THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

C R. W ,	)	
	)	
Petitioner,	)	
	)	File No.: CN21-06063
v.	)	Petition No.: 22-05449 (Ancillary Matters)
	)	
	)	
L H ,	)	
	)	
Respondent.	)	

ORDER ON MATTERS ANCILLARY TO DIVORCE
AS AMENDED UPON CONSIDERATION OF MOTIONS FOR REARGUMENT

Date Submitted: December 1, 2023
Date Decided: December 26, 2023
Date Motions for Reargument Submitted: January 23, 2024
Date of Decision on Motions for Reargument: January 26, 2024
Date of Final Order: January 26, 2024

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ARRINGTON, Judge.

Background

On September 10, 2023 through November 16, 2023, the Court conducted a hearing regarding matters ancillary to divorce. Present in Court were C R. W ("Husband"), represented by Bonnie Egan Copeland, Esquire; and L (W) H ("Wife"), represented by David C. Gagne, Esquire. Trial was scheduled for six days at the request of Counsel. This is the Court's ancillary disposition.

Procedural History

The parties were married on April 15, 1989, and separated on September 15, 2021.

On February 24, 2022, Husband filed a Petition for Divorce with ancillary matters of Property Division, Attorney's Fees, and Court Costs.[1] On April 8, 2022, Wife filed an Answer and Counterclaim with additional ancillary matters of Temporary Alimony and Permanent Alimony.[2] On April 27, 2022, Husband filed an Answer to Counterclaim.[3]

On June 30, 2022, Wife filed a Motion for Interim Alimony.[4] On July 13, 2022, Husband filed a Response to Motion for Interim Alimony.[5]

On July 15, 2022, the Court entered a decree of divorce and retained

[1] Dkt. #22.
[2] Dkt. #27.
[3] Dkt. #28.
[4] Dkt. #29.
[5] Dkt. #30.

jurisdiction over the requested ancillary matters.[6]

On July 26, 2022, Wife requested a first continuance.[7] On August 4, 2022, the Court granted the continuance request.[8]

On October 11, 2022, the Court conducted a Case Management Conference and entered a Trial Scheduling Order.[9]

On October 11, 2022, the Court conducted a hearing on the Motion for Interim Alimony. Prior to conclusion of the hearing, the parties stipulated to an Order of Interim Alimony.[10]

On February 23, 2023, Counsel jointly filed a request for continuance of the trial dates.[11] On March 23, 2023, the Court set a new schedule for the ancillary hearing.[12]

On May 16, 2023, Wife filed a Motion for Continuance.[13] On May 17, 2023, Husband filed a Response to Motion for Continuance.[14] On May 22, 2023, the Court granted the Motion for Continuance.[15]

On May 30, 2023, the Court entered a Trial Scheduling Order which was

[6] Dkt. #40.
[7] Dkt. #43.
[8] Dkt. #44.
[9] Dkt. #49.
[10] Dkt. #50.
[11] Dkt. #54
[12] Dkt. #55.
[13] Dkt. #58.
[14] Dkt. #60.
[15] Dkt. #62.

amended on July 5, 2023.[16] The Pretrial Stipulation was filed on September 5, 2023 and the Pretrial Conference was conducted on September 8, 2023. The Pretrial Order was signed by the Court on September 19, 2023.[17]

Trial was conducted on September 19, 2023, September 21, 2023, September 22, 2023, November 14, 2023, and November 16, 2023. The sixth day of trial was not conducted as the parties rested after the fifth day.

Trial Testimony

Trial testimony was extended over multiple days to accommodate the experts. As a result, the testimony was not presented in chronological order at all times. Phrases in quotation marks represent the witnesses' actual testimony or paraphrases thereof.

Husband's Testimony

Most of Husband's testimony revolved around the issues in dispute. Husband offered little testimony about his personal background. Testimony regarding the issues in dispute are contained in the analysis section of this Order.

Husband began his career working for his father and specializing in excavation, paving, and septic systems. In 2006, after a falling out with his father, Husband and Wife decided to start their own septic business, R. W Excavating,

[16] Dkt. #63.
[17] Dkt. #66.

LLC. Husband acknowledged that the first few years of his business were not very profitable and that Wife helped him "quite a bit." Husband stated that Wife spent most Saturdays learning QuickBooks in addition to working a full-time job.

Husband's company primarily operates in the Greenville, Centreville, and Hockessin markets, with most clientele being "repeat customers" that "trust [Husband]." Husband noted that it took years to build his customer base and described himself as a "hands-on" business owner who is usually "on-site" and "runs everything." Husband explained that he is pivotal to W Excavating and is the only licensed CDL driver for the company.

In August 2023, Husband had by-pass surgery due to severe cardiac damage. Husband was advised by his doctors to not lift more than fifty pounds during first six months of his recovery. However, Husband went back to work too early, and it resulted in him needing excessive fluid drained from his chest. Husband testified that because he is unable to work at full capacity, his business is operating at "50-60%." Before surgery, Husband explained that he worked "60 plus" hours a week. Husband has been working full time notwithstanding his doctor's orders and acknowledged that he is doing more than he should.

Wife's Testimony

Most of Wife's testimony revolved around the issues in dispute which is

contained in the analysis section of this Order. Little testimony was offered about her personal background.

Wife has been intimately involved in Husband's business since its inception. In 2006, Wife formed the LLC for W Excavating and learned how to operate QuickBooks for the company. QuickBooks runs estimates, sends invoices, and generates a variety of reports that are relied upon by the company's accountant, Christopher Smith, when preparing the tax returns for the LLC.

Wife testified that she worked "about 25 hours" per week and was responsible for an assortment of tasks that included opening company mail, making copies of checks, bill pay, and renewing Husband's various licenses each year. Wife also handled the annual insurance audit and collaborated with the business' accountant on different tax issues. In addition, Wife communicated with "Miss Utility" to mark power lines on job sites, and established the entire filing system for W Excavating.

Wife testified that she marketed the business as well. Wife designed the company logos, set up the website, and created business cards. Wife promoted the business by placing the logos on company trucks, and fashioned company clothing that employees could wear while on the job. Wife stated that she "worked her butt off [for the business…] and did what [Husband] asked [her] to do and then some."

Wife testified that her lifestyle during the marriage included vacations "three times a year" to locations such as Italy, Germany, the Caribbean, Colorado, Arizona, Spain, and Las Vegas. Wife was unable to recall where the parties traveled in specific years but contended that Bermuda was "an annual event" where the parties would stay "for a week to ten days." In addition, Wife described going to Delaware Park with Husband "once a week" to "play games" and "listen to the bands play." Wife reported that when she went by herself or with her sister, Husband told her to "go and have a good time." However, Wife contended that she mostly went to Delaware Park with Husband until the end of their marriage.

Expert Testimony

Jonathan A. Patterson, CPA, CVA

Jonathan A. Patterson, CPA, CVA, was Husband's expert for purposes of valuing W Excavating, LLC. Mr. Patterson's testimony is summarized below in the section on valuation of the business.

Andrew Kelly, ABV, CFE, MAFF

Andrew Kelly, ABV, CFE, MAFF, was Wife's expert for purposes of valuing W Excavating, LLC. Mr. Kelly's testimony is summarized below in the section on valuation of the business.

Harris Finkelstein, Ph.D.

Harris Finkelstein, Ph.D., is a well-known psychologist who has testified in the Family Court in hundreds of cases. While Dr. Finkelstein generally testifies in custody matters, he was retained to perform a diagnostic evaluation of Wife's mental health issues.[18] Dr. Finkelstein's testimony and findings are set forth below in the section on attribution of income.

Ellen Lock, CDMS, CCM

Ellen Lock is a certified disability management specialist and a certified case manager. Ms. Lock was retained by Husband for purposes of conducting a vocational evaluation and earnings capacity assessment of Wife. Ms. Lock's testimony and findings are summarized below in the section on attribution of income.

Darlene E. Annas, APRN-BC

Ms. Annas was Wife's medical expert presented for purposes of determining Wife's capacity for employment based on Wife's medical condition. Ms. Annas' testimony is summarized below in the section on attribution of income.

[18] Husband's Ex. 7 at 002.

Issues in Agreement

Based on the parties' representations at the time of the Pretrial Conference and the during of the ancillary hearing, the parties agree upon the disposition of the following marital property:

Marital Home

1. Husband shall retain the former marital residence located at [redacted], Hockessin, DE 19707. The parties agree that the value of the residence is $607,500.[19]

2. Husband shall refinance or assume mortgage. Wife shall retain an equitable interest in the property until the loan is refinanced.

Bank Accounts

3. Marital Savings of $173,434 were divided by prior Court Order on July 14, 2022 with each party receiving $86,717 without prejudice to the percentage division.

4. M&T Checking (xxxx8954) was closed on December 20, 2021.

5. Parties shall each retain their post-separation bank accounts with Husband retaining the M&T Checking (xxxx4518) and Wife retaining PNC Checking and Savings accounts (xxxx4372, 4399, and 4401) without attribution on the Wright Chart.

Wright Chart Items

6. 2012 Ford F-350 value was included in the business valuations and will not be separately divided as it remains with the business assets.

7. 2015 Harley Davidson shall be retained by Husband with value of $15,910.

[19] Dkt. #66. The parties are not agreed on the mortgage loan balance to be used.

8. Wife shall retain the Citizens Bank account (xxxx7155) with a value of $1,558.

9. Wife shall retain the six shares of Chemours stock without attribution on the Wright Chart.

10. The parties each have a 25% membership interest in [K] rental property with a marital value of $60,691 (50% of total value).

