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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-5041-15T2

N.B.,¹

Plaintiff-Respondent,

v.

J.B.,

Defendant-Appellant.

Argued April 10, 2018 - Decided May 1, 2018

Before Judges Reisner, Gilson, and Mayer.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FM-07-0166-12.

Janie Byalik argued the cause for appellant
(Pashman Stein Walder Hayden, P.C., attorneys;
Janie Byalik on the briefs).

Angelo Sarno argued the cause for respondent
(Snyder Sarno D'Aniello Maceri & da Costa LLC,
attorneys; Angelo Sarno, of counsel and on the
brief; Lydia S. LaTona, on the brief).

PER CURIAM

¹ We use initials to protect the parties' privacy interests.

Defendant appeals from Paragraphs 1 and 2 of a Dual Judgment of Divorce (DJOD) entered on August 4, 2015, and a June 28, 2016 order denying his motion for reconsideration and awarding attorney's fees to plaintiff. We affirm.

The parties married in 1989 and had two children, who are now emancipated. Plaintiff filed for divorce in July 2011. The parties exchanged discovery and attempted to negotiate an amicable resolution of their divorce, including the payment of alimony. When settlement discussions failed, the family judge conducted a four-day trial. On August 4, 2015, the judge signed a DJOD and placed her statement of reasons on the record. Under the DJOD, the judge ordered monthly alimony to plaintiff in an amount higher than plaintiff requested during settlement negotiations, but less than the amount of pendente lite support previously ordered.

Plaintiff submitted three case information statements (CIS) over the course of the litigation. Each CIS included a marital lifestyle budget and an individual budget. Plaintiff completed the CIS forms using the family's monthly bills, bank statements, and credit card statements. According to plaintiff's trial testimony, her CIS reflected the marital lifestyle "give or take some." Plaintiff testified that after the parties separated, she reduced her lifestyle expenses because she "had no choice . . . you can't spend more than you make." Plaintiff

explained that she was not enjoying the same lifestyle as she had during the marriage. According to the testimony, plaintiff was spending about half as much money as she spent during the marriage.

Plaintiff's CIS included amounts for past and future dental work. Plaintiff testified she "always ha[d] a lot of dental [expenses]" because she "ha[s] horrible teeth," requiring numerous dental implants and caps. Plaintiff presented dental bills showing an outstanding balance, as well as an estimate for future dental work. Plaintiff testified the future work included root canals and crowns, and none of the work was cosmetic. Defendant confirmed plaintiff "always had a lot of dental work" during the marriage. Defendant failed to refute the costs for plaintiff's past and future dental work.

Defendant's attorney cross-examined plaintiff on her CIS. However, defendant failed to submit any evidence disputing the amounts set forth in plaintiff's CIS, and never requested copies of the documents plaintiff used to create her CIS. Defendant testified that plaintiff's expenses on her CIS seemed high, and he believed plaintiff was living the same lifestyle as she had during the marriage.

In the alimony awarded to plaintiff, the judge included monthly expenses for plaintiff's dental work and plaintiff's payment of her son's college expenses until graduation. The judge

found plaintiff testified credibly regarding her past and future dental expenses and noted defendant acknowledged plaintiff's extensive dental work throughout the marriage. On the inclusion of plaintiff's payment of her son's college expenses in the alimony award, the judge determined plaintiff was foregoing personal lifestyle expenses to pay for her son's college. The judge recognized the financial constraints imposed on plaintiff to contribute to her son's college expenses, and declined to penalize plaintiff for reducing her lifestyle while her son completed his education.

On August 27, 2015, defendant filed a motion for reconsideration regarding the alimony and requested that plaintiff pay his attorney's fees. Plaintiff cross-moved for an award of attorney's fees. On June 28, 2016, the judge issued a written statement of reasons in support of her decision denying the motion for reconsideration and amplifying her reasoning in support of the alimony amount awarded.

