

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1395-99T5

CHRISTOPHER PADDISON,

Plaintiff-Respondent,

v.

LESLIE DEIS,

Defendant-Appellant.

FILING DATE
APPELLATE DIVISION

JUN 14 2001

D. E. Miller
Clerk



Submitted March 28, 2001 - Decided JUN 14 2001

Before Judges Eichen and Steinberg.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Monmouth
County, FM-11-636-98.

Jacobowitz, Grabelle, Defino & Latimer,
attorneys for appellant (Edward Fradkin, on
the brief).

Pellettieri, Rabstein & Altman, attorneys for
respondent (John A. Hartmann, III, of counsel;
Leanne Pike Treese, on the brief).

PER CURIAM

Defendant Leslie Deis appeals from those portions of the judgment of divorce regarding custody and parenting-time, specifically the judge's decision that a prior consent order was intended to be final, thus requiring her to show changed circumstances at trial in order to modify the order. She also appeals the denial of permanent alimony, as well as the amount of

alimony awarded. In addition, defendant appeals the judge's decision not to award "a retroactive increase in support," and not to require plaintiff Christopher Paddison to be responsible for her health insurance costs and unreimbursed medical expenses on a permanent basis. Finally, defendant appeals the denial of an award of additional counsel fees. We affirm in part, and reverse in part.

The parties married in August 1991. Two children were born of the marriage, Rose, who was born on June 1, 1992, and Jeffrey Gus, who was born on April 2, 1994. At the time of the marriage, plaintiff had a college degree, and a master's degree in business administration. He was employed by McKinsey, a general management consulting firm. Defendant also had a college degree, and worked as an architect, earning approximately \$48,000 per year. As the parties had agreed, defendant stopped working one month before Rose was born. Thereafter, for a short period of time, she worked sporadically.

Plaintiff's income grew steadily during the marriage, and his gross income for 1997, the year before the complaint was filed, was \$531,087. His 1998 salary was \$750,000, which included a bonus of \$328,000. A portion of the bonus was based upon his job performance, and the balance was based upon the performance of the company.

In January 1995, defendant was diagnosed with breast cancer. She had a lumpectomy, and the lymph nodes were removed from under

her right arm. One year later, she had more surgery on her breast, and a small lump was removed from her neck. Although defendant's physicians recommended radiation, followed by chemotherapy, she chose to undergo alternative treatments before beginning chemotherapy. She first visited the Wigmore Institute in Puerto Rico for alternative treatment, and in 1996 began treatment with Dr. Sung Baek, an unlicensed acupuncturist in Seattle, Washington. Defendant began chemotherapy in February 1996, and would fly to Seattle to see Baek after finishing a round of chemotherapy. Defendant testified that she felt her illness placed a strain on the marriage.

Defendant traveled to Seattle for ten days each month to pursue her treatment with Baek. She felt her travel to Seattle was stressful for the children, and in May 1997, she moved there. Plaintiff brought the children to Washington on May 23, 1997, then commuted to Washington from New Jersey. The marriage became more strained. For a short period of time, plaintiff, defendant, and the children all resided in the Seattle area. Thereafter, plaintiff returned to Princeton but maintained telephone contact with the children and frequently made trips to see them.

On July 31, 1997, plaintiff filed an application seeking an order requiring defendant to immediately return the children to New Jersey. The parties entered into a consent order for joint custody, allowing the children to remain in Washington until February 20, 1998. Defendant's subsequent application for

modification of that order was denied since no changed circumstances were shown. Thus, the children remained with plaintiff in New Jersey, and defendant exercised visitation here. However, in order to continue her treatment she remained in Washington.

In 1996, plaintiff had been told by McKinsey that he was not being considered for advancement and he began to look for alternative employment. In October 1995, he accepted a position as president of the laboratory division of Essilor of America, requiring him to move to Texas. By that time, defendant's health had begun to improve, and she considered returning to New Jersey. However, plaintiff informed her that he had accepted the job with Essilor and intended to move to Dallas with the children. Both parties filed custody applications in New Jersey. A hearing was scheduled for April 10, 1999. On that day, the parties entered into a consent agreement that was placed upon the record. The agreement provided for joint custody with plaintiff having "primary residential custody." The agreement also provided that the children relocate to Texas by March 15, 1999, and contained extensive provisions reflecting almost equal division of parenting-time. It also contemplated defendant's future relocation to Texas.

Plaintiff's annual salary at Essilor was \$250,000, with an annual bonus of \$100,000 for the first three years of employment. Additionally, plaintiff was entitled to a performance bonus tied to the success of his division. According to plaintiff, the

performance bonus was limited to a maximum of thirty percent of his salary or \$75,000. However, at the time of trial he said he only expected to earn approximately one-half of the performance bonus based on productivity figures available to him at that time.

At trial, on May 26, 1999, defendant presented the testimony of her New Jersey physician, Dr. David Sokol. By that time, defendant had also moved to Texas. However, Dr. Sokol had seen defendant two months earlier, on March 4, 1999. Dr. Sokol had reviewed the report of defendant's then-treating physician, and concluded that defendant had metastatic breast cancer. In addition, there was also evidence that the cancer had spread to the lungs. He also opined that the predicted life span of "a woman with metastatic breast cancer is generally two to three years." He further opined that the likelihood of defendant having a complete or partial remission was about twenty-five percent, and there was only a fifty percent chance she would survive more than one year. He said it would be "extraordinarily difficult for someone receiving chemotherapy to pursue employment" since the chemotherapy, and the disease, can be debilitating and interfere with both concentration and energy levels. Dr. Sokol reviewed the notes of defendant's treating physician in Seattle and concluded that the disease was "starting to grow again."

We first consider defendant's contention that the trial court mistakenly exercised its discretion in concluding that the prior consent order dealing with the issues of custody and parenting-time

was a final order requiring defendant to show changed circumstances at trial in order to obtain modification. We reject that contention. Indeed, when plaintiff's attorney placed the settlement on the record, he indicated that the resolution of the removal and custody issues were permanent and the financial resolution was temporary. Neither defendant nor her attorney voiced any objection. They agreed on an elaborate schedule regarding visitation, including summer visitation. Defendant placed her consent to the agreement on the record.

We conclude that there is nothing in the record that would justify a determination that the parties did not consider the April 1999 consent agreement to be final regarding the issues of removal, custody and parenting-time. Moreover, the agreement was reached two months before the scheduled trial lending validity to the inference that it was intended to be final. Thus, the judge did not mistakenly exercise her discretion in applying a changed circumstances standard regarding modification. Indeed, no testimony was offered at trial in an effort to establish that the current living conditions were not in the best interests of the children.

We next consider defendant's contention that the trial judge erred in awarding rehabilitative alimony, rather than permanent alimony. "New Jersey requires that a dependent spouse receive alimony to assure maintenance sufficient to support that spouse based on the living standards of the couple during marriage. The

primary purpose of alimony is to permit the spouse to share in the accumulated marital assets to which he or she contributed." Konzelman v. Konzelman, 158 N.J. 185, 195 (1999) (internal citations omitted). New Jersey recognizes four types of alimony: (1) permanent; (2) rehabilitative; (3) limited duration, or (4) reimbursement. N.J.S.A. 2A:34-23(b). If the trial court determines that an award of permanent alimony is not warranted, specific findings on the evidence and the reasons for that determination must be set forth. N.J.S.A. 2A:34-23(c). If the court denies the application for permanent alimony, it then must consider whether to grant limited duration, rehabilitative, or reimbursement alimony. Ibid.

The purpose of rehabilitative alimony is to allow the dependent spouse to complete whatever preparation may be necessary to attain economic self-sufficiency. Crews v. Crews, 164 N.J. 11, 34 (2000). It is payable for a set period of time upon which it is reasonably anticipated that the dependent spouse will become self-sufficient. Dotsko v. Dotsko, 244 N.J. Super. 668, 677 (App. Div. 1990). For purposes of rehabilitative alimony, the dependent spouse is deemed self-sufficient upon attaining "a level at which he or she can support himself or herself in a manner reasonably comparable to the marital standard of living." Crews, supra, 164 N.J. at 33 (citing Hughes v. Hughes, 311 N.J. Super. 15, 31 (App. Div. 1998)); Cox v. Cox, 335 N.J. Super. 465, 474-75 (App. Div. 2000). "The basic premise of an award of rehabilitative rather

than permanent alimony is an expectation that the supported spouse will be able to obtain employment, or more lucrative employment, at some future date." Milner v. Milner, 288 N.J. Super. 209, 214 (App. Div. 1996) (quoting Shifman v. Shifman, 211 N.J. Super. 189, 194-95 (App. Div. 1986)). Thus, the focus of rehabilitative alimony is upon the ability of a dependent spouse to engage in gainful employment, combined with the length of the marriage, the age of the parties, and the dependent spouse's ability to regain a place in the workplace. Cox v. Cox, supra, 335 N.J. Super. at 475 (citations omitted).

In deciding to award rehabilitative alimony in this case, rather than permanent alimony, the judge first observed that the marriage of six years was of short duration. The judge also noted that "[w]ith some course work to bring her skills current, [defendant] should be capable of resuming her career, health permitting, and earning a comfortable salary." The judge also observed that defendant would receive "significant assets subject to equitable distribution which will permit [her] to pay off debts and/or invest to produce income." The judge said that defendant's physical health was "the most compelling factor" and recognized that it was impossible to predict the course her illness would take, stating that one "can only hope that in the next year or so she will go into remission." She also noted that defendant's stamina and healthy appearance supported that hope. The judge thus concluded that an award of rehabilitative alimony would address the

present unfortunate circumstances of defendant based upon an assumption that if defendant went into remission, her educational level and skills made "her highly employable" and independently capable of maintaining a standard of living comparable to that which she enjoyed during the marriage.

The judge found that the parties enjoyed a "very comfortable lifestyle during their marriage," and had sufficient funds during the marriage to enable them to comfortably meet their needs, as well as luxuries, and to invest. The judge also said that defendant's need to "update her educational qualifications" was addressed by the award of rehabilitative alimony. Accordingly, the judge awarded rehabilitative alimony for a period of six years conceding that the award "optimistically" assumed that defendant would require two years to complete chemotherapy and other required medical treatments in order to regain her strength and begin necessary training. Thereafter, the judge further assumed that during the next two years defendant would work as an architect on at least a part-time basis. Finally, the judge assumed that some, but a lesser amount of alimony would be required for an additional two years to permit defendant to attain an income sufficient to allow her economic independence.

In determining the amount of alimony, the judge considered the amount each party would receive in equitable distribution. N.J.S.A. 2A:34-23(b)(10); Miller v. Miller, 160 N.J. 408, 420 (1999). In addition, in calculating plaintiff's ability to pay,

and defendant's needs, the judge imputed interest to each party of 7.7 percent on their respective shares of equitable distribution. Miller, supra, 160 N.J. at 425.

Ultimately, although she found defendant's "reasonable expenses" to be approximately \$8,200 per month, the judge awarded defendant \$6,000 per month in rehabilitative alimony, not taxable to defendant, and non-deductible by plaintiff for the period of June 1999 through May 2001. From June 2001 through May 2003, the judge awarded defendant \$6,000 per month in rehabilitative alimony, however, directing that that portion of the award should be taxable to defendant and deductible by plaintiff. For the next two years, the judge reduced the award to \$5,000 per month, again taxable to defendant and deductible by plaintiff. The parties agreed that defendant would also receive \$2,000 per month in child support.

We recognize that our scope of review of an award of alimony is limited, and we must give due recognition to the wide discretion a trial judge is given in determining whether to award alimony, and the amount awarded. Martindell v. Martindell, 21 N.J. 341, 355 (1956); Cox, supra, 335 N.J. Super. at 473; Gugliotta v. Gugliotta, 164 N.J. Super. 139, 141 (App. Div. 1978). Moreover, we must accord substantial deference to the factual determinations made by the trial judge. The judge's factual determinations are considered binding on appeal, particularly in cases involving matters of credibility, provided they are supported by adequate, substantial and credible evidence. Rova Farms Resort v. Investors Ins. Co., 65

N.J. 474, 484 (1974); Cox, supra, 335 N.J. Super. at 473. We may only disturb those factual determinations if "we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, supra, 65 N.J. at 484 (internal citation omitted).

We conclude that the judge erred in deciding to award rehabilitative alimony, rather than permanent alimony. We recognize that in reaching that conclusion, the judge relied on the optimism of defendant and her determination to lead a relatively normal life with a higher than expected energy level despite the progression of her cancer. Unfortunately, the only medical testimony presented was not as optimistic. At trial, the only expert witness to testify regarding defendant's medical condition was Dr. Sokol. He opined that the likelihood of defendant achieving a shrinkage or partial or complete remission was approximately twenty-five percent. As previously noted, he said it would be extraordinarily difficult for defendant to pursue employment while receiving chemotherapy. On cross-examination, he said that the survival rate for someone taking the medication defendant was taking was "probably around a year on average."

In addition, the length of the marriage is not the sole criterion in determining the proper amount of alimony, its duration, Lynn v. Lynn, 91 N.J. 510, 518 (1982), or its type. Even though the marriage may only have been of a relatively short

duration, in those instances where the circumstances of the parties' health diverge greatly, even at the end of a very short marriage, the more fortunate spouse may fairly be called upon to accept responsibility for the other's misfortune. Ibid. As the Court indicated, "that is the fate of their shared enterprise." Ibid. Here, although the marriage was of relatively short duration, unfortunately defendant became seriously ill. The medical evidence in the record does not support a conclusion that defendant will attain economic independence in the near future. Under these circumstances, we conclude that plaintiff should be required to provide permanent alimony. If defendant does recover and become employable, the nature of the award, as well as the amount, will be subject to modification upon a showing of changed circumstances. Lepis v. Lepis, 83 N.J. 139, 146 (1980). We believe this is the more just result. It permits defendant to concentrate on her recovery without being distracted by the fear of a reduction in alimony, and its ultimate elimination. Thus, we reverse that portion of the judgment of divorce limiting defendant to an award of rehabilitative alimony, and remand for the purpose of awarding permanent alimony.

On remand, in calculating the amount of alimony, the judge must recognize that the dependent spouse is entitled to alimony in an amount sufficient to maintain the quality of economic life she enjoyed during the marriage, not bare survival. Lepis, supra, 83 N.J. at 150. In determining the amount of alimony, the court must

consider and make specific findings regarding the statutory factors set forth in N.J.S.A. 2A:34-23(b). Ibid.; Carter v. Carter, 318 N.J. Super. 34, 42-3 (App. Div. 1999). Thus, the judge must consider the dependent's spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the defendant spouse at the former standard. Id. at 152. "[A]lthough the supporting spouse's current income is the primary source considered in setting the amount of the support award, his or her property, capital assessments, and 'capacity to earn the support awarded by diligent attention to [his or her] business' are all proper elements for consideration." Crews, supra, 164 N.J. at 27. Here, the judge's conclusion as to plaintiff's anticipated income was affected by the simple fact that plaintiff had only been working in his new position for approximately eighteen months when the trial took place. On remand, the parties must exchange new case information statements so that the judge will be in a position to make an informed decision as to the appropriate amount of alimony. For example, by the time of the remand proceedings, plaintiff will have been working at Essilor for nearly three years and a more accurate determination can be made as to his income. In addition, the judge will have a more accurate picture as to the amount of assets the parties still have from the equitable distribution award and whether to impute income to that award and, if so, in what amount.

At trial, the judge appeared to be primarily focused on the

budgets submitted by the parties and gave only limited consideration to the standard of living the parties enjoyed during the marriage. Although the judge concluded that the parties' standard of living reflected a very comfortable lifestyle, the judge did not state whether the amount of alimony awarded was sufficient to permit defendant to maintain that comfortable style of living. On remand, the judge must consider the standard of living of the parties, as she found it to be, and state whether the amount of alimony awarded is sufficient to meet that standard. In addition, in setting the amount of alimony the judge must also consider the pertinent factors set forth in N.J.S.A. 2A:34-23(b), and make specific findings regarding those factors. Further, because of the passage of time, the judge must evaluate both parties' financial condition anew in order to properly determine the amount of alimony to which defendant is presently entitled.

The supporting spouse's earnings at the time of the divorce is not determinative in establishing the marital standard of living. Crews, supra, 164 N.J. at 27. As previously noted, the goal is to permit the supported spouse to maintain the standard of living enjoyed during the marriage, if possible. In those circumstances where the standard of living enjoyed by the parties during the marriage would entitle the dependent spouse to a higher award of alimony than the circumstances existing at the time of the initial award permit, the judge must expressly so state. Id. at 33. On remand, the judge must focus on the standard of living achieved by

the parties during the marriage, and then consider defendant's needs, her ability to contribute to those needs, and plaintiff's ability to maintain defendant at that standard. Id. at 25; Lepis, supra, 83 N.J. at 152. While we acknowledge that defendant is not permitted to share in the post-divorce good fortune, if any, of plaintiff, Crews, supra, 164 N.J. at 29, his earnings at the time of the remand hearing are still relevant. The judge must consider plaintiff's post-divorce earnings, as well as his other assets, in setting the appropriate amount of alimony, Crews, supra, 164 N.J. at 29, not for the purpose of allowing defendant to participate in any post-divorce good fortune plaintiff may have achieved, but, rather, to enable defendant to attain the same standard of living enjoyed by the parties during the marriage. If plaintiff is unable to pay the appropriate amount of alimony, the judge must make that finding. On the other hand, if he is able to pay a higher amount, the judge should increase the alimony award sufficient to bring defendant toward the standard of living to which the parties were accustomed during the marriage, as she found it to be, and must also consider plaintiff's post-divorce earnings in order to allow plaintiff an award of alimony sufficient to meet that standard of living. Stated another way, on remand, the judge must set alimony in an amount sufficient to allow plaintiff to enjoy the same "very comfortable lifestyle" enjoyed during the marriage, which the judge concluded permitted the parties to comfortably meet their needs, as well as enjoy luxuries, and invest.

If the judge concludes that plaintiff's earnings and other income are insufficient to maintain the standard of living enjoyed by the parties during the marriage, the order should reflect that conclusion. Crews, supra, 164 N.J. at 33. Such a finding facilitates appellate review, and also facilitates appropriate disposition of a subsequent application for modification based on changed circumstances. For example, if, on this application or a subsequent application plaintiff's financial condition has substantially improved, and defendant can demonstrate an inability to achieve a lifestyle level that is reasonably comparable to the marital lifestyle, a prima facie showing of changed circumstances will have been made, shifting the burden to plaintiff to demonstrate why additional alimony is unwarranted. Ibid.

For further guidance of the parties on remand, we also note our disagreement with the judge's determination to impute 7.7 percent interest on the assets each party received in equitable distribution. In arriving at that amount, the judge relied on Miller v. Miller, supra, 160 N.J. at 419-26. However, in Miller, unlike here, the Court was considering the proper amount of interest to impute on approximately \$4.5 million of liquid assets retained by the supporting spouse. Here, the assets available are much less, and it is unclear how much will ultimately be invested. For example, defendant expressed a desire to purchase a home in Texas, rather than continue to rent, and some of her equitable distribution award may have been used by her for that purpose, as

well as for counsel fees.

We next consider defendant's contention that the trial judge erred in determining the amount of alimony by failing to impute additional income to plaintiff. We have carefully reviewed the record, and conclude that the judge did not mistakenly exercise her discretion in calculating plaintiff's income for the purpose of computing alimony. The judge's conclusion that plaintiff's decision to change employment was made in good faith and with the best interests of his children in mind, is supported by the evidence in the record, and we conclude that the judge did not err in refusing to impute to plaintiff the salary he would have attained had he maintained his prior employment.

We now turn to defendant's contention that the trial judge erred in not making the award of alimony retroactive to reflect the increase from the amount of support allowed pendente lite. A retroactive increase in pendente lite support is not required in every case. Jacobitti v. Jacobitti, 263 N.J. Super. 608, 618 (App. Div. 1993), aff'd, 135 N.J. 571 (1994). While rejecting defendant's request for a retroactive increase, the judge did direct that \$50,000 of the debt accumulated by defendant prior to the divorce be paid from joint assets. We conclude that the judge did not mistakenly exercise her discretion in denying the balance of defendant's claim for a retroactive increase.

We next consider defendant's contention that the judge erred in not requiring plaintiff to be responsible for her health

insurance costs and unreimbursed medical expenses on a permanent basis. Obviously, continued health insurance is of extreme importance to defendant. The judge found medical insurance to be "clearly a necessary expense" and considered plaintiff's estimated cost of health insurance in determining alimony. While defendant correctly argues that it is impossible to predict what the premiums for medical insurance will be in the future, the fact remains that defendant may seek modification of the amount of alimony in the event the cost of health insurance increases. The trial judge noted that at the time of trial, defendant claimed \$3,794.82 in unreimbursed medical expenses. However, the trial judge also concluded that some of these costs may have been incurred for alternative treatment by Sung Baek, which were not reimbursed by medical insurance since Baek was unlicensed. The judge also determined that defendant could get the same treatment from a local licensed acupuncturist, which would be reimbursed by insurance. In addition, defendant would not be required to incur the travel expense to go to Washington to see Baek. Furthermore, the judge noted that \$2,153 of the claimed unreimbursed medical expenses was from the University of Washington and did not specify the treatment. The judge then decided that \$2,500 could "be expected to cover the majority of defendant's unreimbursed medical expenses each year, and required plaintiff to be responsible for the first \$2,500 of reimbursed medical expenses. That decision is supported by the record, and we will not interfere. While defendant

expressed an understandable preference for Baek, we cannot quarrel with the judge's decision not to make defendant responsible for payment to an unlicensed acupuncturist which is not covered by insurance. However, on remand, the judge should consider the reason for the bill from the University of Washington and consider the effect, if any, of that determination on the decision to limit plaintiff's responsibility to \$2,500 of unreimbursed medical expenses.

Finally, we consider defendant's contention that the judge erred in not awarding her counsel fees. In denying the request, the judge noted that defendant had used \$33,065 of the \$115,000 she withdrew from a joint account to pay counsel fees. The judge also observed that plaintiff had already given defendant \$20,000 towards counsel fees. Finally, the judge also considered the fact that the \$50,000 awarded defendant from joint marital funds to pay debts could be utilized, in part, to cover an additional \$29,000 in counsel fees. Defendant's total counsel fees were \$106,517.89. The award of counsel fees in a family action rests in the discretion of the trial judge. Williams v. Williams, 59 N.J. 229, 233 (1979). Under the circumstances here presented, we conclude that the judge did not mistakenly exercise her discretion in denying defendant's request for a further award of counsel fees.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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



Clerk