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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4063-14T3

S.W.,

Plaintiff-Respondent,

v.

G.W.,

Defendant-Appellant.

Argued January 9, 2018 – Decided February 20, 2018

Before Judges Yannotti, Carroll, and Mawla.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FM-20-2163-11.

Robert A. Epstein argued the cause for appellant (Fox Rothschild, LLP, attorneys; Robert A. Epstein, of counsel and on the briefs).

Jeffrey P. Weinstein argued the cause for respondent (Weinstein Lindemann & Weinstein, attorneys; Jeffrey P. Weinstein, of counsel and on the brief; Donald Schumacher, on the brief).

PER CURIAM

Defendant appeals from a December 31, 2014 final judgment of divorce, an April 17, 2015 order denying reconsideration of certain aspects of the judgment, and pendente lite orders addressing discovery relating to a business operated by plaintiff. We affirm the pendente lite orders, and affirm in part and reverse in part the judgment and order denying reconsideration.

I.

The following facts are taken from the record. Plaintiff S.W. and defendant G.W. were married May 19, 1984. Both parties are college educated and met when they worked in an investment bank. Three children were born of the marriage, all of whom are adults and were attending college at the time of trial.

According to his testimony, plaintiff was employed throughout the marriage initially as a partner at Touche Ross, then Deloitte, and since 2001, as a Senior Managing Director of Zolfo Cooper (ZC), a boutique restructuring firm. Defendant ceased employment in the late-1980's, after the birth of the parties' first child. Plaintiff's income financed the family's expenses throughout the marriage.

In 2002, ZC was purchased by Kroll, Inc. (Kroll). In 2004, Kroll was purchased by Marsh & McLennan Companies, Inc. (MMC). In 2008, plaintiff and two other principals financed the purchase of

ZC for $27,000,000, with a loan from MMC. Each principal also contributed $1,000,000 to capitalize ZC.

After the acquisition, plaintiff held a one-third ownership interest in ZC. However, in the event the company was liquidated or sold, plaintiff would receive only twenty-three percent based on his rights in the company's class A and B shares.

Plaintiff was compensated through a net draw and a year-end bonus that was paid based upon company performance and plaintiff's individual performance. ZC paid all taxes on its partners' compensation. The business also paid for plaintiff's firm-related expenses, such as travel, meals, and entertainment. It also paid certain personal expenses for plaintiff, such as insurance and a gym membership.

At the same time as the 2008 acquisition, plaintiff executed a key partner employment agreement. Under the terms of this agreement, plaintiff agreed to remain employed at ZC while the purchase note was outstanding. During the same time period, plaintiff's base salary was set at $850,000, plus incentive compensation, and reimbursement of reasonable business and entertainment expenses. Plaintiff's aggregate compensation was capped at $2,000,000 per year. However, in 2008, 2009, 2012, and 2014, plaintiff's income exceeded the sums in the employment agreement.

Plaintiff testified that ZC's business boomed in 2009, and earnings approximated $70,000,000. However, revenue declined in subsequent years due to the recession and the advent of more industry competition. In 2010, revenue fell to approximately $35,000,000, and then $25,000,000 in 2011. As a result, in 2010 and 2011, ZC executed forbearance agreements on the purchase note with MMC. In 2012, the MMC note was renegotiated. The new note tied repayments to the company's income over the course of three years, through 2014.

The company also laid off employees, sublet space, and reduced the income of managing directors in order to remain in business. Plaintiff's draw experienced a commensurate decline as well, falling from $850,000 in 2009, to $600,000 in 2010, and $450,000 in 2011, where it remained through the time of trial.

Plaintiff's bonuses were $250,000 in 2010 and 2011, $400,000 in 2012, and $800,000 in 2013. His 2013 bonus was utilized to pay the children's tuitions, court-ordered support, and the parties' counsel fees for this litigation.

The parties' marriage began to decline in 2008. Defendant testified she was unaware of the parties' finances. She claimed plaintiff hid financial information from her relating to the marriage. She also testified he squandered money on extra-marital

affairs. Ultimately, plaintiff filed a complaint for divorce on June 20, 2011, ending the parties' twenty-seven-year marriage.

The parties lived a wealthy lifestyle and did not save. At the time of trial, the parties had no retirement accounts because those amount had been liquidated to fund the marital lifestyle. The parties purchased a marital residence in 1986 and a residence on Cape Cod in 1998. According to the testimony, the judge concluded both residences "were renovated and enlarged on an almost constant basis." The improvements were financed through mortgage re-financing of both homes.

The parties owned twelve boats during the marriage including sailboats and three Boston Whalers. Plaintiff's Case Information Statement (CIS) nearest the date of complaint set forth monthly expenses of $80,853 and defendant's CIS indicated those expenses were $92,147 per month. The parties' children attended private schools, including exclusive boarding schools for high school. The children's educational and activity fees and expenses were funded by plaintiff's income and student loans. The family enjoyed the benefits of country club, dinner club, and yacht club memberships. Plaintiff's CIS articulated a family vacation budget of $60,000 and defendant $150,000 per year. Defendant spent $100,000 per year on a photography hobby.

Even though defendant estimated the family spent between $1,000,000 and $1,500,000 annually, defendant maintained plaintiff had secreted funds from the marriage. The trial judge concluded defendant had not proved a dissipation because she had admitted all of plaintiff's income was used to pay the marital expenses. The judge found "[t]he overwhelming evidence is that these parties both lived an incredibly profligate lifestyle as evidenced by both parties['] [CISs] . . . . In short, it was a budget without any apparent restraints."

Pendente lite support for defendant and the children had initially been set by an October 17, 2011 order, which required plaintiff to pay defendant $43,000 per month in unallocated support. The court entered an order on January 5, 2012, reducing pendente lite support to $20,000 per month and also requiring plaintiff to pay for all shelter expenses associated with the marital residence. After the parties' Cape Cod residence was sold on July 31, 2012, the court again reduced pendente lite support to $15,000 to account for the absence of expenses associated with the residence. The final pendente lite order entered was dated February 26, 2013. It required plaintiff to pay defendant $22,000 per month.

At trial, plaintiff sought a credit for the overpayment of pendente lite support as well funds defendant withdrew from a

joint account near the filing of the complaint. Defendant conceded she withdrew funds from a joint account, but claimed she did so to preserve the funds. She argued she spent the money to meet her expenses and the children's needs because plaintiff had not paid enough support. At trial, defendant sought a retroactive increase of pendente lite support.

Defendant sought an award of permanent alimony that included a savings component, and an order requiring plaintiff to maintain life and disability insurance, which named her as beneficiary, to secure the alimony obligation. The CIS defendant relied upon at trial set forth a monthly need of $27,042. Defendant also argued plaintiff should be responsible for the entirety of the children's remaining educational expenses. Because the children resided outside of the marital residence, defendant did not seek an award of child support.

In addition to the parties' testimony, plaintiff adduced the testimony of the court-appointed forensic expert David Politziner, CPA, of Eisner Amper, LLP, and defendant offered testimony from her expert, Barry Sziklay, CPA, of Friedman, LLP. The expert testimony concerned valuation of the parties' largest asset, namely, plaintiff's ownership interest in ZC.

Originally, the parties retained Politziner as their joint forensic expert to value ZC and plaintiff's ownership interest.

However, before Politziner could render his report, defendant retained Sziklay. As a result, the court entered an order that designated Politziner as a court-appointed expert.

Politziner testified that he reviewed documentation provided by ZC for 2008 through 2011. He accepted the documentation as accurate, since he was not commissioned to perform a fraud analysis and because the company's financial statements with the exception of the 2011 statement, which was in draft form, had been audited. Politziner also reviewed industry information and general economic data for purposes of addressing the financial outlook of the firm. He also spoke with both parties, and with the company's general counsel.

Politziner utilized the income or capitalization of earnings method to determine the fair value of ZC. He testified this methodology assumes the company would continue to be a going concern and looks to past performance for a projection of future earnings. Politziner testified the valuation methodology involved applying "normalization adjustments" to the company's reported earnings in order to determine the company's true income. Politziner explained he consulted outside sources to determine the reasonable compensation for ZC's partners as opposed to their actual compensation. He also adjusted for the partners' personal expenses paid by the business, including certain insurance

expenses, and expenses for professional fees, personal tax returns, and estate planning. Politziner made a normalization adjustment for ZC's excessive marketing expenses, which he reduced by twenty-five percent.

