

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1643-16T3

C.B.

Plaintiff-Appellant,

v.

K.B.K.,

Defendant-Respondent.

Submitted February 6, 2018 – Decided February 27, 2018

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FM-07-2369-13.

Barbara Ann Daniels, attorney for appellant.

Donahue, Hagan, Klein & Weisberg, LLC,
attorneys for respondent (Francis W. Donahue,
of counsel and on the brief; Alex M. Miller,
on the brief).

PER CURIAM

Plaintiff C.B. appeals from the equitable distribution provisions of a November 8, 2016 final judgment of divorce (JOD). Prior to the divorce trial, the court conducted a plenary hearing

and upheld the validity of an Antenuptial Agreement ("Agreement") plaintiff entered into with his wife, defendant K.B.K. Plaintiff also appeals a February 10, 2017 order that awarded defendant counsel fees in connection with plaintiff's unsuccessful challenge to the Agreement. Having considered plaintiff's arguments in light of the record and applicable legal standards, we affirm.

I.

The parties were married on November 25, 1995. This was the second marriage for both parties, and no children were born of the marriage.

When the parties were married, plaintiff worked for Johnson & Johnson (J&J) and earned \$70,000 annually. Plaintiff's annual earnings increased to \$90,000 by the time he left Johnson & Johnson in 2004. Plaintiff then obtained a new job with a printing company and earned \$38,000 annually until he retired in 2010.

Defendant is a licensed physician and earned in excess of \$500,000 when the parties were first married. In 2012, she began working as a part-time radiologist at a decreased annual salary of \$228,000. She subsequently retired in 2013.

The parties signed the Agreement the day before their marriage. The Agreement defined and distinguished between "Separate Property" and "Marital Property," and delineated the distribution of the parties' assets in the event of a divorce.

Pursuant to the Agreement, each party would retain his or her own separate property, while the marital property would be "subject to equitable distribution in such percentages or amounts as the parties shall agree or a [c]ourt of competent jurisdiction shall determine." The sole exception involved the marital residence, which defendant owned prior to the marriage. As to that asset, the parties agreed that plaintiff would receive fifty-percent of the increase in the home's value from the date of the marriage to its termination.

Prior to executing the Agreement, plaintiff represented that his salary was \$70,000, as noted above. He also listed assets totaling \$75,000, which included an \$18,000 pension, a \$51,000 IRA, and \$6000 in savings. Defendant provided a Case Information Statement (CIS) that disclosed earnings of approximately \$500,000 from her medical practice. Defendant's gross assets totaled \$951,000, comprised of the marital residence (\$300,000), a home in St. Croix (\$240,000), a time share (\$6000), furnishings (value unknown), two motor vehicles (\$19,000), an \$8000 Shearson Savings investment account, a \$350,000 pension, and an \$18,000 IRA.

In May 2013, plaintiff filed a divorce complaint seeking dissolution of the marriage, equitable distribution of marital property, and alimony. Defendant filed an answer and counterclaim, seeking to enforce the parties' Agreement, equitable distribution

of any marital property not considered separate property under the Agreement, and counsel fees. Plaintiff filed an answer to the counterclaim in which he also sought attorney's fees.

On May 28, 2015, the court conducted a pretrial plenary hearing to determine the validity of the Agreement and concluded it was enforceable. The court found plaintiff proffered no evidence to support his claim that the Agreement contained a rider that included a "sunset" provision, which would render the Agreement invalid if the parties remained married for twelve years. The court reserved decision on the issue of counsel fees.

A two-day divorce trial ensued before Judge Nancy Sivilli on February 29 and March 1, 2016. Before trial, the parties agreed the marital residence appreciated by \$330,000 during the marriage, and both parties would retain their respective vehicles.

The divorce trial focused on the parties' competing claims with respect to various assets, including: (1) the appreciation in the value of the marital home in Livingston; (2) a vacation home in St. Croix; (3) a home equity line of credit (HELOC); (4) a timeshare in Orlando, Florida; (5) plaintiff's IRA; (6) plaintiff's bank and brokerage accounts; (7) plaintiff's stocks, bonds, and securities; (8) plaintiff's 401k; (9) plaintiff's life insurance policies; (10) defendant's bank accounts; (11) defendant's 401k; and (12) defendant's brokerage account, which

included stocks, bonds, and an IRA. Plaintiff also sought a share of the tax refund proceeds from the parties' 2012 joint income tax returns and the personal property remaining in the marital home.

The court entered a JOD on November 8, 2016, accompanied by a comprehensive twenty-four page statement of reasons. The JOD distributed the contested assets as follows:

1. Plaintiff is entitled to [fifty percent] of the stipulated increase in the market value (\$330,000) of the [marital residence]. . . .
2. The parties shall equally share the net sale proceeds of \$83,814.73 from the sale of the St. Croix [vacation] condominium purchased during the marriage
3. The parties shall each be responsible for [fifty percent] of the [\$140,337] balance of the HELOC Plaintiff's [fifty-percent] share shall be applied as a credit against his [fifty-percent] share of the market increase of the [marital] property.
4. The parties shall each be entitled to [fifty percent] of their 2012 [f]ederal and [s]tate tax refunds
5. Defendant shall be entitled to keep the Orlando timeshare free from any claims from [p]laintiff
6. Defendant is entitled to [fifty percent] of [p]laintiff's [s]avings [b]onds on the grounds that they are marital assets Defendant is entitled to a credit of \$6,276.47 for the \$12,552.95 savings bonds that [p]laintiff cashed in post-complaint. Defendant is entitled to [fifty percent] of the remaining [ninety eight] bonds or [fifty percent] of the bonds' value.
7. Defendant is entitled to [fifty percent] of the cash surrender value of

- [p]laintiff's . . . life insurance policies on the grounds that they are marital assets.
8. Plaintiff's . . . [c]hecking [a]ccount is a marital asset and [d]efendant is entitled to [fifty percent] of the \$34,495.45 balance that existed at the time of the filing date of the [c]omplaint for [d]ivorce.
 9. Plaintiff's [b]rokerage [a]ccount is a marital asset and [d]efendant is entitled to [fifty percent] of the filing date balance of \$18,141.
 10. Plaintiff's Johnson & Johnson 401k is a marital asset based upon the court's analysis set forth in the attached Statement of Reasons. Defendant is entitled to [fifty percent] of the marital balance of \$267,183 or \$133,591.50.
 11. Plaintiff's . . . IRA, with an approximate value of \$100,000, is not a marital asset on the grounds that [p]laintiff acquired same prior to marriage. Accordingly, the account is not subject to equitable distribution and [p]laintiff shall keep the entire account.
 12. Defendant's . . . 401k is a marital asset based upon the court's analysis set forth in the attached Statement of Reasons. Plaintiff is entitled to [twenty percent] of the marital balance of \$337,552 or \$67,510 for the reasons set forth herein.
 13. Defendant's . . . [b]rokerage [a]ccount is not a marital asset The account, therefore, is not subject to equitable distribution and [p]laintiff is not entitled to any [of] the monies contained therein.
 14. Plaintiff is not entitled to any portion of the monies in [d]efendant's] [checking account]

15. Plaintiff is hereby permitted to retrieve his personal belongings that still remain in the former marital residence. . . .
16. The parties shall attempt to effectuate the above[-]ordered division of the marital assets in a way to minimize any tax consequences of the division and distribution of assets.

Pertinent to the present appeal, Judge Sivilli concluded the St. Croix vacation home was a marital asset because it was purchased during the marriage for \$132,000 using the parties' HELOC. Because both parties were equally responsible for the outstanding HELOC balance, the judge equally divided the proceeds from the sale of the St. Croix vacation home. The judge additionally noted defendant "paid the HELOC from her salary with minimal contribution from plaintiff," although plaintiff did contribute \$10,412.81 toward the condominium's maintenance fees from 2003 to 2016.

With regard to the parties' HELOC, Judge Sivilli recognized it was secured by a mortgage on the marital home and both were refinanced by defendant in 1998. At that time, plaintiff was added to the account as an obligor. Defendant continued to manage the HELOC thereafter, making monthly deposits and using the HELOC for expenses such as new cars, credit card bills, home renovations, the St. Croix vacation home, the Orlando timeshare, and the parties' vacations. At trial, plaintiff contended his one-half

portion of the HELOC balance should be reduced by \$43,000, which defendant used to purchase a new car. The judge disagreed, finding defendant's car was "bought during the marriage [and] is a marital asset." The judge additionally noted that plaintiff, "several years earlier[,] [also] purchased a new car."

