SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0653-21

ZOGRAFIA
GIKAS-TSOUCARIS,

Plaintiff-Appellant/
Cross-Respondent,

v.

STEPHEN TSOUCARIS,

Defendant-Respondent/
Cross-Appellant.

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Argued February 1, 2023 – Decided April 13, 2023

Before Judges Gooden Brown and DeAlmeida.

On Appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FM-02-1686-19.

Carl J. Soranno argued the cause for appellant/cross-respondent (Brach Eichler LLC, attorneys; Carl J. Soranno, of counsel and on the briefs).

Steven S. Genkin argued the cause for respondent/cross-appellant.

PER CURIAM

In this post-judgment matrimonial matter, plaintiff Zografia Gikas-Tsoucaris appeals from a September 17, 2021 Family Part order denying her request for an award of counsel fees incurred during divorce proceedings with her ex-husband, defendant Stephen J. Tsoucaris. Defendant cross-appeals from the provisions of the same order that denied his request for counsel fees, required him to maintain a $1 million life insurance policy to secure his alimony and child support obligations, and ordered the parties to alternate years claiming the dependent tax exemption for their daughter. We affirm.

I.

We glean these facts from the record. After approximately twenty-three years of marriage, the parties divorced on March 10, 2021, by way of a Dual Judgment of Divorce (JOD). During the marriage, they had adopted one child, a daughter, age fourteen at the time of the divorce. Defendant is an endodontist with a private practice. Since 2015, plaintiff, who has an MBA, has been a stay-at-home parent after she resigned from her part-time job doing administrative work for defendant's practice. During the course of the marriage, the parties acquired significant assets, including real estate, condominiums, securities, and other financial products.

In 2019, after plaintiff had filed the divorce complaint, the parties entered a consent order on May 17, 2019, addressing parenting time and litigation expenses, among other things. Pertinent to these appeals, paragraphs 7 and 10 of the order provided:

> 7. The parties agree to use the joint Wells Fargo investment account . . . to pay for counsel fees, appraisals, the mediator's fees, and any other expert fees that become necessary in this matter, as set forth immediately below.
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> > a. Legal fee distributions shall be paid equally from the investment account without prejudice to reallocation at a final hearing or as part of a final settlement or as otherwise ordered by the [c]ourt.
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> > . . . .
> >
> > c. The parties agree to withdraw the total amount of $50,000 from their Wells Fargo investment account . . . for an initial payment of pendente lite counsel fees, with $25,000 being distributed to [defendant's counsel] on behalf of [d]efendant and $25,000 being distributed to [plaintiff's counsel] on behalf of [p]laintiff, without prejudice to reallocation.
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> > . . . .
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> 10. Both parties are prohibited from transferring, selling, secreting, encumbering, disposing of, or otherwise adversely affecting any and all property rights that either party may have directly or indirectly,

> either personally or by proxy or power of attorney, in any property, cash, stocks, bonds, realty, credit lines, or other assets or businesses, of which either party is in possession, or which he or she may have a beneficial interest or legal interest, except in the normal course of business, unless agreed to by the parties in writing, entry of a [f]inal [j]udgment of [d]ivorce, or further [o]rder of the [c]ourt.

During the divorce proceedings, the parties engaged in motion practice primarily related to pendente lite and parenting issues.[1] Initially, with the assistance of a mediator, the parties reached a temporary agreement with respect to pendente lite support. Subsequently, on November 12, 2019, plaintiff filed a motion to require defendant to pay $13,642 per month in unallocated pendente lite support; to "maintain all Schedule A expenses"; to pay certain Schedule B expenses; and to reimburse plaintiff "$2,618.32 for pendente lite expenses incurred between June and September 2019" when defendant purportedly violated "the parties' temporary pendente lite arrangement." Among other things, plaintiff's motion also sought an order finding defendant in violation of litigant's rights by "unilaterally withdrawing and utilizing marital funds for unknown and unauthorized purposes," and "not facilitating phone contact" between plaintiff and their daughter in violation of provisions in the May 17,

[1] Plaintiff sought an order to show cause seeking to restrain defendant's air travel with their daughter as a result of the COVID-19 pandemic.

