

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3008-21

S.W.,

Plaintiff-Respondent/
Cross-Appellant,

v.

G.M.,

Defendant-Appellant/
Cross-Respondent.

Argued May 20, 2024 – Decided May 30, 2024

Before Judges Mawla, Marczyk, and Vinci.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Union County, Docket
No. FM-20-2163-11.

Brian G. Paul argued the cause for appellant/cross-
respondent (Szaferman, Lakind, Blumstein & Blader,
PC, attorneys; Brian G. Paul, of counsel and on the
briefs).

Barbara Ulrichsen argued the cause for
respondent/cross-appellant (Ulrichsen Rosen & Freed,
LLC, attorneys; Evan R. Weinstein and Barbara

Ulrichsen, of counsel and on the briefs; Erika P. Handler, Julianne Kallas, and Lauren Koster Beaver, on the briefs).

PER CURIAM

This matter returns following successive appeals.¹ In the last appeal, we directed a judge² other than the trial judge to numerically apportion the marital lifestyle to determine the amount of plaintiff S.W.'s alimony obligation to defendant G.M., and defendant's Mallamo³ claim. S.W. III, slip op. at 6-7. On the heels of S.W. III, we denied defendant's request for appellate counsel fees without prejudice and directed the presiding judge to decide the issue.

Defendant now appeals from a May 25, 2022 order entered following a plenary hearing adjudicating the Mallamo claim, alimony arrears, and appellate counsel fees. Plaintiff cross-appeals from a July 14, 2021 pre-plenary hearing order, which declined to revisit the numerical lifestyle determination made by the trial judge, which we affirmed in S.W. III. Having considered the parties' arguments, we affirm in part, and vacate and remand in part the May 25, 2022

¹ S.W. v. G.M. (S.W. I), No. A-4063-14 (App. Div. Feb. 20, 2018); S.W. v. G.M. (S.W. II), 462 N.J. Super. 522 (App. Div. 2020); and S.W. v. G.M. (S.W. III), No. A-3286-19 (App. Div. Jan. 7, 2021).

² The Presiding Judge of the Family Part.

³ Mallamo v. Mallamo, 280 N.J. Super. 8 (App. Div. 1995).

order for modification, and affirm the July 14, 2021 order for the reasons expressed in this opinion.

The parties are familiar with the facts, which have also been detailed at length in our prior opinions. To summarize, as relates to the issues raised here, in S.W. I, we reversed the amount of alimony awarded by the trial judge for several reasons, including that the judge did not numerically articulate the marital lifestyle to enable us to determine how the alimony figure was derived. S.W. I, slip op. at 41. We affirmed the judge's finding that plaintiff earned \$1,313,000, that his company paid the taxes on those earnings, and that the parties spent the entire \$1.313 million to fund the marital lifestyle. Id. at 40-41 n.2. However, we reversed the trial judge's denial of defendant's request for a Mallamo credit and directed him to revisit the issue after quantifying the marital lifestyle. Id. at 49.

On remand, the trial judge noted he mistakenly calculated plaintiff's earnings and found the correct income figure was \$1,520,270. S.W. II, 462 N.J. Super. at 533 n.4. He then determined alimony by augmenting defendant's monthly expenses, which resulted in an increased alimony figure and a Mallamo credit. Id. at 529. Defendant challenged these determinations in S.W. II. She also argued the trial judge did not consider plaintiff's post-divorce earnings.

Plaintiff did not appeal from either determination, and on appeal contended his income "for purposes of determining alimony has been established and affirmed. It is the law of the case and cannot and must not be disturbed."

In S.W. II, we reversed the alimony determination because the judge based it on defendant's budget, ignored the marital lifestyle, and supplemented defendant's needs with some of the expenses incurred during the marriage. Id. at 532-34. We affirmed the judge's income determination and noted the trial record "reflect[ed] expenditures near the adjusted income figure [of \$1,520,270]. In evidence was a marital lifestyle analysis plaintiff commissioned, reflecting expenditures of \$1,600,104." Id. at 533 n.4. However, we reversed and remanded the alimony computation, directing the trial judge to "numerically determine the marital lifestyle and apportion it" and afterwards adjust the Mallamo credits based on the new alimony award. Id. at 534.

The trial judge did not follow our instructions, and without holding a hearing, issued a decision declining to adjust alimony or the Mallamo credit. S.W. III, slip op. at 3. Defendant appealed for a third time. Plaintiff did not cross-appeal or contest the income figure because, he argued, "[t]he fact remains that the '[p]laintiff's reported income' for purposes of determining alimony has been established and affirmed twice by this [c]ourt. It is the law of the case and

cannot and must not be disturbed." We reversed and remanded to the presiding judge because the trial judge was committed to his findings. Id. at 7.

Defendant subsequently moved for an award of appellate counsel fees in the amount of \$38,335 in connection with the third appeal. In an order dated January 28, 2021, we denied the motion without prejudice, referring the application to the trial court for consideration, as permitted by Rule 2:11-4.

The presiding judge handled the remand proceedings. She requested submissions from the parties regarding whether they agreed that the sole issues for determination on remand were: apportioning the previously-determined marital lifestyle of \$1,520,268 for purposes of alimony; calculating the Mallamo credit; and appellate counsel fees.⁴ In connection with the fee issue, the parties submitted updated case information statements (CISs), which showed a net worth of \$360,000 and \$13,648,540 for defendant and plaintiff, respectively.

Defendant's attorney argued the trial judge had quantified the annual marital lifestyle in the net amount of \$1,520,268, and we had affirmed this finding. Therefore, the presiding judge now only had to allocate the corresponding \$126,689 monthly figure for alimony purposes. Counsel pointed

⁴ The letter also identified a life insurance issue that we remanded, but it is not raised in this appeal.

out plaintiff had waived the ability to contest the lifestyle figure, including whether it was a gross or net figure, because he did not raise the issue on appeal.

Plaintiff's counsel acknowledged he had not appealed from the trial judge's quantification of the marital lifestyle because he was satisfied with the alimony ordered, even though he believed the judge's reasoning was incorrect. Counsel insisted plaintiff had demonstrated his average net income was not \$1,520,268, but a much lower figure, and the presiding judge should find that our decision otherwise was erroneous, or at best, dicta.

On July 14, 2021, the presiding judge entered an order, which stated:

The [c]ourt finds that . . . the previous [j]udicial finding by the [t]rial [j]udge and the Appellate Division on three remands established \$1,520,268 is the net figure for marital lifestyle, which is the law of the case, and has not been set aside by the Appellate Division, and will therefore not be revisited by this [c]ourt.

Plaintiff moved for reconsideration. On September 28, 2021, the presiding judge denied the motion and granted defendant's request to supplement the findings in her July 14, 2021 order. She held as follows:

Plaintiff did not file a formal cross-appeal of this issue of an "error" in referring to the marital lifestyle and his income as a net number in any of the previous appeals. However, the record does reflect [p]laintiff contested the "gross" versus "net" distinction before the Appellate Division in the [r]espondent [b]riefs that he filed in both the second and third appeals. Despite [p]laintiff's

raising the issue in the second and third appeals, as noted earlier in this [o]pinion, the Appellate Division reiterated in both [S.W. II] and [S.W. III] that these were "net" after-tax figures.

The presiding judge then conducted a plenary hearing and considered testimony from both parties and documentary evidence regarding the CIS expense categories from the marital lifestyle attributable to alimony. Defendant adduced charts, which showed: (1) the family budget based upon a 2009-2010 spending analysis commissioned by plaintiff totaled \$133,048 per month, or \$1,596,565 per year; (2) the trial judge's reversed monthly alimony award of \$36,792 (\$441,504 per year); (3) a proposed new monthly alimony award of \$70,384 per month (\$844,608 per year); and (4) a proposed budget for defendant of \$60,205 per month (\$722,460 per year). Because defendant's new proposed monthly alimony calculations would leave her with a greater share of the \$1,520,268, she argued a reasonable alimony figure would be \$60,000 per month or \$720,000 per year. Based upon this figure, defendant argued the Mallamo credit should be \$1,216,868 for the period October 11, 2011, through December 31, 2014,⁵ less the \$325,424,⁶ leaving a balance due of \$891,444.