11. The marital value of the [K] Bank Account (xxxx0937) is $56,299 (50% of total value).

12. The marital value of the [K] Checking (xxxx5559) is $6,185 (50% of total value).

13. The parties each have a 25% membership interest in [L] rental property with a marital value of $47,650 (50% of total value).

14. The marital value of the [L] Checking (xxxx0946) is $6,369 (50% of total value).

Retirement Funds

15. The marital value of Husband's SEP IRA with Pacific Life is $19,446.

Issues in Dispute

The parties identified the following issues as matters for trial at the ancillary hearing. Relevant testimony related to these issues is set forth below.

Mortgage Loan Balance:

1. The parties agree that the 1/2022 balance was $226,389; the 1/2023 balance was $213,804; and the 8/2023 balance was $206,768.[20]

[20] Pretrial Stipulation at *3

Husband introduced a mortgage statement showing a loan balance of $221,860 as of May 23, 2022, which is the date closest to the date of divorce.[21] Husband notes that he has paid the mortgage on the property solely and any reduction in the mortgage loan balance should accrue to his benefit.

Wife argues that the August 2023 balance should be used as it is closest to the initial trial date. Wife notes that Husband has benefited from the increase in value of the home since the valuation and should not receive an additional bonus from the decreased mortgage loan balance since divorce. Wife notes that Husband is in a "dominant financial position" and suggests that Wife should share in the benefit of the increased equity.

The Court may determine the equity of a marital property at a fixed point in time whether it be, for example, the date of separation, date of divorce, date of valuation, or date of ancillary hearing. There is insufficient evidence of record to determine the date of the appraisal and the date of the mortgage loan balance. Husband's proposed loan balance is within two weeks of the divorce date. Wife's proposal is approximately one year after the divorce was granted.

Husband paid the entire mortgage payment from the date of divorce. It follows that he should receive the benefit of the post-divorce payments in reducing

[21] Husband's Ex. 13 at *2.

the mortgage loan balance. Husband's Exhibit 13 shows that a payment was made prior to the July 1, 2022 due date, of which $1,140.74 was principal.[22] The Court reduces the $221,859.53 balance on Husband's Exhibit 13 by the principal due paid prior to the due date, and determines that the mortgage loan balance as of divorce on July 15, 2022 was $220,719.[23] The marital equity in the home is $386,781 and will be placed in Husband's column on the Wright Chart.

Vehicles

2. *The NADA clean trade-in value of the 2005 Harley Davidson is $3,680. Each party wishes to retain the motorcycle.*

The parties own two motorcycles. Husband is the driver of both of them. Husband feels attached to the cycles and wishes to retain both of them. On cross-examination, Husband admitted that he has not driven the 2005 Harley Davidson since his heart attack.

Wife believes that there are substantial upgrades to the motorcycle that raise the value above the documented clean trade-in value. Wife wants to be assigned the motorcycle at the NADA clean trade-in value, sell it, and retain the sale proceeds.

The Court questioned Husband as to whether he wished to retain the motorcycle at $3,680 or allow Wife to have it and reduce amounts he ultimately

[22] *Id.* The Exhibit notes that this payment was made on June 11, 2022.
[23] The Court rounds balances for use on the Wright Chart.

would have to pay her. Husband thought about the options and testified that "She can have it." The Court will assign the 2005 Harley Davidson to Wife with Husband's consent at the documented value of $3,680.[24]

3. *Wife drives a 2018 Acura RDX. Wife claims the vehicle has a value of $22,625. Husband claims the vehicle has a value of $24,000.*

The parties submitted documentation that the clean trade-in value of the vehicle is $24,000.[25] Wife's testimony that the car needs new tires does not change the value of the vehicle in a clean trade-in condition. The Court will use $24,000 as the value of the vehicle which shall be placed in Wife's column on the Wright Chart.

4. *Husband purchased a 2014 Honda Accord that is used exclusively by the parties' daughter. The vehicle has a total value of $9,500 agreed at trial. Wife argues that the value should be included as Husband's asset. Husband argues that it should be excluded from the marital estate.*

The testimony was clear that the vehicle was purchased for their daughter's use. While Husband claims that he discussed it with Wife and she was in agreement, Wife contests that she gave her consent. The car is titled jointly in Husband's and daughter's names. The parties agreed at trial that the total value of the vehicle is $9,400 as shown on Wife's Wright Chart. The marital value is half of the total value of the vehicle as the daughter is a co-owner. The Court will use 50% of the value of the vehicle and shall place $4,750 in Husband's column on the Wright Chart.

[24] Wife's Ex. 25 at 006.
[25] Wife's Ex. 25 at 001.

Business Value – [K] and [L] LLC

5. *The parties are co-members with their son and daughter-in-law in two limited liability companies owning rental properties. In addition, there are two bank accounts for operating expenses, and one bank account containing savings for additional property purchases.*

The parties are in agreement on the value of the two real properties. "317-319 [K] Drive, LLC," has a marital value of $60,691.[26] "19-21 N. [L], LLC," has a marital value of $47,650.[27] The [K] operating account, M&T Business Checking xxxx5559, has a marital value of $6,185.[28] The [L] operating account, FNCB Business Checking xxxx0946, has a marital value of $6,369.[29] The [K] savings account, FNCB Business Checking xxxx0937, has a marital balance of $56,299.[30]

The Operating Agreements for the two LLCs permit transfer of membership interests between family members.[31] Wife requests that the Court assign her interest to Husband and place the total marital value on Husband's side of the Wright Chart.

[26] Pretrial Stipulation Wright Charts.
[27] The parties agreed at trial to $47,650 as the marital value of the Kennedy Drive properties.
[28] Husband's Ex. 17 at 007. The total value is $12,370. The marital value is 50% of the total value.
[29] Husband's Ex. 22 at 009. The total value is $12,738. The marital value is 50% of the total value.
[30] Husband's Ex. 16. The total value is $112,598. The marital value is 50% of the total value.
[31] Husband's Ex. 19 at §8.3; Husband's Ex, 24 at §8.3.

Husband testified that the two LLCs were set up to allow their son and daughter-in-law to start up their rental properties. Husband proposes that the marital value of the real property be included on the Wright Chart, but that the bank accounts remain solely and entirely with their son and daughter-in-law.

The Court cannot ignore the marital value of the bank accounts in dividing the marital estate. The parties can always gift their individual membership interests to their son and daughter-in-law if they so wish. Allowing the parties to retain their respective 25% membership interest in each LLC would keep the *status quo* for property division and preserve the parties' options on gifting or keeping their share without infringing on the rights of the other LLC members.

The Court will include the equal shares of the LLCs on each party's side of the Wright Chart.

Business Value – W Excavating, LLC

6. *W Excavating, LLC, is a marital business.*[32] *The parties disagree on the value of the business and the percentage distribution in the property division.*

    a. *Husband's Expert.*

Jonathan A. Patterson, CPA, CVA, is a Director – Tax & Small Business for Belfint·Lyons·Shuman, Certified Public Accountants. Mr. Patterson performed an appraisal of the business and submitted a Summary Appraisal Report of the Fair

[32] The experts referred to W Excavation, LLC as the "Company" or "Business" in their reports. The Court uses both terms consistent with the experts' reports.

Market Value of 100% Interest of W Excavating, LLC as of December 31, 2021.[33] Mr. Patterson's report recites the three well-known basic approaches to valuing businesses: Market Approach, Income Approach, and Asset Based Approach.

"The idea behind the market approach is that the value of a business can be determined by reference to reasonably comparable guideline companies for which transaction values are known."[34] Mr. Patterson searched for comparable companies using ValuSource Market Comps (IBA), BIZCOMPS, and ValuSource M&A Comps, but testified that he did not find any comparable companies to use in his valuation. Consequently, Mr. Patterson did not use the market approach in his analysis.

The Income Approach is "a general way of determining a value indication of a business, business ownership interest, security, or intangible asset using one of more methods that convert anticipated economic benefits into a present single amount."[35] An analyst performing an Income Approach analysis must determine the appropriate benefit stream using historical or projected economic income, whether a tax impact factor should be used, and the capitalization rate to be used to estimate the value of the business. The valuator also applies a marketability discount to reach the ultimate assessment of value. In this case, Mr. Patterson chose *not* to determine the tax impact on the benefit stream in this valuation because the

[33] Husband's Ex. 1.
[34] *Id.* at *14.
[35] *Id.*

business is a pass-through entity.[36] Mr. Patterson applied a marketability discount of 27% and concluded that the Income Approach would value the business at $580,000. However, since his Asset-Based Approach resulted in a substantially higher value than the Income Approach, Mr. Patterson did *not* rely on the Income Approach in valuing the business.

The Asset-Based Approach involves "an analysis of the economic worth of a company's tangible and intangible, recorded and unrecorded, assets in excess of its outstanding liabilities" and addresses the book value of the company.[37] The relevant portion of the Belfint·Lyons·Shuman report reaching its conclusion states:

> ***Conclusion of Value*** – The purpose of this valuation is to provide an estimate of the fair market value of 100% of the stock of the Company. As part of this valuation, all three approaches were considered and two methods were calculated, the Asset-Based Approach and Income-Based Approach. Since the Company cannot be worth any less than it's [sic] liquidation value, the Asset Approach sets the floor for the value of the Company. Since the income method is less than the asset method, we have determined the asset method is the most appropriate method to value the business as of December 31, 2021.

Belfint·Lyons·Shuman concluded that as of December 31, 2021, the fair market value of a 100% interest in W Excavating, LLC, using the Asset-Based Approach was $930,000.[38]

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[36] *Id.* at 15 ("We have not determined the tax on the benefit stream in this evaluation").
[37] *Id.* at 20.
[38] *Id.* at 22.