Politziner testified he eliminated $23,000,000 in "good will" from ZC's balance sheet because it was "really not an asset." He eliminated the remaining debt owed to MMC, with the exception of $2,000,000, because he opined it would not be paid, and he eliminated excess cash on hand.

Politziner testified that he considered the high volatility of earnings in the industry, and ZC's fluctuating earnings over the years. He determined ZC's substantial earnings in 2009 were unlikely to recur. Therefore, he weighted the average earnings in 2010 and 2011, the date of complaint. Politziner testified 2011 was the point at which the company's earnings had bottomed, and he did not expect the downward trend to continue.

Ultimately, Politziner applied a capitalization rate of 16.45 percent. Politziner opined plaintiff owned one-third of the business by virtue of his ownership of one-third of the class A shares. Although plaintiff owned class B shares, which meant he would receive less than a one-third distribution in the event of a liquidation, Politziner opined a sale of ZC was not in the offing. Therefore, he valued the company as of the date of

complaint at $7,820,843, and plaintiff's one-third ownership interest at $2,607,281.

Sziklay's testimony highlighted the information he lacked in order to perform a valuation of ZC. He testified he was provided with a PDF of the company's general ledger, which prevented him from reviewing the details of any particular transaction. He testified he did not have access to the general ledgers of the entities that comprised ZC. He also did not have access to retainer letters for ZC's clientele, bank statements, or detailed payroll information. He was not permitted to interview plaintiff's partners or ZC's Chief Financial Officer.

Notwithstanding, Sziklay valued ZC at $21,162,000 as of the date of the complaint, and assigned plaintiff a one-third ownership interest valued at $7,054,000. Like Politziner, he utilized the capitalization of earnings methodology to arrive at ZC's fair value. Also like Politziner, he did not perceive the class B shares as diluting plaintiff's one-third ownership interest.

However, Politziner and Sziklay's valuations differed in the calculation of the capitalization rate. Unlike Politziner, Sziklay used the weighted average cost of capital method of calculating the capitalization rate, which blends a debt and equity rate. Politziner explained that blending a debt and equity rate was inappropriate in evaluating a personal service business, which

generally does not carry much debt. Politziner found this to be the case with ZC, which did not have debt other than the acquisition debt. This fundamental difference resulted in a capitalization rate used by Sziklay of twelve and one-half percent, compared with Politziner's sixteen percent.

Also, Politziner used a weighted average of earnings in 2010 and 2011. Sziklay used only 2011 earnings.

Politziner and Sziklay also disagreed with respect to the appropriateness of taking a normalization adjustment for the company's excessive compensation expenses. Politziner opined compensation expenses accounted for seventy-two percent of ZC's total revenue in 2011, up from forty-eight percent in 2009. Sziklay opined compensation expenses accounted for 77.19% of the company's total revenue in 2011, up from 53.05% in 2009.

Thus, Sziklay applied a normalization adjustment for ZC's excessive compensation because he concluded the compensation expenses represented a large percentage of revenues. Sziklay opined the expenses were inconsistent with industry standards and the company's own financial plan, which called for compensation expenses to account for only fifty percent of total revenue. Sziklay set compensation at sixty percent of revenue, which he considered a "conservative" figure. By so reducing ZC's compensation expenses the company's valuation significantly

increased.

Politziner agreed ZC's compensation-to-revenue ratio in 2011 was higher than the industry standard, which he opined was approximately fifty-three percent. He also conceded the 2011 ratio was greater than the ratio ZC had projected for itself. However, he did not agree Sziklay's adjustment was appropriate, because ZC already made significant reductions in its compensation expenses. Moreover, Politziner accepted plaintiff's representation the higher compensation was due to employee retention in hopes of generating future business.

Another equitable distribution issue involved plaintiff seeking a credit for the pendente lite pay down of the mortgage on the marital residence. Defendant sought to retain the marital residence and to deny plaintiff any credit for paying the mortgage because it had fallen into default pendente lite, albeit the arrears were later paid by plaintiff.

The Cape Cod residence was sold in July 2012 for $2,895,000 and yielded net proceeds of $650,794.74. Each party received $100,000 and each counsel received $75,000. The remainder of the proceeds were deposited with plaintiff's counsel. Plaintiff argued for a credit against the sales proceeds for mortgage expenses paid by him pendente lite that defendant was supposed to pay. Defendant argued the mortgage arrears accrued when plaintiff

was responsible for the mortgage and that the court ordered the sale of the residence at a low price. Defendant also sought credits for expenses incurred to ready the residence for sale and to move the parties' belongings from the residence after it was sold.

Plaintiff sought certain items of personalty and furnishings from both residences, including family heirlooms. Defendant sought to retain all personalty and furnishings in both residences, and argued many items were gifted by her grandparents and not subject to equitable distribution.

The parties owned five vehicles, each driven by a member of the family. Pendente lite, plaintiff sold a 1999 Jeep Wrangler and utilized the proceeds to purchase a newer vehicle for one of the children. Plaintiff also testified he sold an Infiniti CRX 56 pendente lite, and used those proceeds to purchase the vehicle he was operating at the time of the trial. Defendant sought a credit in equitable distribution for the vehicles plaintiff sold pendente lite.

Plaintiff testified he incurred substantial counsel fees, contributed to defendant's counsel fees, paid Politziner's fees, and paid mediation fees. Plaintiff sought a contribution for his counsel fees and an order requiring defendant to bear one-half of Politziner's fees. Defendant incurred substantial counsel and

expert fees as well. She testified she had contributed to Politziner's fees, but argued plaintiff should be responsible for the remaining fees as Politziner had become aligned with plaintiff's position. Defendant argued plaintiff should bear the entirety of her counsel fees and the cost of the mediation.

The trial concluded on June 30, 2014, after six days of testimony. On December 31, 2014, the trial judge issued a comprehensive written opinion.

The judge rejected defendant's dissipation claims, finding "[d]efendant had not carried her burden to prove that [p]laintiff has purposely defrauded or dissipated the marital assets with an intent to deprive her of same." The judge concluded "infidelity itself is not the same as dissipation." The judge found plaintiff had not shown that she had been deprived of any benefit of the income or assets of the marriage. He stated:

> The overwhelming evidence is that these parties both lived an incredibly profligate lifestyle as evidenced by both parties['] (sic) [CISs], which include such items as a photography hobby of [d]efendant's in which she spent in excess of $100,000 per year. . . . In other words, [d]efendant's argument that [p]laintiff was dissipating assets of the marriage is completely undercut by the fact that she herself admits that all of [plaintiff's] income was going to the marital expenses.

The trial judge next addressed the issue of equitable distribution of ZC and defendant's claim she had been deprived of discovery relating to the business. Regarding discovery, the trial judge noted Sziklay had been granted access to all of the records possessed by Politziner. The judge noted when Sziklay sought more information and motion practice ensued over the discovery "the [c]ourt painstakingly went line by line through the additional requests, and ruled on each. . . . Sziklay, therefore, had more material to rely on than even the court-appointed expert had."

Regarding the valuation of ZC, the trial judge made specific findings regarding each expert. The judge found Sziklay's report to be unreliable because he purposely reduced the actual compensation figures notwithstanding Sziklay's assumption ZC would be run "with the same level of management effectiveness." The trial judge also found Sziklay had ignored the forbearance agreements signed with MMC. The judge concluded these agreements demonstrated MMC was willing to be paid less than its original agreement with ZC, thereby reflecting a more accurate picture of the actual corporate health and ZC's value.

The judge acknowledged "valuation experts will often make relatively minor adjustments to a bottom line, as both experts did here . . . [h]owever, it is a completely different thing to make

wholesale changes in a company's financial operation as a prelude to a valuation calculation." Thus, the judge concluded "[g]iven that . . . Sziklay acknowledged the effectiveness of the company, and then completely ignored its actual finances and substituted his individual judgment, the [c]ourt finds that his opinion as to ultimate value should be given no weight."

The trial judge also scrutinized Politziner's valuation. Although the judge noted he accorded greater weight to the testimony of Politziner, he disagreed with Politziner's consideration of the class B shares in determining plaintiff's percentage of ownership of ZC. The judge found "these shares would only be realizable in a liquidation event." The judge also noted "the effective cross-examination . . . called into question [Politziner's] reliance on the [twenty] year government [treasury bill] also as a function of the equity risk premium could have resulted in a slightly higher value once the capitalization rate was applied."

After considering the expert testimony and plaintiff's testimony regarding ZC, the trial judge concluded ZC had a value of $9,000,000, and plaintiff's one-third interest was worth $3,000,000. The judge noted plaintiff acquired his interest in ZC in 2008 "just a few short years before the filing of the [c]omplaint." Beforehand, plaintiff had been an employee "and

perhaps it could be argued that by 2008, the marital enterprise was largely ending." The judge also attributed acquisition of the business to defendant who "managed their family life so that [plaintiff] could focus on his career." However, the judge concluded "it is the business [owners'] hard work, their track record of success, and indeed their 'sweat equity' that allows them to build a successful career." Thus, the judge awarded defendant $750,000 representing a twenty-five percent share of one-third the value of ZC.

Regarding defendant's request to remain in the marital residence, the judge concluded "[t]here is no basis in law for the [c]ourt to grant [it]." This was because defendant conceded she could not qualify for a mortgage to purchase plaintiff's share of the residence. The judge noted the residence had been valued at $1,635,000, and was encumbered by debt of $1,321,000.

The trial judge rejected each party's claim for credits from the sale of the Cape Cod residence. The judge noted plaintiff had not met his burden to prove he was entitled to a $15,000 credit for pay down of the mortgage on the residence because he had only estimated the sum he believed was due. The judge also rejected defendant's argument for a credit because the residence had been ordered to be listed at a lower price than she had desired. The judge found defendant's argument was in essence a motion for

reconsideration of the court's pendente lite determination "made two years out of time."

Regarding the vehicles, the trial judge noted "[n]either party offered any proofs as to the vehicles listed on their CIS. The [c]ourt is not in a position to equitably divide same." Thus, the judge ordered each party to retain the vehicle in his/her possession, the children retain their vehicles, and all boats to be sold and the proceeds equally divided.

The trial judge ordered the furniture from both residences divided equally. He denied defendant's claim as to the items she argued were exempt from equitable distribution and held: "The [c]ourt has no tangible proof, other than [d]efendant's testimony, that some furniture was either gifted or bought with inherited funds."

The trial judge awarded defendant permanent alimony utilizing the version of N.J.S.A. 2A:34-23(b) that existed before its amendment in September 2014. The judge reasoned "the matter was tried under the former iteration of the statute. That being the case, the [c]ourt believes it should be decided under the former statute. Moreover, in making this decision the [c]ourt believes that, given the facts of this case, the result would be strikingly similar."

The judge determined permanent alimony was supported by the majority of the statutory factors. He concluded the marriage was of an "extremely long duration" and "the parties lived a relatively opulent, and certainly an upper income lifestyle. Their lifestyle consumed the entirety of [plaintiff's] income." He found:

> the goal of "maintaining the lifestyle" is more of a goal than a reality. In the case of [defendant,] her most recent CIS shows that her lifestyle has decreased from $92,352 to $27,042 per month. Without even beginning to analyze these figures for credibility purposes, it is clear that she has had to "sacrifice" her prior lifestyle during the course of this litigation, and will have to do so going forward.

The judge found plaintiff's ability to maintain the lifestyle going forward was facilitated by "an extremely generous expense account." Thus, the judge found plaintiff would "have more flexibility" in maintaining the lifestyle than defendant who would be dependent on alimony alone. Conversely, the judge found the equitable distribution award supported the alimony amount awarded because defendant would receive at least $750,000 from her share of ZC to invest "while [plaintiff] will likely someday have the ability to be bought out upon retirement."

The judge found defendant could earn no money because she had been "out of the workforce for decades." The judge found that plaintiff and his partners had reduced their draw from $850,000

to $450,000 per year each. He determined plaintiff's income fluctuated dramatically because the "bonus can vary relatively wildly." However, the judge determined there was never a year where plaintiff's income fell below $1,000,000.

The judge ordered the alimony payable at a rate of $22,000 per month from plaintiff's draw and $186,000 per year payable from the bonus for a total yearly obligation of $450,000. The judge made alimony taxable to defendant and tax deductible to plaintiff. The judge ordered plaintiff to maintain life insurance of $4,000,000 to secure his alimony obligation.

The trial judge denied plaintiff's request for a credit for overpayment of pendente lite support noting the final alimony award did not support such a credit. The judge also stated:

> Moreover, the interim support has not been tax affected as the alimony will be. The [c]ourt has adjusted interim support a number of times. It has visited upon [plaintiff,] as the sole bread winner, any number of other costs during the course of the litigation. Thus, while the alimony award is greater than the [pendente lite] award, the [c]ourt does not believe either party would be entitled to a retroactive credit.

The trial judge determined the parties' eldest and youngest children were unemancipated because they remained in college. The parties' middle child having graduated college was deemed

emancipated. Therefore, the judge addressed the college contribution for the remaining children.

The judge found both parents were "very supportive of the children and clearly intend they finish their education." The judge noted the children's educations were funded pendente lite from plaintiff's income. The judge ordered that plaintiff bear seventy-five percent and defendant twenty-five percent of the unemancipated children's college housing, tuition, food, and books. The judge declined to order child support.

The trial judge next addressed the issue of counsel, expert, and mediation fees, and each party's claim for a contribution to fees. The judge noted the combined total spent by the parties on such expenses was $1,402,580.

The judge noted plaintiff "can clearly afford his counsel's fees. [Defendant] is less favorably disposed but has received a significant award both in terms of equitable distribution and alimony." The judge also noted plaintiff had been ordered to pay $130,000 towards defendant's fees without prejudice.

Addressing the parties' good faith, the trial judge found defendant achieved a result better than plaintiff had offered her in settlement discussions. However, the judge found "on at least two occasions, [d]efendant's conduct of blatantly violating the confidentiality agreement regarding [ZC] required [p]laintiff's

counsel to come into [c]ourt seeking emergent relief. . . . Defendant at times has acted out of control while both parties have failed to heed orders of this [c]ourt." The judge also found plaintiff had violated a court order "not to receive any monies from ZC, and then signing loan advances to himself."

Thus, the judge awarded plaintiff $25,000 for defendant's violations of the confidentiality agreement, and ordered plaintiff to bear one-third of defendant's counsel fees. The judge ordered the parties to split the mediator's fees equally, which totaled $10,000.

Regarding expert fees, the judge noted defendant had abandoned Politziner as a joint expert before he could complete his work or render an opinion in favor of retaining Sziklay. The judge rejected defendant's challenge to Politziner's "methods, his billing practices, the thoroughness of his investigation, and . . . his conclusions." The judge found that both parties had stipulated to Politziner's expertise and the judge's review of Politziner's billing records did not reveal any inappropriate billing, and that Politziner's bill was less than Sziklay's. The judge noted he found Politziner's conclusions regarding the value of ZC sound and his testimony "extremely helpful." Thus, the judge held plaintiff responsible for two-thirds of Politziner's bill and defendant responsible for the remaining one-third.

The trial judge did not order plaintiff to share in Sziklay's fees. The judge noted although Sziklay was "extremely qualified . . . his position in this matter has been almost completely rejected by this [c]ourt."

Post-judgment, defendant sought reconsideration of the final judgment of divorce, which the judge denied in an order dated April 17, 2015. This appeal followed.

On appeal, defendant argues the trial judge erred in: adopting Politziner's valuation of ZC and in the percentage of ZC's value awarded to defendant; valuing the Cape Cod residence; ordering the sale of the marital residence; ordering taxable alimony be paid to defendant, and the amount of alimony and life insurance to insure it; failing to give defendant a Mallamo[1] adjustment in light of the alimony awarded at trial; rejecting defendant's dissipation claim; failing to make an equitable distribution of personal property; failing to award defendant a portion of the 2011 income tax overpayment; failing to make an equitable distribution of the parties' automobiles; requiring the parties to share in the children's college expenses; granting plaintiff's application to hold defendant in violation of litigant's rights for violation of the confidentiality agreement; and awarding of counsel fees.

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

II.

We begin with our standard of review. The Supreme Court has stated:

> [F]indings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence. Cesare v. Cesare, 154 N.J. 394, 411-12 (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." Id. at 412 (citing Pascale v. Pascale, 113 N.J. 20, 33 (1988)).
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> If the trial court's conclusions are supported by the evidence, we are inclined to accept them. Ibid. We do "not disturb the 'factual findings and legal conclusions of the trial judge unless . . . 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.'" Ibid. (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "Only when the trial court's conclusions are so 'clearly mistaken' or 'wide of the mark'" should we interfere to "ensure that there is not a denial of justice." N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007)).
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> [Gnall v. Gnall, 222 N.J. 414, 428 (2015).]

"Appellate courts accord particular deference to the Family Part because of its 'special jurisdiction and expertise' in family matters." Harte v. Hand, 433 N.J. Super. 457, 461 (App. Div.

2013) (quoting Cesare, 154 N.J. at 412). However, "[t]his court does not accord the same deference to a trial judge's legal determinations. Rather, all legal issues are reviewed de novo." Ricci v. Ricci, 448 N.J. Super. 546, 565 (App. Div. 2017) (citing Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

III.

Defendant argues the trial judge abused his discretion in limiting discovery relating to the valuation of ZC. She contends this error made both experts' opinions unreliable net opinions. She also argues the judge erred regarding the value of ZC, and in awarding an equitable distribution of only twenty-five percent of plaintiff's ownership interest.

The Supreme Court has held "deference is generally accorded to the trial court" on discovery matters. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253 (2001). Therefore, we apply an abuse of discretion standard in our review of discovery determinations by a trial court. Connolly v. Burger King Corp., 306 N.J. Super. 344, 349 (App. Div. 1997).

The trial judge explained that defendant's expert Sziklay received more discovery regarding ZC than Politziner. Both experts were able to render an opinion as to ZC's value. Moreover, the trial judge addressed defendant's pendente lite motions and

exercised his discretion by engaging in a detailed review of defendant's discovery demands.

Defendant does not identify any particular discovery requests that were improperly denied. Rather, she argues generally that "[t]he record reveals the extent of the discovery limitations imposed by the court," and claims the "discovery-based [o]rders were in error." Furthermore, she does not state with any particularity why the unspecified discovery was necessary for her to establish the true value of ZC, or why the permitted discovery was insufficient for that purpose. Having reviewed the record and the judge's determination we are not convinced the alleged lack of discovery had an adverse impact upon the equitable distribution determinations.

We also find no support for defendant's assertion the lack of discovery rendered the experts' reports net opinions. Defendant made no such claim at trial. Moreover, a net opinion is one rendered with only "an expert's bare conclusions, unsupported by factual evidence[.]" Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). "In essence, the net opinion rule requires an expert witness to give the why and wherefore of his expert opinion, not just a mere conclusion." Vitrano v. Schiffman, 305 N.J. Super. 572, 577 (App. Div. 1997) (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)). "Where . . . an expert

offers an opinion without providing specific underlying reasons . . . he ceases to assist the trier of fact and becomes nothing more tha[n] an additional juror." Ibid. (quoting Jimenez, 286 N.J. Super. at 540). "An expert's conclusion 'is excluded if it is "based merely on unfounded speculation and unquantified possibilities."'" Townsend v. Pierre, 221 N.J. 36, 55 (2015) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)).

Given the trial judge's detailed analysis of each expert's report, and explanation regarding how each arrived at a conclusion of valuation, defendant's claim the reports were net opinions lacks merit. Each expert provided a detailed and thorough explanation of the valuation methodology and reasoning for valuation. Their reports were not unsupported speculation.

We also disagree the valuation determination was erroneous. Our review of equitable distribution determinations is narrow. Valentino v. Valentino, 309 N.J. Super. 334, 339 (App. Div. 1998); Wadlow v. Wadlow, 200 N.J. Super. 372, 377 (App. Div. 1985). We decide only whether the trial court "mistakenly exercised its broad authority to divide the parties' property and whether the result was 'reached by the trial judge on the evidence, or whether it is clearly unfair or unjustly distorted by a misconception of law or findings of fact that are contrary to the evidence.'"

Valentino, 309 N.J. Super. at 339 (quoting Wadlow, 200 N.J. Super. at 382). "A sharp departure from reasonableness must be demonstrated before our intercession can be expected." Wadlow, 200 N.J. Super. at 382 (quoting Perkins v. Perkins, 159 N.J. Super. 243, 248 (App. Div. 1978)).

To make an equitable distribution the trial judge must identify the assets subject to equitable distribution, value the assets as of the date of complaint, and determine how the assets should be distributed between the parties. Rothman v. Rothman, 65 N.J. 219, 232 (1974). The goal of equitable distribution is to achieve a fair division of marital property. Steneken v. Steneken, 183 N.J. 290, 299 (2005). Pursuant to N.J.S.A. 2A:34-23.1, the Legislature has provided sixteen factors the trial judge must utilize in making an equitable distribution.

Equitable distribution of a spouse's interest in a closely held company requires identifying the fair value of the business. As stated by the Supreme Court in Steneken, 183 N.J. at 296-97:

> "There are . . . few assets whose valuation impose as difficult, intricate and sophisticated a task as interests in close corporations." Torres v. Schripps, Inc., 342 N.J. Super. 419, 435 (App. Div. 2001) (quoting Lavene v. Lavene, 148 N.J. Super. 267, 275 (App. Div. 1977)). . . . Although there is no general formula that will apply to the "many different valuation situations," the ultimate "goal is to arrive at a fair market

> value for a stock for which there is no market." Ibid.

The capitalized earnings method, used by both experts in this case, involves "[c]apitalization of indicated earnings at a reasonable return on investment based on relative risk and current interest rates." Lavene v. Lavene, 162 N.J. Super. 187, 197 (Ch. Div. 1978).

> This method requires analysis of the earning power of the corporation as it is related to the rates of return expected in the current money market for various types of investments with consideration given to expected rates of growth, risk and the potential time lag until a reasonable level of profit can be obtained. Based on this analysis the earning power is converted into a corresponding value.
>
> This conversion is usually accomplished "by relating the rate of return expected to a corresponding multiple of net after tax income such as is represented by the price-earnings ratio often discussed in analysis of stock exchange traded equities."
>
> > The appropriate rate to use in capitalization . . . is a matter of judgment based primarily upon the degree of risk associated with the probable future income stream and determination of what should be a fair return on the investment.
> >
> > The capitalizing procedure is appropriate where it appears that the operation can continue on for a long period as a profitable business.

[Id. at 197-98 (emphasis added) (alteration in original) (citations omitted).]

The valuation technique accepted by the trial court, is "measured against a reasonableness standard." Steneken, 183 N.J. at 297. Although the approach must be grounded in principles that are generally acceptable in the financial community, a business valuation is a very fact-sensitive inquiry, and it is more an art than a precise science. Id. at 297-98; accord Balsamides v. Protameen Chems., Inc., 160 N.J. 352, 368 (1999); Brown v. Brown, 348 N.J. Super. 466, 477 (App. Div. 2002).

The purpose of normalization adjustments is to reach a fair value of the company based upon application of industry standards. We disagree with defendant's argument the judge erred in rejecting Sziklay's opinion based upon the normalization adjustment he took for the company's excessive compensation expenses. Courts are free to accept or reject expert testimony, and do not have to adopt the opinion of either expert. Brown, 348 N.J. Super. at 478; Cty. of Middlesex v. Clearwater Vill., Inc., 163 N.J. Super. 166, 174 (App. Div. 1978). Moreover, such adjustments are not mandatory. In Steneken, the Court expressly stated: "for the purpose of valuing a closely-held corporation in determining the proper equitable distribution thereof, proper valuation techniques, which may include the normalization of excess salary

expenses, are to be applied." 183 N.J. at 293 (emphasis added).

As we noted, the trial judge found that by making the normalization adjustment for compensation, Sziklay had essentially rewritten the corporate books and valued a "fictional corporation." Although it is a generally accepted accounting valuation practice to take the normalization adjustment for excessive compensation, the trial judge provided a reasonable explanation for rejecting Sziklay's adjustment methodology. The judge found Sziklay's reduction of compensation by forty percent was inconsistent with his "'assumption' that ZC would be managed in the future 'with the same level of effectiveness' as it was on the date of valuation."

Both experts testified regarding normalization adjustments they took for items beyond compensation, namely, ZC's excessive marketing expenses, as well as the upward adjustments made to the partners' compensation amounts. Both experts agreed the industry standard for compensation as a percentage of total revenue was approximately fifty percent, and this was ZC's historical percentage, as well as its future goal. However, in 2011, the compensation ratio for ZC was over seventy percent. Sziklay took a normalization adjustment that assumed a percentage ratio of sixty percent.

Politziner made no adjustment because he accepted plaintiff's

representation the excess compensation was necessary to retain staff and generate future business. This was not inconsistent with Politziner's testimony that ZC had experienced boom years because it was well managed and that based on its prior performance it hoped to achieve similar results compared to its historical earnings.

Defendant also argues the trial judge improperly relied on the restructured note as dispositive of the company's value, thus using a "fair market value" standard for valuing the company, as opposed to the "fair value" standard. We disagree.

"Ordinarily the value that people put on an asset is the most productive place to start such an inquiry[.]" Bowen v. Bowen, 96 N.J. 36, 45 (1984); see also Slutsky v. Slutsky, 451 N.J. Super 332, 362 (App. Div. 2017) (finding a law firm's shareholder agreement relevant to the issue of valuation of partner's interest).

Here, both experts clearly utilized a fair value methodology approach. However, the judge found Sziklay ignored the forbearance agreement altogether. The judge disfavored Sziklay's valuation reasoning:

> Given that the theory underlying setting a valuation is always what a willing buyer would pay a willing seller, neither being under any compunction to act, the decision of [MMC] to renegotiate and accept a largely reduced

> purchase price from the principals of ZC is, to this [c]ourt, much more indicative of true value.

Therefore, Politziner's consideration of the note did not change his analysis to a fair market value approach, but instead better described ZC's fair value. The trial judge's acceptance of Politziner's valuation was not erroneous.

Defendant argues the judge erred in failing to consider other indicators of ZC's value, including: pre-complaint financial reports commissioned by plaintiff, which indicated a value of $25,000,000; the life and disability insurance policies purchased by the company with respect to plaintiff; the $600,000 in revenue sent to the company's Cayman Island branch; and the sale of Zolfo Cooper Europe (ZCE), in February 2015, for $100,000,000. We disagree.

The pre-complaint reports and the value of the insurance ZC held on plaintiff's life were less reliable indicators of value than the valuation undertaken by both experts, who analyzed ZC's prior performance and compared it with its industry. Moreover, the document relied upon by defendant to prove the company had a Cayman Islands operation was not prepared by ZC, and the trial judge accepted plaintiff's testimony that the document was inaccurate. Also, defendant raised the value of ZCE for the first time in her motion for reconsideration, and there is no evidence

in the record plaintiff had any ownership interest in ZCE. The aforementioned items were not a reliable means of valuation.

Defendant argues the trial judge erred in awarding her only twenty-five percent of the value of plaintiff's ownership interest in ZC. She argues she should have received a fifty percent distribution.

As we recently stated:

> The equitable distribution statute "reflects a public policy that is 'at least in part an acknowledgment that marriage is a shared enterprise, a joint undertaking, that in many ways . . . is akin to a partnership.'" Thieme v. Aucoin-Thieme, 227 N.J. 269, 284 (2016) (quoting Smith v. Smith, 72 N.J. 350, 361 (1977)). But, equitable is not synonymous with equal. See Rothman, 65 N.J. at 232 n.6. Our courts must remain true to the legislative mandate expressed in N.J.S.A. 2A:34-23.1, which assures an ordered equitable distribution be "designed to advance the policy of promoting equity and fair dealing between divorcing spouses." Barr v. Barr, 418 N.J. Super. 18, 45 (App. Div. 2011). This requires evaluation of unique facts attributed to each asset.
>
> [Slutsky, 451 N.J. Super. at 358.]

The trial judge was not required to award defendant fifty percent of plaintiff's ownership interest in ZC. The judge's findings reflect an adherence to an analysis of the facts by applying the statutory factors to each asset rather than a uniform application and even distribution of each asset. The trial judge

stated:

> [Plaintiff's] interest in ZC only began in 2008, just a few short years before the filing of this Complaint. Prior to that, [plaintiff] was an employee, and perhaps it could be argued that by 2008, the marital enterprise was largely ending. . . . He was entrusted, along with his partners, by [MMC] [sic] to assume the business effectively for no money down based on the long track record he has built as an effective professional in the industry. He was able to build that track record because he had a partner in life, one [who] managed their family life so that he could focus on his career. That relationship continued throughout the entirety of his career. Having said that, the [c]ourt recognizes that it is the business owner's hard work, their track record of success, and indeed their 'sweat equity' that allows them to build a successful career. It is for that reason that the equitable distribution of a business is different than any other asset of a marriage.

The trial judge's equitable distribution determination of ZC is supported by sufficient credible evidence in the record. The equitable distribution award was not an abuse of discretion.

IV.

Defendant argues the trial judge erred in denying her a credit for fifty percent of the difference between the $3,200,000 listing price she requested for the Cape Cod home, and its ultimate sale price of $2,895,000. We find no error in the judge's findings.

Pendente lite, the trial judge ordered the sale of the Cape Cod residence and set the listing price at $2,895,000. The

residence sold at the listing price before trial, and the funds were deposited into escrow, along with funds attributable to plaintiff's post-complaint earnings.

At trial, defendant argued the trial judge's determination of the listing price for the residence was artificially low. The trial judge rejected defendant's claim, referring to her argument as "essentially a Motion for Reconsideration made two years out of time."

We disagree. Defendant was not time barred to challenge the trial judge's pendente lite order setting the listing price for the Cape Cod residence because the order was interlocutory in nature and therefore reviewable. See Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 261 (App. Div. 1987) (stating "[t]he inherent power of the court to modify its own interlocutory orders prior to the entry of final judgment has long since been recognized in New Jersey.").

Nevertheless, the record lacks evidence supporting a $3,200,000 value for the Cape Cod home. Defendant's testimony was that the parties should have chosen a listing price of $2,995,000. She adduced no expert testimony regarding the value of the home or other objective evidence to establish the home would have sold for an amount greater than the listing price. The trial judge did not err in refusing to grant defendant a credit based upon a

hypothetical sales price for the Cape Cod residence.

V.

Defendant argues the trial judge erred in ordering the sale of the marital home. Additionally, she asserts "[t]he court also erred regarding the escrow account." We find no merit to these claims.

The trial judge ordered the sale and equal distribution of the marital residence, which had an appraised value of $1,635,000, and approximately $1,321,000 in mortgage debt. Pursuant to N.J.S.A. 2A:34-23.1(l), the judge found defendant had no need to retain the residence because the children were grown and residing outside of the residence. The judge acknowledged defendant's desire to remain in the residence, but noted her testimony conceding she could not obtain a mortgage to purchase plaintiff's interest. Therefore, the judge's decision to order the residence sold was not an abuse of discretion.

The record reveals that the escrow account was comprised of plaintiff's post-complaint earnings and the proceeds from the sale of the Cape Cod home. The trial judge awarded defendant one-half of the proceeds from the sale of the Cape Cod residence. Defendant has not articulated a reason why the judge erred in permitting plaintiff to retain his post-complaint earnings. Indeed, absent other circumstances, the filing of a complaint for divorce

terminates the marital enterprise. See Painter v. Painter, 65 N.J. 196, 218 (1974); see also Brandenburg v. Brandenburg, 83 N.J. 198, 209-10 (1980). For these reasons, we decline to disturb the trial judge's decision to permit plaintiff to retain his post-complaint earnings from the escrow.

VI.

Defendant argues the trial judge awarded an insufficient sum of alimony, and as a result the sum of life insurance was also erroneous. Specifically, she contends the judge made inadequate findings regarding the marital lifestyle and inaccurately calculated plaintiff's annual income to be $1,313,000, without considering benefits, perquisites, and plaintiff's earnings for 2012 and 2013. Defendant also argues the trial judge erred by awarding taxable alimony because ZC paid the taxes. Defendant argues the alimony failed to account for the cost of defendant's medical insurance expenses and had no savings component. Defendant asserts the judge failed to specify how the equitable distribution award factored into the alimony determination.

In a review of an alimony award, we defer to the trial judge's findings. Overbay v. Overbay, 376 N.J. Super. 99, 106 (App. Div. 2005). We will not overturn an alimony award unless we find

> the trial court clearly abused its discretion or failed to consider all of the controlling legal principles, or we must otherwise be

> satisfied that the findings were mistaken or that the determination could not reasonably have been reached on sufficient credible evidence present in the record after considering all of the proofs as a whole.
>
> [Gonzalez-Posse v. Ricciardulli, 410 N.J. Super. 340, 354 (App. Div. 2009).]

"An alimony award that lacks consideration of the factors set forth in N.J.S.A. 2A:34-23(b) is inadequate[.]" Crews v. Crews, 164 N.J. 11, 26 (2000).

Courts may award 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. The standard of living during the marriage serves as the "touchstone" for alimony. Crews, 164 N.J. at 16. Whenever possible, the alimony award should be set at an amount that will "enable each party to live a lifestyle 'reasonably comparable' to the marital standard of living." Id. at 26 (citing N.J.S.A. 2A:34-23(b)(4)).

Although the trial judge addressed each statutory factor, he only described the characteristics of the marital lifestyle. He failed to articulate, numerically, his findings regarding the marital lifestyle. Indeed, the judge reviewed plaintiff's income between 2005 and 2011, excepting 2009, which was aberrational, and concluded plaintiff earned an average of $1,313,000 per year. The judge further noted plaintiff's income was paid primarily in the

form of a bonus, which could vary from year-to-year. Thus, while plaintiff's income had never dropped below $1,000,000 annually, the judge found it also "could be more than twice that amount." The judge also noted that plaintiff benefited from "an extremely generous expense account" and "the firm's largesse extended towards its clients on such things as holiday parties, ski trips and the like."

The judge concluded "[p]laintiff's income represented all of the household income," and the parties spent all of plaintiff's income to support their "incredibly profligate lifestyle." The judge further found that the parties "were not savers." Rather, they "liv[ed] at or even above their means."

Although the judge's descriptive findings regarding the lifestyle were adequate, we are unable to correlate his findings regarding the parties' expenditures with the alimony award. Indeed, the judge ordered plaintiff to pay defendant permanent alimony of $450,000 per year based on an income of $1,313,000, but without a numerical finding of lifestyle, we are unable to determine how the alimony figure was derived.[2] For these reasons,

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[2] Conversely, we have no difficulty with the trial judge's calculation of plaintiff's income. The averaging of the income for five years preceding the complaint without consideration of the post-complaint earnings was a sound methodology. See Platt v. Platt, 384 N.J. Super. 418, 426-27 (App. Div. 2006) (affirming

we reverse the alimony award and remand for the trial judge to make a numerical finding of the marital lifestyle and then explain whether and how the alimony award meets it.

The judge's consideration of the marital lifestyle should also consider defendant's claims regarding the costs of her medical insurance. This expense was paid by ZC during the marriage, and post-judgment will continue to inure to plaintiff's benefit alone, yet become a significant post-judgment expense for defendant.

However, we disagree that the trial judge should have increased the calculation of plaintiff's income by the value of the medical insurance provided by ZC, and the expense account ZC afforded plaintiff for marketing purposes, as these benefits only defrayed the marital lifestyle and the trial judge already determined the marital lifestyle was defined by the expenditure of plaintiff's earnings.

We also disagree the trial judge erred by not including a savings component for alimony. We recently stated:

> [T]he court can take into account the marital standard of living and allow the supported spouse to save for the future. See [Glass v. Glass] 366 N.J. Super. [357,] 379 [(App. Div. 2004)]; see also Capodanno v. Capodanno, 58

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the use of a five year average of an obligor's income plus two years following the complaint, but only where the obligor purposely reduced his post-complaint income despite his business performing well). Here, there was no need to consider plaintiff's post-complaint income because he did not intentionally reduce it.

N.J. 113, 120 (1971). This is particularly true when the supporting spouse can afford any amount paid to the supported spouse. [Glass, 366 N.J. Super. at 379.]

A spouse's need for savings has long been recognized as a component of alimony, see [Martindell, 21 N.J. at 354], that allows for the accumulation of "reasonable savings to protect [the supported spouse] against the day when alimony payments may cease because of [the death of the supporting spouse] or change in circumstances." Davis [v. Davis], 184 N.J. Super. [430,] 437 [(App. Div. 1982)] (quoting Khalaf v. Khalaf, 58 N.J. 63, 70 (1971)). Savings have been used for such security in lieu of directing the supporting spouse to keep a life insurance policy or establish a trust. . . . In short, savings has been a relevant and appropriate factor to be considered in the establishment of a reasonable and equitable alimony award because the amount of support awarded is subject to review and modification upon a showing of a change of circumstances, which could result in the supported spouse being incapable of supporting himself or herself. See [Davis, 184 N.J. Super. at 437.]

However, the protection of income being derived through alimony is not the only reason why a supported spouse requires savings, especially where regular savings have been part of the established marital lifestyle. "[A]n appropriate rate of savings to meet needs in the event of a disaster, to make future major acquisitions such as automobiles and appliances, and for retirement can, and in the appropriate case should, be considered as a living expense when considering an award of . . . [alimony]." [In re Marriage of] Weibel, 965 P.2d [126,] 129-30 [(Colo. App. 1998); see also [Glass, 366 N.J. Super. at 378.]

> The most "appropriate case" in which to include a savings component is where the parties' lifestyle included regular savings.
>
> [Lombardi v. Lombardi, 447 N.J. Super. 26, 38-39 (App. Div. 2016) (alterations in original) (emphasis added) (citations omitted).]

The parties did not save during the marriage. Moreover, although plaintiff earns a substantial income, he cannot afford to pay an unlimited amount of alimony to defendant. Also, the trial judge ordered life insurance to secure alimony for defendant in the event of plaintiff's demise. There is no indication the alimony awarded would not enable plaintiff to acquire assets in the future. Moreover, the final judgment of divorce does not foreclose plaintiff from seeking an increase in alimony in the event of a substantial and permanent change in circumstances requiring greater support. For these reasons, we decline to require consideration of a savings component for alimony on remand.

We conclude the trial judge erred by awarding taxable alimony to defendant. There is no dispute ZC pays the taxes on plaintiff's income and that he is not obligated to do so. Therefore, awarding taxable alimony to defendant where there was no commensurate benefit of deductibility to plaintiff seems to only financially burden defendant. Therefore, we reverse the alimony award and direct the trial judge to award an appropriate sum of non-taxable alimony to defendant.

We note further the alimony award must be reversed because the trial judge utilized the wrong version of N.J.S.A. 2A:34-23(b). Although he acknowledged the statute was amended in September 2014, before the entry of final judgment, the judge reasoned the case had been tried and concluded prior to the amendment of the alimony statute.

This may be so, but the trial judge's failure to utilize the current statute was an error. We have previously held that the current statute does not apply where "the post-judgment order became final before the statutory amendment's effective date[.]" Spangenberg v. Kolakowski, 442 N.J. Super. 529, 539 (App. Div. 2015). Here, because the trial judge's decision was issued four months after the September 10, 2014 effective date of the alimony statute, the current version of the law should have been applied.

Indeed, the amendments to the statute altered the core factors trial judges should consider in fashioning an alimony award. Therefore, the determination here did not comport with the statutory requirement the trial judge "shall consider . . . [all of the] factors" in N.J.S.A. 2A:34-23(b).[3] For these reasons, we reverse and remand the alimony determination.

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[3] We do not address defendant's claims regarding how the trial judge weighed the equitable distribution award in the alimony calculation because the trial judge will be considering the current statutory factors anew upon remand.

The trial judge ordered plaintiff to maintain $4,000,000 in life insurance with defendant as the named beneficiary for the duration of the alimony obligation. To the extent the alimony determination upon remand necessitates a review of the life insurance award, the trial judge should also adjust the insurance amount plaintiff is required to maintain, if appropriate.

VII.

Defendant contends the judge erred in denying her Mallamo claims and made inadequate findings of fact. She argues the pendente lite support awards were insufficient in light of plaintiff's post-complaint earnings and the ultimate alimony award. She also argues that the judge erred in granting plaintiff a fifty-percent credit for the money defendant withdrew from the parties' joint money market account.

In Mallamo, we described how, pendente lite,

> [i]n many instances the motion judge is presented reams of conflicting and, at times, incomplete information concerning the income, assets and lifestyles of the litigants. The orders are entered largely based upon a review of the submitted papers supplemented by oral argument. Absent agreement between the parties, however, a judge will not receive a reasonably complete picture of the financial status of the parties until a full trial is conducted. Only then can the judge evaluate the evidence, oral and documentary, and weigh the credibility of the parties. Only then can the judge determine whether the supporting spouse has the economic means represented by

> the other spouse or in the case of declining income has suffered legitimate economic reversal or has been afflicted with a temporary case of diminished resources occasioned by a divorce.
>
> [280 N.J. Super. at 16 (emphasis added).]

Here, as we noted, support fluctuated from $43,000, $20,000, $15,000 and $22,000 per month as pendente lite circumstances changed. The trial judge declined to award a retroactive modification of pendente lite support reasoning the final alimony award was taxable and that plaintiff had been ordered to pay "any number of other costs during the course of the litigation."

However, because the trial judge's decision lacks a numeric description of the marital lifestyle, we are unable to determine whether the pendente lite support was adequate and whether the other expenses paid by plaintiff that the trial judge noted, but failed to quantify, obviated more pendente lite support to defendant. Moreover, the issue of pendente lite support must be revisited in light of our remand on the issue of the taxability of alimony. Our remand of alimony for the purpose of consideration of the factors set forth in the current version of the alimony statute is particularly relevant to this issue, as N.J.S.A. 2A:34-23(b)(13) requires the trial judge to consider the "nature, amount and length of pendente lite support paid" in awarding alimony.

We affirm the trial judge's decision to grant plaintiff a

credit for one-half of the funds defendant unilaterally withdrew from the parties' joint account after the complaint. Specifically, the judge credited plaintiff $65,500 of the $131,000 unilaterally withdrawn by defendant post-complaint. The judge also accepted plaintiff's valuation of the account, which was greater than defendant's $116,400.

Defendant offers no basis for us to second guess the trial judge's findings. We are satisfied the decision to grant plaintiff a credit was not an abuse of discretion and was supported by the credible evidence in the record.

VIII.

Defendant argues the trial judge erred by not finding plaintiff had dissipated income and assets from the marriage. We disagree.

N.J.S.A. 2A:34-23.1(i) states the trial 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 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."); see also Monte v. Monte, 212 N.J. Super. 557, 567-68 (App. Div. 1986) (stating debts incurred by one spouse without knowledge of the other in order to purposely encumber a marital asset constituted a dissipation of the asset).

The concept of dissipation "is a plastic one, suited to fit the demands of the individual case." Kothari v. Kothari, 255 N.J. Super. 500, 506 (App. Div. 1992). In determining whether a spouse has dissipated marital assets, courts consider the following factors:

> (1) the proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefitted the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and amount of, the expenditure.
>
> [Id. at 507 (quoting Annotation, Spouse's Dissipation Of Marital Assets Prior To The Divorce As A Factor In Divorce Court's Determination Of Property Division, 41 A.L.R. 4th 416, 421 (1985)).]

"The question ultimately to be answered by a weighing of these considerations is whether the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate." Ibid.

The record supports the judge's rejection of defendant's

dissipation claim. In particular, defendant pointed to 2010 as the time when the marriage began to break down. She claimed plaintiff had consulted with divorce strategists and simultaneously lulled her into believing he desired to remain married.

However, defendant adduced no evidence of dissipation in 2010, or the years following, to corroborate her theory. Instead, defendant produced self-created charts purporting to demonstrate the dissipation prior to 2010, and her own timeline for the breakdown of the marriage. Moreover, there was no showing plaintiff hid his relationships and expenditures from defendant or evidence he encumbered or transferred marital assets to avoid an equitable distribution to defendant. The record demonstrates plaintiff's income was known and he made no attempts to divert it from the marriage.

The trial judge's finding that the extramarital relationships alleged by defendant were not in and of themselves proof that a dissipation is sound. We discern no abuse of discretion or mistake of law, and affirm this aspect of the judgment.

IX.

Defendant argues the trial judge erred in failing to award her certain personal property within the marital residence and instead evenly dividing it. Specifically, referring to the trial

judge's finding that items defendant claimed were gifted to her had become marital because she brought them into the marriage, defendant argues "[p]ersonalty cannot be deemed a marital asset simply because it exists in the marital home."

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

> Except as provided in this subsection, in all actions where a judgment of divorce, . . . is entered the court may make such award or awards to the parties . . . to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage . . . . However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage . . . by either party by way of gift, devise, or intestate succession shall not be subject to equitable distribution . . . .

The burden of establishing that property is immune from distribution "will rest upon the spouse who asserts it." Painter, 65 N.J. at 214.

Defendant identified items she claimed were gifts from her family members, and argued they should be immune from distribution. However, the judge rejected defendant's claim, stating: "The [c]ourt has no tangible proof, other than [d]efendant's testimony, that some furniture was either gifted or bought with inherited funds. In any event, the exempt status was lost when the furniture became part of the marital residence."

We agree with defendant that inherited or otherwise immune

personalty does not become co-mingled merely because of its location within the marital residence. However, defendant's claim failed because she did not meet her burden of proof to establish the exempt status of the furnishings. We have not been presented with any other evidence to establish the immune nature of the personalty. The trial judge's findings are entitled to deference. For these reasons, we affirm the judge's determination.

X.

Defendant contends the judge erred by not addressing her request for equitable distribution of a 2011 income tax overpayment of $99,234. Although the record reflects no findings by the trial judge on this issue, the reason is self-evident.

It is undisputed ZC paid all of the income taxes for plaintiff. Thus, any overpayment of tax would be due to the firm and did not belong to the parties as equitable distribution.

Therefore, pursuant to Rule 2:10-5, we exercise original jurisdiction to adjudicate this issue. As stated by our Supreme Court,

> [r]esort to original jurisdiction is particularly appropriate to avoid unnecessary further litigation, as where the record is adequate to terminate the dispute and no further fact-finding or administrative expertise or discretion is involved, and thus a remand would be pointless because the issue to be decided is one of law and implicates the public interest.

> [Price v. Himeji, LLC, 214 N.J. 263, 294 (2013) (alteration in original) (quoting Vas v. Roberts, 418 N.J. Super. 509, 523-24 (App. Div. 2011)).]

For these reasons, defendant's request for equitable distribution of the 2011 income tax overpayment is denied.

XI.

Defendant contends the trial judge erred in failing to address her request "for a credit of fifty percent . . . of funds generated by plaintiff's unilateral sale of vehicles during the [divorce] proceedings." We disagree.

As we noted, plaintiff sold a Jeep and used its proceeds to purchase a new vehicle for one of the parties' children. He also sold an Infiniti and applied the proceeds to the purchase of an automobile for himself.

If defendant sought an equitable distribution of the proceeds from sale of the automobiles, which had been invested in newer vehicles, the burden of proof as to value lay with her. Rothman, 65 N.J. at 233. The trial judge stated that "[n]either party offered any proofs as to the vehicles listed on their CIS," and therefore the court was "not in a position to equitably divide same." Therefore, the judge decided that the parties would retain their vehicles, without setoff, and the children's vehicles were to be transferred to them.

The trial judge did not abuse his discretion. We affirm the decision regarding the parties' automobiles.

XII.

Defendant argues the judge erred by requiring the parties to share in the un-emancipated children's college expenses, without applying the factors set forth in Newburgh v. Arrigo, 88 N.J. 529 (1982). She also argues the judge's finding that the parties' eldest child was un-emancipated was contrary to prevailing law.

Pursuant to Newburgh, when a parent seeks contribution to a child's college expenses, the court must consider the following factors:

> (1) whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; (2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; (3) the amount of the contribution sought by the child for the cost of higher education; (4) the ability of the parent to pay that cost; (5) the relationship of the requested contribution to the kind of school or course of study sought by the child; (6) the financial resources of both parents; (7) the commitment to and aptitude of the child for the requested education; (8) the financial resources of the child, including assets owned individually or held in custodianship or trust; (9) the ability of the child to earn income during the school year or on vacation; (10) the availability of financial aid in the form of college grants and loans; (11) the child's relationship to the paying parent, including mutual affection and shared goals

as well as responsiveness to parental advice and guidance; and (12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.

[88 N.J. at 545.]

The trial judge noted the parties' eldest and youngest child each attended college away from home. The judge found both parties were "very supportive of the children and clearly intend they finish their education." However, the record lacks any other findings regarding any of the Newburgh factors to enable us to determine whether the judge's decision that the parties share the college expense on a seventy-five percent/twenty-five percent basis was an appropriate exercise of discretion. Therefore, this issue is remanded for the trial judge to make the appropriate findings.

As set forth in Newburgh, 88 N.J. at 543, "[a]ttainment of ages 18 establishes prima facie, but not conclusive, proof of emancipation." However, "[w]hether a child is emancipated at age 18, with the correlative termination of the right to parental support, depends upon the facts of each case." Ibid. "[E]mancipation of a child occurs when the fundamental dependent relationship between parent and child is terminated. When a child moves beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status on his or her own,

generally he or she will be deemed emancipated." Bishop v. Bishop, 287 N.J. Super. 593, 598 (Ch. Div. 1995). Thus, "[t]he demonstrable needs of the child, not the child's age, are determinative of the duty of support." Patetta v. Patetta, 358 N.J. Super. 90, 93-94 (App. Div. 2003).

Here, the parties' eldest child was twenty-seven years old at the time of trial, and thus well over the presumptive age of emancipation. However, she was a student at Penn State, and remained financially dependent upon her parents. Therefore, the trial judge did not err by finding her un-emancipated, and defendant's argument in this regard lacks merit.

XIII.

Defendant argues the trial judge erred by requiring her to pay $25,000 of plaintiff's counsel fees as a sanction for her violation of the confidentiality agreement. We disagree.

The parties signed a confidentiality agreement on October 19, 2011. In 2013, the judge concluded defendant had violated the confidentiality agreement, but did not issue any sanctions at that time, noting only that defendant was bound by the agreement.

After hearing the trial testimony and considering the evidence, the trial judge found defendant had once again violated the agreement by offering to provide confidential information from the parties' case to a financial reporter. Therefore, the judge

restrained defendant from disclosing confidential information or documentation regarding plaintiff or ZC, and assessed a sanction against her in the form of paying $25,000 in plaintiff's counsel fees "expended in response to [d]efendant's violations of the confidentiality agreement."

"There is no doubt at all of the right of a trial judge, as an exercise of discretion, to impose sanctions for violation of the rules or failure to obey the orders of the court[.]" Kohn's Bakery, Inc. v. Terracciano, 147 N.J. Super. 582, 584-85 (App. Div. 1977). We review a trial judge's enforcement of litigant's rights pursuant to Rule 1:10-3 under an abuse of discretion standard. Barr, 418 N.J. Super. at 46.

The record supports the trial judge's decision. Defendant clearly violated the confidentiality agreement. The trial judge did not abuse his discretion by requiring payment of a sanction.

XIV.

Defendant argues the trial judge's determination regarding counsel and expert fees and costs was erroneous. Specifically, defendant claims "[i]n light of the trial court's disregard of the uncontroverted marital lifestyle, the limited equitable distribution award, and the amount of taxable alimony, [she] was in need of a far greater award of fees/costs." She also claims that the judge erred in concluding plaintiff had already paid

$130,000 in her counsel fees, because the payment had come from the proceeds from sale of the Cape Cod home, half of which belonged to defendant. Defendant also argues the trial judge's decision to ignore plaintiff's misconduct was the cause of her increased expenditure of fees. Lastly, she argues that by requiring her to pay all of Sziklay's fees, the court punished her for retaining her own accounting expert.

N.J.S.A. 2A:34-23 provides: "The court may order one party to pay a retainer on behalf of the other for expert and legal services when the respective financial circumstances of the parties make the award reasonable and just." Rule 5:3-5(c) sets forth nine factors the court must consider in making an award of counsel fees in a family action. Essentially,

> in awarding counsel fees, the court must consider whether the party requesting the fees is in financial need; whether the party against whom the fees are sought has the ability to pay; the good or bad faith of either party in pursuing or defending the action; the nature and extent of the services rendered; and the reasonableness of the fees.
>
> [Mani v. Mani, 183 N.J. 70, 94-95 (2005) (emphasis omitted).]

An award "of counsel fees is discretionary, and will not be reversed except upon a showing of an abuse of discretion." Barr, 418 N.J. Super. at 46. The award here was not an abuse of discretion.

The trial judge addressed all of the factors of Rule 5:3-5(c). The judge concluded the certifications filed by counsel complied with the relevant rules, and their fees, although high, were "appropriate for the work performed." Considering the factors under Rule 5:3-5(c), the judge concluded plaintiff "had a considerable income and can clearly afford his counsel's fees," and noted that he had been ordered to pay some of defendant's fees, in an approximate amount of $130,000. As for defendant, the judge acknowledged that she was "less favorably disposed," but noted that she "has received a significant award both in terms of equitable distribution and alimony."

The judge also found defendant had achieved a result "significantly better" than plaintiff's settlement proposal, which had been provided to the judge under seal for purposes of considering counsel fees. The judge stated both parties had failed to heed court orders, noting defendant's breach of the confidentiality agreement and plaintiff's advancement of loans to himself in violation of court orders barring the incurrence of further debt.

Ultimately, "[u]nder all of the circumstances and in consideration of the factors under R[ule] 5:3-5," the judge ordered that plaintiff was responsible for his own legal fees, with the exception of a $25,000 credit for fees expended in response to

defendant's violations of the confidentiality agreement. The judge also ordered plaintiff to pay one-third of defendant's legal fees, with "credit for any monies previously paid by him from [p]ost-[c]omplaint earnings."

In addition, the judge decided the parties were equally responsible for the mediation fees, and to the extent plaintiff paid them he was entitled to a fifty percent credit. The judge ordered the parties to share Politziner's fees, with plaintiff responsible for two-thirds of his fees and defendant one-third. The judge ordered defendant to bear all of Sziklay's fees, noting that "however extremely qualified Mr. Sziklay is, his position in this matter has been almost completely rejected by this [c]ourt for the reasons previously discussed."

We discern no error in the trial judge's reasoning. He appropriately balanced the Rule 5:3-5(c) factors. Also, it was not an abuse of discretion for the trial judge to require defendant to contribute to the former joint expert's fees, but not require plaintiff to contribute to a partisan expert's fees, especially where the court has rejected his opinion. For these reasons, we decline to disturb the trial judge's determination on counsel and expert fees.

We also find defendant's claim the trial judge ostensibly gave plaintiff a credit for paying defendant's counsel fees by

using defendant's equitable distribution proceeds from the sale of the Cape Cod home to lack merit. As set forth in the final judgment, the judge ruled plaintiff was responsible for one-third of defendant's fees, with a credit only for fees already paid out of his post-complaint earnings. Therefore, the judge did not permit plaintiff a credit for any of defendant's fees paid out of the Cape Cod proceeds.

Affirmed in part; reversed and remanded in part. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION