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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-4996-15T3

KEVIN J. FRIEL,

Plaintiff-Respondent,

v.

CARLY A. BRAUN-FRIEL,

Defendant-Appellant.

Argued September 27, 2017 – Decided March 5, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Atlantic
County, Docket No. FM-01-0413-16.

D. Ryan Nussey argued the cause for appellant
(Klineburger and Nussey, attorneys; D. Ryan
Nussey and Carolyn G. Labin, on the brief).

Shirley Grasso argued the cause for
respondent.

PER CURIAM

Defendant appeals from a provision of the parties' Final Judgment of Divorce (FJOD) requiring plaintiff to pay her limited durational alimony of \$130 per week for two years. The relevant

section of the alimony statute, N.J.S.A. 2A:34-23(c), provides that in marriages of less than twenty years, absent exceptional circumstances, the duration of alimony shall not exceed the length of the marriage. Defendant argues she established exceptional circumstances entitling her to open-durational alimony and that the trial court erred by finding to the contrary. Alternatively, she argues she is entitled to a higher weekly alimony payment.

Although the trial court found exceptional circumstances, it did not explain why it nonetheless limited alimony to the duration of the marriage. Additionally, the court considered defendant's pending claim for social security disability as though an award had been made. Last, the court's finding concerning defendant's financial contribution to the marriage does not appear to have support in the record. Absent explanation from the trial court for these findings and decisions, we cannot conclude the court acted within its discretion in rendering the alimony award. For that reason, we vacate the award and remand this matter to the trial court for further proceedings.

These are the facts. The parties married in October 2010 and separated two years and eleven months later in September 2013. Plaintiff filed a divorce complaint in November 2014 and the court entered the FJOD on June 6, 2016.

Because the parties had no children and, for the most part, did not dispute equitable distribution, the primary issue they litigated at the hearing on plaintiff's divorce complaint was alimony. The court conducted the hearing in February 2016. Plaintiff, then age forty-six, provided the following testimony. He held a Bachelor's degree in criminal justice. Employed as a police lieutenant in a municipal police department, he earned \$106,483 annually and took home \$3961.97 per month based on the assumption there were 4.3 weeks in each month. In addition to state and federal deductions, deductions were made for his pension, certain work benefits and union dues, and child support for his two children born of a previous marriage. The child support deductions from his paycheck were \$498 every two weeks.

Plaintiff's monthly mortgage payment was \$2123. He also paid for his utilities, cable, internet, and a cell phone. He made automobile payments and paid for automobile insurance. In addition, as required by the judgment of divorce that terminated his first marriage, he accepted responsibility for paying one-half of his children's college tuitions. In February 2016, at the time of the hearing on plaintiff's divorce complaint concerning defendant, plaintiff's oldest child was attending college.

Plaintiff also testified he had pre-marital savings of \$59,099.65. As of the time of the hearing, the account balance

was \$13,379.17. According to plaintiff, since his separation from defendant, he was drawing approximately \$1114 a month from the account to satisfy his financial obligations. He supported his testimony with documentary evidence concerning the account.

Defendant, age thirty-five at the time of the hearing, testified that following the parties' separation she leased a first floor apartment for \$1000 per month and resided there with her son, who attended school nearby. She has a high school degree. She attended the Philadelphia Restaurant School for five months.

Defendant is disabled. The parties stipulated to the report of a doctor who had conducted an independent medical examination (IME) of defendant at plaintiff's request. The doctor reviewed numerous medical records and reports concerning defendant and examined her. He concluded, "[a]fter thoroughly reviewing the medical records which I received, I do not believe that [defendant] is capable of full or part-time employment." As a consequence of the parties' stipulation to the doctor's report, the trial court entered an order that stated, among other things, "[a]s defendant is disabled and has been deemed unable to work by [the doctor who performed the IME], neither party shall be required to present any expert on defendant's health or employability."

Defendant testified that after dating plaintiff for approximately one and one-half years, they married in October

2010. When they first met, defendant was employed at a children's rehabilitation medical daycare center as a satellite office manager. She earned approximately \$18 per hour.

Defendant had suffered from a condition known as reflex sympathetic dystrophy for approximately ten years before she met plaintiff. She took many medications, was undergoing physical therapy, and was receiving monthly Ketamine infusions. She explained the Ketamine helped control her pain by blocking pain transmitters. According to defendant, plaintiff was well aware of her medical condition when they first met. She had a visible scar on her neck from an incision made when her trachea was removed due to a tumor she developed as a result of Ketamine infusions. The tumor was removed in August 2008. Defendant said plaintiff told her that her health history did not matter, he would never leave her, and he would always be a part of her life. He said he would help her through her illness and always be there for her.

In the summer of 2010, after defendant started dating plaintiff but before they married, she had a mass removed from her pelvis. Plaintiff supported her through the surgery and her recovery. Defendant also tore her patella shortly before her wedding. She had her knee surgically repaired after she married plaintiff.

Defendant held her job during 2010, the year she married plaintiff, though she missed quite a bit of time due to her surgery and accidents. She had previously earned \$33,550 per year working for the children's rehabilitation center, and \$21,050 working at a second job. She was unable to return to work and hold a full-time job after marrying plaintiff.

Defendant testified that during her marriage to plaintiff, he took care of her son. Plaintiff encouraged her son to call him "Dad." He was the only father defendant's son had known. When they married, plaintiff said he was going to adopt defendant's son, but he never followed through. In April 2015, after plaintiff had filed for divorce, defendant obtained an order establishing paternity and compelling her son's biological father to pay child support.

Defendant testified her medical condition worsened considerably during her marriage to plaintiff. Her bank account had a balance of \$5.85. She testified she co-owned a 2011 Toyota Sienna with plaintiff, owned no real estate, and had no retirement accounts. She received \$258 per week in pendente lite alimony from plaintiff, and he also made the automobile payments and maintained insurance on the automobile.

In addition to her \$1000 monthly rent, defendant paid for utilities and a cellular telephone for her and her son. She also

paid for cable and internet for her apartment. She anticipated having to make car and insurance payments in the future. Obviously, she had to provide food for her and her son. She also incurred expenses for clothing, hair care, and unreimbursed medical treatment and prescriptions.

According to her case information statement, defendant's monthly budget was \$4974. She anticipated that social security disability payments would help her meet the budget.

After hearing the parties' testimony and considering their exhibits, the trial court awarded defendant limited durational alimony of \$130 per week for two years. In a written decision accompanying its order, the court noted plaintiff was paying defendant pendente lite support in the amount of \$258 per week, plus \$410.22 for a monthly car payment and \$106.92 per month for insurance, for total support of \$1626.54.¹ After making adjustments to the expenses defendant listed in her case information statement, the court determined her monthly expenses were \$4124. Further noting defendant received child support in the amount of \$1367 per month, the court deemed defendant's need

¹ The court took "official notice that the [parties'] Sienna has a probable value of approximately \$15,000.00." The court ordered the parties to sell the vehicle as soon as possible, the net proceeds to be paid to defendant to "enable her to purchase an alternative vehicle without a loan or with a loan with a relatively low balance."

to be \$2757. The court commented, "[d]efendant anticipates receiving social security disability in the amount of \$1600.00 per month, leaving a monthly need of \$1157.00 per month or \$269.00 per week. It is unclear how defendant is meeting her current expenses even with current spousal support." The court did state, however, defendant had "indicated that she meets her budget by not paying all of her bills all of the time."

Next, the court reviewed plaintiff's monthly income and expenses. The court noted with respect to plaintiff's payment of college tuition for his oldest child, "a student loan or Parent Plus loan could greatly reduce or virtually eliminate the monthly payment for a period of time, thus freeing up more money for the plaintiff for other purposes."

The court considered the factors relevant to alimony, contained in N.J.S.A. 2A:34-23(b), as well as factors indicative of exceptional circumstances requiring an adjustment to the duration of alimony, which are set forth in N.J.S.A. 2A:34-23(c). As to the statutory factors in subsection (b) concerning the award of alimony, the court gave the most weight to the need and ability of the parties to pay, the duration of the marriage, the age, physical and emotional health of the parties, and the earning capacities, educational levels, vocational skills and employability of the parties. As to factors suggesting exceptional

circumstances, the trial court gave considerable weight to the degree and duration of defendant's dependency on plaintiff during the marriage, as well as defendant's chronic illness and unusual health circumstance.

In making its determination, the court noted both parties had contributed financially to the marriage, though defendant had not been employed since 2013. The court stated that at the commencement of the marriage defendant was employed and earning \$18 per hour.

During its analysis of the factors contained in N.J.S.A. 2A:34-23(b), the court made downward adjustments to defendant's expenses, including the \$550 per month cost of healthcare. The court stated, "the charge for anticipated healthcare appears excessive as well. In fact, if the defendant obtains social security disability benefits, she will be also eligible for Medicaid. Even then, if she needs to go into the marketplace, \$550.00 seems higher than she will have to pay given her limited income."

On appeal, defendant argues because she met the criteria for "exceptional circumstances" set forth in N.J.S.A. 2A:34-23(c), the court erred by limiting the duration of alimony to the length of the marriage. Defendant asserts "the trial court's application of the statutory factors supported a finding of open-duration

alimony." Defendant contends because she suffers from chronic illness, is unemployable, and has no savings, she is entitled to open-durational alimony.

Defendant also argues that in view of plaintiff's ability to pay additional alimony, the court erred by only awarding \$130. Defendant maintains the court placed too little emphasis on her economic dependency upon plaintiff during the course of their marriage.

Plaintiff responds the court appropriately weighed all relevant statutory factors. Plaintiff notes the court carefully considered the exceptional circumstances that would permit it to award alimony for a duration longer than the marriage, but did not abuse its discretion by determining not to do so.