Husband's pretrial stipulation relies upon the Patterson valuation of the business under the Asset-Based Approach at $930,000.[39]

b. Wife's Expert.

Andrew Kelly, ABV, CFE, MAFF, is a Director on RSM US LLP's Financial Investigations and Dispute Advisory Services team. Mr. Kelly prepared an expert report which was peer reviewed at RSM US LLP, and entered into evidence. As with the Belfint·Lyons·Shuman report, the scope of RSM's appraisal services was to provide an opinion as the fair market value of Husband's interest in W Excavating, LLC, for purposes of property division ancillary to divorce.

RSM used five years of financial information to determine the financial position of the business from December 31, 2018 through December 31, 2022. Mr. Kelly noted that the Company's QuickBooks data concerning the accounts receivable balances were misleading, and RSM made certain adjustments as of the valuation date based upon affidavits from Brandywine Oak Private Tax Advisory service which prepares the tax returns for the business.

The RSM report provides significant data that supports the ultimate valuation of the business in areas of officer compensation, payroll taxes, rental expenses true-up, legal fees, charitable contributions, life insurance, meals and entertainment, other income and expense information, cost of sales, interest expenses, and

[39] Pretrial Stipulation at *5.

depreciation. After examining the five years of data, RSM noted that the normalized EBITDA margin remained relatively consistent between the 2018 and 2022.[40]

RSM analyzed the business data under all three approaches, but relied on the Market Approach and Income Approach in its opinion. The report explains that IRS Revenue Ruling 59-60 "indicates that in circumstances where the business sells products or services, an economic benefit stream will be the primary factor to consider and, therefore, the Income and Market Approaches are more appropriate. Conversely, if the subject business is an investment or holding company, greater importance is to be ascribed to the value of the underlying assets of the company."[41]

Using the Market Approach – Transaction Methodology, Mr. Kelly was able to identify approximately thirty businesses similar to the Company to determine an indication of value based upon recent sales in the marketplace. Additionally, RSM reviewed the M&A transactions reported by Deal Stats involving target companies operating similar to that of W Excavating. By way of example, Mr. Kelly used the tear sheet for a Manchester, New Hampshire company to show the areas of similarity and the purchase price of the Manchester company. RSM concluded that the operating equity value of the Company as of December 31, 2022 was $1,114,000 using the Market Approach.

[40] Husband's Ex. 11 at 009. "EBITDA" is earnings before interest, taxes, depreciation, and amortization.
[41] *Id.* at 010.

Mr. Kelly explained that the two most common methodologies used in the Income Approach are the Direct Capitalization Methodology and the Discounted Case Flow Methodology. Applying the risk factors and an industry standard equation for determining the capitalization rate, RSM considered the revenue as of the valuation date, long term growth, normalized expenses, income taxes, interest expense, working capital additions, and interest bearing debt in concluding that the operating equity value of the Company as of December 31, 2022 was $1,112,000 using the Income Approach.

Mr. Kelly testified that the high correlation of the values using the two methods lends credibility to the RSM valuation. Weighing the approaches equally, RSM concluded that the operating equity value of the Company as of December 31, 2022 was best stated at $1,113,000.[42]

In order to determine the fair market value of W Excavating, LLC, RSM needed to consider the deficient debt-free net working capital ("DFNWC"). RSM calculated the actual DFNWC by subtracting current liabilities from the current assets. The target DFNWC was calculated by applying the target working capital percentage of 15% against the revenues. Subtracting the target from the actual, the DFNCW excess was determined to be $20,000 which RSM added to operational value to reach its ultimate conclusion of Fair Market Value of W Excavating, LLC as

[42] *Id.* at 014.

$1,133,000.[43] Wife's pretrial stipulation relies upon the RSM valuation of the business under the Market Approach and the Income Approach at $1,133,000.[44]

c. Court's Determination of Value

Appraisal of business value is a mixture of art and science. Every business is different and the accepted techniques and methods used by financial experts to value businesses also vary.[45] Whether an expert's valuation is "right" or "wrong" cannot be determined with certainty. The Court must weigh the experts accuracy based upon which expert uses the most reliable evidence and the most compelling financial principles.[46] The credibility of the experts, therefore, can inform the Court in the process of analyzing the competing valuations. In this case, Mr. Kelly was far more credible than Mr. Patterson in the written reports and in-court testimony.

The RSM report provides more data and more explanation of how the applicable approaches are to be applied in reaching the value of a company. In particular, IRS Revenue Ruling 59-60 is compelling with respect to the proper valuation methods to be used in this instance. While the Belfint•Lyons•Shuman report relied on the Asset Based (Cost) Approach to reach its conclusion, the RSM report used both of the applicable approaches in determining the value of the Company.

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[43] *Id.* at 014-015.
[44] Pretrial Stipulation at *5.
[45] *Dell v. Magnetar Global Event Drive Masterfund*, 177 A.3d 1, 14 (Del. 2107)..
[46] *A.A. v. B.A.*, 2020 WL 6379355 at *7 (Del.Fam.Ct. Oct 9, 2020).

Mr. Patterson's reliance on the method clearly expressed in his report (and stated in the pretrial stipulation) came under scrutiny as Husband's counsel attempted to move his expert from the stated value in his own report and the pretrial stipulation to a lesser value applying tax factors specifically excluded in his report. The report unequivocally states, "The resulting conclusion of value of the 100% controlling interest in the Company is estimated to be $930,000."[47] The pretrial stipulation states twice that Husband's expert valued the business at $930,000. In the first instance, Husband states "Business is asset intensive requiring heavy equipment. To realize asset valuation (H's expert: $930k…)". In the second instance, Husband states, "if Court divides business based on asset value of $930k, payout should be over 5 years, and in lieu of alimony."[48]

Husband's counsel spent considerable time getting Mr. Patterson to testify to a change in his valuation of the business as of December 31, 2021, based upon Husband having a heart attack in 2023. Aside from the health issue arising more than twenty months after his valuation date, Husband continues to work in the business and, more importantly, Mr. Patterson's valuation was based on the cost of the business assets rather than income approach which would rely on Husband continuing to work. Mr. Patterson's testimony was oft-times confusing and

[47] Husband's Ex. 1 at 022.

[48] Pretrial Stipulation at *5. While Husband's counsel claims that "if business value is to be divided, value of $550,000-$580,000 should be equitably divided, after consideration of taxes." However, Husband's expert *rejected* his income valuation in favor of his asset-based valuation.

contradictory. In short, Mr. Patterson's value stated in the Belfint·Lyons·Shuman written report was far more understandable than his actual testimony at trial which at times was tortured.

Following Husband's logic with respect to the business valuation during his testimony was difficult. As of the pretrial conference held on September 8, 2023, Husband's value for the business was $930,000 under the Asset-Based Approach. One month later, Husband's value was reduced by 43%. Wife's counsel moved to require Husband to stand by his pretrial stipulation. The Court denied the motion in order to allow Husband to make his case, but Husband's position was no clearer after the testimony was concluded. Counsel argued that the value should be reduced by 25% for taxes when Wife's expert had already made an adjustment of $369,000 for those taxes.[49] Moreover, Husband's expert had specifically excluded tax impact from his valuation as the taxes were passed through to the owner, and the expert had already made a marketability reduction of 27% in reaching a value that was ultimately rejected in his report.[50]

Pretrial stipulations serve an important purpose. The parties, counsel, and the Court deserve to rely upon the assertions in their pretrial stipulations, especially after those values were specifically discussed during the pretrial conference. When one party decides to deviate from those assertions, the results are unnecessarily

[49] *See* Husband's Ex. 11 at 015.
[50] *See* Husband's Ex. 1 at 019.

increased preparation for trial, unnecessarily increased trial time, and necessarily decreased credibility at trial.

Based upon the reliability of the RSM Income Approach and Market Approach; IRS Revenue Ruling 59-60; Mr. Kelly's more understandable and consistent testimony; and the reduced credibility of Mr. Patterson's trial testimony; the Court accepts the RSM valuation of the Company as of December 31, 2022, at $1,133,000.

Inheritance/Citizens Bank Account (xxxx6375)

7. *Wife controls Citizens Bank Account (xxxx6375). Wife claims the account is a separate inheritance account and non-marital. Husband claims that Wife deposited business receipts into the account and it is marital.*

In addition to the Citizens Bank account ending in xxxx7155 discussed in the Wright Chart section above, Wife also has an individual Citizens Bank account ending in xxxx6375. Wife claims that the account was used for her inheritance. Husband was unaware of the account until discovery commenced.

Wife's Exhibit 15 is a photocopy of a letter and attachment dated June 3, 2014, from the attorney for the Estate of C. L. H indicating that $22,084.76 was distributed to Wife.[51] Wife claims that she deposited the funds in the Citizens Bank Account xxxx6375 but had no other supporting documentation to evidence segregation of those funds.

[51] Wife's Ex. 15.

Husband's Exhibit 26 contains bank statements from 2021 for the account into which Wife testified that she had deposited the inheritance. The account shows that $12,376.31 was deposited on March 19, 2021.[52] Additionally, the parties testified at trial that Wife took a $12,000 check payable to W Excavating, LLC and deposited it in her Citizens Bank account in 2021. By the end of 2021, the balance in Wife's account was $8,323.94 which is less than the amount of the company check that was deposited.[53] Giving Wife the benefit of the doubt that all of the funds in the account prior to March 19, 2021, were from the inheritance, Wife had depleted her non-marital funds leaving only the remaining proceeds from the marital check in the account.

The Court finds that the remaining funds in Citizens Bank account xxxx6375 are marital and $8,324 will be placed in Wife's column on the Wright Chart.

