation, the Gayet Court said modification

was appropriate "when (1) the third party contributes to the dependent spouse's support, or (2) the third party resides in the dependent spouse's home without contributing anything toward the household expenses." 92 N.J. at 153 (citing Garlinger v. Garlinger, 137 N.J. Super. 56, 64 (App. Div. 1975)); accord Reese, 430 N.J. Super. at 571. "[T]his scheme permits modification for changed circumstances resulting from cohabitation only if one cohabitant supports or subsidizes the other under circumstances sufficient to entitle the supporting spouse to relief." Gayet, 92 N.J. at153–54; accord Quinn, 225 N.J. at 49. See also Konzelman, 158 N.J. at 197 (holding that where, in the context of a marital agreement that listed cohabitation as a "material changed circumstance" permitting termination of alimony, "the court need not delve into the economic needs of the dependent former spouse").

Here, the judge found defendant was cohabitating with Gorda and was using pendente lite marital funds to support not only her lifestyle, but also a joint lifestyle with Gorda, whose limited financial resources would not have permitted the "wining and dining" the couple enjoyed. Nor could defendant and Gorda have been able to support their infant daughter without those funds.

Plaintiff cites a trial court decision that has some relevance. In Rose v. Csapo, the Family Part considered "whether a dependent spouse's cohabitation

with her paramour while the divorce litigation [was] still pending, terminate[d] the supporting spouse's obligation to pay pendente lite spousal support." 359 N.J. Super. 53, 56 (Ch. Div. 2002). The court noted, "The general purpose of pendente lite support is to maintain the parties in the same or similar situation they were in prior to the inception of the litigation." Id. at 58. Finding the plaintiff-wife was cohabitating with her paramour, the court held:

> Inherent in such a finding is a determination that she is receiving economic benefit from the new relationship. Whether it equates to a dollar for dollar equivalent to that which her spouse previously provided is not the controlling issue. The dependent spouse has begun a new life, without waiting for the court to dissolve the marriage. Of course she is free to do so, but she can not expect that her husband will financially support her in such an undertaking.
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> [Id. at 62.]

In short, the judge here was entitled to consider, as she did, the economic consequences of defendant's cohabitation. Under the unique circumstances presented, the substantial alimony award was not the result of the judge penalizing defendant for her "conduct as a cohabitant." Gayet, 92 N.J. at 154.

Furthermore, we agree with plaintiff that the judge considered all the statutory factors in making the alimony award, and she did not simply accept, as defendant contends, the amount suggested by plaintiff. The judge credited

plaintiff's estimated monthly expenses for the entire family of $54,558, a figure that closely approximated defendant's estimate of $59,400. The judge also properly considered the estimated monthly expenses related to the children, obligations shared by both parents, that plaintiff was willing to pay without defendant's contribution, and she deducted that amount from the family's monthly expenses in fixing the annual amount of alimony. The judge rejected plaintiff's proposed limited duration for the award, instead concluding that because defendant had "very limited means of supporting herself," permanent open durational alimony was appropriate.

The judge briefly mentioned our decision in Clark. There, the defendant-wife diverted cash from the marital business. 429 N.J. Super. at 75. We cited Mani and held that although "marital fault is irrelevant," id. at 73, certain marital misconduct rising to the level of "egregious fault" could preclude an award of alimony, id. at 74–75. "Egregious fault" requires proof transcending extended or public acts of marital indiscretion. Id. at 75.

The judge, however, never attributed marital fault to defendant, nor did she explicitly reduce or otherwise adjust alimony based on Clark. Instead, the judge carefully considered the evidence in light of the statutory factors and fashioned an alimony award that was under "the circumstances of the parties and

the nature of the case . . . fit, reasonable and just." N.J.S.A. 2A:34-23. We affirm the alimony award. We hasten to add that our conclusion is limited to the specific facts of this case and the issues presented on appeal.

III.

Defendant also argues the judge failed to conduct "any analysis" in making her child support award and in permitting defendant a percentage reduction whenever a child became emancipated. We disagree but remand for the judge to correct the terms of the JOD to conform with her oral decision or otherwise clarify her decision and amend the JOD if necessary.

At the time of trial, the parties' oldest son had graduated from college and was living with plaintiff. Their oldest daughter was about to begin her junior year at the University of New Haven and resided with defendant in the marital home when not at school. The three youngest children lived with defendant.

In determining child support, the judge used the "shared parenting worksheet" in the Child Support Guidelines and based her calculations on only three children, finding the parties' oldest son was emancipated and their oldest daughter was primarily residing at school. The judge noted that plaintiff had already agreed to pay for their college costs, cars, credit cards, and other

expenses. Given plaintiff's annual income, the judge acknowledged that this was an "above-guidelines" case.

The judge then referenced all the factors contained in N.J.S.A. 2A:34-23(a), which provides:

> In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors:
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> (1) Needs of the child;
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> (2) Standard of living and economic circumstances of each parent;
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> (3) All sources of income and assets of each parent;
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> (4) Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;
>
> (5) Need and capacity of the child for education, including higher education;
>
> (6) Age and health of the child and each parent;

> (7) Income, assets and earning ability of the child;
>
> (8) Responsibility of the parents for the court-ordered support of others;
>
> (9) Reasonable debts and liabilities of each child and parent; and
>
> (10) Any other factors the court may deem relevant.

The judge found that plaintiff would cover the daily expenses of the younger children during his parenting time, and he had agreed to pay for their extraordinary expenses, such as braces, camp, and college tuition. The judge had "no doubt that [plaintiff] w[ould] afford these children the opportunity to continue living the lifestyle that they were accustomed to."

After weighing the statutory factors, the judge determined plaintiff should pay child support for the three children in excess of the Guidelines base amount of $421 per week, or $21,892 per year. The judge determined an appropriate amount would be $40,000 per year, with no upward adjustment for the parties' two eldest children because plaintiff had agreed to pay all their expenses.

"The trial court has substantial discretion in making a child support award. If consistent with the law, such an award will not be disturbed unless it is manifestly unreasonable, arbitrary, or clearly contrary to reason or to other

evidence, or the result of whim or caprice." Foust v. Glaser, 340 N.J. Super. 312, 315–16 (App. Div. 2001); accord Jacoby v. Jacoby, 427 N.J. Super. 109, 116 (2012); Tannen v. Tannen, 416 N.J. Super. 248, 278 (App. Div. 2010), aff'd o.b., 208 N.J. 409 (2011). "An abuse of discretion 'arises when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis."'" Ibid. (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

The Guidelines "shall be applied [in] an application to establish . . . child support" and may be modified only for good cause shown. R. 5:6A. When annual family income exceeds $187,200, "the court shall apply the guidelines up to $187,200 and supplement the guidelines-based award with a discretionary amount based on the remaining family income" together with the factors specified in N.J.S.A. 2A:34-23. Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-A to R. 5:6A, www.gannlaw.com. (2023). See also Isaacson v. Isaacson, 348 N.J. Super. 560, 581 (App. Div. 2002) (noting the "maximum amount provided for in the guidelines should be 'supplemented' by an additional award determined through application of the statutory factors set forth in N.J.S.A. 2A:34-23(a)"). The guidelines are inapplicable to college students living away from home, and, in that case, the

court must fix support based on the statutory factors. Avelino-Catabran v. Catabran, 445 N.J. Super. 574, 595–96 (App. Div. 2016); Jacoby, 427 N.J. Super. at 120.

As best we can discern, defendant's primary argument is that the judge failed to consider that the parties' eldest daughter was not emancipated and, when not at college, lived with defendant in the former marital home. However, the judge found, and it is undisputed, that plaintiff was paying for all of his daughter's expenses while she was away at college, as well as her credit card and car expenses regardless of where she was living. There was no evidence defendant bore the costs of expenses for her daughter whenever the child was not at school and lived at home. The argument deserves no further discussion in a written opinion, and we find no basis to disturb the child support award. R. 2:11-3(e)(1)(E).

In her oral decision, the judge stated that plaintiff's child support obligation would be reduced by one-third as "each child gets emancipated." The JOD, however, provides that "[c]hild support shall be reduced by [twenty-five percent] as each child is deemed emancipated." Defendant contends any automatic reduction in plaintiff's child support obligations contravenes N.J.S.A. 2A:17-56.68. We again disagree.

N.J.S.A. 2A:17-56.67(a) provides for the termination of child support by operation of law in certain circumstances, "[u]nless otherwise provided in a court order, judgment, or court-approved preexisting agreement . . . ." N.J.S.A. 2A:17-56.68(a) provides:

> Whenever there is an unallocated child support order for two or more children and the obligation to pay child support for one of the children is terminated by operation of law pursuant to [N.J.S.A. 2A:17-56.67], the amount of the child support obligation in effect immediately prior to the date of the termination shall remain in effect for the other children.
>
> [(Emphasis added).]

Here, the JOD provided for the termination of support "as each child is deemed emancipated"; the reduction, i.e., partial termination of support, was not by operation of law, but rather by the Family Part's judgment. The statute does not apply. We therefore affirm that portion of the JOD.