We review the trial court's alimony award under well-settled standards. A trial court has broad but not unlimited discretion in determining alimony. The court must consider the factors set out in N.J.S.A. 2A:34-23(b) and case law defining the purpose of alimony. Steneken v. Steneken, 367 N.J. Super. 427, 434 (App. Div. 2004), aff'd in part, modified in part, 183 N.J. 290 (2005). The factors enumerated in N.J.S.A. 2A:34-23(b) are:

- (1) The actual need and ability of the parties to pay;
- (2) The duration of the marriage or civil union;

(3) The age, physical and emotional health of the parties;

(4) The standard of living established in the marriage or civil union 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;

(5) The earning capacities, educational levels, vocational skills, and employability of the parties;

(6) The length of absence from the job market of the party seeking maintenance;

(7) The parental responsibilities for the children;

(8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;

(9) The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;

(10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;

(11) The income available to either party through investment of any assets held by that party;

(12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment;

(13) The nature, amount, and length of pendente lite support paid, if any; and

(14) Any other factors which the court may deem relevant.

"For any marriage or civil union less than 20 years in duration, the total duration of alimony shall not, except in exceptional circumstances, exceed the length of the marriage or civil union."

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

Exceptional circumstances which may require an adjustment to the duration of alimony include:

(1) The ages of the parties at the time of the marriage or civil union and at the time of the alimony award;

(2) The degree and duration of the dependency of one party on the other party during the marriage or civil union;

(3) Whether a spouse or partner has a chronic illness or unusual health circumstance;

(4) Whether a spouse or partner has given up a career or a career opportunity or otherwise supported the career of the other spouse or partner;

(5) Whether a spouse or partner has received a disproportionate share of equitable distribution;

(6) The impact of the marriage or civil union on either party's ability to become

self-supporting, including but not limited to either party's responsibility as primary caretaker of a child;

(7) Tax considerations of either party;

(8) Any other factors or circumstances that the court deems equitable, relevant and material.

[Ibid.]

"[B]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Genovese v. Genovese, 392 N.J. Super. 215, 222 (App. Div. 2007) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). Findings by the trial judge are "binding on appeal when supported by adequate, substantial, credible evidence." Ibid. For these reasons:

To vacate a trial court's finding concerning alimony, we must conclude that the trial court clearly abused its discretion or failed to consider all of the controlling legal principles, or we must otherwise be satisfied that the findings were mistaken or that the determination could not reasonably have been reached on sufficient credible evidence present in the record after considering all of the proofs as a whole.

[Gonzalez-Posse v. Ricciardulli, 410 N.J. Super. 340, 354 (App. Div. 2009).]

In the case before us, the trial court considered the statutory criteria in N.J.S.A. 2A:34-23(b) and (c). However, the trial court was unclear concerning three issues. First, the trial

court determined defendant had contributed financially to the marriage because she had been employed at the inception of the marriage in 2010 and had worked as well in 2013. However, defendant testified due to accidents and medical conditions she suffered, she worked only five of twelve months the year she was married, 2010. She was married in October 2010 and underwent surgery in November of that year. When specifically asked if she returned to work in January 2011, she stated she did not. She attempted to work for H&R Block in 2013 for two and one-half to three months, but was let go because she "couldn't really perform job duties that other people could." Thus, according to defendant, she contributed little or nothing to the marriage from her job. Yet, the trial court seemed to consider her financial contribution to the marriage a factor to which the court gave some weight, albeit not as much as other factors.

Second, the trial court considered defendant had a claim for social security disability pending. The court factored that into consideration as though defendant were receiving the social security disability. The court did not cite any source with respect to when defendant would receive social security disability, assuming she prevailed on her claim.

Lastly, although the court found two of the exceptional circumstances "which may require an adjustment to the duration of

alimony," the court did not explain why it was not making such an adjustment. In instances where a trial court finds a party has established exceptional circumstances that may require an adjustment to the duration of alimony, and the court declines to make such adjustment, the court must provide reasons for its decision. Here, we are unable to discern why the court did not adjust the duration of alimony despite defendant establishing exceptional circumstances. Although the statute does not mandate an adjustment, a trial court must provide its reasons for not doing so. Providing reasons demonstrates to the parties that a decision is not arbitrary and permits proper appellate review.

Absent further explanation concerning the court's finding defendant had contributed economically to the marriage, the court's consideration of social security disability payments that had yet to be awarded, and the court's non-adjustment to the duration of alimony despite finding exceptional circumstances that would warrant an adjustment, we cannot determine whether the court misapplied its discretion. For that reason, we remand this matter for the court to specifically address these issues, after giving the parties the opportunity to address them.

The provision of the FJOD concerning payment by plaintiff to defendant of durational alimony is vacated and this matter is

remanded to the trial court for further proceedings 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