Life Insurance

8. *Husband has a level-term life insurance policy for which Wife was the named beneficiary at the time of divorce. Husband subsequently changed the beneficiaries to the children. The policy expires when Husband turns 69.*

The parties acknowledged at trial that Husband has a level-term life insurance policy for which Wife was the named beneficiary during these proceedings. Upon advice of his insurance agent, Husband changed the name of the beneficiary after divorce. Wife has requested that Wife's name be returned the policy as the

[52] Husband's Ex. 26 at 024.
[53] *Id.* at 057.

beneficiary to secure her alimony interest, and that the policy remain in effect until it expires when Husband turns 69. Husband agreed at trial that he would return Wife's name as beneficiary so long as the policy would expire when he turns 69. This issue was resolved by the parties' consent.

Marital Personal Property

8.a. The pretrial stipulation and order required that the two lists of marital personal property be provided to the Court by the date of trial. Unfortunately, neither party prepared the lists leaving this matter unresolved. The parties' household goods and furnishings shall be divided utilizing the two-list method. Husband shall provide Wife a master list of household goods and furnishings within fifteen days of this Order. Within five days thereafter, Wife shall add any omitted items to the master list. Within ten days thereafter, Wife shall divide the items into two approximately equal lists and provide those lists to Husband in writing. Within five days thereafter, Husband shall select the list of items he wishes to retain. Wife shall be permitted to obtain her items at a reasonable date and time within the thirty days after Husband has selected the list he wishes to retain.

Debts

9. *Capital One Credit Card (xxxx3580).*

The parties agree that there is one credit card debt owed on Husband's Capital

One card having a marital balance of $9,682. Husband shall retain this debt with attribution on the Wright Chart.

10. Tax Debt (2021 return).

The parties agree that there is tax debt in the amount of $42,794 owed on the parties' 2021 tax return. Husband shall retain this debt with attribution on the Wright Chart.

11. Tax Credit Repayment.

Husband asserts that there are tax credits that must be repaid to the Internal Revenue Service. Wife disagrees and notes that there is no document showing the credits that must be repaid. Husband's Exhibit 29 has three years of returns (2020-2022) from Form 1095-A. The 2022 version lists "monthly advance payment of premium tax credits" totaling $25,044.[54] The exhibit does not indicate that any amounts must be repaid nor does it explain how the credits are to be assigned or recaptured. Husband was given the opportunity to have the tax preparer, Brandywine Oak Private Tax Advisory service, testify in support of Husband's claim. Husband did not call the tax preparer even though he was listed as a witness on the pretrial stipulation. There was insufficient evidence presented to allow the Court to calculate how much, if any, of the premium tax credits are required to be repaid. The Court will not use the tax credits in the division of the marital debts.

[54] Husband's Ex. 29.

ANALYSIS

Property Division

The Court retained jurisdiction over property division, alimony, attorneys' fees, and court costs. Delaware law requires that the court "equitably divide, distribute and assign the marital property between the parties without regard to marital misconduct, in such proportions as the Court deems just after considering" eleven statutory factors.[55] The analysis of those factors follows.

(1) The length of the marriage

The marriage lasted more than thirty-three years.

(2) Any prior marriage of the party

This is the first marriage for each party.

(3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties

Husband is 61 years old and lives in the former marital residence in Hockessin. In August 2023, Husband experienced a blockage requiring major bypass surgery. Husband testified that he continues to work, often more than he should, but that the business continues uninterrupted.

Husband is a high school graduate who worked for his father for a number of years. When Husband took the opportunity to visit Germany for a vacation, his

[55] 13 *Del.C.* §1313(a).

father told him that if he went on vacation he would not have a job when he returned. As a result, Husband and Wife opened W Excavating, LLC, which turned into a successful business comprising nearly 60% of the couple's joint assets. Husband is reaching the end of his working years and is eligible to receive full social security in six years. Husband is undecided on whether he will continue to work, sell the business, or exercise some other option during those six years. Husband is able to meet his needs and has been paying Wife $4,500 in monthly interim alimony.

Wife is 63 years old and rents her sister's home. Wife had a major heart attack in 2020, and as a result has an implanted pacemaker and defibrillator. She has continuing leg pain resulting from irreparable nerve damage from her heart attack. Wife suffers from severe anxiety and takes multiple medications to try to regulate her emotional distress. She continues to see medical professionals on a regular basis. According to Husband's expert, Dr. Finkelstein, Wife is likely to experience suicidal ideations and has major depressive disorder, post-traumatic stress disorder, and attention deficit disorder. According to Wife's expert, Darlene Annas, Wife has a serious and incapacitating physical condition that prevents her from working. Wife has not been able to work or travel due to colitis and bowel issues combined with her other physical ailments.

(4) Whether the property award is in lieu of or in addition to alimony

The property award is in addition to alimony. Wife has insufficient income to meet her current monthly needs. Wife modified her request from a disproportional division to an equal division of the marital estate to allow the Court to consider alimony.

(5) The opportunity of each for future acquisitions of capital assets and income

Both parties are close to retirement age. Husband has six years to full social security entitlement. Husband continues to work in the family business and earns in the mid-$200K per year. Wife has not worked for a number of years and currently is eligible to draw social security payments at a reduced level. Two of the experts testifying at trial questioned whether Wife will ever be able to return to the workforce. A nurse who has worked with Wife for over fifteen years opined that Wife has severe and incapacitating physical conditions that impact her ability to seek employment. Husband has opportunities to acquire capital assets and income that are superior to those of Wife.

(6) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker, husband, or wife

It is clear that Husband has worked assiduously in the business over the last seventeen years. Wife played a less active, yet still contributory, role that enabled these two high school graduates to acquire close to $2MM in marital assets with few

associated debts. Wife worked outside the home as a receptionist at a law firm in addition to assisting in the setup of the business but has not worked since 2018. The parties were able to raise two now-adult children. Each have contributed to the marital estate in their own way.

Husband believes that Wife has dissipated the marital assets. The Supreme Court of Delaware in *E.E.C. v. E.J.C.* ruled that one party's dissipation must be weighed against the other party's contribution and then related to any other depreciation or appreciation of the marital property and the allocation of such property between the parties.[56] The Family Court has considered dissipation of marriage assets but has done so usually in cases where there has been loss through gambling[57] or alcohol and drug abuse.[58] In this case, Husband alleges that Wife would gamble at Delaware Park and would take illegal drugs.

Husband references Wife's bank statements showing withdrawals at Delaware Park. However, the account from which withdrawals were taken was her separate account into which she deposited more than $22,000 of inheritance from her mother. Wife testified that Husband would also go to the casino with Wife where they would gamble together. Husband admits that he did accompany Wife but notes that it was usually for a concert and his spending would be under $500 as

[56] *E.E.C. v. E.J.C.*, 457 A.2d 688 (Del. 1983).
[57] *V.V. v. Z.Q.R*, 2002 WL 31445228 (Del.Fam.Ct. Apr. 1, 2002).
[58] *In re Marriage of J-M-R and K.L.R.*, 2013 WL 8181480 (Del.Fam.Ct. July 29, 2013).

compared to Wife spending $2,000 per month. It is not clear from the documentation and testimony introduced at trial that the marital estate was significantly impacted by Wife's visits to Delaware Park.

Husband also notes his suspicion that Wife was buying drugs from "friends" but had no evidence to support the allegation other than his observation of Wife's behavior. Wife denies the claim and testified that Husband *also* took drugs with Wife. Husband concedes that the couple used cocaine with their friends but he discontinued use years ago. Husband stated that he "begged Wife" to stop, but Wife responded, "I would like to but I need it." Husband could not point to any significant or unusual expenditures that might lend support to his suspicions.

(7) The value of the property set apart to each party

While the parties have substantial marital assets, close to 60% of those assets are in the value of the business. Fortunately, there is little marital debt. Unfortunately, there is little set aside for retirement. Neither party has significant non-marital assets.

(8) The economic circumstances of each party at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the party with whom any children of the marriage will live

Husband will be retaining the marital home and the business. While these two assets have significant value, he also has to be able to pay Wife for her equitable share in the property division. Husband has the ability to earn a substantial income

for the foreseeable future. Conversely, Wife's medical conditions make it next to impossible for her to work even on a part-time basis. Wife is unable to meet her monthly expenses at present and requires alimony from Husband. Husband will have stress over the next few years as he pays Wife her share of the former marital estate, but he still will be in a superior position to Wife.

(9) Whether the property was acquired by gift, except those gifts excluded by paragraph (b)(1) of this section

None of the remaining assets were acquired by gift.

(10) The debts of the parties

The parties have only one credit card obligation and taxes due for the 2022 year. There is no significant debt.

(11) Tax consequences

There are no tax consequences on the property division portion of this case. The capital gains on the marital residence are well within the exemption afforded to all taxpayers. Husband's counsel focused on "tax implications" that Husband claims will be associated with the business, but presented no testimony or evidence that would quantify the impact. Husband's expert did not consider taxes for the business as they are passed through to the owner on his individual tax return. There was insufficient evidence of record to determine the tax consequences except through speculation.

Husband suggested that Wife retain all of her retirement funds in an offset against amounts owned to Wife in the property division. Husband proposes that the offset be "dollar-for-dollar" with no consideration of the tax impact on those pre-tax funds. Wife notes that the retirement funds are pretax dollars. While the Court can calculate an *estimated* tax impact using Wife's income as a basis, the calculation would be largely speculative and could be the basis for an appeal. Consequently, the Court will not accept Husband's suggestion for purposes of this Order.

Conclusion – Property Division

The Court considers each of the factors as a whole in deciding the division of the marital estate. In this case, none of the factors carries more weight than another. The parties differ substantially in their positions on percentage distribution of the marital estate. The Court sets the percentage distribution of the marital estate after consideration of all eleven statutory factors.

Wife initially proposed a 60/40 division of the marital estate in her pretrial stipulation. However, after the evidence was in, Wife modified her request to propose a "50/50 division across the board." The change in position shows Wife's recognition of the parties current health situations and the limited number of working years remaining for each of them.

Husband's proposal has been consistent but unreasonable. Husband seeks a 70/30 division in his favor for the business and 50/50 for the remaining assets. The effective division of the entire marital estate under Husband's proposal would be 62%(H)/38%(W).

Husband offers two cases in support of his request for the disproportionate division of the marital estate in his favor. Husband relies on a 2021 decision from Sussex County where the Family Court awarded Husband 70% of a marital plumbing business in which Wife was not involved.[59] The case is easily distinguished from the facts in this matter. In *J.W.*, the competing valuations differed by a factor of more than ten times. (Husband's valuation was $312,000 while Wife's capitalized valuation was $3,410,617). In this case the competing valuations differed by just 17%. In *J.W.*, Husband recommended a 60%/40% division in Wife's favor of the remaining assets whereas in this case Husband wants an equal division. In *J.W.*, the combined division of the entire marital estate was 50.01%(H)/49.99%(W) whereas in this case Husband would have a 62%(H)/38%(W) division under his proposal. In *J.W.*, Wife was retaining a home with a value of $920,000 while in this case Wife is renting a home from her sister. In *J.W.*, Wife was retaining $958,000 in assets while in this case Wife is retaining $212,000. In *J.W.*, Wife ran her own business and had

[59] *J.W. v. R.W., III*, File No. CS19-02694, Petition No. 19-29220, Ryan, J. (Nov. 9, 2021).

21 years of work life remaining. In this case, Wife is unemployable and has no income. The facts are so disparate that comparison with *J.W.* is not helpful.

Husband next relies on *Shockley v. Shockley* claiming that the Court awarded Husband 66.5% of all of the marital property because Husband would "bear the burden of any transfer tax and capital gains tax" from the sale of the business.[60] Husband has "cherry picked" a phrase from the decision while ignoring the more significant explanation in the decision. In *Shockley,* the business at issue was a farm consisting largely of real property and some business assets. Mr. Shockley was gifted his minority share from his father, while in this case the parties established the business together. In *Shockley,* a tax expert testified whereas in this case the identified tax expert was not called to testify. Significantly, the decision on the percentage division of the *Shockley* estate was not based solely on tax implications but rather on the nature of the gift and consideration of *all* of the property division factors. As stated by Judge Robinson, "I have given careful consideration to these various factors. I have given particular weight to the fact that the basis for the substantial marital estate was a gift from respondent's father. Further, I have noted the nature of these business-family owned and operated farming operations- which now involves three generations of respondent's family."[61] In this case, there is no transfer tax because there is no real estate to be transferred. In this case, Husband

[60] *Shockley v. Shockley*, 1989 WL 107690 at *10 (Del.Fam.Ct. Jul 24, 1989).
[61] *Id.* (emphasis added).

was not willing to state whether he intended to sell the business but planned on continuing to operate it as a going concern.

Judge Robinson further noted that "the policy that has been followed by this judge is not to consider sales expenses in valuing marital property unless it clearly appears the property is to be sold."[62] As stated in *Shockley*, "The Court acknowledges the difficult situation in which Mr. Shockley finds himself in that he is unable to consider a method for reimbursing the petitioner for her share of the marital estate until the Court determines what that share is. Nevertheless, I believe it is inappropriate for purposes of valuation of property to speculate about whether property is to be sold."[63] In short, *Shockley* differs substantially from this case and, in fact, stands for the opposite of the tendered proposition when the case is read in its entirety.

In this case, a 50/50 division of the marital estate is equitable. While Husband has labored more directly in the business, he also has more ability to earn assets over the remaining six years prior to reaching full retirement. The parties' first and only marriage lasted more than thirty years. Their lifestyle was consistent with their earnings. While they did not set aside adequate funds for retirement, neither party incurred much debt. Both parties had heart attacks. Husband has recovered more

[62] *Id.* at *6 (citing *L. v. L.* [reacted titles], No, 87-9-23D, Robinson, J. (Del.Fam.Ct. Jan 23, 1989); and *S. v. S.* No, 86-9-28CV, Robinson, J. (Del.Fam.Ct. Apr 25, 1988).
[63] *Id.* (citing *Snyder v. Snyder*, No, 731-79, Poppiti, J. (Del.Fam.Ct. Feb 18, 1981).

than Wife, and he still plans on working at full capacity. One of the biggest factors in this case is the parties' respective economic conditions. Husband has asked to retain the former marital home and to continue to operate the business. On the other hand, Wife is unable to work and lives in a house that she rents from her sister.

In light of the foregoing, dividing the estate equally will make it possible for Husband to pay Wife her share of the marital estate and pay alimony to meet a large share of Wife's monthly deficit until the parties are on more equal economic footing.

The parties surmise that it may not be possible for Husband to make immediate payment of over $700,000. The Court proposed that the parties consider a payout schedule. Husband wanted the payout to be interest free. Wife wants the legal rate of interest to apply.[64] The issue has been addressed by the parties in other high asset cases and the payor was allowed a number of years to make payment with interest at the federal discount rate.[65] Granting the federal discount rate could provide the payee with a guaranteed return on principal in excess of the earnings rate from a bank, and allows the payor to benefit from an affordable schedule of payments. This approach could neatly fit the parties' circumstances in this case. *However,* the Court will not impose an agreement on the parties by order but will allow Husband three months to make a lump sum payment to Wife. If the parties

[64] The legal rate of interest as of the date of this order is 11.5% representing the federal discount rate plus 5%. *See* 6 *Del.C.* §2301.
[65] *D.L.H. v, E.T.H.*, [arbitration case unreported], CN05-06328 (Del.Fam.Ct. 2008).

believe there is a plan that better suits them, they may consider the structured payout by agreement.

Reconciliation of Property Division.

A. Non-retirement assets and debts.

The parties are largely in agreement on the assignment of assets. The Wright Chart attached hereto lists the individual assets and debts being retained by each party. In order to effectuate a 50/50 division of the marital estate, Husband owes Wife $725,202 to equalize the non-retirement assets.

Husband shall have ninety days from the date of this Order to make full payment to Wife on the non-retirement assets. The Court recognizes the extraordinary difficulty that this presents Husband, but allows him the requested time necessary to finalize his plans while ensuring that Wife is able to meet her reasonable monthly needs.

Unless otherwise agreed by the parties, the marital personal property shall be divided using the two-list method. Husband shall have until March 1, 2024 to prepare two lists of the marital personal property. Wife shall have the opportunity to inspect the former marital home on one mutually agreed day to inspect for any personal property not found on the two lists. Wife shall select one of the two lists without modification by May 1, 2024. The parties shall attempt to mediate any disputes prior to filing a petition to enforce this provision.

B. Retirement assets.

The parties shall equally divide Husband's SEP IRA with a marital total of $19,446 and Wife's Fidelity IRA with a marital total of $243,200. The total retirement funds are $262,646 and each party's half share is $131,323. Counsel requested that a single Qualified Domestic Relations Order ("QDRO") be prepared. Husband's counsel shall prepare a QDRO to transfer the offset of $111,877 (plus gains and minus losses from December 31, 2021) from Wife's Fidelity IRA to an eligible account for Husband. The QDRO shall be submitted within 60 days of the date of this Order.

Alimony

In determining whether alimony shall be awarded, the Court must consider whether the party receiving alimony: (1) is dependent upon the other spouse for support and the other spouse is not contractually obligated to provide such support after divorce; (2) lacks sufficient property to provide for his or her reasonable needs; and (3) is unable to support himself or herself through appropriate employment or is the custodial of a child whose conditions or circumstances make it appropriate not to seek employment.[66] In reaching its conclusion, the Court must consider ten statutory factors.[67]

Wife's Income and Claimed Expenses

Wife claims $7,980 in monthly expenses. Husband did not significantly challenge Wife's claimed expenses at trial. The Court adjusts Wife's amounts as noted in the following chart below. The Court lists only those items identified in the "Estimated Expense" column of Wife's Expense Information Sheet. The Court adjusts some expenses up and others down for reasons in the "Notes" column. Items in green were agreed to by Husband. Items in red show adjustments made by the Court to reasonable levels based on the lifestyles of the parties during the marriage, current health circumstances, and reasonable claims.

[66] 13 *Del.C.* § 1512(b).
[67] 13 *Del.C.* § 1512(c).

	Wife Estimated	Court Adjusted		Explanation
Rent	$1,900	$1,900		
Water	$50	$50		
Sewer	$50	$50		
Electric	$150	$150		
Oil	$250	$250		
Garbage	$36	$36		
Cable Television	$139	$139		
Telephone	$125	$125		
Household maintenance and repairs				
Gutter & House cleaning/Landscape	$448	$250		Monthly cleaning only
Groceries	$500	$500		
Clothing	$200	$200		
Health Insurance and COBRA	$482	$482		
Out of pocket medical and dental - self	$825	$650		Matches Husband
Laundry and dry cleaning	$50	$50		
Toys and presents	$220	$200		Matches Husband
Cosmetics and toiletries	$200	$200		
Hobbies	$150	$100		Matches Hobby/Entertainment
Barber and Hair Stylist	$150	$150		
Charitable and religious contributions	$100	$0		No personal documentation
Vacation	$500	$150		Matches Husband
Entertainment and miscellaneous	$225	$225		Matches Hobby/Entertainment
Automobile:				
Monthly Payment	$449	$0		No car payment
Repairs and Maintenance	$125	$125		
Insurance	$142	$142		
Gasoline	$250	$250		
Other:				
W: Renter's Insurance	$10	$10		
W: Pacemaker/Heart Check Monito	$50	$50		
W: Prescriptions	$204	(incl in med exp)		Inconsistent documentation
	$7,980	$6,434		

A. Attribution of Wife's Earning Capacity.

Wife has no taxable income but is eligible to receive $1,508 per month in social security payments when she turns 67 years old. Wife has an interim alimony stipulation awarding her $4,500 per month. Husband challenged Wife's income capacity and presented two expert witnesses in support thereof. Wife presented one witness as to her ability to work.

1. Wife's Employability:

The parties differ on whether Wife is capable of seeking employment. Wife maintains that she has severe and incapacitating physical and mental conditions that prevent her from working. Husband maintains that Wife is immediately employable. Husband retained medical expert, Dr. Harris Finkelstein, and vocational expert, Ellen Lock. Wife retained medical expert, Darlene Annas. Each party's expert reports were submitted at trial.

a. Harris Finkelstein, Ph.D. Dr. Finkelstein is a licensed psychologist in Delaware and has been performing evaluations for forty years. Dr. Finkelstein was presented by Husband to lay a foundation for Ellen Lock's testimony as Ms. Lock relied upon Dr. Finkelstein's evaluation in her vocational report to assess Wife's employability. Dr. Finkelstein began his evaluation process by interviewing both Wife and Husband to obtain their perspectives. Additionally, Dr. Finkelstein reviewed the testimony of the parties' children from the January 2022 PFA hearing. Dr. Finkelstein testified that Wife took a considerable amount of time to schedule their first interview that took place on January 11, 2023. He stated that it took six hours to complete Wife's psychological testing due to Wife's stress level.

Dr. Finkelstein testified that Wife was worried about doing the interview, but stated that she would share events as she could recall. He testified that she was emotionally stressed by her recollections and described her as "sad, anxious, and depressed." After the initial interview, Dr. Finkelstein held two more testing

sessions with Wife and scheduled a third. Wife did not show up to the third testing session on February 7th, so Dr. Finkelstein called Wife and conducted the testing remotely. As Wife had missed multiple appointments, Dr. Finkelstein offered to hold the final session at Wife's house for convenience as she complained of stomach pain, foot pain, and emotional pain. Wife told Dr. Finkelstein that the pain in her feet was due to blood clots and nerve damage. He stated that no doctors note was provided to substantiate her claims, but he observed relief after she went to the bathroom.

Dr. Finkelstein observed that Wife had difficulty recalling specifics during the evaluation and had difficulty managing her emotions, displaying feelings of despair and hopelessness over losing relationships with her children and grandchildren. Dr. Finkelstein expressed that Wife felt mistreated by the people around her.

Dr. Finkelstein testified as to Husband's concern that Wife displayed a pattern of erratic behavior following the death of her parents in 2012 and 2013. Husband told Dr. Finkelstein that Wife would stay up late and would sleep in their basement.

Husband told Dr. Finkelstein that Wife abused drugs and alcohol. Husband acknowledged that he used to participate in drug use but stopped using drugs in 2011 or 2012. Dr. Finkelstein testified that Husband said Wife continued taking drugs even after her massive heart attack in 2020. Husband believed that Wife's drug use

contributed to her coronary incident. Dr. Finkelstein went on to describe Husband's account of an altercation during which Wife became violent, threw things at him, and accused him of abusing her.

Dr. Finkelstein recounted the testimony from the parties' adult children claiming that Wife displayed aggressive and assaultive behavior. He noted that their daughter stated that Wife had hit her with a hairbrush in high school. Their son had found Wife passed out in the garage with a lit cigarette in her hand claiming that she did not want to live anymore. Dr. Finkelstein testified that their daughter claimed Wife frequently had a glass of alcohol in her hand. He noted that Wife claims she no longer uses drugs and alcohol and did not engage in the behaviors that Husband and their children described.

Dr. Finkelstein reported that Wife's cognitive functioning was in the "low-average range." He testified that stress could potentially affect her cognitive functioning negatively. Additionally, Wife had limited visual memory and difficulty with focus and problem solving. Based on the integrated visual and auditory tests, he opined that Wife is likely to overlook significant information. Dr. Finkelstein further stated that Wife meets the definition of having moderate attention deficit hyperactivity disorder ("ADHD") and likely struggled with attention since childhood.

Dr. Finkelstein testified that Wife is experiencing intense emotional pain, grief, and is highly distressed. He notes that Wife feels emotionally "vulnerable and weak," and describes her as having the "potential for suicidal ideation." He also explains that Wife has the potential to feel emotions very deeply and to act compulsively. He describes Wife as having low levels of trust and tends to blame others for her difficulties. He states that she feels as if others have control over her life. Dr. Finkelstein opined that Wife has all the symptoms of Major Depressive Disorder ("MDD"). He testified that some of those symptoms are fatigue, thoughts of guilt, and thoughts of death.

He testified that Wife's emotions are very high due to the divorce, and that she tries to avoid people and places that remind her of the divorce. Dr. Finkelstein said Wife has experienced panic attacks and post-traumatic stress disorder ("PTSD") post-divorce. He stated that Wife's PTSD could be a reason why she missed consecutive appointments with him. He testified that, based on his evaluation, Wife is not an individual attempting to feign PTSD.

Dr. Finkelstein recommends ongoing treatment and individual therapy to help with mood issues and problem solving. He notes that suicidal ideation also needs to be addressed either through therapy or hospitalization. Dr. Finkelstein testified that he believes that therapy every couple of months is insufficient given the severity of Wife's issues.

Dr. Finkelstein testified that he cannot give an opinion as to whether Wife is able to work or not because he does not have a test to determine it. He states that he has no opinion on Wife's employability -- only an opinion on her intellectual functioning. He testified that the findings in his report have not changed and that his opinions are to a reasonable degree of professional certainty.

b. Darlene Annas, APRN-BC. Darlene Annas, is a licensed nurse practitioner and has been working in her field for thirty years. She explained that for the last ten years she has been practicing at Delaware Behavioral Health focusing on psychiatric care, medication management, and treatment.

Ms. Annas testified that she has treated Wife for the last "fifteen to twenty years." She sees Wife every two to three months and spends between twenty to forty-five minutes with her on each visit. Ms. Annas clarified that she mostly does medication management for Wife but is not Wife's therapist. She states she only talks to Wife about emotions when she is gathering information about how Wife is responding to her medication. However, based on her fifteen years of treating Wife, Ms. Annas thinks it would benefit Wife to participate in frequent therapy sessions. Ms. Annas testified that Wife has been compliant with her recommendations for treatment even though she has not sought out therapy for her mental health issues. She explained on cross examination that she has developed a close professional

relationship with Wife over the years and considers her a kind person but she is not Wife's "friend."

Ms. Annas testified that she believes Wife suffers from Major Depressive Disorder, generalized anxiety disorder, post-traumatic stress disorder, and insomnia. She also concurs with Dr. Finkelstein's diagnosis of ADHD. She testified that she further agrees with Dr. Finkelstein that Wife's suicidal ideation needs to be monitored. Ms. Annas testified that Wife's suicidal ideation arises when Wife is feeling depressed, overwhelmed, anxious and fearful. She explains that when Wife feels trapped, she has fleeting thoughts of not wanting to be alive.

Ms. Annas testified that Wife experiences pain in her toe resulting from Wife's heart attack and blood clots. She stated that Wife also experiences bouts of diarrhea since her cardiac arrest and noted that Wife's relationship stressors exacerbate the issue. She notes that the divorce litigation has overwhelmed Wife. Ms. Annas testified that while she cannot point to her records noting Wife's diarrhea complaints, she does recall talking to Wife about her gastrointestinal issues prior to her interim alimony hearing.

Ms. Annas testified that Wife is currently on paroxetine extended release and Xanax as needed. She explains that these medications are for anti-depressant purposes, anxiety, and sleep. Ms. Annas testified that Wife ran out of medication when her insurance was inadvertently cancelled.

Ms. Annas testified that she believes Wife is unable to work. She bases this opinion on the fact that Wife has trouble being around people due to her anxiety and her frequent bouts of diarrhea. She also notes that due to Wife's insomnia and trauma she cannot sleep at night and cannot get up in the morning. Ms. Annas explained that Wife has tried to work but has not been successful. On cross examination, Ms. Annas concedes that if Wife had frequent bathroom breaks it would lessen her concerns around her gastrointestinal issues, but she does not see an employer allowing her to be away from her desk for long periods of time on a frequent basis.

Ms. Annas testified that she has considered all medical experts when opining that Wife's condition is severe and incapacitating and believes Wife's physical and mental issues prohibit her from working.

c. Ellen Lock, CDMS, CCM. Ellen Lock testified that she is a vocational case manager holding certification as a certified disability management specialist since 2011, and a certified case manager since 2020. Ms. Lock primarily assists in personal injury and workers' compensation cases. She noted that eighty percent of her cases involve disabilities. She stated that she evaluates skill level and ability to work. However, she testified that her scope of practice is in vocational evaluation, and she cannot determine the ability to work on a medical basis.

Ms. Lock testified that in doing a vocational evaluation she conducts interviews and reviews work history, medical history, and age. She then takes this information and does a "transferrable skill analysis." Finally, she reviews the person's résumé and social security earnings record to perform a labor market survey. Ms. Lock testified that her labor market survey looks for jobs for which a person is vocationally qualified. She pointed out that ninety-eight percent of her labor market surveys are done in the Delaware labor market.