2019 consent order. Additionally, plaintiff sought an award of "counsel fees and costs incurred in connection with th[e] motion." Defendant opposed the motion and cross-moved for counsel fees, spousal support to be set at $2,000 "in accordance with the [parties'] prior spending history," and various other relief not pertinent to this appeal.

Following oral argument, in a January 23, 2020 order, the judge directed defendant to pay "$5,250[] per month in unallocated pendente lite support," effective January 23, 2020, and granted some of plaintiff's other requests that are not pertinent to this appeal. Notably, the judge denied plaintiff's requests to find defendant in violation of litigant's rights and "reserved" both parties' "application[s] for counsel fees and costs incurred in connection with th[e] motion . . . until the time of trial."

On the eve of trial, the parties settled, incorporating a March 9, 2021 marital settlement agreement (MSA) into the March 10, 2021 JOD. Pursuant to the MSA, defendant agreed to pay plaintiff "open duration alimony" in the amount of $5,835 per month, beginning February 14, 2022. From February 14, 2021, to February 14, 2022, defendant agreed to pay plaintiff "$5,250[] per month in alimony" to "partially account for the temporary loss of income resulting from the ongoing Covid-19 pandemic." The alimony was "non-

taxable" to plaintiff and "non-tax-deductible" to defendant. The MSA further provided that although "[t]he [p]arties could not reach a consensus on the amount of their respective incomes," the agreed-upon alimony was "based on an income differential of approximately $300,000 per year."

Regarding child support, under the MSA, defendant agreed to pay plaintiff "$440 per month . . . for basic child support" from February 14, 2021, until their daughter's emancipation. In the MSA, the parties agreed that the child support amount was based on the "Child Support Guidelines Shared Parenting Worksheet" utilizing, among other things, an "[a]nnual income of $420,000 for [defendant,]" and, for plaintiff, an "[a]nnual income of $35,000" plus plaintiff's alimony. The child support calculation was also based upon "[e]qual (50/50) parenting." Additionally, the MSA indicated that although defendant "claimed the [c]hild as a dependent on his 2019 tax returns," the "[p]arties were unable to reach an agreement as to who shall be permitted to claim the [c]hild as a dependent exemption going forward . . . , and . . . therefore agreed to defer to the judgment of the [c]ourt" to "make a final determination." Likewise, the MSA specified that the parties were unable to come to an agreement on the amount of life insurance needed to secure defendant's alimony and child support obligations. As a result, the parties agreed "to defer [the issue] to the judgment

of the [c]ourt" and to "submit their positions on th[e] issue . . . after entry of [f]inal [j]udgment."

As to equitable distribution, pursuant to the MSA, plaintiff received a sum of $742,000, which included cash payments of $500,000 for her share of the marital residence and $206,253.18 for her share of an investment portfolio. Plaintiff also received title to certain properties, including income-generating properties, credits for assets retained by defendant or acquired with marital funds, and additional cash payments to settle claims against assets that defendant claimed were pre-marital. In turn, defendant retained several parcels of real estate as well as other significant interests and assets. The MSA further provided that pursuant to paragraph 7 of the May 17, 2019 consent order, the parties would seek "an award and/or reallocation of counsel fees and costs incurred in connection with th[e] matter" by submitting "a [c]ertification of [p]rofessional [s]ervices" to the court following the "entry of [f]inal [j]udgment" for the court to "make a final determination on th[e] issue."

In accordance with the MSA, the parties subsequently submitted certifications of services prepared by their respective attorneys, accompanied by certifications of the parties, setting forth their respective claims for an award of counsel fees. In plaintiff's certification dated May 26, 2021, and defendant's

certification dated May 21, 2021, the parties exchanged barbs and cited instances of purported bad faith on each other's part. Plaintiff sought $150,000 in fees from defendant, detailing that she had incurred a total of $595,942.95 in counsel fees through May 2021, and had paid $311,674.62 to date. Plaintiff's request included fees incurred in connection with the November 2019 pendente lite motion. Defendant countered with a request that plaintiff be required to contribute to his counsel fees, explaining that he had paid a total of $446,500 in fees to date. Along with her May 26, 2021 certification, plaintiff submitted a current Case Information Statement (CIS), while defendant relied upon a pre-trial CIS, dated January 11, 2021. The parties also submitted their respective positions on life insurance and the dependent tax exemption as prescribed in the MSA.