During the marriage, the parties acquired a one-half interest in a timeshare in Orlando, Florida. Judge Sivilli determined the parties' interest in the timeshare was paid initially with defendant's American Express account and then the HELOC. The judge concluded defendant "is entitled to keep the timeshare and will carry the burden of . . . associated fees and costs [because] she still uses it and has been paying the costs related thereto post-[c]omplaint." The judge also found that plaintiff "has not used the timeshare since 2013" and "failed to present any evidence showing the timeshare has any value"

Addressing plaintiff's liquid assets, Judge Sivilli noted plaintiff listed two bank accounts and a brokerage account valued at \$34,495, \$2500, and \$18,000 respectively, on his 2013 CIS. The judge found that none of those accounts appeared on his disclosure statement that accompanied the parties' Agreement. Accordingly, the judge concluded the accounts were marital property and should be equally divided between the parties. The judge also found

defendant was entitled to one-half the value of plaintiff's savings bonds because they were acquired during the marriage.

With regard to plaintiff's 401k, the judge found:

[Plaintiff] has a 401[k] with Johnson & Johnson [J & J] which at the time . . . the [c]omplaint for [d]ivorce was filed had a balance of \$267,183. [Plaintiff] testified that he worked at J & J for [seventeen] years when he left the company in 2004. Accordingly, he commenced his employment prior to the marriage, around 1987. [Plaintiff] further testified that he had to work at J & J for [ten] years before he received the benefit of a 401k. Thus the vesting of the 401k occurred in 1997[,] which was during the marriage. The court finds that based upon those facts, the 401k is a marital asset since it was acquired during the marriage. The court is ordering that the [c]omplaint-filing balance of \$267,183 be divided equally between the parties on the grounds that the parties had a [seventeen]-year marriage and . . . [defendant] paid all of the marital expenses thereby freeing up [plaintiff's] income for contributions to the 401k. For those reasons, [defendant] is entitled to 50% of the asset. Any contributions or increase in value of the 401k post-complaint is not a marital asset and [plaintiff] shall be entitled to 100% of those funds.

Next, Judge Sivilli determined plaintiff was not entitled to any monies in defendant's checking account. The judge found the account was funded solely by defendant and it "was opened two years after [plaintiff] stopped making any financial contributions to the marriage and the parties' living expenses . . . and [defendant] was paying all of the bills"

The judge found defendant's 401k was a marital asset subject to equitable distribution. Defendant sought "all if not most of the monies . . . in the [401k] account as an offset to [plaintiff's] lack of financial contribution throughout the marriage, as well as to offset [plaintiff's] tax liabilities." Plaintiff instead contended he should be awarded fifty percent. Ultimately, the judge concluded:

[Plaintiff] is entitled to a portion of this 401k, but not [fifty percent] because of [plaintiff's] minimal financial contributions to the marriage and his total failure to contribute from 2009 to the present. As noted earlier, for [ten] year[s] of the parties' [seventeen]-year marriage, [plaintiff] contributed less than [two percent] to the parties' marital expenses and assets and for the other [seven] years he contributed nothing. Based thereon, the court finds that [plaintiff] is entitled to [twenty percent] of [defendant's] 401k. This amount balances the parties' relatively long[-]term marriage with the minimal financial contributions of [plaintiff] during the marriage.

Finally, Judge Sivilli found defendant's brokerage account was not subject to equitable distribution. The judge noted defendant originally opened the account in 1991 with Shearson using premarital money. The Shearson account later converted to a Morgan Stanley account as a result of corporate mergers and restructuring. The judge found this did "not change the premarital

status of the account," which was deemed to be separate property under the parties' Agreement.

Thereafter, on February 9, 2017, Judge Sivilli entered an order and an accompanying eight-page statement of reasons addressing the issue of counsel fees. The judge denied plaintiff's application for counsel fees, and awarded defendant \$10,274.50 in legal fees stemming from the plenary hearing. In her detailed analysis, the judge evaluated the nine factors a court must consider in determining whether counsel fees are appropriate under Rule 5:3-5(c). Those factors include:

- (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.

The judge first recognized each party had assets and annual income from social security, pensions, 401ks, and/or IRAs, although defendant's assets were worth significantly more. Accordingly, the judge determined each party had the ability to pay his or her own counsel fees.

As to factor three, the reasonableness and good faith of the positions advanced by the parties, the judge discussed that the plenary hearing was occasioned by plaintiff's assertion of an alleged rider to the parties' Agreement, which included a "sunset" provision that provided the Agreement was void after twelve years of marriage. Because plaintiff "failed to produce a signed copy of the alleged [r]ider or any witnesses to support his claim[,]" the court held the Agreement was valid and enforceable despite the parties' marriage lasting almost eighteen years. The court also found plaintiff's testimony on this issue was not credible. Consequently, Judge Sivilli gave "great weight" to this factor in deciding defendant's application for legal fees for the plenary hearing.

With respect to factor four, the judge determined both parties incurred substantial fees in litigating this case and, under factor five, no fees had yet been awarded to either party during the pendency of the litigation. Regarding factor six, the judge recognized plaintiff had paid \$10,000 toward his own counsel fees while defendant had paid \$94,371 to her attorneys. As to factor seven, the results obtained by the parties, the judge noted defendant was successful in enforcing the Agreement, but neither party was successful on all of the issues that were the subject

of the divorce trial. Finally, the court found both factors eight and nine inapplicable.

After analyzing these factors, Judge Sivilli concluded defendant was entitled to legal fees she incurred in "defending against [plaintiff's] meritless claim." This determination was largely grounded on factor three, the unreasonableness of plaintiff's position with respect to the Agreement, and the court's finding that defendant was not a credible witness at the plenary hearing. The court did not award fees in connection with the divorce trial.

II.

On appeal, plaintiff challenges the accuracy of the trial court's factual findings. He further contends the court abused its discretion in determining the equitable distribution of the parties' assets and liabilities. We do not find these arguments persuasive.

The goal of equitable distribution is to bring about a "fair and just division of marital assets." Steneken v. Steneken, 183 N.J. 290, 299 (citation omitted). Equitable distribution is a three-step proceeding, in which a trial judge must (1) "decide what specific property of each spouse is eligible for distribution"; (2) "determine its value for purposes of such

distribution"; and (3) "decide how such allocation can most equitably be made." Rothman v. Rothman, 65 N.J. 219, 232 (1974).

Pursuant to N.J.S.A. 2A:34-23.1, the trial court must consider various enumerated factors including the duration of the marriage, the income or property the parties brought to the marriage, and their economic circumstances at the time of division. A court should apply all the factors set forth in N.J.S.A. 2A:34-23.1, and distribute marital assets consistent with the parties' unique needs. Devane v. Devane, 280 N.J. Super. 488, 493 (App. Div. 1995).

"Equitable" does not necessarily mean "equal." Rothman, 65 N.J. at 232 n.6. A court must avoid a mechanistic division of assets. Ibid.; Devane, 280 N.J. Super. at 493; Stout v. Stout, 155 N.J. Super. 196, 205 (App. Div. 1977). "[A] trial judge does not fulfill his [or her] heavy judgmental obligation by routinely or mechanistically dividing the marital assets equally." Gibbons v. Gibbons, 174 N.J. Super. 107, 114 (App. Div. 1980), rev'd on other grounds, 86 N.J. 515 (1981) (citing Rothman, 65 N.J. at 232-33). Equal division may be appropriate in some cases, see, e.g., Overbay v. Overbay, 376 N.J. Super. 99, 114 (App. Div. 2005) (affirming the trial court's finding there was no basis for anything other than equal distribution of both assets and liabilities), but not in others, see, e.g., Winer v. Winer, 241

N.J. Super. 510, 522-24 (App. Div. 1990) (affirming a seventy-five percent allocation to husband, and twenty-five percent allocation to wife); Clark v. Clark, 324 N.J. Super. 587, 596-97 (Ch. Div. 1999) (stating that debts may be unequally allocated even where assets are not). The end result need only reflect that the "trial judge . . . appl[ied] all the factors set forth in N.J.S.A. 2A:34-23.1 and distribute[d] the marital assets consistent with the unique needs of the parties." Devane, 280 N.J. Super. at 493.