However, the judge's oral decision anticipated any reduction would be by thirds as each of the parties' three youngest children became emancipated, but the JOD specifically requires a twenty-five-percent reduction, presumably adding the parties' eldest daughter who usually resided at university into the calculus. It is well-accepted that if there is a conflict between a judge's oral or written opinion and a subsequent written order, the opinion will control. Taylor

v. Int'l Maytex Tank Terminal Corp.-Bayonne, 355 N.J. Super. 482, 498 (App. Div. 2002) (citing State v. Pohlabel, 40 N.J. Super. 416, 423 (App. Div. 1956)).

We therefore remand for the judge to either correct the JOD to conform to her oral decision, or, alternatively, to clarify her reasons for the difference if so intended. Should the judge decide to pursue this latter course, she should provide the parties with an opportunity to address the issue and amend the JOD, if necessary, based on her conclusions.

IV.

In her oral decision, the judge directed plaintiff to secure a $500,000 life insurance policy with defendant as beneficiary to cover his child support obligations, which the judge estimated would exist for approximately thirteen years, until the parties' youngest child would likely graduate college. The judge noted that counsel should agree on a schedule by which this obligation would be reduced "every few years" as the children aged, and plaintiff's total child support obligation decreased.

The judge also ordered plaintiff to obtain a $3 million life insurance policy with defendant as beneficiary to secure his alimony obligations, which she reasoned would "likely terminate at the time [plaintiff] retires" at age sixty-five. She again stated that counsel should "come up with . . . a reasonable schedule

for reducing the overall coverage." Paragraph 4 of the JOD, therefore, provided that plaintiff shall maintain a $500,000 life insurance policy

> to guarantee his child support obligation through the children's emancipation. Plaintiff may reduce the amount of coverage proportionately as the children get older and/or are emancipated. Counsel shall agree on a schedule for a proportionate reduction. Plaintiff shall also maintain life insurance in the amount of $3,000,000 to guarantee defendant's alimony. Again, [p]laintiff may reduce the amount of coverage proportionally over the passage of time. Counsel shall agree on a schedule for a proportionate reduction.

Defendant contends it was error for the judge to permit plaintiff to reduce the amount of life insurance he maintained to secure his child support and alimony obligations. Specifically, she argues that the judge miscalculated the time periods for which the policies were needed as security, and, therefore, erred in permitting plaintiff any reduction in coverage due to the passage of time. The argument requires little discussion in a written opinion. R. 2:11-3(e)(1)(E).

In fixing the security for plaintiff's alimony obligations, the judge utilized an expected retirement age for plaintiff of sixty-five, and, presumably, N.J.S.A. 2A:34-23(j)(1), which provides: "There shall be a rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age . . . ." In S.W. v. G.M., we described other methodologies the court should consider in determining the length of the security obligation, but

recognized that "[a] determination of the proper amount of life insurance coverage [to secure] a support obligation requires a consideration of many variables." 462 N.J. Super. 522, 534 (App. Div. 2020). "In alimony contexts, determining whether to use life expectancy or the presumptive retirement age, and a fixed or declining amount of security will depend on the circumstances of each case and is a matter of judicial discretion." Id. at 535. We conclude the judge did not mistakenly exercise her discretion in setting the amount of life insurance to secure plaintiff's alimony obligations.

As to security for child support, "[i]n most cases, a parent will no longer be bound to support a child who reaches the age of majority." R.A.C. v. P.J.S., Jr., 192 N.J. 81, 102 (2007) (citing Newburgh v. Arrigo, 88 N.J. 529, 543 (1982)). However, "[p]rior to addressing whether parental support is required for a child who reaches majority, the pivotal question is whether the child remains unemancipated." Ricci v. Ricci, 448 N.J. Super. 546, 573 (App. Div. 2017).

The judge was not deciding whether plaintiff's child support obligations would continue because all children were not emancipated or when they would terminate. In trying to ensure there was adequate security, the judge only estimated how long plaintiff's obligations would likely continue. There was no

mistaken exercise of discretion in ordering plaintiff to obtain a $500,000 life insurance policy as security.[3]

V.

In fashioning an equitable distribution award, the judge considered all the statutory factors contained in N.J.S.A. 2A:34-23.1. She ordered that the marital residence and plaintiff's condominium be listed for sale, with the net proceeds divided equally between the parties. By consent, plaintiff would retain the condominium used by his mother, and the judge ordered that he pay defendant $29,005, one-half of the home's equity. Plaintiff's 401(k) was to be divided equally, based on its value as of the date the complaint was filed, with a QDRO to effectuate the division. The parties would retain their respective cars and jewelry.

During trial, plaintiff testified in detail about the complicated compensation scheme employed by Morgan Stanley, which basically guaranteed

[3] We have made clear that "it is perfectly reasonable to provide for the periodic reduction or review of the amount of . . . required security to reflect the diminishing need for it as the parties age, or circumstances otherwise change." Claffey v. Claffey, 360 N.J. Super. 240, 264–65 (App. Div. 2003). The JOD simply recognized this general principle but left open the possibility of any reduction in either life insurance policy to the parties and their attorneys to negotiate. We assume that if they do not agree, future motion practice may ensue. But for now, plaintiff has not to our knowledge sought a reduction and there is no juridical provision in the JOD requiring our review.

him a certain amount of annual income and deferred a substantial amount of additional compensation in stock and deferred payments. This amount was to be calculated by a combination of variables. The judge awarded defendant half of the net, post-tax deferred compensation payments that plaintiff had earned during the marriage but Morgan Stanley had not yet paid.

Specifically, the judge awarded defendant half the 2017 deferred stock payment of $221,250, which would be paid to plaintiff in January 2021; half the 2018 deferred cash payment of $217,500, which also would be paid in January 2021, and half the 2018 deferred stock payment of $217,500, which would be paid in January 2022. The judge also awarded defendant one-twelfth of any deferred stock or deferred cash due plaintiff for 2019, based on the date the divorce complaint was filed. The judge held that if plaintiff received less discretionary compensation than anticipated because of his or the company's poor performance, he could proportionally reduce the amount payable to defendant.

Defendant broadly asserts that the judge failed to consider all the statutory factors. More specifically, defendant argues the judge failed to account for potential market gains and losses in plaintiff's 401(k), and, although the judge permitted plaintiff to proportionately reduce distributions from his deferred

compensation if it were less than anticipated, she did not account for potential additional amounts for distribution if the deferred compensation were more than anticipated. These contentions require little comment. R. 2:11-3(e)(1)(E).

The judge considered all the statutory factors in the context of the trial evidence. We frankly do not understand defendant's argument regarding changes in the value of plaintiff's 401(k) account; the parties stipulated to the value of this marital assets as of the date of the complaint. There was no evidence at trial that plaintiff might receive more than the stated amounts of deferred stock and monies in compensation, only that some compensation might be "clawed back" by Morgan Stanley depending on the circumstances. We affirm the equitable distribution provisions of the JOD.

VI.

Lastly, defendant argues that given the financial disparity between the parties and defendant's inability to pay except by invading the assets she obtained through equitable distribution, the judge mistakenly exercised her discretion by not awarding counsel fees.

"Under Rule 5:3-5(c),[4] the trial judge, in her discretion, may award counsel fees in a matrimonial action." J.E.V. v. K.V., 426 N.J. Super. 475, 492 (App. Div. 2012). 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[,]" Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)), or a clear error in judgment, Tannen, 416 N.J. Super. at 285 (citing Chestone v. Chestone, 322 N.J. Super. 250, 258 (App. Div. 1999)).

The judge considered the factors contained in Rule 5:3-5(c). She noted that plaintiff had prevailed on most of the issues in dispute. The judge also

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[4] Rule 5:3-5(c) requires a court to consider:

> (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

noted that plaintiff could have sought reimbursement for the pendente lite expenses he had paid related to defendant's and Gorda's infant daughter, but chose not to make that request. The judge took note of the substantial assets defendant was going to receive through equitable distribution, and that plaintiff agreed to pay all income taxes for 2019 without seeking any credit from defendant even though he was entitled to do so. The judge took into account plaintiff's agreement to pay for his children's extraordinary expenses. Lastly, and perhaps most importantly, the judge noted that plaintiff had already paid a portion of defendant's legal fees.

Certainly, "[s]uccess in the litigation or the parties' dispute is not a prerequisite for an award of counsel fees." J.E.V., 426 N.J. Super. at 492 (citing Guglielmo v. Guglielmo, 253 N.J. Super. 531, 545 (App. Div. 1992)). And, "a disparity in income often suggests some entitlement to a fee allowance." Id. at 494 (citing Argila v. Argila, 256 N.J. Super. 484, 494 (App. Div. 1992)). However, the judge considered the appropriate factors and adequately explained her findings and conclusions in considering defendant's request for a fee award. We cannot conclude the judge mistakenly exercised her discretion.

Affirmed and remanded for the limited purposes expressed in our opinion. We do not retain jurisdiction.