In connection with defendant's motion for reconsideration of the alimony award, the parties presented evidence of their counsel fees. Defendant, represented by his former law firm, testified that he incurred legal fees in excess of \$30,000. Defendant submitted a bill purporting to reflect the amount owed for legal fees. Defendant testified that he had not paid any legal fees as

of the date of the divorce trial because his counsel was "kind enough to let [him] float on this, but eventually [defendant would] have to pay it." The judge questioned defendant's attorney about defendant's payment of legal fees and asked defense counsel to submit bills or invoices reflecting defendant's fees, as well as evidence that defendant's former firm was carrying a balance owed by defendant for legal work associated with the divorce action.²

Plaintiff's counsel submitted a detailed certification, with invoices, in support of plaintiff's request for attorney's fees. Plaintiff incurred in excess of \$42,000 in attorney's fees and costs in the divorce action. Plaintiff paid approximately \$39,000 of her legal expenses. Applying the factors for awarding counsel fees, N.J.S.A. 2A:34-23 and Rule 5:3-5(c), the judge determined defendant should pay \$21,000, representing one-half of the legal fees incurred by plaintiff.

Defendant appeals, arguing the family judge erred in calculating plaintiff's monthly expenses to determine alimony. Specifically, defendant challenges the judge's findings related to plaintiff's dental expenses and their son's college expenses. Defendant also contests the award of counsel fees to plaintiff. In addition, defendant seeks to compel plaintiff to elect the

² It does not appear that the requested documents were submitted to the court.

survivor annuity option for her pension and designate him as the beneficiary.

We accord deference to the factual findings of the family judge "[b]ecause of the family courts' special jurisdiction and expertise in family matters." Cesare v. Cesare, 154 N.J. 394, 413 (1998). We reverse only if the family judge's conclusions are "clearly mistaken" or "wide of the mark," to "ensure that there is not a denial of justice." Parish v. Parish, 412 N.J. Super. 39, 48 (App. Div. 2010) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). We are not bound by the family judge's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

I.

Our review of an alimony award is limited. On appeal,

[a] trial court's findings regarding alimony should not be vacated unless the court clearly abused its discretion, failed to consider all of the controlling legal principles, made mistaken findings, or reached a conclusion that could not reasonably have been reached on sufficient credible evidence present in the record after considering the proofs as a whole. Substantial weight should be given to the judge's observations of the parties' demeanor and credibility.

[J.E.V. v. K.V., 426 N.J. Super. 475, 485 (App. Div. 2012) (citation omitted).]

N.J.S.A. 2A:34-23 sets forth factors to be considered in the trial court's award of alimony. "The goal of alimony is to assist the supported spouse in achieving a lifestyle 'reasonably comparable' to the one enjoyed during the marriage." J.E.V., 426 N.J. Super. at 485 (quoting Steneken v. Steneken, 183 N.J. 290, 299 (2005)).

Defendant argues the family judge erred in determining plaintiff's alimony award because: (1) plaintiff's dental expenses were exaggerated and non-recurring; (2) \$1000 of the individual expenses included in plaintiff's CIS was for plaintiff's portion of their son's college costs, which the parties were already ordered to split, and was not a recurring cost; and (3) the judge's finding that plaintiff "could" use the \$1000 tuition money for vacations, entertainment, and other personal expenses after the child graduated was not supported by the record.

Defendant erroneously contends that plaintiff provided no evidence documenting her dental expenses. At trial, plaintiff submitted past due dental bills and estimates for future dental work totaling over \$20,000. Defendant failed to challenge plaintiff's trial testimony regarding her dental expenses. The judge deemed plaintiff's testimony on the subject credible and reasonable. Defendant failed to present any evidence warranting

reversal of the judge's credibility and factual findings related to plaintiff's dental expenses.

Defendant also argues the judge erred when she included \$1000 of their son's college expenses in arriving at plaintiff's monthly living expenses. Defendant claims the college expenses were calculated and allocated between the parties pursuant to Paragraph 11 of the DJOD. Defendant contends the inclusion of their son's college expenses in the alimony award results in him paying twice for the same expense.