⁵ The date of complaint until the date of the judgment of divorce.

⁶ This was the Mallamo credit we directed the trial judge to calculate in S.W. II.

Plaintiff's submissions employed a different methodology. He used the marital lifestyle amounts indicated on each party's 2011 CIS, deducted ten, twenty, twenty-five, or fifty percent from certain categories to account for the children's share of the costs, and then split the remaining numbers in half. His calculations did not include any funds for defendant for the following marital expenses: a second home; medical insurance; prescription drugs; eye care; dental care; or psychiatric care. Plaintiff argued defendant was entitled to monthly alimony of \$32,219, or pursuant to the figures in his 2011 CIS, \$28,155 per month. Plaintiff's calculations did not consider the \$1,520,268, because, he now claimed, the figure was an "unfortunate error."

On May 25, 2022, the presiding judge entered an order accompanied by written findings. She found defendant testified credibly about why alimony should be \$60,000 per month rather than the sum awarded by the trial judge. The presiding judge analyzed defendant's testimony regarding the marital schedule A, B, and C expenses, and explained in detail why she either did or did not credit defendant's arguments in allocating certain expense categories for alimony. The judge's opinion appended a chart showing the allocations she made to defendant, which totaled \$54,604 per month.

The presiding judge also analyzed plaintiff's testimony and proofs. Plaintiff claimed the budget, which showed a marital lifestyle of \$1,507,592, was a document prepared by his expert that was a "work in progress." The judge noted plaintiff could not recall whether there was a prior preliminary analysis projecting a marital lifestyle of \$1,507,592, even though it was in evidence and a part of his exhibit binder at the divorce trial.

As to the schedule A expenses, the judge noted plaintiff conceded he did not consult "any empirical or economic data for the formula he used to deduct [ten percent from the marital lifestyle] once the children had left the marital home." Moreover, he could not recall certain details about the marital lifestyle such as the sales price of the former marital residence. The judge "did not find his analysis reliable []or credible" on this issue.

The judge found defendant's representation of the schedule B expenses more reasonable than plaintiff's because he admitted the expense listed in his chart for a monthly vehicle payment was wrong. The judge noted plaintiff's schedule C expenses did not include basic expenses such as medical insurance, unreimbursed medical expenses, eye care, dental, and psychiatric costs. Moreover, plaintiff admitted defendant had a far greater hobby expense than he had allotted to her.

Although the judge accepted some of plaintiff's reasoning regarding the alimony allocation, she ultimately rejected his formulaic approach to the allocation in favor of defendant's line-by-line explanation of the reasons for the allocation. The judge awarded defendant alimony of \$54,604 per month (\$655,248 per year), effective December 31, 2014.

As for the Mallamo credit, the presiding judge deducted the \$36,724 per month plaintiff paid since December 31, 2014 from the \$54,604 monthly alimony amount. The difference was \$17,880, which she multiplied by the eighty-nine months between December 31, 2014 and May 2022, which totaled \$1,591,320. The judge then deducted the \$325,424 Mallamo credit determined by the trial judge following the second appeal, resulting in a Mallamo credit of \$1,265,896.

As to defendant's request for appellate counsel fees, the judge recounted the parties' arguments under the Rule 5:3-5(c) factors. She noted despite the several appeals, this was defendant's first request for fees. Defendant owed her attorney less than \$6,500. The judge found both parties "previously received substantial assets in equitable distribution," and the judge had now corrected the erroneous alimony award, which not only resulted in greater monthly alimony, but a sizeable Mallamo credit that nearly equated a year's worth of earnings for

plaintiff. Therefore, "[b]oth parties have the financial ability to pay counsel fees and costs. Further, both parties have proceeded in good faith in litigating their positions." Although defendant prevailed, no fees were incurred to enforce orders or compel discovery. The judge denied defendant appellate counsel fees.

I.

"We accord deference to a trial court's factfindings, particularly in family court matters where the court brings to bear its special expertise." Moynihan v. Lynch, 250 N.J. 60, 90 (2022) (citing Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "Under that deferential standard of review, we are bound to uphold a finding that is supported by sufficient credible evidence in the record." Ibid. "Deference [to fact findings] is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare, 154 N.J. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). "However, we owe no deference to a trial court's interpretation of the law, and review issues of law de novo." Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016).

II.

On the appeal, defendant contends the presiding judge erred in quantifying both the Mallamo credit and the post-judgment arrears and conflated the post-

judgment credits with Mallamo credits. Plaintiff does not dispute the latter point. Defendant also argues the judge erred by not awarding her appellate counsel fees. We address these arguments in turn.

A.

Pendente lite support orders are subject to modification at the time final judgment is entered. Mallamo, 280 N.J. Super. at 12. The decision whether to retroactively modify pendente lite support is discretionary. Jacobitti v. Jacobitti, 263 N.J. Super. 608, 618-19 (App. Div. 1993). However, a retroactive increase of pendente lite support is appropriate where the original amount awarded was "woefully inadequate" or "obviously unjust." Id. at 617-18.

The presiding judge correctly recognized there should be a Mallamo credit given her recalculation of the final alimony amount. However, the judge did not calculate the pendente lite Mallamo credit, and instead calculated defendant's post-judgment arrears and deducted the prior Mallamo credit ordered by the trial judge. The judge correctly found plaintiff's post-judgment arrears were \$1,591,320, and that plaintiff owed a Mallamo credit. However, the Mallamo credit, which is by definition pre-judgment, should not have been deducted from the post-judgment arrears.

Notwithstanding this error, the mathematics are simple, and we need not remand for a fourth time to calculate the Mallamo credit because the record contains defendant's detailed testimony of the credit owed. The pendente lite period spanned thirty-nine months between October 11, 2011 and December 31, 2014, during which plaintiff paid defendant a grand total of \$1,123,132 in support. Based on the judge's calculation of the monthly alimony of \$54,604, plaintiff should have paid defendant \$2,129,556 ($\$54,604 \times 39 \text{ months} = \$2,129,556$). Therefore, plaintiff owed defendant \$1,006,424 ($\$2,129,556 - \$1,123,132 = \$1,006,424$). This figure is further reduced by the Mallamo credit the trial judge granted defendant after S.W. II of \$325,424, which plaintiff paid pending the disposition of defendant's second appeal. Therefore, defendant's Mallamo credit is \$681,000 ($\$1,006,424 - \$325,424 = \$681,000$).

For these reasons, we vacate this portion of the presiding judge's decision and remand the matter to the Assignment Judge⁷ to enter an order in conformity with this opinion. To reiterate, the order shall provide that plaintiff shall pay defendant \$681,000 for the Mallamo credit and shall pay her \$1,591,320 for alimony arrears accrued through May 25, 2022.

⁷ At oral argument, the parties advised us the presiding judge has since retired.

B.

A trial court is obligated to consider nine factors under Rule 5:3-5(c), which are designed to measure whether counsel fees are compensable. Therefore, standing alone, one's success in the litigation is not a prerequisite for an award of counsel fees or the only consideration. Ibid. See also Kingsdorf v. Kingsdorf, 351 N.J. Super. 144, 158 (App. Div. 2002).

Counsel fee awards are discretionary. Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011). Therefore, if we conclude there is satisfactory evidentiary support for the trial judge's findings, our "task is complete and [we] should not disturb the result." Beck v. Beck, 86 N.J. 480, 496 (1981) (quoting State v. Johnson, 42 N.J. 146, 162 (1964)).

Pursuant to these principles, we are satisfied the presiding judge did not abuse her discretion when she declined to award defendant appellate counsel fees following S.W. III. The judge analyzed the Rule 5:3-5(c) factors and appropriately concluded they did not warrant an award of counsel fees. We decline to reach a different conclusion, especially considering S.W. III was borne of the trial judge's refusal to follow our instructions, and the fact defendant will receive a sizeable Mallamo credit and alimony arrears payment.

III.

On cross-appeal, plaintiff contends the amount of the monthly alimony award was erroneous because the presiding judge made a mistake of law when she applied the law of the case doctrine to bar consideration of anything other than the \$1,520,268 for purposes making the alimony allocation. He repeats the trial judge found this was a gross figure, and we misinterpreted the finding when we concluded the sum was net and therefore entirely disposable income. He claims this tainted our view of the alimony awarded by the trial judge.

Plaintiff argues our remand required the presiding judge to conduct a wholesale review of alimony and try the issue anew. He claims the judge erred when she: relied upon the 2009-2010 marital spending analysis; refused to allow testimony concerning defendant's current lifestyle; failed to consider defendant's investment income; and used duplicative categories of spending from defendant's submissions.

As we have previously noted, including in this case, adherence to instructions on remand "precisely as it is written" is the "peremptory duty" of a trial court. Tomaino v. Burman, 364 N.J. Super. 224, 233 (App. Div. 2003) (quoting Jersey City Redevelopment Agency v. Mack Props. Co. # 3, 280 N.J. Super. 553, 562 (App. Div. 1995)). Appellate court instructions are "binding,"

id. at 234, and the trial court "has no choice but to follow those instructions irrespective of its private view as to their soundness." Ibid. (quoting Pressler, Current N.J. Court Rules, cmt. on R. 2:11-3 (2004)).

The law of the case doctrine is another important principle. It is a discretionary rule intended "to prevent relitigation of a previously resolved issue." Jacoby v. Jacoby, 427 N.J. Super. 109, 117 (App. Div. 2012) (quoting In re Est. of Stockdale, 196 N.J. 275, 311 (2008)). Under the doctrine, "where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." Ibid. (quoting Bahrle v. Exxon Corp., 279 N.J. Super. 5, 21 (App. Div. 1995)). The prior determination "should be respected by all other lower or equal courts during the pendency of that case." Lombardi v. Masso, 207 N.J. 517, 538 (2011) (quoting Lanzet v. Greenberg, 126 N.J. 168, 192 (1991)). The doctrine "most commonly applies to the binding nature of appellate decisions upon a trial court if the matter is remanded for further proceedings, or upon a different appellate panel which may be asked to reconsider the same issue in a subsequent appeal." State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974).

Our remand instructions in S.W. III were clear. We directed the presiding judge to take the marital lifestyle figure of \$1,520,268, which the trial judge had

previously quantified following S.W. II, and apportion it between the parties to determine the proper alimony amount. S.W. III, slip op. at 6-7. We did not direct a reconsideration of any other aspect of the alimony statutory factors. Moreover, we clearly rejected plaintiff's argument the lifestyle figure was subject to taxes paid by the parties that would further reduce it. And, as we previously recounted, in S.W. II and S.W. III, plaintiff argued the trial judge's findings related to his income were correct and should not be disturbed.

Finally, Family Part judges have broad discretion to make alimony determinations. Martindell v. Martindell, 21 N.J. 341, 355 (1956). "Our review of the trial court's evidential rulings 'is limited to examining the decision for abuse of discretion.'" Ehrlich v. Sorokin, 451 N.J. Super. 119, 128 (App. Div. 2017) (quoting Parker v. Poole, 440 N.J. Super. 7, 16 (App. Div. 2015)). Therefore, for us to vacate a trial court's findings concerning alimony, we must be convinced the court clearly abused its discretion by failing to consider all the controlling legal principles, or by making a determination that could not reasonably have been reached on the record. Gonzalez-Posse v. Ricciardulli, 410 N.J. Super. 340, 354 (App. Div. 2009).

Pursuant to these principles, the presiding judge neither misapplied the facts nor erred as a matter of law in parsing the evidence and apportioning the

lifestyle to reach the monthly alimony amount. The judge considered the parties' testimony and the documentary evidence and made credibility and factual findings regarding the apportionment. Those findings were unassailable, and defendant's arguments to the contrary lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part and vacated and remanded in part for entry of an order consistent with this opinion. 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