In a September 17, 2021 order, the judge denied both parties counsel fees; ordered defendant to "maintain a life insurance policy in the amount of $750,000[] to secure his alimony obligation and . . . $250,000[] to secure his child support obligation,"[2] and directed the parties to "alternate years" claiming "their daughter as a dependent for the child tax exemption." In support, on

[2] The judge also ordered plaintiff to "maintain a life insurance policy in the amount of $100,000[] until the child's emancipation."

September 15, 2021, the judge made findings of fact and stated his legal conclusions in an oral opinion on the record.

Regarding counsel fees, after determining that the rates and hours billed by both sides were reasonable, the judge methodically considered the factors set forth in Rule 5:3-5(c), requiring the 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 . . . ; (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.
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> [R. 5:3-5(c).]

Applying each factor, the judge explained:

> [A]s to factor one, . . . defendant was the primary wage-earner during the marriage and continues to earn significantly more than . . . plaintiff. In reaching an agreement on support, the parties could not agree as to their respective incomes. What the parties could agree on, however, was that the disparity in their incomes is approximately $300,000 per year.
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> Pursuant to their agreement, ... plaintiff is currently receiving about $63,000 annually in alimony, which will increase in February of 2022 to $70,000 approximately.

Plaintiff has also received approximately $750,000 in equitable distribution, as well as an additional $150,000 from which $90,000 will go directly to plaintiff for settlement of the Astoria property rent and Wells Fargo accounts.

Now as to factor two, the [c]ourt finds that in light of all of the circumstances, even though defendant is the primary wage-earner, that neither party really is in a . . . substantially superior financial position to contribute to the fees of the other party. . . . [D]efendant is the higher wage-earner, but both parties did receive over $1 million in equitable distribution.

Moreover, . . . defendant does pay support to . . . plaintiff that totals about $70,000 a year when you take into account the alimony and the child support.

Now [plaintiff] is unemployed or at least was unemployed . . . . She may be employed at the time of this decision, but the [c]ourt recognizes that it does not anticipate that she has the ability to earn a substantial income, but does have the ability to earn some type of income in addition to the alimony and the child support that she receives, but she did receive nearly $750,000 in equitable distribution and some rental income.

The challenge in this case is that the parties incurred legal fees . . . in excess of a half-a-million dollars, and that's what makes this application so challenging and this litigation so challenging. But, nevertheless, there were still substantial assets that remain and substantial assets that the parties distributed.

. . . .

Now as to factor three, the [c]ourt thought about this issue deeply because typically when there is lengthy litigation, there is often a reason for that lengthy litigation and it's not uncommon that it's due to one or both parties proceeding in bad faith.

But the [c]ourt notes that advancing a legal position reasonably supported, which the [c]ourt rejects, is not the equivalent of bad faith. . . . [B]ad faith is something more than that. . . .

Here, there were challenging personalities. Here, the parties also had to divide real estate and bank accounts that . . . defendant acquired before the marriage. That can be a complicated issue. It's a lot easier to divide accounts that are clearly marital.

COVID impacted the defendant's dental practice, which added a further complication, and their daughter has special needs, which added yet another complication to this matter. So[,] there were issues in this case that made it uniquely challenging, but complications and challenges are not tantamount to bad faith. It's not the same thing.

The parties did negotiate extensively over numerous mediation sessions and intensive settlement conferences and they were ultimately able to reach an agreement as to all essential terms. I was deeply and intimately involved in a lot of those negotiations. I'm familiar with a lot of the back and forth and I do not find, despite all of the mediation sessions, all of the intensive settlement conferences, all of the litigations, that either party negotiated in bad faith.

There were challenging issues that unfortunately were litigated over an extended period of time, but,

again, that's not the same thing as bad faith and the [c]ourt does not make that finding in this case.

Now as to factor four, each party did incur extensive legal and expert fees given the length of this litigation. They participated in a number of mediation sessions, perhaps over ten mediation sessions. There was motion practice at the beginning of all of this. There was a lot of trial preparation. The [c]ourt tried to avoid that trial preparation. It failed. And there were various intensive settlement conferences, which ultimately preserved resources for the parties because they were able to save all of those trial dates.

. . . .

Now factor five is inapplicable to the [c]ourt's analysis. I did not award any fees previously.

Factor six. Plaintiff has paid her attorneys $311,000. Defendant paid his prior attorney about $80,000. He's paid his current attorney about $265,000, and there were some additional fees subsequent to the entry of the final judgment of divorce.

Now as to factor seven, the [c]ourt really was not asked at the time to make any determination as to any of the issues except for what's before the [c]ourt today. The parties, through the mediation process, through the intensive settlement conference process, they were able to resolve all of their material issues by way of agreement.

Now as to factor eight, both parties argue that they incurred excessive fees in order to compel the other party to abide by various court orders. I recognize that there is an allegation of noncompliance and there were some allegations of production issues, but, again,

> I don't make a finding that anyone proceeded in bad faith.
>
> So based on the foregoing analysis, the [c]ourt here finds that neither party is entitled to an award of counsel fees.

Regarding life insurance to secure defendant's support obligations, the judge relied on S.W. v. G.M., 462 N.J. Super. 522, 536 (App. Div. 2020), where we provided trial judges with "the methodology . . . to determine the extent and amount of life insurance needed." Applying those principles, the judge found:

> Defendant is a self-employed dentist and has no mandatory retirement age, but he is about ten years away from the Social Security retirement age and the [c]ourt does believe that's not an unreasonable benchmark in light of the circumstances in this case.
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> . . . .
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> Thus, using the ten-year benchmark for . . . defendant's alimony obligation, the current value of the alimony obligation is about $687,000. The [c]ourt believes that a life insurance policy in the amount of $750,000 is appropriate to secure the alimony obligation and, in light of their daughter's age and the child support obligation, the [c]ourt believes that a child support life insurance policy in the amount of $250,000 is appropriate.

The judge indicated that the life insurance policy to secure child support "shall terminate upon the[ir] daughter's emancipation."

Finally, addressing the "child tax exemption," the judge determined "the parties should alternate the exemption going forward," reasoning the parties were "both providing for their daughter and . . . will benefit from the exemption." This appeal followed.

II.

Our review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We "review the Family Part judge's findings in accordance with a deferential standard of review, recognizing the court's 'special jurisdiction and expertise in family matters.'" Thieme v. Aucoin-Thieme, 227 N.J. 269, 282-83 (2016) (quoting Cesare, 154 N.J. at 413). While we owe no special deference to the judge's legal conclusions, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), "'the factual findings and legal conclusions of the trial judge'" should be left undisturbed unless we are "'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' or when we determine the court has palpably abused its discretion." Parish v. Parish, 412 N.J. Super. 39, 47 (App. Div. 2010) (quoting Cesare, 154 N.J. at 412). Thus, "[w]e reverse only to 'ensure that there is not a denial of justice' because the family court's 'conclusions are [] "clearly mistaken" or "wide

of the mark."'" Id. at 48 (alteration in original) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)).

Plaintiff challenges the judge's order denying counsel fees on several grounds, including insufficient fact findings in violation of Rule 1:7-4. Specifically, she argues that contrary to their agreement, "legal fees were not paid equally from joint marital funds," resulting in defendant receiving a disproportionately larger award in addition to having greater earning power. She also contends that given defendant's failure to provide an updated CIS, the judge's "conclusion that 'neither party [was] in a substantially superior financial position' was an abuse of discretion." Further, she asserts the judge erred in not considering defendant's "bad faith" and her successful motion practice, particularly her pendente lite motion, and that "the vast majority" of her equitable distribution was "earmarked for the purchase of a home." In his cross-appeal, defendant argues he should receive a reallocation of counsel fees because "[a]t this juncture," he is "in an 'unequal' financial position."

"An allowance for counsel fees is permitted to any party in a divorce action subject to the provisions of Rule 4:42-9." Slutsky v. Slutsky, 451 N.J. Super. 332, 366 (App. Div. 2017) (citation omitted) (citing R. 5:3-5(c)); see also N.J.S.A. 2A:34-23 (authorizing an award of counsel fees in family actions based

on consideration of "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"). Rule 4:42-9 "provides that 'all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a).'" Slutsky, 451 N.J. Super. at 366 (quoting R. 4:42-9(b)). Critically, under Rule 4:42-9(a)(1), to determine whether a counsel fee award is appropriate "[i]n a family action," the court must consider the factors enunciated in Rule 5:3-5(c).