The judge explained she included this expense "because plaintiff is currently incurring that expense. The court recognized that once the child graduates those expenses will no longer exist, but acknowledged that there will be other expenses that plaintiff has forgone to pay for college and may begin to incur those expenses such as vacations, entertainment, etc." Plaintiff testified that had she not spent the money on her son's college expenses, she would have spent the money on things for herself. The judge concluded plaintiff credibly testified that she had to forego certain lifestyle expenses due to her financial limitations resulting from the divorce action.

Based on the judge's credibility determinations and application of the statutory factors in calculating the alimony award, we find the alimony awarded was not an abuse of discretion.

The judge made findings based on her evaluation of the parties' evidence and testimony, and determined plaintiff had a need for, and defendant had an ability to pay, the monthly alimony amount.

II.

A family judge's assessment of legal fees in a divorce action is discretionary. We "will disturb a trial court's determination on counsel fees only on the 'rarest occasion,' and then only because of clear abuse of discretion." Slutsky v. Slutsky, 451 N.J. Super. 332, 365-66 (App. Div. 2017) (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)).

N.J.S.A. 2A:34-23 authorizes the trial court to award attorney's fees in matrimonial actions. The court "shall consider 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." N.J.S.A. 2A:34-23. Rule 5:3-5(c) also provides guidelines for awarding counsel fees in a matrimonial action. A court

must consider whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature and extent of the services rendered; and the reasonableness of the fees.

[Mani v. Mani, 183 N.J. 70, 94-95 (2005) (emphasis omitted).]

Defendant argues the judge erred because she mistakenly concluded defendant had not incurred legal fees during the divorce action. Defendant also asserts the judge failed to consider his ability to pay plaintiff's attorney's fees.

In this case, defendant and his attorney testified that defendant had not paid any money for his legal representation, and that defendant's former law firm contemplated a discharge of the fees owed by defendant. Defense counsel acknowledged he had not submitted invoices to the court. In deciding attorney's fees, the judge found "[d]efendant claims that his former firm expects [him] to pay \$30,000 for services upon his behalf, but submits no proofs that the fees have ever been calculated, charged, or documented."

Defendant also argues the judge erred in awarding attorney's fees because she failed to account for defendant's financial situation at the time of the application. Specifically, defendant contends that the judge imputed annual income to him four times greater than defendant's earnings at the time.

Defendant relies on his self-serving testimony regarding his ability to pay attorney's fees. The judge found defendant's drastic reduction in income during the divorce proceedings was likely the result of a lack of good-faith effort to secure adequate employment and that defendant's annual income during the years

preceding the divorce action supported his ability to pay one-half of plaintiff's attorney's fees.

In awarding attorney's fees to plaintiff, the judge found that: (1) defendant had not paid any legal fees during the four years of the divorce action; (2) defendant submitted no evidence that he was billed for legal services or would ever have to pay for legal services related to the divorce action; (3) defendant acted in bad faith by rejecting a reasonable settlement offer from plaintiff, forcing plaintiff to expend legal fees associated with extensive discovery; and (4) plaintiff paid almost \$40,000 in attorney's fees. The judge found that defendant's free legal representation caused him to take unreasonable positions and protract the litigation, because defendant had "no 'skin in the game.'" The judge concluded it would be inequitable for plaintiff to bear the entire cost of her representation while defendant was able to litigate the matter for free. Based on the foregoing, we find the judge did not abuse her discretion in awarding attorney's fees to plaintiff.

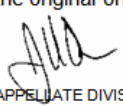
III.

For the first time on appeal, defendant seeks to compel plaintiff to elect the survivor annuity option for her pension and designate defendant as the beneficiary. Because this issue was not presented to the family judge, the issue is not properly before

us. A trial court "[can] not grant relief on an issue of which it was unaware." State v. Stein, 225 N.J. 582, 586 (2016). For that reason, "appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). In addition, defendant's statement of facts fails to cite references in either the trial court transcripts or other documents regarding the pension issue per Rule 2:6-2(a)(5) (requiring "[a] concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript.")

Affirmed.

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


CLERK OF THE APPELLATE DIVISION