Ms. Lock testified she met with Wife remotely for about an hour on January 18, 2023. She stated that Wife presented well during the interview and was able to hold a conversation. Ms. Lock described Wife as articulate and well-spoken. She also noted that Wife cried through parts of the interview when they discussed therapy, her psychiatric evaluation, and medical treatment.

Ms. Lock testified that she reviewed the records of Ms. Annas, Dr. Haley, Dr. Finkelstein, Dr. Tsai, and Christiana Care to inform her opinion. She testified that she offered Wife the ability to provide additional records. Ms. Lock reviewed Dr. Harris Finkelstein's entire report and noted that his findings of ADHD, PTSD, MDD, intermittent anxiety, chronic pain, and fatigue did not affect her opinion. Similarly, Ms. Lock testified that Ms. Annas' report stating that Wife was incapable of working did not affect her opinion. Ms. Lock concedes that she cannot dispute Ms. Annas' findings that Wife cannot work because Ms. Lock is not a medical professional.

Ms. Lock testified to Wife's medical history and noted she had a placement of a pacemaker after her heart attack. She stated that the heart attack resulted in loss of blood flow to her right foot which caused nerve damage. She stated that Wife suffered panic attacks, used a cane intermittently, and has ulcerative colitis. She testified that some of these issues started in 2012 when her mother and father passed away which was an impetus for a lot of her issues. None of these issues affected Ms. Lock's opinion.

Ms. Lock testified that Wife graduated from Mount Pleasant High School in 1979. She explained that Wife worked various administrative roles since 1986 and earned an average of $45,000 as an Administrative Coordinator/ Receptionist for Drinker Biddle & Reath LLP. She stated Wife was employed part-time at Husband's excavating business doing administrative tasks from 2006 to 2021. Altogether, Ms. Lock testified Wife has 35 years of administrative experience. However, Ms. Lock testified that the last year Wife earned a salary was in 2016 based on Wife's social security and disability income resume for 2018.[68]

Ms. Lock testified that Wife has transferrable skills over a broad category of jobs given her work history. Ms. Lock states Wife has knowledge in obtaining information, administrative activities, computer work, preparing documents,

[68] Ms. Lock did not explain why the social security earnings statement showed earnings through 2018 if Wife last earned a salary in 2016. The discrepancy is not significant in this case as Wife has not worked for at least the last five years.

organization, and proofreading. She testified that Wife has skills in reading comprehension, time management, speaking, active listening, accounting, and invoicing. Ms. Lock thinks Wife is employable as a receptionist, cashier, telephone operator, delivery driver, or customer service representative.

Ms. Lock testified that she listed both full-time and part-time jobs in her evaluation. She testified that part-time work ranges between twelve to twenty hours a week. Ms. Lock testified that Wife could earn $48,000 to $58,000 a year if she worked full-time. She testified Wife could earn between $16,000 and $27,000 a year working part-time at twenty hours a week. However, Ms. Lock did not calculate annually what Wife would earn working twelve hours a week. Ms. Lock concedes that Wife's mental health diagnoses could affect her keeping the jobs she recommends.

Ms. Lock testified that based on her interview and the documentation provided, she believes that Wife should start work on a part-time basis given her medical and mental health issues. Lock concedes that she cannot opine on a medical basis whether a person can work or not and concedes she has no mental health expertise. At the same time, Ms. Lock opined that Wife is employable if she maintains her mental health.

d. Court's Conclusion on Employability. Based upon the testimony of the experts and the evidence submitted, the Court finds that Wife's

physical and mental illnesses are severe and incapacitating, and prevent her from working. First, the Court considered the medical expert testimony of Dr. Finkelstein and Darlene Annas and finds them persuasive. Dr. Finkelstein found that Wife's psychological evaluation indicated several cognitive issues such as attention-deficit/hyperactivity disorder, post-traumatic stress disorder and major depressive disorder. Wife was also found to suffer from generalized anxiety disorder and insomnia. In addition, Wife is in the "low-average range" of cognitive functioning and is likely to overlook significant information. Wife also suffers from physical pain in her toe and gastrointestinal issues resulting from her heart attack and blood clots. Moreover, Wife's treating nurse practitioner of twenty years, Darlene Annas, found Wife's mental and physical illnesses to be severe and incapacitating and based this opinion off personal knowledge and her review of all medical expert reports. Significantly, Wife has tried to work but has been unsuccessful.

Second, the Court considered Ms. Lock's testimony and finds it lacking. Ms. Lock made a point of noting that she reviewed the reports and records of multiple medical experts, yet not a single report affected her opinion. A reasonable expert would have to consider reports of attention deficit/hyperactivity disorder, post-traumatic stress disorder, major depressive disorder, intermittent anxiety, chronic pain, fatigue, panic attacks, and ulcerative colitis – offered by Husband's own expert – as requiring some consideration in the opinion. On cross examination, Ms. Lock

conceded that Wife's mental health diagnoses could affect her keeping the jobs she recommends in her report but never considered how they would affect her ability to even find a job.

On balance, the Court finds that Wife is unable to meet her needs independently by working because her physical and mental conditions are severe and incapacitating.

* * * * *

Wife has reasonable monthly expenses of $6,434. Wife has no current income. Wife's current monthly deficit is ($6,434). Wife will have some liquid assets from the property division available for her use after payment by Husband. The Court did not consider the LLCs with multiple members over which Wife has no control, Wife's vehicle, or the amount previously distributed to the parties during the pendency of this action, as they are not presently available for distribution.

Withdrawn from her asset pool over her remaining lifetime with 4% interest on the balance remaining, Wife should have $2,000 per month available to her to contribute to her monthly deficit.[69] By August 2027, Wife will have used all of the accrued interest and approximately $9,000 of her principal. Additionally, by August 2027, Wife will be able to receive $1,508 in social security, thereby reducing her

[69] Wife is able to withdraw $2,000 per month from the property division award and interest thereon. While Wife has a "paper award" of $111,877 in taxable retirement funds, Wife was attributed with $50,000 that she withdrew during the pendency of this case for her living expenses, and has $89,000 in attorney's fees that will eliminate these funds in their entirety.

monthly deficit to a more manageable number. Wife will have to use considerably more of her principal at that time to maintain the marital standard of living.

In reaching this decision on Wife's available financial resources, the Court has considered the expert testimony concerning Wife's inability to work, the property division award plus interest thereon, and the reduction in alimony that is likely to occur upon Husband's retirement.

Husband's Income and Claimed Expenses

Husband works at full capacity in the family business, W Excavating, LLC. According to Husband's pretrial stipulation, Husband earned $204,000 in 2020, $342,000 in 2021, and $320,000 in 2022. The average of Husband's income over the three reported years on the pretrial stipulation is $288,000. Husband's after-tax monthly take home pay is a calculated at $15,143.[70]

Husband claims $7,684 in monthly expenses. The Court adjusts Husband's amounts as noted in the following chart below. The Court lists only those items identified in the "Estimated Expense" column of Husband's Expense Information Sheet and updated by testimony at trial. The Court adjusts a single expense down for the reason in the "Notes" column. Items in green were agreed to by Wife. Items in red show adjustments made by the Court to reasonable levels based on the lifestyles of the parties during the marriage, current health circumstances, and

[70] https://smartasset.com/taxes/paycheck-calculator#6BmlTRoCng

reasonable claims.

	Husband Estimated	Court Adjusted		Explanation
Mortgage (taxes, insurance and escrow)	$3,700	$3,700		
Garbage	$34	$34		
Household items	$50	$50		
Household maintenance and repairs				
HVAC/Lawn Care	$192	$192		
Groceries	$329	$329		
Clothing	$215	$200		Matches Wife
Health Insurance and COBRA	$1,182	$1,182		
Out of pocket medical and dental - self	$650	$650		
Laundry and dry cleaning	$10	$10		
Toys and presents	$200	$200		
Cosmetics and toiletries	$37	$37		
Hobbies	$70	$70		
Barber and Hair Stylist	$13	$13		
Vacation	$150	$150		
Entertainment and miscellaneous	$255	$255		
Transportation (other than auto)	$25	$25		
Automobile:				
Monthly Payment				
Repairs and Maintenance				
Insurance				
Gasoline				
Life Insurance	$172	$172		
Other:				
H: Dining out	$164	$164		
H: Streaming srvs.	$68	$68		
H: Pet Care	$63	$63		
H: ADT	$67	$67		
H: Gym Membership	$38	$38		
	$7,684	$7,669		

Husband has reasonable monthly expenses of $7,669. Husband has available after-tax income of $15,143. Husband has a monthly surplus of $7,474.

Analysis of §1512(c) Factors:

(1) The financial resources of the party seeking alimony, including the marital or separate property apportioned to him or her, and his or her ability to meet all or part of his or her reasonable needs independently;

Husband is receiving 50% of the available marital assets. Husband currently pays $4,500 per month in interim alimony, an amount stipulated at the interim alimony hearing. Husband is retaining the former marital home. Husband has a substantial payout due to Wife to equalize the distribution. Husband has a monthly surplus of $7,474. Husband is able to meet his needs at present.

Wife also will receive 50% of the available marital estate. Wife has a monthly deficit of ($6,434) but is also able to claim social security benefits of $1,508 per month as of August 2027. Wife is unable to work due to serious and incapacitating physical and mental health issues. Wife does not have capacity to meet her entire monthly deficit at present.

In her motion for reargument, Wife noted that the Delaware Supreme Court in *Thomas v. Thomas* found reversible error where the Family Court "only included the interest income from [her] inheritance toward Wife's financial resources when calculating whether Wife was dependent."[71] The Delaware Supreme Court decision in *Glanden v. Glanden* noted that *Thomas* was not controlling where the "Wife did not have independent financial resources" and "[h]er assets following divorce came from the division of shared marital assets."[72] The present case is more similar to *Glanden* than to *Thomas*. In this case, Wife has no assets available to her at all until Husband makes payment. Husband has not made a payment and, as indicated in

[71] *Thomas v. Thomas*, 102 A.3d 1135 (Del. 2014).
[72] *Glanden v. Glanden*, 128 A.2d 994, 1004 (Del. 2015).

his Motion for Reargument, is not sure of how much will be paid or when such payment would be made. Husband in this case has a current surplus of $7,474 per month while Wife has a deficit of ($6,434). Husband clearly has the ability to pay alimony to Wife who has no other resources available to her.

As in *Glanden*, all of Wife's assets following divorce will come from the property division. However, the entire property division award is not liquid. While Wife will receive 50% of the value of the business, the remaining assets are not necessarily income producing. Wife has a car worth $24,000. It will not appreciate and selling it would leave her without a vehicle. The parties divided $173,434 equally during the marriage but much of those funds have been exhausted in Wife's living expenses. The parties' interest in the limited liability companies are not within Wife's control and she has no ability to direct the distribution of the principal and interest, if any is generated. Wife's share of the equity in the former marital home will have be used as a modest down payment on a home with a substantial mortgage. Wife's retirement assets are already reduced by $50,000 withdrawn during the pendency of this case and she owes her attorney over $80,000. The statement in *Glanden* that "it would in many cases be unfair for the less pecunious spouse to have to liquidate marital assets while the supporting spouse keeps his or her allocated

marital assets and maintains the marital standard of living"[73] is directly applicable to this case.

Continuing the interim alimony stipulated payment of $4,500 per month still leaves Wife with a shortage of ($1,934) and leaves Husband with a surplus of $2,974. Wife will have to use close to $2,000 per month from her property division assets to meet this deficit. Assuming that Wife is able to earn 4% interest on the liquid assets from the property division award – whenever it is paid – Wife will be using both principal and interest from her share of the property division while Husband continues to have a surplus. Additionally, once Husband has figured out how he will be making payment and when he will be retiring, there likely will be a substantial change in circumstances raised in a motion to modify alimony at which time Wife will have to use more of her awarded principal and interest to maintain the same standard of living enjoyed during the marriage.

> *(2) The time necessary and expense required to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;*

Wife seeks alimony. Wife has a high school diploma but has not worked since 2018 due to her physical conditions. Wife is 63 years old and has only four more working years until she reaches full social security retirement age. The Court does not anticipates that Wife will find appropriate work due to her physical and mental

[73] *Id.* at 1003.

conditions. Additional education and/or training in not likely to be of assistance in this case.

(3) The standard of living established during the marriage;

The parties lived within their means throughout the marriage. However, once the parties separated, Wife was very limited in her access to funds. She took a distribution of $50,000 from her retirement funds prior to the interim alimony stipulation. Unfortunately, neither party set aside adequate funds for retirement during the seventeen years of operating the business.

(4) The duration of the marriage;

The marriage lasted more than 33 years. While there is no bar on the length of Wife's eligibility to receive alimony, both parties are quickly approaching retirement. Husband essentially is a laborer and runs the family business. It is unlikely that he will have more than Wife once he is retired and Wife has received her share of the marital estate.

(5) The age, physical and emotional condition of both parties;

Husband is 61 years old and is in average physical and mental health. While Husband had a heart attack, he continues to work as many others with similar conditions have done.

Wife is 63 years old and in poor physical health and delicate emotional condition.

(6) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;

Both parties graduated from high school. Each party was supportive of the other party. Together they started W Excavating, LLC, seventeen years ago. Wife assisted in the business to her capacity during the marriage.

(7) The ability of the other party to meet his or her needs while paying alimony;

Alimony is sought from Husband. As documented above, Husband has the ability to meet his needs while paying alimony toward some of Wife's monthly deficiency.

(8) Tax consequences;

There are no tax consequences in connection with alimony as a result of the changes to the tax code.

(9) Whether either party has foregone or postponed economic, education or other employment opportunities during the course of the marriage; and

Neither party had to forgo or postpone opportunities during the marriage.

(10) Any other factor which the Court expressly finds is just and appropriate to consider.

Husband argues against an award of alimony claiming that it is "double dipping because Wife is receiving substantial assets, and it is unclear if or how Husband will be able to pay alimony and property payments since there are few

assets to offset against."[74] In support of his position, Husband suggests that *A.A. v. B.A.* stands for the proposition that alimony should not be awarded because "Wife is receiving essentially a portion of the business income after separation…".[75]

In *A.A. v. B.A.*, the *dicta* in the Court's opinion merely states that the Court would consider the issue in deciding on credits for expenses on an investment property and interim alimony. No alimony was awarded but not because of any alleged "double dipping." Rather, the wife in *A.A.* was in a position far superior to Wife in the present case. *B.A.* was working full time as an executive assistant for a law firm, and part time in a clothing store to earn supplemental income. She was "in relatively good health. [She] exercises regularly and has a personal trainer … [and] intends to work as long as she is able."[76]

In this case, Husband has many options available to him for making payment to Wife on the property division portion of the case. Husband was unable at trial to decide whether he would continue to work, sell the company and work for the new owner, or liquidate the business and retire. In light of Husband's surplus and Wife's inability to work, this factor is not highly significant.

[74] Dkt. #68.
[75] *Id*, (citing *A.A. v. B.A.*, 2020 WL 6379355 at *9 (Del.Fam.Ct. Oct . 9, 2020).
[76] *A.A.*, 2020 WL 6379355 at *13.

Conclusion – Alimony

Based upon the evidence presented at trial and in consideration of the statutory factors for alimony, the Court finds that Wife is dependent upon Husband for support. Husband is not obligated by contract or separation agreement to provide support to Wife. Wife lacks sufficient property to provide for her needs as the Court adjusted and determined as reasonable. Additionally, Wife currently is unable to support herself through appropriate employment.

Wife has a monthly deficit of ($6,434) through August 2027,_while Husband has a monthly surplus of $7,669. However, much of this situation will change in the next six years. Husband's superior income will only last as long as the business is in operation. Once Husband retires, there no longer will be such a surplus available and the parties will have relatively equal income which likely will result in a request to modify alimony.

In determining an amount of alimony to be paid, the Court considers that Wife may begin drawing her social security retirement funds at age 67. The Court also recognizes that Wife will have one-half of the former marital estate at her disposal upon payment by Husband plus interest on amounts invested therefrom. These factors should reduce Wife's dependence on Husband and should leave her with a monthly deficit which may be manageable using assets from property division or some "belt tightening."

The parties were married for more than thirty-three years which removes the time bar against an award of alimony. The Court will order alimony at the current amount of $4,500 per month at least until Husband turns 67 years old on March 28, 2029. However, the alimony statute provides for modification in the event of a substantial change in circumstances, or termination in certain instances, and either party may avail themselves of this statutory right by filing a petition.[77]

The Court declines to modify the stipulated interim alimony order retroactively for numerous reasons. First, the amount of interim alimony was mutually agreed. Second, Wife has no income and no available assets to assist her with her monthly deficit during the pendency of this case. Third, Husband had a monthly surplus greater than Wife's monthly deficit during the pendency of this case.

Attorney's Fees and Court Costs

Wife has requested that Husband pay a share of Wife's attorney's fees in this case. The principal source of the Family Court's authority to award counsel fees is 13 *Del.C.* § 1515.[78] The statute permits the Court to "order a party to pay all or part of the cost to the other party of maintaining or defending any proceeding under this title and for attorney's fees…".[79] The Supreme Court of Delaware has ruled that an

[77] *See Boyer v. Boyer*, 532 A.2d 1000 at *3 (Del. 1987).
[78] *Julin v. Julin*, 787 A.2d 82 (Del. 2001).
[79] 13 *Del.C.* § 1515.

"award of fees may not be made arbitrarily and a statement as to the reasons for an award of costs and fees should appear in the record."[80]

In this case, Wife notes that Husband has earned over $300,000 while Wife had no income and had to withdraw $50,000 from her 401(k) account, the amount of which already has been included in Wife's asset column in the property division. Husband testified that he has been able to pay the interim alimony and his attorney's fees throughout this litigation. The Court finds that Husband is in the superior financial position and has the ability to assist in the costs of litigating this matter.

Significantly, Husband's back tracking on his pretrial stipulation and expert report incurred unnecessary additional costs for Wife. Wife's counsel objected to Husband's attempt to change his expert's valuation as stated in the pretrial stipulation and the expert report, and sought an award of fees in connection therewith. Wife claims that this change delayed any meaningful negotiations and caused Wife to prepare and litigate for two additional days beyond what should have been required. The Court deferred ruling on the objection and allowed the testimony to permit Husband that opportunity to fully present his case. The additional time was not helpful.

[80] *Lee v. Green*, 574 A.2d 857 (Del. 1990).

Both parties submitted affidavits with a listing of attorney's fees for the entire case. Husband incurred $134,832 in attorney's fees. Wife incurred $111,353 in attorney's fees. The Court considered the total costs of fees to both parties, their relative income disparity, the extra time incurred with Husband's changed position from the pretrial stipulation, and litigation conduct, and finds it equitable that Husband pay a 20% share of Wife's attorney's fees in this case. The Court notes that this award leaves Wife a balance of $89,000 that she must pay with few resources available to her at present. The Court orders that Husband pay $22,270 within three months of the date of this order directly to Wife's counsel as permitted by the statute.

THIS IS A FINAL ORDER.

IT IS SO ORDERED this 26th day of January 2024.

/s/Michael W. Arrington
MICHAEL W. ARRINGTON
Judge

Attachment – Wright Chart

Date E-mailed to Counsel: 1/26/2024