We defer to the trial court's fact findings that are rooted in its familiarity with the case, its opportunity to make credibility judgments based on live testimony and its expertise in family matters. Cesare v. Cesare, 154 N.J. 394, 411-13 (1998). Trial courts have broad discretion to allocate marital assets subject to equitable distribution. Clark v. Clark, 429 N.J. Super. 61, 71 (App. Div. 2012). "Where the issue on appeal concerns which assets are available for distribution or the valuation of those assets, . . . the standard of review is whether the trial judge's findings are supported by adequate credible evidence in the record." Borodinsky v. Borodinsky, 162 N.J. Super. 437, 443-44 (App. Div. 1978). "[W]here the issue on appeal concerns the manner in which allocation of the eligible assets is made," the appellate court reviews for abuse of discretion. Id. at 444.

Accordingly, "we will affirm an equitable distribution as long as the trial court could reasonably have reached its result from the evidence presented, and the award is not distorted by legal or factual mistake." La Sala v. La Sala, 335 N.J. Super. 1, 6 (App. Div. 2000); see also Perkins v. Perkins, 159 N.J. Super. 243, 247-48 (App. Div. 1978) ("An equitable distribution will be affirmed even if this court would not have made the same division of assets as the trial judge."). We review the trial court's legal conclusions de novo, however. La Sala, 335 N.J. Super. at 6.

Guided by these principles, we find no basis to disturb Judge Sivilli's findings, which find ample support in the record. Defendant paid the vast majority of the parties' expenses and proved plaintiff made little or no contribution to them. Defendant also proved she paid the HELOC, which funded many of the parties' assets and expenses, without plaintiff's contribution. Therefore, while the court divided many if not most of the parties' marital assets and liabilities equally, it was not unreasonable for the court to allocate defendant a larger share of her 401k account.

Also, plaintiff did not prove the value of the parties' time share. He also failed to establish that his savings bonds, bank accounts, brokerage account, and 401k were non-marital assets. "[T]he burden of establishing immunity from distribution of a

particular marital asset or portion of an asset rests upon the spouse who asserts it." Pacifico v. Pacifico, 190 N.J. 258, 269 (2007). "[A]ny property owned by a husband or wife at the time of marriage will remain the separate property of such spouse and in the event of divorce will not qualify as an asset eligible for distribution." Painter v. Painter, 65 N.J. 196, 214 (1974). With the exception of the increase in equity in the marital home, the parties clearly sought to reinforce this proposition in their Agreement.

Consequently, it was reasonable for the trial court to not require an equitable distribution of the time share, and permit defendant to share in plaintiff's bank and brokerage accounts, savings bonds, and 401k. In contrast, defendant proved her brokerage account was pre-marital and not subject to equitable distribution in accordance with the terms of the parties' Agreement. Also, as defendant points out, plaintiff entered the marriage with \$75,000 in assets and left with \$479,000.

In short, Judge Sivilli carefully addressed each of the factors set forth in N.J.S.A. 2A:34-23.1 in fashioning an appropriate equitable distribution award. The judge's findings as to the assets available for distribution and their valuation are supported by adequate and credible evidence in the record. We discern no abuse of discretion in the judge's allocation of the

various assets and liabilities, nor did such distribution lead to an unfair or inequitable result.

III.

Plaintiff also argues the trial court acted arbitrarily and capriciously and abused its discretion in awarding defendant counsel fees with respect to the plenary hearing on plaintiff's challenge to the Agreement. We disagree.

We review a trial court's award of attorney's fees for an abuse of discretion. Chestone v. Chestone, 285 N.J. Super. 453, 468 (App. Div. 1995) (citing Williams v. Williams, 59 N.J. 229, 233 (1971)). Thus, the decision to award counsel fees "in a matrimonial action rests in the discretion of the trial court[,]" Addesa v. Addesa, 392 N.J. Super. 58, 78 (App. Div. 2007), and will be disturbed "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)).

A trial court is authorized to award attorney's fees in Family Part proceedings in accordance with Rule 5:3-5(c). In determining whether to award such fees, a trial court must weigh each of the factors listed in Rule 5:3-5(c), and consider an applicant's need for fees, the respondent's ability to pay, and the applicant's

good faith in litigating the proceeding. Williams, 59 N.J. at 233.

Here, Judge Sivilli weighed the appropriate factors and ordered plaintiff to pay defendant \$10,274.50 for counsel fees and costs she incurred in the plenary hearing. We note this was a fraction of the total fees defendant incurred for the entire litigation. The judge accorded substantial weight to plaintiff's lack of candor and the complete absence of proof to support his position that a rider existed that would nullify the Agreement after twelve years of marriage. We discern no abuse of discretion in this regard.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION