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Mahar v. Clark

Superior Court of New Jersey, Appellate Division

March 30, 2022, Submitted; May 4, 2022, Decided

DOCKET NO. A-2212-20

Reporter
2022 N.J. Super. Unpub. LEXIS 742 *; 2022 WL 1397373

ROBERT MAHAR, Plaintiff-Respondent/Cross-Appellant, v. MARGARET GIG CLARK, Defendant-Appellant/Cross-Respondent.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FM-12-1304-18.

Core Terms

parties, equitable distribution, marriage, counsel fees, extreme cruelty, trial court, retirement, one-half, factors, marital residence, divorce, retirement account, marital assets, student loan, pension, time of trial, alimony, marital, depleted, Savings, expenses, credit card debt, proceeds, living expenses, bad faith, counterclaim, surgery, argues, proofs, funds

Counsel: Margaret Gig Clark, appellant/cross-respondent, Pro se.

Szaferman, Lakind, Blumstein & Blader, PC, attorneys for respondent/cross-appellant (***Brian G. Paul***, of counsel and on the briefs).

Judges: Before Judges Hoffman, Whipple and Geiger.

Opinion

PER CURIAM

In this matrimonial matter, defendant Margaret Gig Clark appeals from the final dual judgment of divorce and Family Part orders dated December 1 and 9, 2020. Plaintiff Robert Mahar cross-appeals from the December 1, 2020 order. We affirm in part and remand in part.

I.

We take the following facts from the record. The parties married on May 29, 1999. Plaintiff has three adult children from a prior marriage, and defendant has four adult children from a prior marriage. At the time of their marriage, the parties had similar financial situations; both earned high salaries, held assets of approximately the same value, and owed substantial student loan debt on behalf of their children.

During the marriage, the parties had an informal agreement whereby to maintain separate bank accounts and attempt to equally share joint household expenses. **[*2]** They each contributed to their own retirement accounts, and they jointly purchased the marital residence in Monmouth Junction in 2015 for $385,000, with each contributing one-half of the $77,000 down payment.[1] They established a joint household expense account, and each deposited the funds necessary to cover their share of the joint monthly living expenses. They paid their individual expenses from their own accounts. There was no written agreement memorializing this arrangement.

In or about 2016, the parties began arguing about their shared marital expenses and household chores. A marital account became overdrawn after plaintiff failed to contribute the amounts necessary to cover certain bills, which forced defendant to notify her employer because of federal banking regulations.

The parties are highly educated. Plaintiff had worked in compliance. Defendant had worked as an attorney for various banks before taking her current position as an attorney overseeing banking for the federal government.

Plaintiff was born in 1945 and defendant was born in

[1] The mortgage balance was $277,446 as of October 2020.

1953. They were seventy-four and sixty-six years old, respectively, when the trial commenced.

On October 23, 2017, plaintiff's counsel informed **[*3]** defendant that plaintiff planned to file for divorce and proposed engaging in settlement discussions. Defendant did not reply to counsel, but asked plaintiff to delay filing the complaint until after the holidays and after she recuperated from three planned surgeries. On December 28, 2017, plaintiff filed a complaint for divorce based on irreconcilable differences. Defendant had the surgeries in January 2018.

On January 20, 2018, defendant vacated the marital residence and began staying with her sister but did not inform plaintiff of her whereabouts. Plaintiff wrote to defendant's sister and her best friend inquiring about defendant's whereabouts but received no reply. In February 2018, plaintiff emailed defendant stating that he planned to change the locks because he believed someone had entered the house and offered her a new key.[2] Defendant did not reply to the email. During defendant's absence, plaintiff placed defendant's mail and personal files in boxes in the basement. He sent defendant cordial emails inviting her to return to the marital residence at any time but received no response.

Because he was unable to reach defendant, plaintiff moved for substituted service of process **[*4]** and an award of related counsel fees. The court denied the motion, directed plaintiff to undertake further diligent inquiry and found no bad faith by defendant. Thereafter, plaintiff wrote to defendant's employer seeking information about her whereabouts but received no information. Defendant returned to work in March 2018 but did not contact plaintiff. Plaintiff ultimately hired a private investigator and served defendant at her office in New York City on July 18, 2018.

On July 23, 2018, plaintiff filed a motion to declare that defendant had been successfully served with process and for an award of counsel fees. The court granted the motion as to service of process but denied counsel fees, finding no bad faith by defendant.

Defendant moved back into the marital residence in August 2018 and lived there through the time of trial. Defendant filed an answer and counterclaim in September 2018.

[2] Plaintiff ultimately changed the locks in June 2018. Defendant maintained access to the house through her garage door remote.

In his October 29, 2020 case information statement (CIS), plaintiff reported 2019 income of $44,370, including $32,040 from Social Security and $11,539 from a premarital UBS pension. In addition, plaintiff received $5,597 in IRA distributions. The CIS stated a budget of $11,496 per month. Plaintiff **[*5]** did not state the total value of the marital assets, but listed his gross liabilities as $501,326, including a $277,000 mortgage balance, $96,428 in remaining student loans, $78,303 in counsel fees, and significant credit card debt.

In her October 30, 2020 CIS, defendant reported her 2019 gross income as $223,095. It stated her then-current living expenses as $11,091 per month. Defendant included an incomplete list of assets without a total value, but listed the marital residence, her own pension, her two retirement plans worth $241,181 and $169,699, plaintiff's UBS pension, and plaintiff's IRA worth approximately $88,000. Her listed debts were similarly incomplete but included a mortgage balance of $277,446, unspecified student loan debt for both parties, $14,673 in plaintiff's credit card debt, and $12,150 of her own credit card debt.

The trial began in July 2019 and continued for six nonconsecutive days. Plaintiff testified that he was retired but previously worked in compliance with Black Rock Asset Management until he lost his job during the 2008 financial crisis. He earned $476,401 in 2008 but was unable to find comparable work thereafter. Plaintiff took jobs as a substitute teacher **[*6]** and at a grocery store. He drove for Uber in 2015 and 2016, until he stopped working completely. Plaintiff testified that much of his professional knowledge was obsolete, and that he would not be able to obtain a job comparable to his 2008 position.

Defendant worked as an attorney for various banks, earning approximately $200,000 per year. In 2008, she began working as a federal government attorney supervising banks, and earned about $235,000 annually at the time of trial. Plaintiff testified that defendant had intended to retire in March 2019 at age sixty-six but did not do so.

Early in the marriage, they lived at defendant's house in Princeton, where plaintiff paid half of the marital expenses. They purchased the marital residence in Monmouth Junction in June 2015 and plaintiff estimated that the house was worth between $410,000 and $420,000.

Plaintiff acknowledged that from the beginning of the marriage until about 2016, the parties shared living

expenses equally and largely kept their accounts separate. They maintained separate credit cards and paid their own children's student loan debts. Plaintiff gave money to his children while they attended college. The parties never entered **[*7]** a formal prenuptial or mid-marriage agreement memorializing their arrangement.

At the time of trial, plaintiff received $2,598 per month from social security and $962 per month from his premarital UBS pension. His checking and savings accounts had very low balances and were routinely "drawn down to virtually zero to pay ongoing bills." He also had a retirement account, from which he routinely made withdrawals to pay his living expenses. After losing his job in 2008, plaintiff used this account to pay his share of the monthly expenses in order to "keep the peace at home." The account balance declined from approximately $750,000 in 2008, to $250,000 in 2012, to about $80,000 at the time of trial, due to the withdrawals and market fluctuations.

Plaintiff testified that their marriage deteriorated in 2016 and that defendant was aware he met with an attorney to discuss divorce. He felt that he could no longer afford to pay half of the living expenses as his retirement account was being depleted. Plaintiff stopped contributing his half of the mortgage payments around January 2016 but continued to pay other bills associated with the marital residence without defendant's contribution. Through **[*8]** the time of trial, he paid approximately $1,229 per month for such expenses, including homeowner's association fees, water, sewer, electric, cable and internet service, insurance, and cleaning services. Defendant paid the monthly mortgage and real estate taxes totaling approximately $2,686.

In addition to approximately $100,000 in remaining student loan debt, plaintiff testified to his significant credit card debt. His Bank of America credit card had a balance of $16,868.37 for post-complaint living expenses and legal fees at the outset of the trial. His Merrill Lynch credit card had a $14,388.71 balance incurred for marital debts at the time of the complaint, which increased to $24,500.99 by the time of the trial, which he used for living expenses. Plaintiff had paid $10,905 in counsel fees and still owed $66,750 plus interest.

Plaintiff testified that defendant had an investment account with Ameriprise containing funds she earned during the marriage while working at Wachovia Bank. It contained $1,751,000.70 in early 2015, $871,661.82 at the end of 2015, $301,298.89 at the end of 2016, $188,039.42 at the time of the complaint, and only $23,100 by November 2018. Plaintiff did not know **[*9]** the value of defendant's other assets at the time of trial.

Plaintiff contended defendant dissipated the Ameriprise account funds without his consent in anticipation of the divorce, after learning that he met with a divorce lawyer in 2016. From this account, which contained $1,751,000.70 in early 2015, she paid $70,000 to her son and $25,000 to her daughter in 2016. In addition, she paid her son $4,161 on December 21, 2017. She also made large payments from this account toward her children's student loan balances, including $40,068.11 on April 25, 2016, $46,295.66 on April 26, 2016, $46,847.95 on April 27, 2016, $43,046.61 on May 4, 2016, and $37,188.31 on June 13, 2016.

At the beginning of defendant's case, plaintiff's counsel proposed that she amend her cause of action from extreme cruelty to irreconcilable differences, to save the time of having to prove the extreme cruelty count. Defendant refused and proceeded on her claim of extreme cruelty.

Defendant testified as to some of the equitable distribution factors enumerated in *N.J.S.A. 2A:34-23.1*. She noted that the duration of the marriage was 18 years, and that plaintiff was in good health. She had some "health issues" which impaired her quality of **[*10]** life but did not provide further details. Each party owned a home at the time of the marriage and had their own bank accounts, though defendant did not know the value of plaintiff's assets because they kept everything separate. They shared household expenses equally until plaintiff stopped contributing to the mortgage and real estate taxes in 2016. They never had joint credit cards or joint investment accounts. They equally shared the cost of vacations and requested separate checks when dining out.

Defendant testified that she had two retirement accounts totaling $410,880, composed of $169,699 in a Thrift Savings Plan and $241,181 in a 401(k) as of the date of the complaint. She did not know their value at the time of trial. Plaintiff also had a federal government pension which was not yet in pay status. These accounts and benefits were earned entirely during the marriage. Defendant had not yet applied for social security benefits.

Regarding the alleged dissipation of the accounts, defendant testified that she used the Ameriprise account funds, which were earned during the marriage, for

"legitimate expenses" including household expenses, income tax payments, the down payment on the marital **[*11]** residence, closing costs, and her children's student loan debts. She testified that plaintiff was aware of many of these withdrawals, some as early as 2011.

Defendant acknowledged that she made these large payments toward her children's student loans shortly after learning that plaintiff consulted with a divorce attorney but alleged that she did so because she wanted to eliminate the debt before retiring. She owed $22,000 toward these student loans as of November 2018, and they were not yet paid off at the time of trial.

The court issued an oral opinion and "judgment/order" on December 1, 2020, granting a dual judgment of divorce based on irreconcilable differences and denied defendant's demand for a judgment of divorce based on extreme cruelty. The court entered a separate dual judgment of divorce on December 9, 2020, simply dissolving the marriage.

In its oral opinion, the court concluded that both parties were "average witnesses," but plaintiff was more persuasive regarding alimony. The court noted plaintiff was professional, intelligent, and highly educated but had difficulty providing detailed answers to questions posed by the court and during cross-examination. Defendant was also **[*12]** professional and very intelligent but "extremely argumentative."

Significantly, the court found that defendant evaded service, "either intentionally or unintentionally." The court noted there was no evidence as to the nature of defendant's surgery, or why this surgery precluded her from being served. She also failed to account for her depletion of funds.

The court noted the parties' informal arrangement to split household expenses equally and the absence of a written agreement concerning the payment of expenses or the division of assets.

As to equitable distribution, the court ordered the sale of the marital residence, and directed that the proceeds be divided equally after some deductions from defendant's share. The court identified the other marital assets subject to equitable distribution, namely plaintiff's IRA, defendant's 401(k), defendant's Thrift Savings Plan, defendant's Ameriprise account, and the parties' vehicles. The court awarded defendant a credit of $44,162 for one-half the value of plaintiff's IRA as of the date of the complaint. It awarded plaintiff one-half the value of defendant's 401(k) and Thrift Savings Plan as of the date of the complaint, or $120,500 and $84,500 **[*13]** respectively, and one-half the value of defendant's Ameriprise account as of the date of the complaint, or $94,000.

The court concluded that defendant had "depleted" the Ameriprise account, which was a marital asset containing funds earned when working at Wachovia Bank during the marriage but found plaintiff did not prove dissipation under *Kothari v. Kothari, 255 N.J. Super. 500, 507, 605 A.2d 750 (App. Div. 1992)*. The court rejected plaintiff's claim for a larger share of this account, finding that both parties had "unclean hands" because plaintiff had also dissipated assets during the last years of the marriage by spending down his retirement account and accumulating significant credit card debt.

The court found that plaintiff's UBS pension was exempt from equitable distribution because it was premarital but ordered that any survivor benefit be paid to defendant. It also found that defendant's federal pension was earned during the marriage but was not yet in pay status. The court awarded plaintiff one-half of the marital coverture portion of defendant's federal pension and ordered it be paid through a Qualified Domestic Relations Order (QDRO), with the parties equally sharing the cost of preparation of the QDRO.

The court permitted each party to retain their **[*14]** own "very modest" bank accounts. Each party was permitted to retain their car, though defendant was awarded a credit for one-half the value of plaintiff's car. The court assigned a value of $6,957 for one-half of plaintiff's car, which the parties do not dispute.

The court ordered each party solely responsible for their own debts, including their credit card debts and their children's student loans. The court directed the parties to manage personal property distributions independently.

In sum, the court ordered defendant to pay plaintiff $247,881 in equitable distribution, in whatever manner and using whatever assets she preferred. This amount included awards of $120,500 and $84,500 for defendant's retirement accounts and $94,000 for her Ameriprise account, reduced by $44,162 for one-half of plaintiff's IRA and $6,957 for one-half the value of his car.

As to alimony, the court found that plaintiff's monthly budget was $6,378. Reducing that amount by his

income, plaintiff needed $2,711 per month in alimony, or approximately $626 per week. Defendant's monthly budget was $9,000 but her gross salary of $235,000 or $19,583 per month enabled her to pay alimony. The court awarded plaintiff limited **[*15]** durational alimony of $626 per week for three years, commencing December 1, 2020, considering defendant's eventual retirement. The parties do not appeal the court's alimony determination. Accordingly, we need not detail the court's consideration of the statutory alimony factors enumerated in *N.J.S.A. 2A:34-23B*. Relevant here, the court found that the parties lived a "middle to upper middle class" lifestyle, with their standard of living costing approximately $10,000 to $11,000 per month. As to factor five, the earning capacities of the parties, the court found plaintiff had a "limited earning capacity" since losing his job in 2008, but defendant had an "excellent job" with a "healthy salary" despite her stated desire to retire. The court observed that it could not speculate as to defendant's retirement plans and noted she could file a post-judgment motion in the event she retired. The court noted that, by statute, the alimony would be nontaxable to plaintiff and nondeductible to defendant. The court found additional factors to be relevant, particularly because plaintiff depleted his retirement funds in order to pay the monthly bills under the arrangement between the parties and defendant depleted her **[*16]** assets over the prior five years by "slowly draining" her Ameriprise account and using marital assets during the divorce proceeding.

As to counsel fees, the court considered the factors enumerated in *Rule 5:3-5(c)* and *RPC 1.5(a)* and awarded plaintiff $28,000 to be paid from defendant's share of the proceeds from the sale of the marital residence. The court imposed a "lien or judgment for $28,000" to secure payment of the award from the marital home sale proceeds.

Defendant moved for reconsideration of the dismissal of her cause of action for extreme cruelty and the award of counsel fees to plaintiff, and sought a stay of the payment of that award from the marital home sale proceeds. She did not seek reconsideration of the equitable distribution or alimony awards.

Defendant alleged that the court "prevented [her] from testifying regarding the facts that would establish the elements of extreme cruelty." She complained that the court "commandeered" her case. Defendant presented new examples of the alleged extreme cruelty, including plaintiff's restricting her from using certain rooms in the marital residence and installing security cameras.

Regarding the counsel fees award, defendant contended that the court "sua **[*17]** sponte placed a lien and a judgment on the defendant's portion of the house sale proceeds," in favor of plaintiff's counsel, but did not impose a lien on plaintiff's portion of the proceeds. She disputed the court's finding that she engaged in bad faith by evading service, pointing out that she ultimately accepted service at her office in New York. Defendant alleged that she was not served at the marital home because plaintiff had locked her out. Defendant argued that the court failed to consider the substantial student loan debt, and that she covered "[eighty] percent of the household expenses." She further argued that the counsel fee award should be set aside because she had not engaged in bad faith or outrageous conduct.

A different judge issued an oral decision and order denying reconsideration, finding that the irreconcilable differences count substituted for the extreme cruelty count. As to counsel fees, the court found the prior judge had adequately considered the required factors and noted the fee award was less than one-half of the total fees incurred. The court rejected defendant's application for a stay of the fee award, finding no irreparable harm and that defendant was **[*18]** unlikely to succeed on the merits. This appeal followed.

Defendant raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN PRECLUDING DEFENDANT FROM ASSERTING AND PRESENTING EVIDENCE AT TRIAL REGARDING DEFENDANT'S VALIDLY PLEAD COUNTERCLAIM FOR EXTREME CRUELTY.

POINT II

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN MISAPPLYING THE FACTORS OF *N.J.S.A. 2A:34-23.1* WHEN DISTRIBUTING THE AVAILABLE RETIREMENT ASSETS TO THIS ELDERLY COUPLE "EQUALLY" (50/50), RESULTING IN AN "INEQUITABLE" DISTRIBUTION OF RETIREMENT ASSETS NOT SUPPORTED IN THE TRIAL RECORD AND PREVAILING STATUTORY AND CASE LAW.

POINT III

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION WHEN IT MISAPPLIED THE FACTORS OF *RULE 5:3-5(c)* WHEN AWARDING ATTORNEY FEES UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

A. The Trial Court Abused Its Discretion By Requiring Payment of Plaintiff's Attorney Fees to Be Taken Out of Defendant's Portion of House Sale Proceeds Assets Awarded to Defendant in Equitable Distribution.

Plaintiff raises the following points in his cross-appeal:

POINT I

THE TRIAL COURT FAILED TO FOLLOW CONTROLLING LEGAL PRINCIPLES WHEN IT AWARDED PLAINTIFF $247,881 AS HIS EQUITABLE **[*19]** DISTRIBUTION SHARE OF VARIOUS PASSIVE ASSETS CALCULATED ON THE BASIS OF THEIR VALUE AS OF THE DECEMBER 28, 2017 COMPLAINT DATE - AS OPPOSED TO THEIR VALUE AT THE TIME OF TRIAL OR DISTRIBUTION - WITHOUT PROVIDING ANY MECHANISM FOR HIS $247,881 OF THE ASSETS DEFENDANT CONTINUES TO HOLD TO PARTICIPATE IN GAINS OR LOSSES CAUSED BY PASSIVE MARKET FACTORS FROM THE DATE OF COMPLAINT THROUGH THE DATE OF DISTRIBUTION (WHICH WILL BE MORE THAN FOUR (4) YEARS LATER) RESULTING IN DEFENDANT RECEIVING A WINDFALL.

POINT II

THE TRIAL COURT FAILED TO FOLLOW CONTROLLING LEGAL PRINCIPLES AND ABUSED ITS DISCRETION WHEN IT LEFT THE MANNER OF PAYING PLAINTIFF HIS EQUITABLE DISTRIBUTION AWARD TO DEFENDANT RATHER THAN SIMPLY ORDERING HER TO TRANSFER TO PLAINTIFF VIA [QDRO] $247,881 FROM HER 401(K) AND/OR THRIFT SAVINGS PLAN RETIREMENT ACCOUNTS AS OF DECEMBER 28, 2017, PLUS GAINS OR LOSSES CAUSED BY MARKET CONDITIONS ON THAT AMOUNT FROM DECEMBER 28, 2017 THROUGH THE DATE OF DISTRIBUTION.

II.

We first address defendant's argument that the trial court erred in barring evidence of her counterclaim of extreme cruelty by limiting proofs during her testimony. We are unpersuaded.

The following exchange occurred with defendant: **[*20]**

CLARK: No, I want to go with my pled extreme cruelty count. Do you want me to continue Your Honor?

THE COURT: No, I'm going to do it for you. You ready?

EXAMINATION BY THE COURT:

Q. I'm going to do the cause of action. Your name is Margaret Clark, correct?

A. I would prefer to do it myself.

Q. No, ma'am. I'm going to do the cause of action and then we'll launch into the other. I'm not restricting you. You can still make your proofs, but I'm going to expedite this. Your name is Margaret Gig Clark, correct?

A. Yes.

Q. And you're married to Robert Allen Mahar, correct?

A Yes.

Q. And . . . you live in Monmouth Junction, New Jersey, is that correct?

A. Correct.

. . .

Q. Okay. Now I'm going to give you the opportunity to put on the record the acts of extreme cruelty that you allege.

Defendant began to identify the purported acts of extreme cruelty by reading directly from her counterclaim. The court interrupted:

> Ma'am I'm not going to let you read the whole pleading. Here's what I'm going to let you do, I'm going to let you highlight, okay. Because the Court has the pleading. You can explain to me in your own words without reviewing it line by line, what acts of extreme cruelty are. You can start at paragraph **[*21]** [five].

The court again clarified, "I'm not restricting you or advising you what to do." Defendant testified that plaintiff "belittle[ed] and berat[ed]" her constantly and refused to help with chores around the house. She noted that plaintiff's counsel's letter "threatening divorce" was sent while she was awaiting a scheduled surgery. She also alleged plaintiff created a hardship by locking her out of the marital residence. She further alleged that

plaintiff had an alcohol problem and often drove under the influence. The court rejected defendant's hearsay testimony that her son told her that plaintiff drank excessively. The court found the testimony was "unnecessary" and "delaying the trial."

Defendant expressed concern that the court would not allow her to prove her claim for extreme cruelty:

> CLARK: -- then you will dismiss my counterclaim without giving ample opportunity to present.
>
> THE COURT: No, I didn't say I would dismiss it. I plan to enter a dual judgment of divorce more than likely. So if you get up and you testify and I find you credible, you're going to get a dual judgment of divorce. What I wouldn't allow to happen would be bringing lay witnesses on a cause of action. In fact, **[*22]** I don't think I've ever seen that.

The court further clarified:

> [W]hat I'm not going to let happen more than likely is, to give you a heads up, is to bring lay witnesses in who could substantiate that on this day the plaintiff yelled at me and on this day the plaintiff did this and on this date, the plaintiff did that. Because under Rule 401 and Rule 403, those kinds of witnesses would not help me make a decision on the central issues of the case, alimony, equitable distribution, counsel fees, bad faith, those kind[s] of things.

On cross-examination, plaintiff's counsel was permitted to address the allegations in defendant's counterclaim for extreme cruelty. The court granted the dual judgment of divorce based on irreconcilable differences, finding that plaintiff established the cause of action under the statutory factors. The court rejected defendant's claim of extreme cruelty, finding that she failed to produce any "legitimate" or "substantial proofs" supporting the claim.

N.J.S.A. 2A:34-2(c) provides a fault-based cause of action for divorce based on "extreme cruelty" where a party has engaged in physical or mental cruelty that endangered the safety or health of the plaintiff or made it improper or unreasonable to expect **[*23]** the other party to continue to cohabit with the offending party. In contrast, "irreconcilable differences" is a "no-fault" ground permitting a divorce when "[i]rreconciliable differences . . . have caused the breakdown of the marriage for a period of six months and which make it appear that the marriage should be dissolved and that there is no reasonable prospect of reconciliation." *N.J.S.A. 2A:34-2(i)*. A "divorce isn't available on mere request or demand." *Steiner v. Steiner, 470 N.J. Super. 112, 119, 269 A.3d 454 (App. Div. 2021)*. "Whatever ground is asserted must be proven by the party seeking a divorce." *Id. at 120* (citing *Patel v. Navitlal, 265 N.J. Super. 402, 408, 627 A.2d 683 (Ch. Div. 1992)*).

A trial judge has the broad discretion in controlling the courtroom and court proceedings in civil cases. *Martin v. Newark Pub. Schs., 461 N.J. Super. 330, 340, 221 A.3d 148 (App. Div. 2019)*. *N.J.R.E. 611(a)* provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."

The trial judge's discretion in excluding evidence is broad. *Ratner v. Gen. Motors Corp., 241 N.J. Super. 197, 202, 574 A.2d 541 (App. Div. 1990)*. "Evidentiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." **[*24]** *Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84, 997 A.2d 954 (2010)*. An appellate court "will reverse an evidentiary ruling only if it 'was so wide off the mark that a manifest denial of justice resulted.'" *Griffin v. City of E. Orange, 225 N.J. 400, 413, 139 A.3d 16 (2016)* (quoting *Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999), 734 A.2d 1147*).

Our review of the record reveals no such manifest denial of justice. The trial court did not prevent defendant from asserting her counterclaim. Instead, the court used its authority under *N.J.R.E. 611(a)* and related caselaw to expedite the proceedings, and properly excluded hearsay testimony in the form of statements from defendant's son. Otherwise, the court repeatedly stated that it would not limit defendant's ability to offer her proofs. The court afforded defendant the opportunity to present evidence of the alleged extreme cruelty, about which defendant herself testified and gave examples. After hearing and considering the proofs, the court determined the evidence was insufficient to prove a cause of action for extreme cruelty. Accordingly, the court dismissed that claim but granted defendant a divorce based on irreconcilable differences. We discern no abuse of discretion or legal error.[3]

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[3] We reiterate that defendant does not challenge the alimony award. Here, the primary issues on appeal are equitable

III.

A.

Defendant argues the trial court misapplied the statutory equitable distribution factors enumerated in N.J.S.A. 2A:34-23.1. She alleges the court's "mechanical" equal division **[*25]** of the marital assets was inequitable and not supported by the trial record. We disagree.

"The goal of equitable distribution . . . is to provide a fair and just division of marital assets." Steneken v. Steneken, 367 N.J. Super. 427, 434, 843 A.2d 344 (App. Div. 2004), *aff'd as modified*, *183 N.J. 290 (2005)*. A trial judge undertakes a three-step analysis when determining equitable distribution:

> Assuming that some allocation is to be made, [the judge] must first decide what specific property of each spouse is eligible for distribution. Secondly, [the judge] must determine its value for purposes of such distribution. Thirdly, [the judge] must decide how such allocation can most equitably be made.
>
> [Rothman v. Rothman, 65 N.J. 219, 232, 320 A.2d 496 (1974).]

When engaging in this analysis, the court must consider the factors enumerated in N.J.S.A. 2A:34-23.1. Sauro v. Sauro, 425 N.J. Super. 555, 576, 42 A.3d 227 (App. Div. 2012). N.J.S.A. 2A:34-23.1 provides:

> In making an equitable distribution of property, the court shall consider, but not be limited to, the following factors:
>
> 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 **[*26]** 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 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;
>
> 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; **[*27]**
>
> 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.

Appellate courts owe substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters. Cesare v. Cesare, 154 N.J. 394, 411-12, 713 A.2d 390 (1998). In reviewing a ruling by a Family Part judge, we defer to factual findings "supported by adequate, substantial, credible evidence" in the record. Gnall v. Gnall, 222 N.J. 414, 428, 119 A.3d 891 (2015); *accord* Landers v. Landers, 444 N.J. Super. 315, 319, 133 A.3d 637 (App. Div. 2016). Deference is particularly warranted "when the evidence is largely testimonial and involves questions of

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distribution and counsel fees. While marital fault can play a limited role in determining alimony if it is egregious, marital fault is not a factor in determining equitable distribution. Mani v. Mani, 183 N.J. 70, 87, 869 A.2d 904 (2005) (citing Kinsella v. Kinsella, 150 N.J. 276, 314, 696 A.2d 556 (1997); Chalmers v. Chalmers, 65 N.J. 186, 193, 320 A.2d 478 (1974)). Nor did plaintiff's alleged extreme cruelty directly impact the counsel fee award as it did not result in motion practice or significantly lengthen the trial. Moreover, the trial court did not base its fee award on the services rendered opposing defendant's extreme cruelty claim. On these grounds, the alleged error was harmless.

credibility." *In re J.W.D., 149 N.J. 108, 117, 693 A.2d 92 (1997)*. However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378, 658 A.2d 1230 (1995)*.

"A Family Part judge has broad discretion in setting an alimony award and in allocating assets subject to equitable distribution." *Clark v. Clark, 429 N.J. Super. 61, 71, 57 A.3d 1 (App. Div. 2012)*. However, a judge "does not fulfill his heavy judgmental obligation by routinely or mechanistically dividing the marital assets equally." **[*28]** *Gibbons v. Gibbons, 174 N.J. Super. 107, 114, 415 A.2d 1174 (App. Div. 1980)*, *rev'd on other grounds*, *86 N.J. 515, 432 A.2d 80 (1981)*. Under equitable distribution, the statutory factors enumerated in *N.J.S.A. 2A:34-23.1*, are to be "used in concert with the facts of each case," and inform the otherwise "broad discretion" accorded to the trial judge. *Steneken, 367 N.J. Super. at 434-35*. Therefore, where the issue on appeal concerns the valuation and distribution of assets, "the standard of review is whether the trial judge's findings are supported by adequate credible evidence in the record." *Borodinsky v. Borodinsky, 162 N.J. Super. 437, 443, 393 A.2d 583 (App. Div. 1978)*. And, relatedly, when the issue involves the allocation of the marital assets, we review for abuse of discretion. *Id. at 444*.

The record demonstrates that the trial court considered the statutory factors, finding the marriage lasted for eighteen and one-half years, and that plaintiff was seventy-five years old while defendant was sixty-seven at the time of the decision. The court noted both parties were in good health and although defendant had undergone surgery, she presented as a "very healthy, very capable energetic woman." Concerning the income and property brought to the marriage, both parties had "high paying jobs" and plaintiff had a UBS pension earned before the date of the marriage. As to the joint marital lifestyle, the court credited plaintiff's estimate **[*29]** and found that it cost $11,496 per month. The court found that plaintiff and defendant were living together in the marital home at the time of trial, though defendant had moved out temporarily after the complaint filing. Regarding factor five, there were no written agreements made before or during the marriage.

The court placed "extra emphasis" on factor six, regarding the economic circumstances of each party. The court considered the income disparity between the parties, with plaintiff's income from Social Security and pension benefits being only $44,000 annually, while defendant earned $235,000 and had not yet claimed her social security or federal pension benefits. Both parties were still paying their children's student loans, and plaintiff had significant credit card debt. The court found that defendant was in a "much better financial position" than plaintiff, who was in a "very unfortunate financial position" because he was forced to rely on his savings for several years.

Regarding factor seven, the income and earning capacity of the parties, the court again cited the parties' disparate incomes, the unlikelihood that plaintiff would find a job in the future, defendant's employment, **[*30]** and the fact that she had not taken any steps toward retirement.

Under factor nine, the contribution of each party to the acquisition, dissipation, preservation, appreciation or depreciation of marital property, the court found both parties held professional jobs during the marriage. Plaintiff lost his job in 2008, and was unable to find comparable work, but the court found that he "could have made a more diligent effort" to find comparable work at that time. Nonetheless, at age seventy-five, plaintiff "could not be expected to work in a capacity that he once enjoyed." The court found that plaintiff was forced to deplete his retirement savings in order to pay his half of the household expenses.

As to factor ten, the court noted its discussion of taxes regarding alimony, without considering the tax consequences of withdrawing large amounts from a retirement account, absent a rollover into a tax-deferred account via a QDRO.

As to factor eleven, the present value of the parties' assets, the court valued the marital residence at $420,000. Plaintiff's checking account was valued at $200 and his savings account at $50. The court valued plaintiff's car at approximately $12,000 and defendant's **[*31]** car at approximately $2,000, though plaintiff did not claim entitlement to her car. At the time of the complaint, plaintiff's IRA was worth $88,323, and defendant's 401(k) was worth approximately $241,000 and her Thrift Savings Plan was worth approximately $169,000. Plaintiff's premarital UBS pension paid $962 per month, while defendant's federal pension was not yet in "pay status." Defendant's Ameriprise account had been substantially depleted for "nonmarital expenses shortly before the filing of the complaint" since its $1 million valuation in 2015.

Regarding factor thirteen, the debts and liabilities of the parties, the parties owed a $277,000 mortgage balance.

Plaintiff owed $96,428 toward his children's student loan debt and had credit card debt of $49,605. He incurred significant counsel fees and still owed a large balance. Defendant owed $26,750 in credit card debt. The court could not determine if defendant still owed any money toward her children's student loans.

Regarding factor sixteen, other relevant factors, the court found that both parties depleted assets, but defendant did so in a "much more aggressive" manner than plaintiff, particularly as to the Ameriprise account. **[*32]** The court found that the remaining factors were inapplicable.

Based on its weighing of the applicable factors, and valuing assets as of the date of the complaint, the court awarded: (1) defendant a credit of $44,162 for one-half the value of plaintiff's IRA; and (2) plaintiff a credit of $120,500 for one-half the value of her 401(k), $84,500 for one-half the value of her Thrift Savings Plan, and $94,000 for one-half the value of her Ameriprise account. The court found no evidence that these assets were exempt. It found plaintiff's premarital UBS pension was exempt but awarded him one-half of the marital coverture portion of defendant's federal pension. The court ordered that payment of plaintiff's share of defendant's pension would be effectuated through a QDRO, with the parties equally sharing the cost of preparation.

The trial court appropriately applied, weighed, and balanced the statutory factors and concluded the marital assets should basically be divided equally between the parties. The court's analysis and ruling are amply supported by the record. Applying that analysis, the award of one-half of the value of defendant's federal pension earned during coverture was appropriate. **[*33]** The court also properly reasoned that plaintiff's UBS pension was exempt from equitable distribution because it was earned entirely before the marriage. We discern no abuse of discretion or other reason to disturb the distribution of assets and liabilities.

Defendant argues that the court erred in awarding her only one-half of the remaining balance in plaintiff's IRA because plaintiff depleted the account during the marriage on "wasteful spending." In determining whether a spouse has dissipated marital assets, courts consider the factors adopted in *Kothari, 255 N.J. Super. at 507*, to determine if "the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate." As the court reasonably concluded here, in equity, both parties depleted marital assets and had "unclean hands." However, plaintiff's "unclean hands" arose from his spending down assets on marital lifestyle expenses after he lost his job, including payments toward the monthly expenses on the marital home, for defendant's benefit and consistent with their informal arrangement. Those expenditures were necessary to maintain the marital lifestyle in accordance with the parties' longstanding informal agreement. **[*34]**

Defendant further argues that the court should have considered the parties' significant age difference. Relying on life expectancy tables, defendant posits that she is projected to live another nineteen years while plaintiff is projected to live only another eleven years, suggesting that she has a greater need for retirement funds. This argument is plainly speculative. The court explicitly acknowledged and considered the parties' ages, defendant's continuing employment, that defendant had not taken any steps toward retirement, and that each will receive pension and social security income in retirement. Moreover, the court appropriately indicated that defendant may file a post-judgment motion to adjust her support obligations upon retirement.

Defendant's remaining equitable distribution arguments do not warrant extended discussion. *R. 2:11-3(e)(1)(E)*. The trial court acknowledged and considered the parties' informal arrangement regarding living expenses. As to the parties practice of keeping their finances, assets, and liabilities separate, *N.J.S.A. 2A:34-23.1(e)* provides that only written agreements need be considered in equitable distribution.

We are unpersuaded by defendant's contention that the court failed to consider the **[*35]** economic circumstances of the parties, including that plaintiff was a high earner, and that the court should have imputed income to him because he was deliberately underemployed. The trial court correctly noted that defendant was unlikely to find a job and salary comparable to his position in 2008 considering plaintiff's uncontroverted testimony that his professional knowledge was obsolete. Moreover, plaintiff was seventy-five years old at the time of trial.

Finally, defendant argues that the court failed to consider the tax consequences of its equitable distribution award. While the tax consequences of an equitable distribution award are to be considered, there must be an evidentiary basis to do so, "presumably fixed by competent expert testimony[.]" *Orgler v. Orgler, 237*

N.J. Super. 342, 356, 568 A.2d 67 (App. Div. 1989). There was no such evidence or testimony offered here.

B.

1.

In his cross-appeal, plaintiff first argues the trial court erred by calculating the value of certain assets as of the date of the complaint rather than at the time of trial or distribution. He contends that defendant's retirement accounts were passive assets whose value fluctuated based on market forces, and thus he should have shared in the increases or decreases in value since **[*36]** the complaint. We are unpersuaded for the following reasons.

At trial, no evidence was presented demonstrating the post-complaint value of defendant's two retirement accounts, or whether they experienced gains or losses after the complaint was filed. Instead, both parties testified that they did not know the then current value of those accounts. The court awarded plaintiff one-half the value of these accounts as of the date of the complaint.

The court did not otherwise discuss the valuation date. New Jersey courts generally follow the rule that the valuation date is the date the complaint for divorce was filed. Smith v. Smith, 72 N.J. 350, 361-62, 371 A.2d 1 (1977); Borodinsky, 162 N.J. Super. at 447. However, there is "no iron-clad rule for determining the date of valuation of marital assets[.]" Scavone v. Scavone, 243 N.J. Super. 134, 137, 578 A.2d 1230 (App. Div. 1990). The "use of a consistent date is preferable, such as the filing of the complaint[.]" Bednar v. Bednar, 193 N.J. Super. 330, 332, 474 A.2d 17 (App. Div. 1984).

Because the distribution of assets "must still be equitable," an alternate valuation date may be appropriate if the use of the date of the complaint would create an injustice or contravene the policies supporting equitable distribution. *See* Smith, 72 N.J. at 362. Depending on the circumstances, a significant change in the value of a particular asset between the date of the complaint and the date of final judgment **[*37]** may warrant the use of the later date for valuation purposes. *See* Bednar, 193 N.J. Super. at 332 (the date of final hearing may serve as valuation date, depending on nature of asset and any compelling equitable considerations); *see also* Scherzer v. Scherzer, 136 N.J. Super. 397, 400, 346 A.2d 434 (App. Div. 1975) (a proper factor in determination of what is equitable is any significant change in valuation of marketable assets that occurs prior to final judgment).

For example, when there has been a substantial post-complaint increase in the value of an asset, valuation as of the date of the complaint may be inappropriate if the appreciation was attributable to market forces alone. *See* Wadlow v. Wadlow, 200 N.J. Super. 372, 385, 491 A.2d 757 (App. Div. 1985) (trial judge should have considered appraised value of marital residence at time of hearing where the property had increased significantly in value after filing of complaint due only to market factors).

Generally, "passive" assets which fluctuate in value "by virtue of market forces," should be valued as of date of trial or distribution, not the date of the complaint. Platt v. Platt, 384 N.J. Super. 418, 427, 894 A.2d 1221 (App. Div. 2006). Conversely, when an asset declines in value after the filing of a divorce or dissolution complaint, the choice of valuation date may require a closer analysis of the reasons for the loss. *See* Goldman v. Goldman, 275 N.J. Super. 452, 457, 646 A.2d 504 (App. Div. 1994) (consequence of value fluctuations for purposes of **[*38]** equitable distribution should not turn wholly on whether an asset is properly classified as "active" or "passive" including whether one of the parties acted in bad faith).

In a divorce action, the burden is on the plaintiff to establish all elements of the case. Costabile v. Costabile, 131 N.J. Eq. 458, 459, 25 A.2d 888 (1942). In turn, the parties have the primary obligation of adducing proofs that will enable the trial judge to make sound and rational evaluations of their financial interests. Lavene v. Lavene, 148 N.J. Super. 267, 276, 372 A.2d 629 (App. Div. 1977). Here, plaintiff failed to prove the post-complaint value of the assets in question. There was no competent evidence demonstrating that the retirement assets had changed in value due to market forces and if so, to what extent. Plaintiff and defendant both acknowledged that they did not know the post-complaint value of the accounts. On these proofs, the court was unable to determine if the value had increased as in *Platt*, or decreased as in *Goldman*, and what may have caused such a change. Thus, the court was within its afforded discretion to follow New Jersey's common practice of valuing marital assets as of the complaint date.

2.

Plaintiff contends that the trial court erred by failing to specify the way defendant was to pay plaintiff his net share of equitable **[*39]** distribution, particularly because she has not yet paid the award. At trial, the court recognized that defendant's primary assets were

her retirement accounts. Nonetheless, the court concluded that defendant should pay plaintiff the $247,881 he was due in equitable distribution in whatever manner and using whatever assets defendant preferred. It did so despite recognizing that a QDRO might be necessary to convey the sum awarded if defendant were to pay it from her retirement accounts, citing *Orlowski v. Orlowski, 459 N.J. Super. 95, 208 A.3d 1 (App. Div. 2019)*.

Plaintiff argues that the court should have required a QDRO to credit him the award of $247,881 from defendant's retirement funds. As we have noted, we review the way in which the trial court allocated the marital assets for abuse of discretion. *Borodinsky, 162 N.J. Super. at 444*.

The trial court could have ordered that a QDRO be used to effectuate the equitable distribution award. *Orlowski, 459 N.J. Super. at 104-05*. A QDRO "permit[s] a direct distribution to the non-pensioner spouse of a QDRO-designated share of the pensioner's ERISA retirement benefit. The non-pensioner spouse then becomes responsible for the tax consequences." *Risoldi v. Risoldi, 320 N.J. Super. 524, 532, 727 A.2d 1038 (App. Div. 1999)*. Thus, as *Orlowski* made clear, where the obligor otherwise lacks assets sufficient to pay the award, a QDRO to equitably distribute **[*40]** a retirement account is appropriate. *459 N.J. Super. at 108*; *see also Barr v. Barr, 418 N.J. Super. 18, 35 n.3, 11 A.3d 875 (App. Div. 2011)* (recognizing that "most often," a QDRO is used to transfer an interest in a retirement account).

The trial record below suggests that defendant does not have sufficient assets to pay the equitable distribution award, aside from her retirement accounts. Moreover, as defendant asserts, a lump sum withdrawal from her retirement accounts to satisfy plaintiff's equitable distribution could have significant unintended tax consequences for defendant in the absence of a QDRO. A QDRO may well have been appropriate in this situation.

The trial court provided little explanation for declining to require a QDRO to implement the equitable distribution award. Thus, the basis for the court's discretionary decision to permit defendant to pay plaintiff his portion of her assets in whatever manner she wished is unclear. Absent adequate analysis and explanation we are constrained to remand that issue. Under the circumstances, allowing defendant to unilaterally decide how the equitable distribution award would be paid was an abuse of discretion.

We vacate that aspect of the trial court's decision that permitted plaintiff to decide the manner in which she would **[*41]** pay plaintiff his net share of the equitable distribution and remand for the court to determine if a QDRO or some other form of payment should be required. In doing so, the court shall consider the fact that the equitable distribution remains unpaid and the tax consequences of the manner of payment.

IV.

We next address the counsel fees awarded to plaintiff. Defendant contends she acted in good faith and points to the trial court's denial of counsel fees regarding service of process and finding that she did not act in bad faith. She further argues she made all required payments to plaintiff throughout the proceeding.

Counsel fees may be awarded in a divorce action. *R. 5:3-5(c)*; *R. 4:42-9(a)(1)*. The court should consider the factors enumerated in *Rule 5:3-5(c)* and *RPC 1.5(a)*, and the information required by *Rule 4:42-9(b)*, *(c)*. The trial court considered these factors and information in its decision awarding counsel fees to plaintiff. The court noted the financial circumstances of the parties, the ability of each party to pay their own fees or contribute to the fees of the other party, and that defendant had substantially greater income and assets than plaintiff. The court considered defendant's advantage in being an attorney who could represent herself. **[*42]** In contrast, plaintiff needed representation by counsel. The court found that defendant had the ability to pay some of plaintiff's counsel fees.

Regarding the reasonableness and good faith of the positions advanced by the parties, the court found that both parties depleted assets, but defendant did so "on a wider scale" and in a "more comprehensive manner." The court also found defendant had no basis to file a counterclaim asserting extreme mental cruelty, and that the filing was "unwisely advanced." The court also found that defendant "without question evaded service of process," thereby delaying trial. It required plaintiff to file a motion and hire an investigator in order to serve her. The court rejected defendant's assertion that her surgery precluded service, finding that she was "playing games," particularly where she provided no proofs as to the nature or timeline of her surgeries. However, the court did not explicitly find that defendant engaged in bad faith.

As to the extent of fees incurred by both parties, plaintiff

incurred $77,655 and paid $10,905 of that amount, leaving an outstanding balance of $66,750. Defendant represented herself and thus owed no fees, but had paid **[*43]** $3,000 to an attorney early in the litigation.

Regarding factor seven, the results obtained, plaintiff was successful as to alimony and partially successful as to equitable distribution. Factor eight, the degree to which fees were incurred to enforce existing orders, or to compel discovery, was not applicable. Finally, as to any other factor bearing on the fairness of an award, the court reiterated that plaintiff was at a disadvantage and needed to hire a lawyer, while defendant could represent herself.

The court also considered each of the *RPC 1.5(a)* factors. We need not repeat its findings. Upon balancing the factors, the court awarded plaintiff counsel fees of $28,000, significantly less than the $33,750 he sought, because plaintiff's counsel "could have been a little bit more efficient."

Typically, the award of counsel fees and costs in matrimonial actions rests in the sound discretion of the trial court. *Williams v. Williams, 59 N.J. 229, 233, 281 A.2d 273 (1971)*. Where caselaw, statutes, and rules are followed and the judge makes appropriate findings of fact, the fee award is entitled to deference. *Yueh v. Yueh, 329 N.J. Super. 447, 466, 748 A.2d 150 (App. Div. 2000)*. We will disturb a counsel fee determination "only on the 'rarest occasion,' and then only because of clear abuse of discretion[,]" *Strahan v. Strahan, 402 N.J. Super. 298, 317, 953 A.2d 1219 (App. Div. 2008)* (quoting *Rendine v. Pantzer, 141 N.J. 292, 317, 661 A.2d 1202 (1995)*), or a **[*44]** clear error in judgment. *Tannen v. Tannen, 416 N.J. Super. 249, 285 (App. Div. 2010)*.

Applying this deferential standard, we discern no such clear abuse of discretion or error in judgment. The court appropriately balanced the requisite factors and found that they weighed in favor of an award to plaintiff. The court emphasized the financial disparity between the parties as the primary basis for the award. The evidence demonstrated that defendant was in a superior financial situation and had the ability to pay counsel fees due to her employment. In contrast, plaintiff had minimal ability to pay his outstanding counsel fees due to his insufficient assets and income. "A Family Part judge is empowered to make an award of counsel fees to enable the parties to litigate on an even playing field . . . ." *Fattore v. Fattore, 458 N.J. Super. 75, 90, 203 A.3d 151 (App. Div. 2019)*.

Defendant further argues that the court erred in requiring her to pay plaintiff's counsel fee award from her share of the proceeds of the sale of the marital residence. She claims this resulted in an inequitable distribution of the marital home. Defendant's argument lacks sufficient merit to warrant extended discussion. *R. 2:11-3(e)(1)(E)*. Pursuant to *Rule 5:3-5(c)*, the court may "direct the parties to sell, mortgage, or otherwise encumber or pledge marital assets to the extent **[*45]** the court deems necessary to permit both parties to fund the litigation." The court may direct the use of such sale proceeds in a manner "as 'the case shall render fit, reasonable, and just.'" *Randazzo v. Randazzo, 184 N.J. 101, 113, 875 A.2d 916 (2004)* (quoting *R. 5:3-5*).

Directing payment of the counsel fees from the sale proceeds did not alter the equitable distribution of the marital residence. Moreover, the marital residence has already been sold and payment has already been made, rendering this issue moot.

V.

Considering our ruling, and defendant's failure to brief this issue, we briefly address defendant's argument that the court erred in denying reconsideration. Reconsideration is properly utilized only in that "narrow corridor" of cases in which the court "expressed its decision based on a palpably incorrect or irrational basis," or where "it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence[.]" *Cummings v. Bahr, 295 N.J. Super 374, 384, 685 A.2d 60 (App. Div. 1996)* (quoting *D'Atria v. D'Atria, 242 N.J. Super. 392, 401-02, 576 A.2d 957 (Ch. Div. 1990)*). Defendant clearly did not satisfy that standard.

"We review the trial court's denial of [defendant's] motion for reconsideration for abuse of discretion." *Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582, 243 A.3d 633 (2021)* (citing *Kornbleuth v. Westover, 241 N.J. 289, 301, 227 A.3d 1209 (2020)*). Reconsideration was properly denied. We discern no abuse of discretion.

In sum, we affirm in all respects **[*46]** except for vacating the court's decision to permit defendant to unilaterally decide the manner of paying plaintiff his net share of the equitable distribution, and remand for the court to determine if a QDRO or some other form of payment should be required.

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We do not retain jurisdiction.

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