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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3302-21

A.P.,[1]

Plaintiff-Respondent/
Cross-Appellant,

v.

D.P.,

Defendant-Appellant/
Cross-Respondent.

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Argued May 8, 2024 – Decided June 6, 2024

Before Judges Currier, Firko, and Susswein.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FM-20-1124-20.

Bonnie C. Frost argued the cause for appellant/cross-respondent (Einhorn, Barbarito, Frost & Botwinick, PC, attorneys; Bonnie C. Frost, Patricia Lynn Veres, Matheu D. Nunn, and Jessie M. Mills, on the briefs).

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[1] To safeguard their privacy, we refer to the parties and their minor children by their initials. R. 1:38-3(d).

Lizanne J. Ceconi argued the cause for respondent/cross-appellant (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, PC, attorneys; Lizanne J. Ceconi and Nancy C. Richmond, on the briefs).

PER CURIAM

Defendant D.P. appeals from the May 24, 2022 final judgment of divorce (JOD) entered in this action involving his ex-wife, plaintiff A.P., following an eleven-day trial. Defendant argues the Family Part judge erred by: (1) not granting him full joint legal and physical custody of the parties' three minor children and granting plaintiff sole educational decision-making authority; (2) reducing his parenting time and omitting vacation time with the children; (3) barring discovery regarding plaintiff's family's trusts; (4) awarding limited duration alimony to plaintiff; (5) requiring him to pay $535 per week in child support; (6) not awarding him 100% of his retirement accounts; and (7) denying him an award of counsel fees.

On cross-appeal, plaintiff argues the judge erred in denying her an award of counsel fees. Following our review of the record and applicable law, we reject defendant's arguments on custody, parenting time, discovery regarding the trusts, and counsel fees. However, because the judge failed to quantify the marital lifestyle, we reverse the alimony award and remand for a new analysis, which shall include a numerical finding as to the marital lifestyle and

reconsideration of Mallamo[2] credits. The child support award is reversed because the judge utilized an erroneous alimony award in the child support analysis. The equitable distribution award is reversed and remanded because the judge omitted a credit awarded to plaintiff and an advance awarded to defendant. We affirm the order denying plaintiff's counsel fees.

I.

Factual Background

The parties married in September 2015. They have twins, T.P. and G.P., born in February 2017; and a son, J.P., born in October 2018. During the marriage, plaintiff was primarily a stay-at-home parent but managed a small interior design business briefly in the early part of the marriage, never earning more than $44,000 annually. Defendant was employed by MetLife until September 2019 and earned $132,900 that year. In February 2020, defendant began working for Rothesay Asset Management, with a base salary of $200,000 per year, plus bonuses of approximately $79,000.

Contributions From Plaintiff's Parents

In 2015, plaintiff's parents purchased, through the [J.N.P.] 2011 Dynasty Trust (the Dynasty Trust), a home in Chatham for $985,000 for the parties' use.

[2] Mallamo v. Mallamo, 280 N.J. Super. 8, 11 (App. Div. 1995).

The parties leased the home from the Dynasty Trust for $1,285 per month, which covered the cost of the property taxes and insurance. Three years, later in 2018, through the Dynasty Trust, plaintiff's parents purchased a larger home in Summit for approximately $2,000,000 for the parties. The parties leased the home from the Dynasty Trust for $3,425 per month, again to cover property taxes and insurance. The Dynasty Trust provided significant funds to facilitate the move and renovate the home.

Plaintiff's parents paid for the children's nannies, preschool tuition, swimming classes, country club and other memberships, and routinely paid for the parties, their children, and nannies to fly by private jet to their home in Naples, Florida. The parties paid for certain Schedule C expenses using defendant's income. In 2018, plaintiff's parents made discretionary cash gifts to the parties and their two children for $25,000 each.

The following year, 2019, plaintiff's parents provided cash gifts to the parties and all three children of $28,000 each. According to an email defendant sent to plaintiff's father, he stated the gifts were intended to "supplement [defendant's] support of the family" and allow a "more comfortable lifestyle." No further gifts were made after the complaint for divorce was filed.

In 2019 when the marriage broke down, defendant began providing plaintiff with $5,000 quarterly—$1,666 per month—towards household expenses. He transferred several marital accounts into his own name. According to plaintiff, she began paying the rent and utility expenses for the marital home from her own accounts, using defendant's payments and the gifts from her parents, because defendant was not giving her sufficient monies to cover the family's expenses. From July 2019 through 2021, plaintiff executed multiple promissory notes in favor of her father and borrowed in excess of $300,000 to pay expenses.

In January 2020, defendant ceased making payments to plaintiff but began paying the family's utility bills. He refused to pay the rent and other Schedule A expenses. That month, plaintiff transferred two marital accounts totaling $86,618 to a new account in her sole name to pay bills and legal fees.

On January 21, 2020, plaintiff filed her complaint for divorce, after four years and four months of marriage. Defendant filed an initial case information statement (CIS) on February 24, 2020. As to monthly expenses, he provided almost identical estimates for his joint and individual lifestyles, including $9,089 per month for Schedule A expenses, which did not include a mortgage payment or rent, but included $3,072 in real estate taxes, and the balance for

utilities, maintenance, service, and repairs. As to Schedule B, he estimated $1,188 monthly, which included car insurance and commuting expenses. Regarding Schedule C, his estimate was $41,801 monthly, which included $11,292 in savings and investments, $9,900 for vacations, $5,000 for restaurants, $3,787 for a nanny, and $1,500 per month for clothing. Defendant estimated the joint marital lifestyle was $52,078 per month.

As to assets, defendant's CIS reported joint and individual bank accounts, two vehicles, and his individual, premarital IRA. The assets totaled $579,519, of which defendant alleged $461,124 were subject to equitable distribution. He listed no liabilities.

Plaintiff filed an initial CIS on April 17, 2020. As to the monthly joint marital lifestyle, she estimated $6,308 in Schedule A expenses, including $3,425 in rent paid to the Dynasty Trust, and the balance for utilities, lawn care, and furnishings. As to Schedule B, plaintiff estimated joint expenses of $1,136 per month, including car insurance, fuel, and commuting expenses. Under Schedule C, she listed joint monthly expenses of $10,896, including $2,000 in savings and investments, $1,051 in gifts, $968 in club dues, $802 for clothing, and $768 for domestic help. Plaintiff thus estimated the joint marital lifestyle at $18,340 per month.

Relevant here, plaintiff acknowledged that her parents maintained her country club membership, paid $3,225 per month for the nanny, and $421 per month for the children's private school, but she did not include these sums in her monthly joint lifestyle estimate. Separately, plaintiff estimated that the lifestyle costs for herself and the three children was $12,877 per month, which included $6,189 for Schedule A expenses, $313 for Schedule B expenses, and $6,375 for Schedule C expenses, again noting that her parents paid for additional items not included in the estimate.

As to assets, plaintiff reported various joint and individual bank accounts and two cars. She included $74,000 for the value of defendant's "severance package buyout." Plaintiff estimated the assets totaled $862,627, of which she alleged $643,292 was subject to equitable distribution. Plaintiff listed liabilities of $8,676 for credit card balances.

On September 20, 2021, defendant filed an updated pretrial CIS. As to his then-current monthly expenses, he reported $4,363 in Schedule A expenses including an apartment rental at $2,350, $1,464 in Schedule B expenses, and $8,121 in Schedule C expenses, including $1,666 in family support payments, $1,351 for debt service, and $943 for sports and hobbies. Defendant estimated that his total monthly A, B, and C expenses were $14,221.

Defendant included an updated list of assets and liabilities, reflecting assets of $1,963,090.24, which included an unexplained substantial increase in his estimated value of the contents of the marital home. He also listed liabilities of $458,599.32, which included $366,332 for promissory notes plaintiff allegedly signed in favor of her parents, as well as credit card debt.

On September 21, 2021, plaintiff filed an updated pretrial CIS reflecting the same estimates as her prior CIS for the marital lifestyle. She estimated that her then-current lifestyle, including the three children, included $6,470 for Schedule A expenses, $634 for Schedule B expenses, and $5,390 for Schedule C expenses, for a total monthly lifestyle of $12,494. She updated her gross assets to be worth $1,052,525, of which she alleged $494,785 was subject to equitable distribution, and liabilities of $384,506, including $366,332 for loans from her father.

Plaintiff's Pendente Lite Application

On April 22, 2020, plaintiff moved for pendente relief, seeking residential custody of the children with daytime parenting time for defendant on alternate weekends and some weekdays, exclusive use and occupancy of the marital home, and pendente lite support of $12,500 per month. Defendant cross-moved in opposition, seeking daytime and overnight parenting time on alternate

weekends, and proposed that he continue to pay $5,000 per quarter, or $1,666 per month, and that plaintiff pay the Schedule A expenses.

The judge entered a pendente lite support order and statement of reasons on July 17, 2020, and an amended order on August 7, 2020, with both parties permitted to remain in the marital home. The judge awarded the parties joint legal custody of the children. Because defendant "ha[d] been the primary breadwinner," and without further commentary on plaintiff's need, the judge ordered defendant to pay plaintiff $1,666 per month in unallocated pendente lite support retroactive to April 22, 2020, and all Schedule A expenses associated with the marital home while he remained living there including rent, property taxes, and upkeep, retroactive to April 22, 2020.

On September 9, 2020, plaintiff moved for enforcement of the pendente lite order, and to hold defendant in violation of litigant's right for failing to pay certain ordered retroactive expenses. She certified that after the pendente lite order was entered, defendant paid only the court ordered support of $1,666 per month, plus gas, electric, water, internet, and insurance, but failed to pay the rent arrears, ongoing rent payments, and retroactive maintenance payments. Plaintiff claimed defendant owed $8,489.03 in maintenance arrears and $13,900 in rent arrears. Defendant cross-moved in opposition, and proposed that his

retroactive arrears for Schedule A be offset by half of the approximately $86,000 that plaintiff withdrew from joint marital funds.

On January 12, 2021, the judge entered a consent order directing defendant to pay the rent arrearages of $17,125 from marital assets as an advance on his share of equitable distribution, and to pay the rental costs going forward. The judge also ordered defendant to pay the outstanding maintenance expenses retroactively and going forward while he remained in the home. In addition, the judge appointed a parent coordinator (PC) and a best-interests custody evaluator, Dr. Mathias Hagovsky. In June 2021, the parties vacated the marital home.

Hagovsky Evaluations

Both parties completed court-ordered forensic psychological evaluations with Hagovsky, who issued a best interests report on December 10, 2020. Hagovsky concluded that neither parent suffered from any psychopathology which might affect their parenting ability. He concluded that plaintiff had functioned as the children's parent of primary residence (PPR) from the outset, though defendant "did many things as a parent." Hagovsky found both parents were "willing and capable" of caring for the children, but noted that, "with the largesse of her family," plaintiff could devote all of her time to the children,

while defendant would be required to maintain a full-time job, encumbering his availability.

Hagovsky recommended that the parties share joint legal custody, with plaintiff designated the PPR, and defendant as the parent of alternate residence (PAR). Hagovsky recommended defendant have parenting time from Thursday afternoons until Friday mornings, and every other weekend from Friday until Monday morning. Hagovsky further recommended that following plaintiff's weekends with the children, defendant have parenting time for dinner on Monday nights and that the parties share or alternate holidays and school breaks and work with the PC to implement that arrangement.

Defendant's Subpoenas and Discovery as to Plaintiff's Trusts

On December 22, 2020, defendant issued subpoenas to two brokerage firms handling plaintiff's family's trusts. Plaintiff moved to quash the subpoenas and defendant moved to compel production of documents relating to any trusts of which plaintiff and the children were beneficiaries, including accountings of these trusts.

Following entry of a protective order, plaintiff provided copies of trust instruments in her possession for the Dynasty Trust, the [J.N.P.] 2010 Grantor Retained Annuity Trust (the GRAT), and a third trust, the [P] Family 2000

Survivorship Trust, which she certified was unfunded. She subsequently provided a copy of the trust instrument for a fourth trust, the [J.N.P.] 2012 Irrevocable Family Trust, of which she was a beneficiary. She certified that none of these trusts supported the marital lifestyle, which was instead supported by defendant's earnings and discretionary gifts from her parents' personal funds.

Plaintiff's father provided a certification in opposition to the motion, arguing that production of information about the various trusts would invade his privacy. He certified that plaintiff has no guaranteed income from any trust he created until she turns sixty-five, and the only benefit the parties have received from the Dynasty Trust and the GRAT is the ability to rent their homes at below-market rates.

Plaintiff's father confirmed that these trusts have not provided "a single dollar of income" to the parties or their children. He explained that although plaintiff is a trustee of the Dynasty Trust, she cannot make distributions to herself, and the GRAT is not presently funded, but included sub-trusts for plaintiff. At her deposition, plaintiff's mother testified she was not aware of any other trusts affecting this matter.

Plaintiff's parents' estate planning attorney provided a letter describing the terms of the Dynasty Trust, the GRAT, the [P.] Family 2000 Survivorship Trust,

and the [J.N.P.] 2012 Irrevocable Family Trust. Counsel confirmed that plaintiff receives no guaranteed payments from any of these trusts, she has no authority to make disbursements to herself, and represented that the latter two trusts are not yet funded.

On March 9, 2021, following a hearing, the judge entered an order, accompanied by a comprehensive statement of reasons, denying plaintiff's application to quash the subpoenas, and also ordered plaintiff to produce redacted versions of the credit card statement for the credit card she shared with her parents. The judge also directed plaintiff to provide an accounting of disbursements from the Dynasty Trust and the GRAT, but not any other trusts of which plaintiff and the children were beneficiaries. Plaintiff's parents then provided a spreadsheet detailing the distributions from the Dynasty Trust and the GRAT, and reflecting expenses associated with the purchase of the homes but showing no direct distributions to plaintiff.[3]

Defendant moved for reconsideration of the March 9, 2021, order, seeking full discovery of all trusts under which plaintiff and the children were

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[3] The parties acknowledge that plaintiff received a one-time reimbursement of $47.99 from the Dynasty Trust for hardware purchased for the marital home, and before the parties met, a $49,000 check to pay a life insurance premium on her father's life.

beneficiaries; plaintiff cross-moved in opposition and for counsel fees. After a hearing, the judge denied both applications in an order dated June 11, 2021. Defendant's subsequent motion for leave to appeal was denied.

Custody and Parenting Time Disputes

In July 2021, after the parties moved to separate residences, plaintiff moved for a custody and parenting time order consistent with Hagovsky's recommendation, and defendant moved for an equal parenting time schedule. He also alleged that plaintiff was pursuing enrollment in private school for the children without his consent.

On July 30, 2021, the judge entered an order maintaining joint legal custody, designating plaintiff as the PPR and defendant as the PAR, and providing for pendente lite parenting time consistent with Hagovsky's recommendation. The judge awarded defendant additional overnight parenting time beyond Hagovsky's recommendation—parenting time on alternate weekends from Friday until Monday morning, and overnights every week on Monday and Thursday nights. The judge held that neither party could unilaterally place the children in private school without the consent of the other and ordered the parties to keep each other apprised of all information regarding the children's education and activities.

The Divorce Trial

Trial began in September 2021, and continued for eleven nonconsecutive days, with plaintiff represented by counsel and defendant proceeding pro se, although he was represented by counsel before trial. Plaintiff and defendant were the only witnesses who testified.

Plaintiff's Case

Plaintiff testified that she has an undergraduate degree and a Master of Fine Arts degree. She worked as an interior designer at the beginning of the marriage and earned approximately $30,000 per year.

Regarding custody, plaintiff testified it was difficult to co-parent with defendant, especially with scheduling doctor's appointments and agreeing on extracurricular activities. Plaintiff testified that defendant took the children out of town on a vacation without her permission while she was away. If awarded custody, plaintiff testified she would be "fully available" for the children and described her parenting skills.

Plaintiff stated defendant was capable of caring for the children's physical needs but struggled to address their emotional needs. Plaintiff agreed with Hagovsky's recommendations and parenting time proposal but suggested that defendant's parenting time end on Sunday evenings rather than Monday

mornings to prevent the children from having to wake up early on Monday and return to her home in time for defendant to go to work or alternatively, spend the morning with a babysitter.

Plaintiff sought final decision-making authority as to enrollment in private schools, stating she and defendant "can't get along" and "can't agree on anything." She wanted the children to attend private school because she disagreed with what was being taught in public schools. She agreed to be responsible for the full cost.

Before March 2019, plaintiff testified the couple's money was in joint accounts, to which they had equal access. That month, with her consent, defendant redirected his income into an individual account and transferred most of their marital accounts into his own name. Plaintiff testified the $5,000 quarterly payments defendant paid were insufficient to pay the rent and utilities on the Summit home. To make ends meet, plaintiff testified in January or February 2020, she transferred the remaining joint brokerage accounts containing approximately $86,000 into her own name. She used some of this money to pay the family's bills until the pendente lite order was entered because defendant stopped making quarterly payments in January 2020.

Plaintiff stated she requested alimony because she could not afford to live without it and had no guaranteed income. Plaintiff testified that she gave up her career to allow defendant to advance in his career while she raised the children. Plaintiff sought a credit for defendant's failure to pay pendente lite support as ordered. The judge admitted a spreadsheet into evidence and supporting invoices to show Schedule A items for which plaintiff sought reimbursement totaling $18,468.95. Defendant did not object to the admission of the invoices.

Plaintiff testified that at the time of trial, she and the children lived in her parents' home at no cost. She stated that "a sub-trust of the GRAT" recently purchased a home in Summit into which she planned to move with the children after the divorce. She would pay rent comparable to the marital home but testified this trust would not "guarantee" her residence there. The new home was within walking distance of defendant's home.

Plaintiff confirmed the figures on her CISs and testified that the "current lifestyle" for herself and the children is $12,494 per month, which included estimated future housing expenses. She testified that Schedule C expenses totaled at least $5,390 per month, she received $1,666 per month pendente lite from defendant, and borrowed the rest from her parents.

Plaintiff testified that she never received any payments from the Dynasty Trust, the GRAT, or any other trust. She testified that she did not know the value of the Dynasty Trust. Plaintiff explained that she will not receive any assets from the Dynasty Trust because its principal will be distributed in the year 2300 to any living members of her family, however in the interim, it could be used for educational purposes or medical needs. She admitted that the children were beneficiaries of the Dynasty Trust. Plaintiff testified that she would receive a portion of the assets in the GRAT upon turning sixty-five, but did not specify the amount.

Defendant's Testimony

Defendant testified that for the first three and a half years of the marriage, the parties combined their finances, including his earnings and monetary gifts from plaintiff's family. He admitted that he financially supported plaintiff and the children, and that plaintiff's parents had no obligation to do so.

Defendant confirmed that beginning around April 2019, the parties agreed to separate their finances, with defendant paying plaintiff $5,000 per quarter and all of his own car and personal expenses, plus provide medical insurance for the family, and plaintiff would pay all of the family's housing expenses, her personal expenses, and any of the children's expenses not covered by her family. He

testified that even after this agreement, throughout the balance of 2019, plaintiff's parents continued to pay these items and continued to provide quarterly financial gifts, as well as the use of their private jet, medical expenses, and country club dues.

Regarding custody, defendant testified that he disagreed with Hagovsky's recommendation that plaintiff be designated the PPR and that he be designated the PAR. However, he agreed with Hagovsky's recommendation that his alternate weekends with the children terminate on Monday mornings, rather than Sunday nights as plaintiff proposed, and he further agreed with Hagovsky's recommendation that he have a dinner meeting with the children on Monday evenings following plaintiff's weekends with the children.

Defendant proposed a fifty/fifty parenting time schedule, with a plan to utilize childcare during his work hours. He testified that his employer would begin a hybrid work arrangement in October 2021, requiring him to travel to New York City but there was flexibility that would allow him to work from home two days per week. He suggested that he have parenting time on alternate weekends from Friday to Monday, and overnights every Monday and Thursday.

Defendant admitted that to the extent this time overlapped with his work hours, he would utilize childcare at his own expense, for approximately fifty-

five or fifty-six hours every two weeks. He testified that his sister and mother were available to help with childcare, but acknowledged that it would be better for the children to be with their mother than in childcare.

Regarding plaintiff's desire for sole educational decision-making, defendant testified that he would consent to enrolling the children in private school if he were not required to contribute to the cost. He testified that he would cooperate with a PC as to the decisions about private schooling or home schooling.

Defendant admitted that his monthly net income to date in 2021, exclusive of retirement contributions and commuter benefits, was $16,966.39. He testified that at the time of trial, he was not seeking alimony but was seeking child support from plaintiff to provide the children with a residence comparable to hers and ensure that the children's "increased entitlements" provided by plaintiff were also available to them during his parenting time. Defendant testified that he increased his request from $5,000 per month to $11,412 per month during trial after learning that plaintiff would be moving with the children into a larger, renovated home.

Defendant admitted that he had no evidence of any guaranteed payments to plaintiff under the trusts of which she is a beneficiary, other than payments to

begin when she turned sixty-five. He also admitted that he could not prove that plaintiff received income from the trusts. Regarding equitable distribution, he testified that plaintiff withdrew approximately $86,000 in investment proceeds from marital brokerage accounts in January 2020, and he estimated that the investments would have been worth $117,074.98 at the time of trial, so he sought half that amount or approximately $58,500.

Defendant testified that he spent $35,687.88 in marital funds on his counsel fees and plaintiff spent $32,616.80 in counsel fees from a previous marital brokerage account. He agreed that the $12,912 total tax refunds for 2019, and the $2,406 COVID stimulus payment that he received should be considered marital funds. Defendant sought $153,953 in counsel fees, with $59,278 owing as of July 2021.

Defendant acknowledged that some entries on his February 2020 CIS describing the joint marital lifestyle—including $5,000 per month for restaurants and $1,000 per month for eye care—were inaccurate.

The Judge's Decision

After trial, the judge issued a 119-page written opinion, which was incorporated into the JOD. The JOD provides, in essence:

(1) The parties shall have joint legal custody of the children, with plaintiff designated as PPR and defendant designated as PAR, and provides a detailed parenting time schedule. Regarding educational decision-making, the judge ordered the parties to confer first and attempt to resolve any educational issues with the PC, but if this failed, plaintiff was granted final decision-making authority and permitted to select the children's school and was ordered to pay for that school.

(2) Defendant is required to pay plaintiff $63,944.20 to equalize the marital bank, certificate of deposit, and brokerage accounts, and $7,659 to equalize their 2019 income tax refunds and 2020 stimulus payments. The judge directed the parties to calculate the marital portion of their retirement accounts and distribute the funds equally.

(3) Defendant was ordered to pay alimony to plaintiff in the amount of $2,508 per month for three years[4] and $535 per week in child support. Defendant was required to maintain life insurance in the amounts of $100,000 and $600,000, respectively, to secure his support obligations.

Both parties' applications for counsel fees were denied. This appeal followed.

On appeal, defendant argues broadly that the judge's decision was an abuse of discretion because every discretionary decision was made to his detriment. Specifically, he asserts error in awarding plaintiff sole educational decision-making authority for the children because that ruling deprives him of the decision-making authority he is entitled to as a joint legal custodial parent. Defendant argues the judge abused her discretion in reducing his parenting time and omitting his vacation parenting time with the children.

Defendant also contends the judge erred in preventing him from obtaining discovery regarding plaintiff's trusts; the alimony award is arbitrary because it

[4] At oral argument, we were informed that plaintiff remarried in October 2023, and the alimony obligation terminated.

failed to quantify the marital lifestyle and plaintiff's actual need; the above child support award financially penalized him because plaintiff's parents paid for the children's expenses, not plaintiff; he should have been awarded 100% of his retirement accounts because plaintiff is a beneficiary of at least four trusts and does not have to save for her retirement; and plaintiff's superior financial circumstances should have resulted in an award of counsel fees to him.

In her cross-appeal, plaintiff contends the judge erred in failing to award her counsel fees and litigation costs and in failing to find defendant acted in bad faith. We affirm the JOD in part, and reverse and remand for further proceedings as directed below.

II.

A.

Custody and Parenting Time

Defendant argues that the judge erred in her custody determination by failing to award him joint legal and physical custody. Specifically, he argues (1) that the judge's award of sole educational decision-making authority to plaintiff deprives him of the decision-making authority to which he is entitled as a joint legal custodian; and (2) that the parenting time schedule improperly reduced his parenting time and omitted his vacation parenting time.

N.J.S.A. 9:2-4(c) provides:

> In making an award of custody, the court shall consider but not be limited to the following factors: the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children.

In contested custody cases, the court "must reference the pertinent statutory criteria with some specificity." Kinsella v. Kinsella, 150 N.J. 276, 317 (1997). The "primary and overarching consideration is the best interest of the child." Ibid.

Appellate courts accord the judge's factual findings after a bench trial substantial deference when "'supported by adequate, substantial, credible evidence' in the record." Landers v. Landers, 444 N.J. Super. 315, 319 (App. Div. 2016) (quoting Gnall v. Gnall, 222 N.J. 414, 428 (2015)). "We also note

proper factfinding in divorce litigation involves the Family Part's 'special jurisdiction and expertise in family matters,' which often requires the exercise of reasoned discretion." Slutsky v. Slutsky, 451 N.J. Super. 332, 344 (App. Div. 2017) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)).

"We defer to the credibility determinations made by the trial court because the trial judge 'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall, 222 N.J. at 428 (quoting Cesare, 154 N.J. at 412). But "[a]ll 'legal conclusions, and the application of those conclusions to the facts, are subject to our plenary review.'" Slutsky, 451 N.J. Super. at 344-45 (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

We reject defendant's arguments that the judge abused her discretion on the issues of custody and parenting time. The judge addressed the N.J.S.A. 9:2-4 factors. As to the parties' ability to agree, communicate, and cooperate, the judge found they were unable to do so. By way of example, the judge pointed to testimony about their struggles to coordinate medical appointments and travel plans.

Regarding the parties' willingness to accept custody, the judge credited Hagovsky's unrefuted opinion that both parties were willing and able to care for

the children. Relying on Hagovsky's report, the judge concluded preference should be given to plaintiff, who has significant availability because she does not work. The judge found no unwillingness by either party to allow parenting time. The judge did not specifically address the interaction and relationship of any of the children with their parents and siblings.

As to the history of domestic violence, the judge found no substantiated history of domestic violence, but credited the parties' testimony about their ordinary domestic contretemps. As to the safety of the children, the judge found they were safe with both parents. Regarding the preference of the children, the judge found this factor inapplicable due to the children's young ages.

As to the needs of the children, the judge credited plaintiff's testimony that she managed all the children's needs and was familiar with their schedules, activities, meals, and doctor's appointments. The judge also noted defendant's testimony that the children are better off with plaintiff than with a childcare provider hired during his work hours. The judge also found that during the marriage, defendant spent time with the children primarily on evenings and weekends due to his work schedule. The judge found that both parties offered a stable home environment.

As to the quality and continuity of the children's education, the judge found the parties agreed the children should attend private school. Regarding the fitness of the parents, the judge found both parents cared for and loved their children, crediting Hagovsky's opinion that both parties were fit parents. The judge repeated defendant's testimony that the children would be better served being with plaintiff than at his home with a babysitter.

As to the geographical proximity of the parents' homes, the judge found that the parties lived minutes away from each other in separate homes in Summit. Regarding the extent and quality of the time spent with the children, the judge found plaintiff's testimony credible that she cared for the children's physical and emotional needs, and enrolled them in activities which defendant rejected because of cost. As to the parents' employment responsibilities, the judge found that plaintiff had not been employed outside the home since the children were born. The judge found that defendant proposed a "complicated plan" of working remotely and part-time commuting to New York City. Finally, as to the age and number of children, the judge recited their dates of birth.

The judge found that joint legal custody was appropriate, with plaintiff as the PPR, because her testimony "revealed she puts the children's needs as a priority" and had been their primary caretaker since birth. The judge awarded

defendant parenting time largely in accordance with Hagovsky's recommendations, rejecting defendant's claim for equal parenting time because he would need to have childcare while working and "admitted the children would be better off with their mother under those circumstances." There exists substantial credible evidence in the record to support the judge's findings, including her credibility findings, and we see no abuse of discretion.

Defendant argues that the judge's award of sole educational decision-making authority to plaintiff deprives him of the decision-making authority to which he is entitled as a joint legal custodian. We are unpersuaded.

We reiterate that the judge found the parties agreed that the children should attend private school. Citing Levine v. Levine, 322 N.J. Super. 558, 563-68 (App. Div. 1999) and Asch v. Asch, 164 N.J. Super. 499, 505 (App. Div. 1978), the judge properly concluded that the best interests of the child standard is the proper test for evaluating school choice. The judge found that the parties should confer on educational issues and attempt resolution with the parenting coordinator. If that failed, plaintiff could then choose a private school and pay for same. The record supports that determination.

N.J.S.A. 9:2-4(a) provides that "[j]oint custody of a minor child to both parents, [] shall include [] provisions for consultation between the parents in

making major decisions regarding the child's health, education and general welfare . . . ." In Boardman v. Boardman, 314 N.J. Super. 340, 348 (App. Div. 1998), we upheld a provision in a divorce judgment awarding joint legal custody with the mother as the primary custodial parent having final decision-making authority. Boardman made clear that "the legal authority and responsibility for making 'major' decisions regarding the children's welfare is shared by both parents" in a joint custody arrangement. Ibid. However, the primary caretaker has "somewhat more authority to decide issues in the event of a disagreement." Ibid.

Here, the judge's decision included a provision for consultation between the parents, as required by N.J.S.A. 9:2-4(a), which allows defendant to have significant input on educational decision-making, with the benefit of collaboration with the PC. Beyond that, given the parties' stated desire for the children to attend private school, and their demonstrated struggles with coparenting, the judge duly employed a best interests analysis in finding that plaintiff could decide on and pay for the specific private school of her choice. On this record, we discern no abuse of discretion and defer to the judge's findings.

Defendant next argues the parenting time schedule improperly reduced his parenting time and omitted his vacation parenting time. In particular, he alleges that the JOD provides him with less parenting time than he had pendente lite, and less than was recommended in Hagovsky's report, and failed to fix vacation parenting time. Again, we reject defendant's argument.

Hagovsky recommended defendant have overnight parenting time on Thursday nights and every other weekend from Friday until Monday morning. He further recommended that following plaintiff's weekends with the children, defendant have parenting time for dinner on Monday nights. The pendente lite parenting time order provided defendant with parenting time on alternate weekends from Friday until Monday morning, and overnights every week on both Monday and Thursday nights.

The judge ordered that defendant have parenting time on alternate weekends beginning on Friday evenings and ending on Sunday evenings, as well as every Thursday overnight. And, the judge ordered that on alternating Mondays following plaintiff's parenting time weekends, defendant was awarded dinner parenting time, provided he arrived by 5:15 p.m. after work. In addition, the judge set forth a specific alternating schedule for holidays and special days, such as the children's birthdays.

Contrary to defendant's assertion, the judge ordered the parties to "discuss full weeks of vacation time with the [PC]" and "confer each school year regarding the children's summer plans" and "notify each other of their choice of summer vacation weeks by April 1st of each year." The judge ordered that if any dispute arose as to summer vacation weeks, plaintiff's selection would prevail in odd-numbered years, and defendant's selection would prevail in even-numbered years. The judge further ordered that the parties "equally allocate" the children's school vacations during the school year, with the expectation that school vacations in excess of one week be alternated each year, and additional school breaks be equally divided between the parties.

Importantly, the judge ordered that all parenting time disputes be brought to the PC, who would make a binding recommendation, unless and until either party filed a motion in the Family Part.

The record supported the elimination of the Sunday overnight visit because plaintiff credibly testified that it required the children to wake up early on Monday mornings to either return to her home or spend time with a babysitter when defendant began work, whether remotely or otherwise. And, as to the replacement of the Monday overnight with a dinner visit, there was similar evidence—including defendant's own admission—that he would require

childcare if he were to return home from work late in the evening, and that the children were better off with plaintiff. Importantly, defendant testified that he did not disagree with the Monday dinner meeting.

Next, as to vacation parenting time, the judge made specific provisions for equal vacation parenting time and gave defendant binding authority to choose his weeks with the children in even-numbered years. Further, plaintiff testified she was willing to work with defendant to schedule holiday and vacation parenting time. This arrangement was further endorsed by Hagovsky, who recommended the parties work with the PC to implement vacation schedules. The judge carefully considered the relevant N.J.S.A. 9:2-4 factors, and we discern no abuse of discretion. The judge appropriately evaluated the evidence presented, made findings of fact that are supported by credible evidence in the record, and correctly applied the controlling law.

B.

The Trusts

Defendant argues that the judge erred in barring discovery regarding all of plaintiff's trusts despite finding that they were relevant to the litigation. He alleges that the judge's March 9, 2021, order permitting limited discovery as to only two trusts was error because the judge failed to address any additional trusts

of which plaintiff was a trustee and/or beneficiary. He asserts this omission is inconsistent with the judge's simultaneous finding that further discovery was necessary to obtain a full understanding of the assets available to plaintiff, and her beneficiary status may affect her need for alimony. Defendant avers that the trusts may be a source of income for the children affecting the child support calculation. Defendant's arguments lack merit.

As stated, in January 2021, defendant moved to compel production of documents relating to "any and all trusts in which plaintiff and/or their children are beneficiaries, including, but not limited to, [the Dynasty Trust] and [the GRAT]." In response, plaintiff's parents and their estate planning attorney certified that plaintiff and the children had not, and will not, receive any guaranteed income from any trust they created until age sixty-five, that the two additional trusts beyond the Dynasty Trust and the GRAT were not actually funded, and they were not aware of any additional trusts affecting this matter.

Following oral argument, the judge entered an order directing plaintiff to provide an accounting of disbursements from the Dynasty Trust and the GRAT only, but did not specifically order discovery as to any other trusts of which plaintiff and the children were beneficiaries. The judge noted, as to the two

trusts for which discovery was ordered, that such discovery was needed to develop a full understanding of the assets available to plaintiff.

Defendant moved for reconsideration, and the judge denied the motion, concluding she deliberately omitted discovery regarding any additional trusts because plaintiff had testified and certified that these trusts were not funded. Instead, the judge struck a balance and crafted the relief ordered to "protect the privacy of [p]laintiff's parents while also allowing [d]efendant to discovery information related to any disbursements from the Trust." We defer to a trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011).

In this case, the record established that plaintiff and the children have not received any guaranteed income from the Dynasty Trust or the GRAT and will not receive income until they reach age sixty-five. The spreadsheets in evidence showed the distributions from these trusts and confirmed this information. Moreover, the evidence showed that any remaining trusts were not yet funded, and therefore, not providing plaintiff or the children with any support. We are also mindful of the fact that the information is irrelevant on the issue of alimony because a party's beneficial interest in a trust is not an asset held by that person,

and income shall not be imputed based on that beneficial interest in determining an alimony obligation. Tannen v. Tannen, 416 N.J. Super. 248, 273 (App. Div. 2010).

Defendant further argues this information is relevant because the judge must consider the parties' economic circumstances in the equitable distribution analysis. The judge did consider plaintiff's superior economic circumstance primarily based on the benefits derived from her parents. Defendant also asserts the judge erred in allowing plaintiff to redact portions of the statements for the credit card she shared with her parents because these statements might show amounts her parents paid for the benefit of the children.

Beyond defendant's mere speculation, no evidence or proof has been proffered to show plaintiff improperly redacted the statements, and the judge made no finding as to the amount contributed by plaintiff's parents to support the family. As a result, we conclude the judge did not abuse her discretion on any discovery matters.

C.

Limited Durational Alimony

Defendant next contends the limited duration alimony award is arbitrary and the judge abused her discretion because: (1) the marital lifestyle was not

quantified; (2) plaintiff failed to demonstrate a need for alimony; (3) the award improperly exceeds the length of the marriage when the pendente lite support is considered; and (4) plaintiff was improperly awarded a credit pursuant to Mallamo and failed to award him such a credit.

"The award of spousal support is broadly discretionary." 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 court may order alimony "as the circumstances of the parties and the nature of the case shall render fit, reasonable and just." N.J.S.A. 2A:34-23. "[A]limony is neither a punishment for the payor nor a reward for the payee." Mani v. Mani, 183 N.J. 70, 80 (2005). "The basic purpose of alimony is the continuation of the standard of living enjoyed by the parties prior to their separation." Innes v. Innes, 117 N.J. 496, 503 (1990). "[T]he goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage." Crews v. Crews, 164 N.J. 11, 16 (2000).

Alimony awards are "governed by distinct, objective standards defined by the Legislature in N.J.S.A. 2A:34-23(b)." Gnall, 222 N.J. at 429. The court must consider the following statutory factors:

(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.
>
> [N.J.S.A. 2A:34-23(b).]

The court must "make specific findings on the evidence about all of the statutory factors" listed above. N.J.S.A. 2A:34-23(c). "[F]ailure to consider all of the controlling legal principles requires a remand." Boardman, 314 N.J. at 345.

In her opinion, the judge addressed each of the requisite statutory factors. Because defendant only challenges the adequacy of the judge's findings with respect to factors (1), (2), (4), and (13), we focus on those four aspects of the judge's decision.

Actual Need and Ability of the Parties to Pay

On statutory factor (1), the judge found that plaintiff, who sought alimony of $40,000 yearly, did not adequately articulate her specific need for alimony

due to the numerous gifts from her parents. Nonetheless, the judge acknowledged she entered a pendente lite award of $1,666 per month after previously finding that plaintiff established a need for alimony, and defendant had an ability to pay. The judge observed that plaintiff left her job to care for the children, and even when working, she never earned more than $44,000 annually. The judge's finding on the need for alimony centered around the parties' CISs, and to a lesser extent, their testimony pertaining to marital lifestyle.

The judge adopted plaintiff's Schedule A expenses of $6,470, Schedule B expenses of $634, and Schedule C expenses of $5,390 and simultaneously emphasized the upward trajectory of defendant's income in support of her finding on the need for alimony. The judge stressed that the parties' standard of living was supplemented by plaintiff's parents and that she "carefully analyzed the needs and ability to pay after considering both parties' testimony."

Duration of the Marriage

On statutory factor (2), the judge found the length of the marriage was four years and four months. The judge ordered defendant to pay alimony of $2,508 per month for three years, beginning on May 1, 2022, and concluding on May 1, 2025. As noted, plaintiff remarried in October 2023. Previously, the

judge ordered defendant to pay unallocated pendente lite support of $1,666 per month, plus Schedule A expenses, while he lived in the former marital home, for the period of April 22, 2020, until May 1, 2022.

The purpose of pendente lite support is to maintain the situation that the parties were in prior to the inception of the litigation. Mallamo, 280 N.J. Super. at 12. Pendente lite support and alimony are different legal concepts. N.J.S.A. 2A:34-23 does not require the court to consider the combined duration of pendente lite support and alimony vis-à-vis the duration of the marriage. Instead, the duration of pendente lite support is merely one factor to consider in the alimony analysis, and the judge expressly considered this factor in her opinion. Therefore, we find no error in the judge's determination of the duration of the alimony award. In any event, plaintiff remarried approximately a year-and-a-half after the alimony payments were ordered in the JOD. Although we find no error in the durational alimony award, on remand, the judge shall take this change of circumstance into consideration.

Marital Lifestyle

On statutory factor (4), without numerically quantifying what the marital lifestyle was, the judge examined the parties' proposed post-divorce budgets as set forth in each CIS. The judge found the parties lived an "extravagantly lavish

lifestyle" as a result of plaintiff's parents' gifts and assistance. The judge relied on testimony about the parties' residences and expenses associated with their lifestyle, concluding the marital lifestyle was "greatly enhanced" by plaintiff's parents. The judge discussed the CISs in evidence and pointed to defendant's admission that some of his estimates were significantly overstated. But the judge reasoned that plaintiff's parents paid for many of the parties' expenses, and the amounts of those expenses were unclear due to the absence of statements for various expenses, such as the children's lessons. Consequently, the judge concluded that "it is impossible to quantify the marital lifestyle of the parties due to the generosity of . . . [p]laintiff's parents."

Defendant contends that the judge erred when she set an alimony award without having numerically quantified the marital lifestyle. This contention has merit, as "[a]n alimony award that lacks consideration of the factors set forth in N.J.S.A. 2A:34-23(b) is inadequate, and one finding that must be made is the standard of living established in the marriage." Crews, 164 N.J. at 26 (citing N.J.S.A. 2A:34-23(b)(4)).

"[I]n determining the marital standard, the trial court establishes the amount the parties needed during the marriage to maintain their lifestyle." Weishaus v. Weishaus, 180 N.J. 131, 145 (2004); accord S.W. v. G.M., 462 N.J.

Super. 522, 532 (App. Div. 2020) ("[A] finding of marital lifestyle must be made by explaining the characteristics of the lifestyle and quantifying it."). "[A] trial judge may calculate the marital lifestyle utilizing the testimony, the CISs required by Rule 5:5-2, expert analysis, if it is available, and other evidence in the record." Ibid.

"The judge is free to accept or reject any portion of the marital lifestyle presented by a party or an expert, or calculate the lifestyle utilizing any combination of the presentations." Ibid. "[O]nce a finding is made concerning the standard of living enjoyed by the parties during the marriage, the court should review the adequacy and reasonableness of the support award against this finding." Crews, 164 N.J. at 26.

In this case, the judge failed to "establish[] the amount the parties needed during the marriage to maintain their lifestyle." Weishaus, 180 N.J. at 145. Her opinion does not contain a numerical finding as to what the marital lifestyle was. Although the judge reviewed each party's CIS and reduced their current lifestyle budgets based on discrepancies brought out in defendant's testimony, those calculations should have been undertaken in relation to the judge's determination of what the marital lifestyle was.

Instead, the judge merely concluded it was "impossible" to quantify the marital lifestyle because of the generous contributions that plaintiff's parents made to the parties. This decision is contrary to well-established law, which emphasizes that establishment of the marital lifestyle is "the touchstone" for the initial alimony award. Crews, 164 N.J. at 16; S.W., 462 N.J. at 532. For these reasons, we agree that the judge misapplied her discretion in calculating the initial alimony award requiring remand to address that issue.

Mallamo Adjustment

On statutory factor (13), defendant argues the judge abused her discretion when she denied his request for a Mallamo adjustment, and instead awarded plaintiff a credit instead. In particular, defendant contends the judge erred in ordering him to pay $18,468.95 to plaintiff for reimbursement of Schedule A expenses incurred pendente lite, which he was previously ordered to pay. Separately, defendant asserts the judge abused her discretion in not awarding him one-half of the $86,000 in marital funds that plaintiff withdrew from a joint brokerage account and spent on the family's expenses from January through May 2020, and instead awarding plaintiff a Mallamo credit for those funds.

"[P]endente lite support orders are subject to modification prior to entry to final judgment . . . , and at the time of entry of final judgment. . . ." Mallamo,

280 N.J. Super. at 12 (citations omitted). "In many instances the motion judge" hearing a pendente lite application "is presented reams of conflicting and, at times, incomplete information concerning the income, assets and lifestyles of the litigants." Id. at 16. Often "a judge will not receive a reasonably complete picture of the financial status of the parties until a full trial is conducted." Ibid.

In analyzing a request for a Mallamo adjustment, the judge must consider whether the amount of pendente lite support paid "was consistent with the marital lifestyle." Slutsky, 451 N.J. Super. at 369. "Any changes in the initial orders rest with the trial judge's discretion" and are therefore reviewed under an abuse of discretion standard. Id. at 368.

At trial, plaintiff's counsel moved a spreadsheet into evidence, without objection, showing bills totaling $11,541.56, along with numerous other expenses not arising under Schedule A. Counsel further introduced additional Schedule A maintenance bills for $1,218.19, $662.32, $331.75, $93.83, and $85.30, as well as a lawn care bill for $4,536. Although the judge did not specifically provide the basis for the $18,468.95 award to plaintiff, the Schedule A spreadsheet items and these additional bills total $18,468.95.

Further, the judge determined that defendant stopped contributing to the family's expenses in January 2020, and the pendente lite order went into effect

April 22, 2020. The judge found that in the interim, plaintiff drew on the roughly $86,000 in marital funds.[5] The judge awarded plaintiff a Mallamo credit for defendant's approximately one-half share of these funds, which it found to be $41,505, explaining that defendant's own minimal estimate of the Schedule A and B expenses, which he should have been paying, combined with the $1,666 in pendente lite support later ordered, totaled $9,129 per month, or at minimum $36,516, that should have been paid for the period that defendant paid nothing.

The judge denied defendant's request for a Mallamo credit and granted such a credit to plaintiff. The judge reasoned as to the $18,468.95 ordered, defendant had failed to pay "some" of the Schedule A expenses ordered based on plaintiff's testimony and found that plaintiff paid these amounts following entry of the pendente lite order because defendant refused to do so. Without reference to any numerical findings pertaining to the marital lifestyle, the judge concluded defendant underpaid pendente lite support in this matter.

However, Mallamo adjustments are necessarily calculated in relation to, and dependent upon, the judge's final determination of the marital lifestyle. Slutsky, 451 N.J. Super. at 368-69. Here, the judge ruled upon the Mallamo

[5] Plaintiff concedes that this amount was actually $86,618, though the judge mistakenly found it to be $82,809. Half of these amounts are $43,309 and $41,505, respectively.

issue without having first numerically quantified the marital lifestyle. We remand the Mallamo credit issue for reconsideration following the judge's quantification of the marital lifestyle finding.

D.

Child Support

Next, defendant argues the judge erred in entering an above-Guidelines child support award, which penalized him and provided a windfall to plaintiff, because her parents paid the children's expenses.

Child support awards and modifications are left to the sound discretion of the trial court, and we are limited to determining whether there was an abuse of discretion. Innes, 117 N.J. at 504; Raynor v. Raynor, 319 N.J. Super. 591, 605 (App. Div. 1999). "The trial court has substantial discretion in making a child support award." Tannen, 416 N.J. Super. at 278. A child support determination will not be set aside unless shown to be unreasonable, unsupported by substantial evidence, or "'the result of whim or caprice.'" Ibid. A court must attach a Guidelines worksheet to its decision and also provide a statement of reasons for its decision. Fodero v. Fodero, 355 N.J. Super. 168, 170 (App. Div. 2002).

Rule 5:6A provides that the Guidelines "shall be applied in an application to establish child support" and may only be modified for good cause shown. Where the family income exceeds $187,200, "the court shall apply the [G]uidelines up to $187,200 and supplement the [G]uidelines-based award with a discretionary amount based on the remaining family income" together with the factors specified in N.J.S.A. 2A:34-23. Child Support Guidelines, Pressler & Verniero, Current N.J. Court Rules, Appendix IX-A to R. 5:6A (2024), www.gannlaw.com. See also Isaacson v. Isaacson, 348 N.J. Super. 560, 581 (App. Div. 2002) (the "maximum amount provided for in the [G]uidelines should be 'supplemented' by an additional award determined through application of the statutory factors set forth in N.J.S.A. 2A:34-23(a)").

Pursuant to N.J.S.A. 2A:34-23(a), in determining the amount to be paid by a parent for support of the child or children and the period during which the support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors:

> (1) Needs of the child;
>
> (2) Standard of living and economic circumstances of each parent;
>
> (3) All sources of income and assets of each parent;

> (4) Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing childcare and the length of time and cost of each parent to obtain training or experience for appropriate employment;
>
> (5) Need and capacity of the child for education, including higher education;
>
> (6) Age and health of the child and each parent;
>
> (7) Income, assets and earning ability of the child;
>
> (8) Responsibility of the parents for the court-ordered support of others;
>
> (9) Reasonable debts and liabilities of each child and parent; and
>
> (10) Any other factors the court may deem relevant.

Nevertheless, it is well within the judge's discretion to determine "the choice of the methodology to employ in arriving at a child support award when the total income of the parties exceeds the [g]uidelines," recognizing that the "goal is to calculate a child support award that is in the best interest of the child after giving due consideration to the statutory factors and the [G]uidelines." Caplan v. Caplan, 182 N.J. 250, 272 (2005).

In Caplan v. Caplan, 364 N.J. Super. 68, 89-90 (App. Div. 2003), we set forth a detailed process for determining child support in high-income families:

> First, the reasonable needs of the children must be determined. . . .
>
> . . . .
>
> Second, because there must be a fair and appropriate allocation of the children's needs between the parties, the ability of the parties to generate earned income, in addition to unearned income, must be determined.
>
> . . . .
>
> Third, upon determining the respective percentage of each party's net imputed earned and unearned income of their total combined net imputed earned and unearned income, those percentages shall be applied to determine each party's share of the maximum basic child support guideline award for two children.
>
> . . . .
>
> Fourth, the maximum basic child support amount . . . should be subtracted from the court-determined reasonable needs of the children to determine the remaining children's needs to be allocated between the parties. Then, the court must analyze the factors outlined in N.J.S.A. 2A:34-23(a) and determine each party's responsibility for satisfying those remaining needs.

In the matter under review, the judge ordered defendant to pay plaintiff $535 per week in child support, and to maintain life insurance in the amount of $600,000 to support that obligation. The judge also ordered defendant to pay 69% of the children's unreimbursed medical expenses, extracurricular activities,

summer camps, and programs, with plaintiff paying the balance. The judge rejected defendant's claim for child support, in which he sought to equalize the disparate lifestyle the children enjoyed with plaintiff finding no legal or factual support for such an award.

The judge offered a thorough analysis of each of the N.J.S.A. 2A:34-23(a) factors. As to the children's needs, the judge found they were in need of support and plaintiff's parents had no obligation to support them. Specifically, the judge found their needs were set forth on plaintiff's September 2021 CIS, as part of Schedule A, B, and C expenses, and also included preschool tuition and extracurricular activities. The judge credited plaintiff's testimony about the children's additional needs including food, prescription drugs, clothing, and entertainment.

Regarding the standard of living and economic circumstances of each parent, the judge reiterated its earlier findings that plaintiff lived a lavish lifestyle due to her parents' generosity.

As to all sources of income and assets of each parent, the judge cited its findings as to equitable distribution and alimony, mentioning plaintiff's bank accounts and defendant's rising income, as well as the "extreme generosity" of plaintiff's parents.

Regarding the earning ability of each parent, the judge again cited the "upward trajectory" of defendant's income, including his compensation totaling $279,000 per year and that the judge imputed income of $40,400 to plaintiff.

As to the need and capacity of the children for education, the judge found they attended preschool and noted that plaintiff was granted final educational decision-making authority and that she bear the cost of subsequent private schooling. Regarding the age and health of the children and each parent, the judge referred to the children's and parties' ages.

As to the income, assets, and earning ability of each child, the judge found the factor generally not relevant, but noted custodial and Section 529 accounts could eventually be used to pay for private or higher education. The remaining factors were not relevant.

The judge attached a child support worksheet to her opinion. According to the worksheet, the judge found that the base award using the Guidelines and defendant's income of $279,000 per year, and the income imputed to plaintiff of $40,400, was $434 per week.

After determining that a supplemental award was required in light of defendant's income, the judge calculated a supplemental award of 10% of defendant's earnings, ($27,900) or $535.07 per week.

Further, "based on the parties' respective percentages of income" on the worksheet, the judge ordered that defendant pay 69%, and plaintiff pay 31%, of any child-related expenses not covered by child support, such as unreimbursed medical expenses, extracurricular activities, and summer camps.

We commend the judge for conducting a thorough analysis of the child support statute and making reasonable findings supported by the record. However, in light of our determination to remand for a recalculation of alimony, we vacate the child support award and remand for a recalculation after the marital lifestyle is determined and the amount of the alimony award is considered anew.

E.

Equitable Distribution

Defendant next argues the judge erred in rendering an "inconsistent" equitable distribution award by ordering him to pay plaintiff $63,944.20 to equalize marital accounts because plaintiff unilaterally removed over $86,000 in marital funds after filing the complaint. Defendant contends he should have been awarded 100% of his retirement accounts because plaintiff is a beneficiary of at least four trusts and does not have to save money for retirement.

Marriage is a shared enterprise and, as a result, when a marriage is dissolved, the assets should be fairly divided by the parties. Rothman v. Rothman, 65 N.J. 219, 229 (1974). The judge conducts a three-part analysis when distributing a marital asset. Id. at 232. First, the judge decides what property is eligible for distribution, then determines the value of the property, and finally decides how much to equitably allocate to the parties. Ibid. Importantly, the term "equitable" does not necessitate that the parties receive equal shares, but rather the judge provides the parties with a fair division achieved by applying a series of factors set forth in N.J.S.A. 2A:34-23.1. See Carr v. Carr, 120 N.J. 336, 348 (1990). These factors include:

> (a) The duration of the marriage or civil union;
>
> (b) The age and physical and emotional health of the parties;
>
> (c) The income or property brought to the marriage or civil union by each party;
>
> (d) The standard of living established during the marriage or civil union;
>
> (e) Any written agreement made by the parties before or during the marriage or civil union concerning an arrangement of property distribution;
>
> (f) The economic circumstances of each party at the time the division of property becomes effective;

(g) The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage or civil union;

(h) The contribution by each party to the education, training or earning power of the other;

(i) The contribution by each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker;

(j) The tax consequences of the proposed distribution to each party;

(k) The present value of the property;

(l) The need of a parent who has physical custody of a child to own or occupy the marital residence or residence shared by the partners in a civil union couple and to use or own the household effects;

(m) The debts and liabilities of the parties;

(n) The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse, partner in a civil union couple or children;

(o) The extent to which a party deferred achieving their career goals; and

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

[N.J.S.A. 2A:34-23.1.]

Furthermore, the judge does not simply mechanically divide the marital assets, but it weighs the unique circumstances of each case. Stout v. Stout, 155 N.J. Super. 196, 205 (App. Div. 1977). If a party contends that an asset is immune from equitable distribution, the burden of proof lies with the challenging party. Landwehr v. Landwehr, 111 N.J. 491, 504 (1988).

When the parties appeal the designation of assets subject to equitable distribution and valuation, the standard of review is whether the judge's decision was supported by sufficient credible evidence in the record. Rothman, 65 N.J. at 232-33. When the parties appeal the amount of the equitable distribution award or the manner of allocation, a reviewing court applies an abuse of discretion standard. Borodinsky v. Borodinsky, 162 N.J. Super. 437, 443-44 (App. Div. 1978).

In making an equitable distribution of marital property, a judge must consider whether a party has dissipated an asset. Kothari v. Kothari, 255 N.J. Super. 500, 506 (App. Div. 1992). While the Legislature did not define dissipation, "the concept is a plastic one, suited to fit the demands of the

individual case." Ibid. Generally, dissipation may be found where a spouse uses marital property for his or her own benefit, with the intent of diminishing the other spouse's share of the marital estate, at a time when the marriage relationship was in serious jeopardy. Id. at 506-07.

Here, the judge expressly considered each of the statutory factors. To avoid repetition, we need only discuss the findings on the pertinent factors.

As to the income or property brought to the marriage, the judge noted that plaintiff claimed a bank account and a vehicle were exempt, and defendant has three premarital IRA accounts. The judge indicated that both parties had additional premarital IRAs with a brokerage firm into which marital funds were invested.

As to the standard of living established during the marriage, the judge reiterated that the parties lived an "extravagant" lifestyle, which was "greatly enhanced" because of gifts from plaintiff's parents, but noted again that many of these expenses were "unclear." The judge found that neither party could maintain the marital lifestyle going forward without the gifts from plaintiff's parents, again noting it was "impossible to quantify the joint marital lifestyle of the parties due to the generosity of . . . [p]laintiff's parents." The judge again described the "upward trajectory" of defendant's income and that plaintiff left

the workforce when the children were born. The judge cited both parties' September 2021 CISs as illustrative of the standard of living.

Regarding the economic circumstances of each party at the time the division of property becomes effective, the judge stated that plaintiff claimed to be living off loans from her parents. The judge did not find this testimony credible and found plaintiff would not be required to repay the loans. The judge further found that defendant had the economic ability to pay support.

Regarding the contribution by each party to the education, training or earning power of the other, the judge found that plaintiff and her family encouraged defendant's career, and found no proof that defendant encouraged plaintiff to work during the marriage.

As to the contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the value of the marital property, the judge found that both parties contributed through defendant's earnings and plaintiff's role as homemaker and primary care provider for the children.

In addressing plaintiff's withdrawal of approximately $86,000 from the joint account, the judge found that plaintiff used approximately $32,000 of these funds for legal fees, and the remainder for living expenses after defendant began

depositing his income into his own account. However, the judge also found that defendant used approximately $35,000 from marital funds for his own legal fees.

The judge rejected any notion of wrongdoing, finding that "both parties candidly admitted they transferred assets" around the time of the filing of the complaint, "in approximately the same amount." As to the balance of the funds plaintiff withdrew, the judge found defendant should not receive a credit for funds plaintiff used to support herself and the children.

After balancing these factors, the judge ordered defendant to pay plaintiff $7,659, representing one-half of their income tax refunds and stimulus payment. The judge ordered the parties to determine "the marital portion of their retirement accounts and the distribution of funds to equalize the accounts from each party from their respective retirement accounts." The judge rejected plaintiff's claim for defendant to pay one-half of the $366,332 in loans she borrowed from her parents, finding plaintiff's testimony that she had to repay the loans not credible.

Defendant asserts the judge's equitable distribution award is inconsistent because in one section of her opinion, the judge held that he would retain his retirement accounts and elsewhere in the opinion ordered them subject to equitable distribution. However, the judge's opinion made clear that defendant

would retain his accounts only after conveying to plaintiff her marital portion because the judge specified the need to calculate that amount. The opinion does not suggest that defendant was entitled to retain these accounts without conveying the marital portion to plaintiff.

Defendant also argues the judge erred in ordering him to pay plaintiff $63,944.20 to equalize marital accounts because she unilaterally removed approximately $86,000 in marital funds after filing the complaint. In support of his argument, defendant asserts the judge erred in including two brokerage accounts in the equitable distribution calculations because plaintiff transferred these accounts into her own name.

Our review of the record reveals the judge erred in including these two brokerage accounts in her equitable distribution determination after plaintiff received these accounts via a Mallamo adjustment. Moreover, the judge erred by failing to include and consider the $17,125 advance that defendant received by virtue of the January 12, 2021 order.

The judge accepted the spreadsheet prepared by plaintiff listing all of the marital accounts as of the filing date of the complaint, including the two brokerage accounts at issue, and found they totaled $283,122. The judge reduced this amount by certain deductions that occurred during the litigation,

including $50,000 for advances to the parties under their consent order, $40,000 for withdrawals to replenish the parties' respective litigation funds on March 9, 2021, $32,616.80 for plaintiff's counsel fees paid from the marital funds she transferred in January 2020, and $35,687.88 for defendant's counsel fees paid from marital funds.

After making these deductions, the judge found the remaining value of the bank accounts existing at the time of the complaint was $124,817.32 . The judge thus ordered defendant to pay plaintiff one-half this amount, or $62,408.66. And, the judge ordered him to reimburse plaintiff one-half the differential of $3,071.08 in their counsel fees already deducted, or $1,535.54, such that he should pay her $63,944.20. But the judge made no provision for her earlier finding that plaintiff had received and was entitled to the brokerage account funds as a Mallamo credit, and that defendant had been ordered to use $17,125 in marital funds to pay rent arrearages under the March 12, 2021, order.

Under N.J.S.A. 2A:34-23.1(i), in making an equitable distribution of marital property, the court shall consider, "[t]he contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, or the property acquired during the civil union as well as the contribution of a party as a homemaker . . . ."; see also Vander

Weert v. Vander Weert, 304 N.J. Super. 339, 349 (App. Div. 1997) ("[A]s a general matter, the distributable marital estate is deemed to include assets diverted by one of the spouses in contemplation of divorce and for the purpose of diminishing the other spouse's distributable share").

Here, the judge relied on plaintiff's spreadsheet and divided the total value of the parties' accounts in half, after deductions for certain advances and counsel fees, and ordered payment as though defendant was in possession of all these funds. However, the judge had already found that plaintiff used the brokerage accounts for lifestyle expenses, and was entitled to by way of a Mallamo credit.

Defendant was thus not in possession of these funds, and it was error to order him to give one-half of them to plaintiff. Simply stated, plaintiff was entitled to one-half of these funds as they existed at the time of the complaint, and she was awarded the other half by way of the Mallamo credit. Given that she received the full balance, it was error for the judge to order defendant to pay one-half of this sum to plaintiff again in equitable distribution.

Moreover, the judge's award is inconsistent with her March 12, 2021, order, which provided that defendant would receive a $17,125 advance on equitable distribution, to be resolved following trial. There is no reference to

this advance in the opinion, warranting a remand for reconsideration of this issue.

Finally, defendant argues the judge erred in reducing the total of the marital assets by $32,616.80 based on the counsel fees plaintiff paid absent a fee award. However, the judge similarly reduced this figure by the amount of defendant's counsel fees of $35,687.88 and equalized the difference. Thus, we discern no error or abuse of discretion on this issue.

F.

Counsel Fees

Finally, we consider whether the judge erred in denying both parties' requests for counsel fees. An award of attorney's fees in a matrimonial action rests in the discretion of the Family Part judge. R. 5:3-5(c); Tannen, 416 N.J. Super. at 285 (citing Eaton v. Grau, 368 N.J. Super. 215, 225 (App. Div. 2004)). On appeal, the Family Part judge's decision regarding attorney's fees will be upheld absent a showing of abuse of discretion. Ibid.

In deciding whether to award attorney's fees, the judge should 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 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.

[R. 5:3-5(c).]

Here, the judge explained her reasons for rejecting both parties' counsel fee requests consistent with these factors. The judge determined that neither party acted in bad faith, but each engaged in "rigorous litigation." The judge noted that plaintiff used $32,616.80 of marital assets to pay her fees, and defendant used $35,687.88, and there were no previous fee awards. Plaintiff was represented by counsel at trial and defendant was not.

With these findings, we discern no abuse of discretion and therefore, have no basis to disturb the judge's denial of both parties' requests for counsel fees.

Affirmed in part, reversed and vacated in part, and remanded. Affirmed as to the cross-appeal. We do not retain jurisdiction.