"That a party advances a legal position reasonably supported which the court rejects, is not the equivalent of 'bad faith.'" Slutsky, 451 N.J. Super. at 367 (quoting Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 580 (App. Div. 2016)); see also Steiner v. Steiner, 470 N.J. Super. 112, 131 (App. Div. 2021) ("The bad faith of a matrimonial litigant does not arise merely because that litigant failed at a trial on the merits."). As we have explained, "[w]hen [a party]'s conduct bespeaks an honest attempt to press a perceived, though ill-founded and perhaps misguided, claim, he or she should not be found to have acted in bad faith." Tagayun, 446 N.J. Super. at 580 (quoting Belfer v. Merling, 322 N.J. Super. 124, 144-45 (App. Div. 1999)). Rather, to establish "bad faith," the party seeking fees must show the opposing party "acted beyond

the bounds of proper advocacy by pursuing a claim or defending against a claim without factual support." Steiner, 470 N.J. Super. at 131. "Examples of bad faith include misusing or abusing process, seeking relief not supported by fact or law, intentionally misrepresenting facts or law, or otherwise engaging in vexatious acts for oppressive reasons." Slutsky, 451 N.J. Super. at 367 (citing Borzillo v. Borzillo, 259 N.J. Super. 286, 293-94 (Ch. Div. 1992)).

In matrimonial matters, the application of the relevant factors and the ultimate decision is discretionary, Williams v. Williams, 59 N.J. 229, 233 (1971), and we will not disturb a counsel fee decision absent a showing of "an abuse of discretion involving a clear error in judgment." Tannen v. Tannen, 416 N.J. Super. 248, 285 (App. Div. 2010). Indeed, we will overturn "a trial court's determination on counsel fees only on the 'rarest occasion.'" Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)).

Applying this deferential standard of review, we discern no abuse of discretion and affirm substantially for the reasons stated in the judge's comprehensive oral decision. Contrary to plaintiff's contentions, the judge addressed "the standards set forth in our statutes and cases," Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990), considered the relevant factors, and made

"appropriate findings of fact" that are supported by the record, Yueh v. Yueh, 329 N.J. Super. 447, 466 (App. Div. 2000).

Likewise, we are satisfied there was no abuse of discretion in the judge's reliance on defendant's January 11, 2021 CIS. Rule 5:5-2(a) requires a party to file a CIS "in all contested family actions, except summary actions, in which there is any issue as to custody, support, alimony or equitable distribution." Further, parties are required "to inform the court of any material changes in the information supplied" in the CIS. R. 5:5-2(c). Having presided over the entire divorce litigation, the judge was keenly aware of plaintiff's salary and other relevant information and even acknowledged the $300,000 income disparity between the parties. There is no indication in the record that on the date of his submission, May 21, 2021, defendant's assets and liabilities differed from the CIS dated only four months prior.

In his cross-appeal, defendant challenges the provision of the September 17, 2021 order requiring him to obtain a $1 million life insurance policy to secure his alimony and child support obligations, arguing "[he] should not be required to provide security exceeding the current payment amounts over time." It is well settled that courts can secure an obligor's support obligation through a life insurance policy. See N.J.S.A. 2A:34-25 ("Nothing in this act shall be

construed to prohibit a court from ordering either spouse or partner to maintain life insurance for the protection of the former spouse, partner, or the children of the marriage . . . in the event of the payer spouse's or partner's death."); N.J.S.A. 2A:34-23 (authorizing "reasonable security" for a parent's current and future child support obligation); Schwarz v. Schwarz, 328 N.J. Super. 275, 286 (App. Div. 2000) ("Life insurance policies are frequently included in final judgments of divorce as security for support obligations."); Grotsky v. Grotsky, 58 N.J. 354, 361 (1971) ("[T]he court may . . . direct the father to maintain his insurance, naming the minor children as beneficiaries, for the purpose of securing due fulfillment of the support order during their minority.").

Recently, we held:

> A determination of the proper amount of life insurance coverage for a support obligation requires a consideration of many variables. Where a party is insurable and able to pay the necessary premiums, a life insurance death benefit should neither only meet a beneficiary's bare needs, nor be a windfall. In the former case, unexpected changes in circumstances can leave a beneficiary with unmet needs, whereas the latter condition exposes a payor's estate to obligations he or she never had during the marriage.
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> In the alimony context, "once the amount of the obligation is established, the present value (or more correctly, the continuing present value as the obligation decreases) should be determined." . . .

The present-day value methodology is appropriate where there is a "known future quantity" of an obligation. Where the alimony obligation is not readily quantifiable because the duration of the obligation is unknown, a trial judge may utilize an obligor's life expectancy to determine the duration of the obligation if it is reasonable to do so.

Additionally, a reduction in the amount of security as the obligation is satisfied is an appropriate means of assuring alimony is secured but not subject to a windfall. In some cases, where the obligation has the potential to extend beyond an assumed end date because of a change in circumstances, or where a presumption of termination has been rebutted, it may be appropriate to decrease the death benefit in smaller increments or not at all.

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.

[S.W., 462 N.J. Super. at 534-35 (emphasis added) (citations omitted) (first quoting Lawrence J. Cutler & Robert J. Durst, II, Life Insurance As a Security Vehicle In Dissolution Cases, 12 J. Am. Acad. Matrim. Laws. 155, 161 (1994); then citing Life Expectancies for All Races & Both Sexes, Pressler & Verniero, Current N.J. Court Rules, Appendix I-A, www.gannlaw.com (2023); and then citing Claffey v. Claffey, 360 N.J. Super. 240, 264-65 (App. Div. 2003) (stating "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")).]

Here, the alimony was an open-duration alimony and the child was fourteen years old at the time of the divorce. The judge used a ten-year benchmark to calculate the life insurance needed given defendant's age, profession, and presumed retirement at Social Security age. The judge also ordered termination of the child support component of the life insurance obligation upon the daughter's emancipation. Under the circumstances, we discern no abuse of discretion in fixing defendant's life insurance requirement at $1 million to secure his alimony and child support obligations. See N.J.S.A. 2A:34-23(j)(1) (providing "a rebuttable presumption that alimony shall terminate upon the obligor spouse . . . attaining full retirement age"). Defendant can apply to modify his life insurance requirement in the future as his obligation is reduced with time or his circumstances change.

Defendant also contends that "the designation of head of household and the exemption should remain with [him]" because plaintiff "claims virtually no income and pays no taxes." The Internal Revenue Code (IRC) provides that "a qualifying child" may be claimed as a dependent. 26 U.S.C. § 152(a)(1). Among other requirements, a "qualifying child" must live at least half the year with the parent-taxpayer claiming the exemption, id. § 152(c)(1)(B), and the child must receive at least half of his or her support from that parent-taxpayer,

see id. § 152(c)(1)(D) (stating that a qualifying child is "an individual . . . who has not provided over one-half of such individual's own support for the calendar year in which the taxable year of the taxpayer begins").

Divorced parents are allowed the exemption as long as the parents provide more than half of "the child's support during the calendar year" and the child "is in the custody of [one] or both . . . parents for more than one-half of the calendar year." Id. § 152(e)(1). The IRC gives the custodial parent the right to the exemption, subject to waiver by that parent. Id. § 152(e)(1) to (2). However, "if the child resides with both parents for the same amount of time during such taxable year, the parent with the highest adjusted gross income" can claim the exemption. Id. § 152(c)(4)(B)(ii). A parent who cannot meet the abode or support test is not entitled to claim the dependent exemption for a child. Id. § 152(c); see generally 2A Lexis Tax Advisor – Federal Topical § 2A:3.03 (2023).

Notwithstanding the above provisions, New Jersey case law permits family part judges to allocate the exemption to either parent based on equitable principles. See Gwodz v. Gwodz, 234 N.J. Super. 56, 62 (App. Div. 1989) (recognizing "the legal right of the trial court to equitably enforce an allocation of tax exemptions between the parties"). "The trial court may exercise its

discretion in allocating tax exemptions, subject to acceptance by the Internal Revenue Service [(IRS)]." Heinl v. Heinl, 287 N.J. Super. 337, 353 (App. Div. 1996).

Here, plaintiff, as the parent of primary residence, meets the IRS criteria of a custodial parent. However, the child spends equal time with both parents, so defendant would be entitled to the exemption as the higher wage-earner. We discern no abuse of discretion in the judge's decision to alternate exemption years based on equitable principles.

Affirmed.