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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Bonnie KMINEK-NIERENBERG, Plaintiff-Appellant/Cross-Respondent,
v.
Kenneth NIERENBERG, Defendant-Respondent/Cross-Appellant,
and
Estate of Richard Nierenberg, Naomi Nierenberg, Princeton Aero Corporation, Princeton Air Corporation, Raritan Valley Flying School, DKN and Associates, and Pacific Air Craft Corporation, Defendants-Respondents.

DOCKET NO. A-5955-12T3
|
Argued March 14, 2016
|
Decided September 8, 2016

On appeal from Superior Court of New Jersey, Family Division, Somerset County, Docket No. FM-18-711-05.

Attorneys and Law Firms

Eden P. Quainton (Law Offices of Eden P. Quainton) of the New York bar, admitted pro hac vice, argued the cause for appellant/cross-respondent (Louise M. Robichaud and Mr. Quainton, attorneys; Ms. Robichaud and Mr. Quainton, on the briefs).

Kevin J. Musiakiewicz argued the cause for respondent/cross-appellant Kenneth Nierenberg, and respondents Princeton Air Corp., Raritan Valley Flying School, and DKN and Associates.

Ross A. Lewin argued the cause for respondents Estate of Richard Nierenberg, Naomi Nierenberg, Princeton Aero Corp., and Pacific Air Craft Corp. (Drinker Biddle & Reath attorneys; Mr. Lewin, on the brief).

Before Judges Sabatino, O'Connor and Suter.

Opinion

PER CURIAM

***1** Plaintiff Bonnie Kminek-Nierenberg (Bonnie) [1] appeals from the alimony, child support and equitable distribution provisions of her judgment of divorce, as well as the denial of her request for attorney's fees and punitive damages. Defendant Kenneth Nierenberg (Kenneth) cross-appeals from the denial of a credit for pendente lite support he paid prior to the divorce and from select provisions of the equitable distribution award. We affirm in part, subject to the resolution of the "A-20" account and related disqualification issue, and remand in part.

I.

Bonnie Kminek and Kenneth Nierenberg were married October 31, 1992. They had three children, all of whom were minors when this litigation commenced. The couple separated in August 2003. Bonnie filed for divorce on January 31, 2005. Her divorce complaint was subsequently amended in 2008 to add as defendants Kenneth's parents, Richard and Naomi Nierenberg, and certain closely held corporations, which were the subject of this lengthy litigation. A pendente lite order awarding Bonnie unallocated support was entered shortly after the divorce complaint was filed, which required Kenneth to pay $5,000 per month to her. At that time, the children resided with Bonnie. In 2011, the parties agreed to a child custody order that reflected that the three children, now teenagers, were residing with their father.

The case was bifurcated. The first phase of the divorce trial, involving just one of the closely held corporations, DKN, was conducted and decided in 2012. The trial court found that DKN was a "passive" asset, but that some marital funds were used by DKN in a property exchange. Because of that, Bonnie was awarded $33,485.29 in equitable distribution.

The second phase of the trial, involving the remaining issues of equitable distribution, alimony, child support and Kenneth's cross-claims, concluded in 2013. A dual final judgment of divorce, entered on June 25, 2013 and supplemented on July 22, 2013, incorporated the parties' custody agreement and awarded permanent alimony to Bonnie of $711 per week, but required her to pay child support to Kenneth of $278 per week. Bonnie's equitable distribution award for certain business assets totaled over $165,000. She

also was awarded 60% of the value of the marital residence. Of the $1.1 million Bonnie sought in attorney's and expert fees, she was awarded $37,133.43. The trial court did not award punitive damages. The court denied Kenneth's claim for reimbursement of a portion of the pendente lite support.

II.

A. Princeton Airport and the 1031 Exchange

In 1985, Kenneth and his parents established Princeton Airport in Somerset County by creating three separate, closely-held corporate entities as a means of limiting significant potential liabilities that could arise from operating an airport. "Princeton Aero" was created to purchase a fifty-acre parcel of land that would be used for the airport. "Princeton Air" was formed to operate the day-to-day affairs of the airport. "RV Flying" was formed to train pilots. Princeton Aero acquired the airport in 1985 for $1,250,000, which included a contemporaneous $600,000 mortgage from Somerset Trust Company Bank. For more than a decade, Princeton Air leased property as a tenant from Princeton Aero under an oral month-to-month lease in which the rent charged was below market rates. RV Flying subleased a portion of the property from Princeton Air.

***2** Initially, Richard, Naomi, and Kenneth individually held a one-third ownership interest in each of the three corporations. Kenneth, who was twenty-four at the time, borrowed $183,333 from his parents to purchase his shares in the companies, and in 1985, he signed a demand promissory note that reflected this obligation. In 1989, Bonnie began working as a bookkeeper at the airport.

A fourth corporation, "DKN," was formed by Kenneth and his parents in July 1992 as a holding company to purchase an additional thirty-three acres of land adjacent to the airport. The land was purchased from the Resolution Trust Corporation for $380,000, although it was assessed for much more. Kenneth borrowed $128,333 from his parents to purchase his one-third share of DKN, which loan was memorialized in a 1992 demand promissory note.

The DKN property was not used initially to expand the airport, but in January 1999, after having been approached by the Federal Aviation Administration (FAA) to become a "reliever airport," DKN sold eleven of the thirty-three acres to Princeton Aero for $700,000, which purchase was entirely funded by a grant to Princeton Aero from the FAA. Then, in May 1999, DKN signed an agreement with a company named "C-GEM Group LLC" (C-GEM), which was a property developer, to sell the other twenty-two acres to that company. It would take until January 2004 to finally close this sale for $1,156,918, which included $160,000 in deposits C-GEM paid to DKN from 1999 to 2004.

Because Kenneth wanted to defer capital gains on this transaction, a tax-free exchange was arranged utilizing the provisions of 26 *U.S.C.A.* § 1031 (the 1031 exchange).[2] Steven Nierenberg, Kenneth's cousin, was principally involved in arranging and implementing the 1031 exchange. He located a three-story apartment complex in Philadelphia and negotiated a purchase price of $1,700,000. Additional monies amounting to approximately $600,000 were needed by DKN to fund the 1031 exchange because DKN's transaction with C-GEM had netted only $995,769.14.

To provide the additional funding, Aero loaned $100,000 to DKN from its construction account, but this loan was "booked" by DKN as a personal loan from Richard to DKN.[3] Richard and Naomi loaned $50,000 to DKN from their personal funds. Kenneth paid $30,000 from a personal bank account and DKN paid $130,000; thus, these two amounts reflected the $160,000 in deposits C-GEM had paid to DKN from 1999 to 2004.

As part of these transactions, $416,500 was wired to DKN from an account at Merrill Lynch, referred to as the "A-20" account. The ownership of that account is a central issue of this appeal.

Aside from the funding as indicated, Kenneth had little involvement thereafter with both managing and arranging for the purchase of the Philadelphia property. A management company was utilized to collect rents, although Kenneth was involved in paying taxes, fines and insurance.

In June 2004, the Philadelphia property was mortgaged for $600,000 and the proceeds were paid to Richard. This resulted in an overpayment to Richard of $22,723, compared to the funds that he had advanced.

B. Estate Planning

It was undisputed that in 1999, Richard and Naomi retained an attorney to revise their estate plan. They wanted to begin transfer of their ownership in Princeton Air, RV Flying and DKN to Kenneth, but they also wanted to maintain control of

Princeton Aero. Richard and Naomi rejected a proposal from counsel that would have transferred assets into a trust, because of significant tax implications. Instead, Richard and Naomi gifted Kenneth their two-thirds ownership in Princeton Air, RV Flying and DKN, making him the sole owner of these entities by 2001. They maintained their two-thirds ownership in Princeton Aero because it leased the operations of the airport to Princeton Air. Hence, by keeping Princeton Aero, they maintained control of the airport. In connection with these transfers, a new shareholders' agreement was executed for Princeton Aero that included a provision requiring shares in that corporation to be sold back for "book value" in the event of the death, divorce, disability, or bankruptcy of a shareholder. Kenneth also revised his will to create trusts that would benefit Bonnie if the other participants were deceased.

***3** The validity of this estate plan was the subject of an in limine motion for partial summary judgment. The court upheld the validity of the new shareholders' agreement, including the buyback provision, finding there was no intent to defraud Bonnie of her equitable distribution by creating the estate plan because "reasonable restrictions on the transfer of shares" are authorized by *N.J.S.A.* 14A:17-2 and Bonnie had not shown Richard or Naomi knew of any marital difficulties at the time the estate plan was made.

Although the parties separated in August 2003 and Bonnie filed for divorce in January 2005, it was not until a shareholders' meeting in June 2007 that Richard and Naomi enforced the "divorce provision" of the shareholders' agreement that required Kenneth to sell his shares of Princeton Aero back to the corporation for their book value of $125,000. At that meeting, Princeton Aero also terminated Princeton Air's month-to-month lease, effectively depriving that corporation of its income. Richard and Naomi then formed "Pacific Air," a closely held corporation in which Kenneth had no ownership interest. Pacific Air began performing the same functions as Princeton Air had performed, even purchasing Princeton Air's assets. Kenneth became an employee of Pacific Air and continued to run its aircraft purchase and sales department. Richard and Naomi took legal action against Kenneth to enforce the repayment of the 1985 and 1992 demand notes, now totaling more than $1.8 million, and obtained a money judgment against their son.

In the motion for partial summary judgment, the court found the $128,333 loan to Kenneth to purchase DKN was a pre-marital event, which amount was not commingled by him with marital funds and, thus, for equitable distribution purposes, his interest in DKN remained his separate property. The court rejected Bonnie's attempt to pierce the corporate veil of the airport entities, finding she had not proven that one corporation dominated the others. The court also found that DKN was a "passive" pre-marital asset and that any increase in its value was due to market forces.

However, two factual issues were reserved for trial, namely,

> 1) Whether any martial funds were used by DKN to purchase the Philadelphia property;
>
> 2) whether any increase in value of DKN, including profits related to the Philadelphia property ownership, from the time marital funds were introduced into DKN, if any, until the filing of the complaint on January 31, 2005.

With the consent of the parties, the divorce trial was bifurcated; the purpose of phase one was to determine the reserved issues regarding DKN.

Following several days of trial, the court determined in a written opinion dated October 9, 2012 that, in 2000, Richard and Naomi had gifted their two-thirds interest in DKN to Kenneth as part of a valid estate plan, rejecting Bonnie's contention that this transfer was a disguised sale. Bonnie's theory was "plagued by certain material discrepancies that were not supported by the testimony and the documentary proof and a general lack of evidence to support her theory." The court found that, notwithstanding the failure of Richard and Naomi to file gift tax returns, the parties intended to give DKN as a gift and had relinquished control of it without "an improper purpose or conspiracy that deprived [Bonnie] of a share of any asset to which she was entitled."

Finding Richard Nierenberg's testimony credible, the trial court determined that Merrill Lynch account A-20 was owned "solely" by Richard and not by Princeton Air, and had not been gifted to Kenneth. Rather, account A-20 served the dual purposes of providing personal funds for Richard and Naomi, and an escrow account for Princeton Air's use in buying and selling airplanes. [4] The trial court found DKN was a "passive asset" for purposes of equitable distribution based on the testimony of Kenneth and Steven Nierenberg, who the judge found to be credible. Even if the assets were not passive, DKN had not increased in value during the course of the marriage. Nevertheless, $63,333 in marital funds had been used in connection with the 1031 exchange, which entitled Bonnie to an equitable distribution of $33,485.29.

***4** The balance of the disputed divorce issues were resolved in a lengthy written opinion dated June 25, 2013, which followed phase two of the trial. Permanent alimony of $3,060.50 per month was awarded to Bonnie, taxable to Bonnie and deductible by Kenneth. The parties were to share joint legal custody of the children. Kenneth was named as the parent of primary residence of the two younger boys. Bonnie was to have reasonable and liberal visitation. Family therapy was ordered for Bonnie and the children, at her expense. Bonnie was ordered to pay child support of $1,226 per month. There were other provisions for the payment of health related expenses, tax exemptions, life insurance, college contributions, and bank accounts.

Bonnie was awarded 60% of the value of the marital home. If Bonnie retained the property, she was responsible for its carrying costs. [5] The parties were equally responsible for a $165,000 home equity line of credit.

Bonnie's equitable distribution of the business interests consisted of $100,000 from Princeton Air, to be paid by a judgment entered against Kenneth, Princeton Air and Pacific Air, $7,345 from RV Flying and $58,253.17 from Princeton Aero. Kenneth was ordered to pay $37,133.43 in counsel fees to Bonnie's prior counsel. Otherwise, the parties' requests for reimbursement of legal fees and expert fees were denied. The court also denied Bonnie's request for punitive damages, and denied Kenneth's request for reimbursement of payments he made pendente lite.

Bonnie raises a number of issues on appeal. She contends that cumulative errors by the trial court cast doubt on its factual findings; that the court erred in finding account A-20 belonged "solely" to Richard Nierenberg; that the court abused its discretion in determining alimony, child support, and equitable distribution of the business interests. She also claims she was deprived of due process as a result of trial errors; did not properly waive her right to counsel; was erroneously deprived of an award for legal fees; and that punitive sanctions should have been imposed. Finally, she alleges the trial court was biased against her.

The defendant's cross-appeal claims the trial court erred by failing to award Kenneth reimbursement of pendente lite support he overpaid, by awarding Bonnie the appreciation in the value of Princeton Aero, and by awarding Bonnie a greater share of the equity in the marital home.

III. A-20 Account

A significant issue in this appeal is the status of Merrill Lynch account "A-20" for purposes of equitable distribution. In approaching this issue, we recognize that we generally defer to the factual findings of the trial court when there is substantial credible evidence in the record to support them. *N.J. Div. of Youth & Family Servs. v. E.P.*, 196 *N.J.* 88, 104 (2008). In doing so, we are mindful of the "special expertise of judges hearing matters in the Family Part," according due deference to factual-findings. *Parish v. Parish*, 412 *N.J. Super.* 39, 48 (App. Div. 2010); *see also Cesare v. Cesare*, 154 *N.J.* 394, 413 (1998). However, "[w]here our review of the record 'leaves us with the definite conviction that the judge went so wide of the mark that a mistake must have been made,' we may 'appraise the record as if we were deciding the matter at the inception and make our own findings and conclusions.' " *C.B. Snyder Realty, Inc. v. BMW of North America, Inc.*, 233 *N.J. Super.* 65, 69 (App. Div.) (quoting *Pioneer Nat'l Title Ins. Co. v. Lucas*, 155 *N.J. Super.* 332, 338 (App. Div.), *aff'd*, 78 *N.J.* 320 (1978)), *certif. denied*, 117 *N.J.* 165 (1989). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty L.P. v. Twp. of Comm. of Manalapan*, 140 *N.J.* 366, 378 (1995)).

***5** The burden of showing that an asset is exempt from equitable distribution rests with the party claiming the exemption. *Painter v. Painter*, 65 *N.J.* 196, 214 (1974); *Weiss v. Weiss*, 226 *N.J. Super.* 281, 291 (App. Div.), *certif. denied*, 114 *N.J.* 287 (1988). It was Kenneth's burden to show account A-20 was not an asset of Princeton Air or gifted to him as part of his parents' estate plan.

The court found the account had been jointly titled in the names of Richard and Princeton Air, but owned solely by Richard, relying in part on its finding that Richard's and Kenneth's testimony was credible. While we have accepted the trial court's credibility determinations, we have evaluated the implications of those facts differently. The evidence did not support the finding of sole ownership, but rather showed that account A-20 was a fund consisting of comingled monies from Richard, Princeton Air, and other business entities and, thus, was not entirely Richard's nor entirely Princeton Air's. There was, however, no evidence that the account was gifted

to Kenneth as a part of the estate plan. The account was always treated separately as an "off the books" account.

The A-20 account was jointly titled to Princeton Air and Richard, but it used Princeton Air's tax identification number. There was no dispute that the use of that title and tax number was to encourage third parties to buy and sell airplanes from Princeton Air. The IRS required the party first named on the account to utilize its tax identification number on any submissions to the IRS, a requirement about which Bonnie's expert was unaware. Thus, Princeton Air used its tax identification number for the account.

Richard testified he had inherited from his father the monies that were originally deposited into the account, which he periodically replenished. Then, he testified, as did Kenneth, that the account was used as an escrow to buy and sell airplanes. Princeton Air could access this account more expeditiously than it could access funds through Merrill Lynch or a bank, and so this account was used to advance monies to buy and sell airplanes, the proceeds of which were then deposited into the account. Kenneth acknowledged that the account contained monies from third-party sales and commissions on those sales, at least until the commissions were transferred to Princeton Air's operating account. Tellingly, the interest and dividends earned from the A-20 account were not paid to Richard; rather because Princeton's tax identification number was used, this income was recorded by Princeton Air on its IRS Schedule K. As Princeton Air was a closely held corporation, such income was then reported for two years by Bonnie and Kenneth on Schedule B of their federal income tax returns as interest income. The record does not show whether Richard reported any income from this account on his own tax returns, as Bonnie's requests for Richard to produce his tax records were denied by the court prior to trial.

Having considered the record supplied to us as a whole, the court's conclusion the A-20 account was solely owned by Richard was not supported by substantial, credible evidence. The treatment of interest income earned from the account, the largely unexplained movement of money within the account involving airplane sales for Princeton Air and the absence of evidence about the tax treatment of this account by Richard, all in combination undermined the conclusion that the account was owned solely by Richard. It does not appear the account was funded entirely from corporate monies. Rather, it was an account that commingled Richard's and Princeton Air's money, the relative portions of which were not ascertained. We, therefore, remand the A-20 issue to the trial court for further consideration, including ascertaining the appropriate percentages of ownership, following appropriate limited discovery and presentation of relevant supplemental proofs regarding the sources of its funds.

IV. Bias

***6** On remand, the trial court will have the opportunity to address the allegation, raised for the first time on appeal by Bonnie, that there was a $100,000 transfer in July 2004 from the A-20 account to an attorney trust account at the law firm in which the trial judge was previously employed. Kenneth contends this transfer was related to the sale of an airplane. Bonnie appears to have been aware of the $100,000 transfer during the trial, but did not raise the issue then. She now contends that this transaction provides a basis to disqualify the trial judge. Because this issue was raised for the first time on appeal, the judge was not accorded the opportunity to address this allegation.

With respect to the other allegation of judicial bias raised by Bonnie, in reviewing the evidence, the trial judge discovered that thirty years ago he prepared on behalf of one of his clients, a bank, a mortgage note issued by the bank evidencing funds loaned to acquire Princeton Airport. The judge made the parties aware of his discovery and neither opposed his continued involvement in the case. Now, on appeal, Bonnie asserts this alleged conflict of interest should have been fully explored in phase one of the trial.

Our statutes and court rules specify that a judge must disqualify himself on motion of a party or on the court's own motion if he "has been [an] attorney of record or counsel *in the action*[.]" *R.* 1:12-1(c) (emphasis added); *see also N.J.S.A.* 2A:15-49(b).

We agree that the judge was not required to disqualify himself on this basis because he did not represent the parties in this litigation, no objection was raised by the parties about the mortgage note issued by his former client, and no party asserted the judge's very limited, peripheral involvement thirty years ago created a disqualifying conflict of interest. However, for the reasons we have already noted, the disqualification issue relative to the A-20 account must be explored on remand. That determination shall precede, of course, the resolution of the merits of the A-20 issue.

V. Equitable Distribution

We recognize that the ultimate decision herein regarding account A-20 will affect the equitable distribution determination regarding Princeton Air and perhaps the other closely held corporations. The trial court shall have the discretion to afford the parties an opportunity for discovery and to adduce additional proofs limited to the issues that are the subject of, or affected by the remand insofar as it may be warranted to expand the record on those subjects. Even so, we find no error with many portions of the decisions.

"The goal of equitable distribution ... is to effect a fair and just division of marital assets." *Steneken v. Steneken,* 367 *N.J. Super.* 427, 434 (App. Div. 2004), *aff'd in part, modified in part*, 183 *N.J.* 290 (2005). "In going about this task, the court must decide what specific property each spouse is eligible to receive by way of distribution; the value of such property for purposes of distribution; and how such allocation can most equitably be made after analysis of the factors set forth in *N.J.S.A.* 2A:34-23.1." *Sauro v. Sauro,* 425 *N.J. Super.* 555, 572-73 (App. Div. 2012), *certif. denied,* 213 *N.J.* 389 (2013). The determination need only reflect that the "trial judge ... appl[ied] all the factors set forth in *N.J.S.A.* 2A:34-23.1 and distribute[d] the marital assets consistent with the unique needs of the parties." *DeVane v. DeVane,* 280 *N.J. Super.* 488, 493 (App. Div. 1995).

For an asset to be subject to equitable distribution, it must be "property ... legally and beneficially acquired by [the parties] or either of them during the marriage." *Orgler v. Orgler,* 237 *N.J. Super.* 342, 350 (App. Div. 1989) (alterations in original) (quoting *N.J.S.A.* 2A:34-23). It is generally understood that property owned by a party "at the time of marriage will remain the separate property of such spouse[.]" *Painter, supra,* 65 *N.J.* at 214; *see Scavone v. Scavone,* 230 *N.J. Super.* 482, 488-89 (Ch. Div. 1988), *aff'd,* 243 *N.J. Super.* 134 (1990). *N.J.S.A.* 2A:34-23 requires the court, in making an equitable distribution of marital property, to consider the contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of marital property. We review a trial judge's decisions concerning the allocation of assets for equitable distribution, and concerning counsel fees, for abuse of discretion. *See Williams v. Williams,* 59 *N.J.* 229, 233 (1971); *Borodinsky v. Borodinsky,* 162 *N.J. Super.* 437, 443-44 (App. Div. 1978).

***7** With respect to the closely held corporations, the court ordered equitable distribution to Bonnie of 1) $31,667 paid by Kenneth for DKN, plus $1,828.29 for taxes and associated interest, totaling $33,485.29; 2) $100,032 to be jointly paid by Kenneth, Princeton Air, and Pacific Air for her share of Princeton Air; 3) $58,253.17 for her share of Princeton Aero; and 4) $7,345 for her share of RV Flying.

A. DKN

The court found the estate's attorney was credible when she testified that DKN was gifted to Kenneth as part of the estate plan for Richard and Naomi, the goal of which was to transfer value out of the estate of "Richard" and "Naomi" without relinquishing control of the airport, and that the execution of the new shareholder's agreement and the Will were all part of this planning. The trial court rejected the testimony of Bonnie's expert, who theorized that Kenneth purchased DKN. The trial court reviewed the financial evidence and its conclusion that account A-20 had a dual personal and business use was supported by that evidence. The trial court also found credible Kenneth's testimony that this account was used "primarily for convenience or [a] conduit account to buy and sell airplanes." The trial court did not find "there was an improper purpose or conspiracy that deprived [Bonnie] of a share of any asset to which she was entitled."

The trial court further found "the DKN investment property [was] a property in which neither [Bonnie] nor [d]efendant Kenneth ha[d] made any contributions or efforts that in any meaningful way contributed to the growth (or for that matter the loss of value) of the investment asset." The determination that the property was a passive asset for purposes of equitable distribution was based upon testimony that the court found to be credible and in which key facts were uncontradicted. The court determined it was not bound by the IRS designation of the property as "non-passive" for tax purposes when considering equitable distribution. The court also found Kenneth's participation in a subdivision approval needed to expand the airport or the 1031 exchange did not convert this asset (DKN) to an active asset. Kenneth's involvement with the Philadelphia property was "minimal and 'passive.' " The court also concluded that there was no increase in DKN's value.

The trial court determined that limited marital funds amounting to $63,333 were used to facilitate the purchase of the apartment building in Philadelphia by DKN and awarded Bonnie 50% of such sum, i.e. $31,667. This was increased to $33,485.28 to reimburse Bonnie for taxes for which she was responsible because DKN was an exempt and passive entity.

We find no error in the trial court's decision that Richard and Naomi's estate planning was not intended to wrest marital assets from Bonnie. Based largely on findings of credibility that were not challenged, we are satisfied there was substantial evidence in the record to support the determination the companies were gifted, which was done to reduce taxes while also maintaining control. Also, the estate planning counsel testified that her clients told her that Kenneth was not experiencing any marital difficulty. The gifting arrangement exposed active assets to equitable distribution to the extent that their value was increased by Kenneth's efforts. Further, Kenneth's amended Will had provisions that would have benefited Bonnie in the event that Richard and Naomi predeceased Kenneth.

***8** We affirm the decision that account A-20 was not "gifted" to Kenneth as part of the estate plan. There was no testimony to that effect from the estate attorney. Also, the trial court found as fact that account A-20 was used both personally by Richard and for business purposes by Princeton Air to facilitate buying and selling airplanes. The fact that there were payments in and out of the account for business purposes and that the accounting records were not maintained with the pinpoint accuracy of a larger corporation did not overcome the substantial evidence the account was not gifted to Kenneth in the DKN transaction.

We agree with the trial court's determination that DKN was a passive asset. "Passive immune assets can be defined as those assets whose value fluctuations are based exclusively on market conditions." *Valentino v. Valentino,* 309 *N.J. Super.* 334, 338 (App. Div. 1998). As a passive asset, DKN was not subject to equitable distribution unless Kenneth used marital monies to help fund DKN's shortfall during the 1031 exchange.

There was adequate, substantial evidence to support the court's finding that any activity by Kenneth in DKN's sale of its first eleven acres to Princeton Aero was insufficient to convert DKN to an active asset. From 1999 to 2004, this land continued to be farmed, and thus retained its passive nature until the remaining acreage was sold in connection with the 1031 exchange. At that point, in 2004, Bonnie and Kenneth listed DKN as a non-passive asset on their joint return. We agree with the trial court that, although the IRS designation of this asset as non-passive is a consideration, it is not controlling for equitable distribution purposes. Having analyzed Kenneth's role in the 1031 exchange and his lack of involvement in its management thereafter, the trial court arrived at the conclusion, in which we find no error, that DKN remained a passive asset for purposes of equitable distribution.

We agree with the court that, to the extent Kenneth used marital monies in 2004 to help fund DKN's shortfall in the 1031 exchange, Bonnie is entitled to a portion of these monies as part of equitable distribution. In the court's decision, it found that $63,333 of marital monies from Kenneth's own account and from Princeton Aero were utilized by him to fund DKN's 1031 exchange and, thus, awarded Bonnie half of that amount for equitable distribution. As noted, we expect that our analysis of account A-20 may change this calculation if a portion or all of the additional $416,000 used for the 1031 exchange also is considered to be marital.

There is no legal support for Bonnie's novel claim that she is entitled to equitable distribution from any increased value of DKN because of its land transaction with Princeton Aero. Bonnie did not cite authority for this unique theory, nor did she factually demonstrate that anything other than market conditions controlled the price of DKN's vacant farm land.

As for the transaction involving the 1031 exchange, the trial court justifiably found the testimony did not support Bonnie's claim that DKN became an active asset, given Kenneth's limited involvement in the 1031 exchange and his lack of subsequent management of the property. In any event, the trial court found, and Bonnie does not credibly challenge, that DKN had no appreciable increase in value from 1992, conceding that the consideration received and Kenneth's equity when the complaint was filed "are roughly equivalent."

B. Princeton Air

We affirm the trial court's decision that Princeton Air was an active asset for purposes of equitable distribution, that it was premarital, and that Richard and Naomi had gifted their two-thirds interest in this asset to Kenneth in 2000. "The increased value of active immune assets must be considered eligible [for equitable distribution] to the extent that it may be attributable to the expenditures or the effort of the non-owner spouse, and a determination must be made regarding

the extent the original investment has been enhanced by contributions of either spouse." *Valentino, supra,* 309 *N.J. Super.* at 338. An active immune asset "involves contributions and efforts by one or both spouses toward the asset's growth and development which directly increase its value." *Ibid.*

***9** The trial court determined that Bonnie was entitled to equitable distribution, based upon the appreciation in Princeton Air's value from 1992, when the parties were married, to 2000, when Princeton Air was gifted, and then to 2005, when the divorce complaint was filed. However, the court found "major flaws" in Bonnie's expert's analysis, because the expert did not take into consideration the decision in the first trial that that two-thirds of Princeton Air had been gifted to Kenneth, making it immune from equitable distribution.

The court also rejected Kenneth's proposed use of a 3% straight-line, sustainable-growth-rate formula, because such proposal was not supported by the credible testimony. The court found the income-methodology formula proposed by Bonnie's expert valid. That formula took into consideration the 2005 value, less two-thirds of the 2000 value, less one-third of the 1992 value to determine the value of Princeton Air that is subject to equitable distribution. Using Bonnie's expert's 1992 valuation of Princeton Air, a valuation for the year 2000 based upon reported earnings from 1999, and the year 2005 valuation based upon adjusted earnings as determined by plaintiff's expert but without adjustment for the A-20 account, the trial court found the amount subject to equitable distribution was $200,064 and awarded Bonnie half of such amount.

We find no error in the formula selected. "There are [ ] few assets whose valuation impose as difficult, intricate and sophisticated a task as interests in close corporations." *Steneken, supra,* 183 *N.J.* at 296 (alteration in original) (quoting *Torres v. Schripps, Inc.,* 342 *N.J. Super.* 419, 435 (App. Div. 2001) (quoting *Lavene v. Lavene,* 148 *N.J. Super.* 267, 275, (App. Div.), *certif. denied*, 75 *N.J.* 28, (1977))). No single formula applies, as it is a fact-sensitive inquiry. *Ibid.* "Although there is no general formula that will apply to the 'many different valuation situations,' the ultimate 'goal is to arrive at a fair market value for a stock for which there is no market.' " *Ibid.* (quoting *Bowen v. Bowen,* 96 *N.J.* 36, 44 (1984)).

As for the valuation, we note that the remand on the A-20 account issue may affect valuation. Although the 1992 valuation used by the trial court was not disputed, the year 2000 value was not addressed by Bonnie's expert, and the court relied on reported earnings. We do not know if those values will change on remand. Plaintiff's year 2005 valuation suffered from flaws, such as, among other things, the assumption of an over-optimistic profitability in airport operations not demonstrated in subsequent years, which even Bonnie's real estate expert did not support. On that element of the formula, the trial court looked to the adjusted earnings found by Bonnie's expert, but did not make an adjustment for the A-20 account in determining valuation. That component of the analysis will have to be re-examined on remand. Thus, although the methodology and valuation used by the court was within its discretion,[6] the remand on account A-20 may well affect the outcome of the application of the formula.

C. Princeton Aero

Subject to the remand regarding account A-20, we find no error in the trial court's equitable distribution determination regarding Princeton Aero, despite challenges by both parties.

***10** The trial court awarded Bonnie one-sixth of the amount Princeton Aero had appreciated during the marriage, amounting to $58,253.17, which reflected one-half of Kenneth's one-third interest in Princeton Aero.[7] The court rejected the valuation of Princeton Aero that had been made by Bonnie's real estate expert because his report only valued the land and improvements at the airport as of October 13, 2008. The expert was not asked to value the business as of 2005, the date when the divorce complaint was filed. As such, his valuation figure was of little use in resolving the issues before the court because the valuation post-dated the filing of the divorce complaint. The court also found "other defects ... that further undermined the usability of [his] report[.]" However, that expert's 1992 valuation of $1,880,000 for Princeton Aero was "a workable baseline for the value of the real estate asset at that time," as it favorably compared with the tax-assessed value. The court then compared that figure with an adjusted valuation for 2005 of $2,229,519, finding the difference to be a "supportable appreciation [of] $349,510[,]" which also then reflected the increase in the value of Princeton Aero between 1992 and 2005. Because Kenneth was a one-third owner, Bonnie was entitled to 50% of one-third or $58,253.17.

On appeal, Bonnie asserts the court was improperly swayed by the family, failed to appoint an independent expert to value Princeton Aero, and failed to allow her expert to extrapolate a 2005 valuation from his 2008 data. She also asserts the court did not make an independent assessment of Princeton Aero's value and should have taken into consideration Kenneth's sale of his shares at below market value (as required by the shareholder agreement) by holding Richard and Naomi Nierenberg liable for the difference between the shares' book value and their actual market value.

Kenneth cross-appeals, claiming that Bonnie failed to meet her burden of proving Princeton Aero's valuation because of the flaws in Bonnie's expert's report. "Valuation techniques, regardless of the approach selected, are to be measured against a reasonableness standard." *Steneken, supra,* 183 *N.J.* at 297. A finder of fact can accept or reject the testimony of any party's expert or accept only a portion of an expert's opinion. *Brown v. Brown,* 348 *N.J. Super.* 466, 478 (App. Div.), *certif. denied*, 174 *N.J.* 193 (2002). We will affirm an equitable distribution award as long as the award is supported by the evidence. *Perkins v. Perkins,* 159 *N.J. Super.* 243, 247-48 (App. Div. 1978).

Here, there is, of course, no evidence the trial court was improperly swayed by any party. The comprehensive decision by the trial judge shows he carefully evaluated the evidence on valuation. Nor was there error in the trial court's rejection of Bonnie's attempt to extrapolate her expert's valuation from 2008 back to 2005. Even the expert agreed that could not be done. The trial court took into consideration profit margins, the FAA lien, the restrictions on the land itself that affected marketability, the lack of inflation evidence, and the actual rental values in rejecting the valuation by Bonnie's expert as inflated and in accepting the lower valuation figure derived by Kenneth from actual income and expenses, a figure similar to the property tax assessor's valuation. We cannot say that using the lower valuation figure was error, especially given the difficulty in valuing any closely held corporation. The trial court was not required to simply restrict its analysis to the book value, but was to arrive at a fair value for its appreciation. *See Steneken, supra,* 183 *N.J.* at 297.

In deciding as we do, we reject Kenneth's cross—appeal that the trial court erred by awarding Bonnie any portion of the appreciation in value of Princeton Aero because of the many flaws in her expert's opinion. Plainly, there had been some appreciation that warranted relief.

We do, however, note that our remand on the A-20 issue could affect the valuation of this company as well. As such, our decision is not meant to preclude analysis of account A-20's potential impact on Princeton Aero's valuation.

VI. Alimony

***11** On appeal, Bonnie challenges the permanent alimony award as inadequate. She claims the court made conflicting findings and failed to consider Kenneth's income from gifts, loans, and other transfers. She also contends the court failed to determine the marital lifestyle.

The trial court awarded Bonnie permanent alimony of $3,060.50 per month. Based on Bonnie's needs of $4,780 per month and her 2011 actual income of $2,301 per month, the trial court determined the difference, $2,479 per month, was needed to meet her lifestyle expenses. Taking into consideration a 19% tax rate, the judge found that the "taxable alimony that will be required to sustain [Bonnie] and her current lifestyle is $3,060.50 per month or $711.75 (rounded) per week."

"[T]he goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during the marriage." *Crews v. Crews,* 164 *N.J.* 11, 16 (2000). Our Supreme Court in *Crews* stressed that it is "critical" and "essential" to "[i]dentify[ ] the marital standard of living at the time of the original divorce decree ... regardless of whether the original support award was entered as part of a consensual agreement or of a contested divorce judgment." *Id.* at 25. In awarding alimony, the judge must consider the thirteen factors enumerated in *N.J.S.A.* 2A:34-23(b), along with any other factor deemed relevant. Determinations about alimony are left to the broad discretion of the trial court. *Steneken, supra,* 367 *N.J. Super.* at 434; *see also Heinl v. Heinl,* 287 *N.J. Super.* 337, 345 (App. Div. 1996).

On appeal, alimony awards are not disturbed if the trial judge's conclusions are consistent with the law and not "manifestly unreasonable, arbitrary, or clearly contrary to reason or to other evidence, or the result of whim or caprice." *Foust v. Glaser,* 340 *N.J. Super.* 312, 316 (App. Div. 2001) (quotations omitted). The question is whether the trial judge's factual

findings are supported by "adequate, substantial, credible evidence" in the record and the judge's conclusions are in accordance with the governing principles. *Ibid.*; *accord* *Gnall v. Gnall,* 222 *N.J.* 414, 428 (2015).

We remand the issue of alimony to the extent it may be affected by account A-20. We do note that to the extent Kenneth's parents may have contributed gifts to the couple during their marriage, they were not required to continue supplementing Kenneth's income after the divorce. Although *Weishaus v. Weishaus,* 360 *N.J. Super.* 281 (App. Div. 2003), *aff'd in part, rev'd in part on other grounds*, 180 *N.J.* 131 (2004), discussed whether gifts from third parties should be considered in the determination of the marital lifestyle, it did not require the court to add gifts from Kenneth's parents to Kenneth's income.

We are satisfied the trial court properly considered income from exempt assets when calculating the amount of the permanent alimony award. The judge used Kenneth's tax returns, which included his earnings, commissions, and distributions from the exempt entities, the proceeds from the DKN sale showing a capital gain of $123,424 in 1999 and higher incomes in 2000 and 2001 from investment of the balance, as well as the $125,000 buy-out from Princeton Aero.

***12** We remand the issue of Kenneth's income to the trial court because of our remand of the A-20 issue. The trial court had concluded that Kenneth's income was $130,800 per year. The court's conclusion was based on income information Kenneth submitted in a 2007 loan application, his average adjusted income for three years prior to and including the year of separation, which more accurately indicated Kenneth's income, along with the addition of certain cash expenses. These figures were then averaged to reach the trial court's calculation of income. The court found this income was consistent with the lifestyle reflected by the parties' 2005 Case Information Statements (CIS's). We do not know if the remand will affect Kenneth's income during the relevant periods.

The court found Bonnie's net earned income to be $27,612 per year or $2,283 per month, as a car salesperson, plus $5,000 per month from an earlier pendente lite support order with "limited potential for any more lucrative employment." In rejecting rehabilitative alimony for an award of permanent alimony, the court found Bonnie already had rehabilitated herself. The court observed that Bonnie "will not have the opportunity for future acquisition of capital assets and income."

However, Kenneth would "likely continue to earn substantial income from his business at Princeton Airport ...." He will "retain significant capital assets as the business interests were acquired either prior to the marriage or via gift." We find no error in the court's analysis here.

The trial court determined the parties' lifestyle was "a reasonably comfortable middle class to upper middle class lifestyle." In considering their marital lifestyle, the court reviewed the parties CIS's from 2005 and 2012. The court considered and adjusted Kenneth's CIS by including the daughter's college expenses, for which he was responsible. The court made other upward adjustments to reflect points made by Bonnie's expert that the court accepted, and concluded Kenneth's total expenses are $7,085 per month.

As for Bonnie's CIS, the court found some of her expenses "inflated or unrealistic," but also added in a shelter expense of $1,750 per month before finding she required $4,780 per month. Because the court found Bonnie's income was only $2,301 per month, she needed, after taxes, $3,060.50 per month. We are fully satisfied the court's analysis was supported by substantial credible evidence in the record. Thus, although the alimony issue is remanded, it is Kenneth's income that is potentially subject to adjustment. Therefore, the alimony previously awarded should continue unless and until it may be adjusted either as a result of the remand or changed circumstances.

VII. Child Support

The court calculated Bonnie's child support obligation was $278 per week. Two of the parties' children were minors at the time of trial, residing with Kenneth, and the parties' daughter resided several months per year at college; however, Kenneth incurred "fixed expenses for her" during the school year. Bonnie objected to the child support amount because it was calculated by including the alimony she was to receive from Kenneth as income to her contrary to *Koelble v. Koelble,* 261 *N.J. Super.* 190 (App. Div. 1992).

When determining child support, the trial court has "substantial discretion." *Jacoby v. Jacoby,* 427 *N.J. Super.* 109, 116 (App. Div. 2012) (quoting *Foust, supra,* 340 *N.J.*

Super. at 315-16); *see also* *Pascale v. Pascale,* 140 *N.J.* 583, 594 (1995). A child support award that is consistent with the applicable law "will not be disturbed unless it is manifestly unreasonable, arbitrary or clearly contrary to reason or to other evidence, or the result of whim or caprice." *Gotlib v. Gotlib,* 399 *N.J. Super.* 295, 309 (App. Div. 2008) (quotations omitted).

***13** There was no error by the trial court in including alimony in the calculation. Since *Koelble* was decided in 1992, the Child Support Guidelines have changed. At present, alimony is to be excluded from the payor's gross income, but alimony is included in the payee's gross income. Child Support Guidelines, Pressler & Verniero, *Current N.J. Court Rules,* Appendix IX–A to *R.* 5:6A, ¶ 19, at www.gannlaw.com (2016). In addition to using the Guidelines, the court also analyzed the statutory factors under *N.J.S.A.* 2A:34-23(a) in reaching its determination on child support because one child was over eighteen but not emancipated. Given the court's analysis of the statutory factors in conjunction with the Guidelines, we see no basis to disturb the award on the grounds raised. If, however, the remand affects Kenneth's income, the child support amount may also change.

VIII. Other Issues

With respect to Bonnie's remaining points, we find they do not merit discussion in a written opinion, *see R.* 2:11-3(e)(1)(E), but we add the following comments.

As for the claim that the court erred by admitting a summary from QuickBooks, we note evidentiary rulings are entitled to substantial deference. *Estate of Hanges v. Metro. Prop. & Cas. Ins. Co.,* 202 *N.J.* 369, 383-85 (2010). Here, the information in the summary was corroborated by an actual canceled check, deposit slip and corresponding monthly bank statements. *See also N.J.R.E.* 1006 (authorizing the use of summaries for voluminous documents).

As for Bonnie's claim that her due process rights were violated when she requested and was granted the opportunity to represent herself, we note that a matrimonial litigant does not enjoy a constitutional right to counsel, unlike, for example, a criminal defendant. *In re Estate of Schifftner,* 385 *N.J. Super.* 37, 44-45 (App. Div.), *certif. denied*, 188 *N.J.* 356 (2006). While we require counsel when a litigant faces a "consequence of magnitude," such as in a criminal prosecution threatening the possibility of actual incarceration, *Rodriguez v. Rosenblatt,* 58 *N.J.* 281, 295 (1971), our Supreme Court has held the absence of representation is not fatal when the consequences are less severe, such as when there is a possibility of losing a civil suit. *Eaton v. Eaton,* 119 *N.J.* 628, 645 (1990).

Here, Bonnie was advised by the court that the case was "a complicated" one, and that she had "difficult and complex burdens to prove on some of these claims ...." Despite this, she chose to terminate the services of her attorney. [8]

As for counsel fees, "[w]e will disturb a trial court's determination on counsel fees only on the rarest occasion, and then only because of clear abuse of discretion." *Strahan v. Strahan,* 402 *N.J. Super.* 298, 317 (App. Div. 2008) (internal quotation marks and citation omitted). The court properly analyzed the factors under *Rule* 5:3-5(c) before awarding counsel fees, and its decision is fully supported by the credible evidence.

Further, there was no basis to award punitive damages. Appellate review of a trial court's decision to award or not award punitive damages rests within the court's sound discretion. *Maudsley v. State,* 357 *N.J. Super.* 560, 590 (App. Div. 2003). Here, the court did not find Bonnie had been defrauded when it created an equitable remedy in the form of awarding a judgment against Pacific Air in Bonnie's favor in an amount equal to her equity interest in Princeton Air. Thus, there were no findings of malicious conduct warranting the imposition of punitive damages.

***14** The court rejected Kenneth's request for a *Mallamo* credit, pursuant to *Mallamo v. Mallamo,* 280 *N.J. Super.* 8, 12 (App. Div. 1995). In *Mallamo,* we stated that pendente lite support orders may be subject to modification prior to the entry of a final judgment. The decision to correct a pendente lite order is based upon the court's sound discretion in light of the equities established during the trial. *Jacobitti v. Jacobitti,* 263 *N.J.* Super. 608, 617-18 (App. Div. 1993), *aff'd on other grounds*, 135 *N.J.* 571 (1994). Here, the court found that to retroactively modify the pendente lite amount he had been obligated to pay would be "inequitable and unfair," because Bonnie's needs "very nearly match [Kenneth's] pendente lite obligation[,]" especially when the children were living with Bonnie. We find the court did not

abuse its discretion when it declined to make a retroactive modification of the previously paid support.

With respect to the court's decision to award Bonnie 60% of the equity in the marital home, we note that a court is not required to divide assets evenly. *See* *Rothman v. Rothman,* 65 *N.J.* 219, 232 n.6 (1974). The court's determination here was based on its finding that "[Bonnie's] ability to accumulate assets in the future is unlikely. On the other hand [Kenneth] has accumulated and will be able to retain significant premarital assets ... and it is likely that given the nature of his skills and the security of his job, he will be more likely to accumulate assets in the future as well." Accordingly, we do not find any abuse of discretion in awarding a greater portion of the equity in the marital home to Bonnie.

We affirm in part, subject to the A-20 account and disqualification issue, and remand in part. Any aggrieved party may file a new timely appeal of the determinations reached on remand. The trial court shall conduct a case management conference with the parties within thirty days to plan the remand proceedings. In the meantime, the terms of the original final judgment shall remain in effect unless the trial court chooses to stay or modify those terms in the interim. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2016 WL 4699173

Footnotes

1 We use the first names of the individual parties because they share a common surname. We do not intend any disrespect by using their respective forenames.

2 Such an exchange permits an investor to sell property and reinvest the proceeds in another "like-kind" property to defer capital gains taxes.

3 Richard had previously made a $100,000 loan to Princeton Aero.

4 The trial court stated it was not able to determine "whether taxes were paid (or not) on any profits generated from the transactions conducted in that account" and thus, was not able to "find to any degree of likelihood" evidence of illegal or improper activities," citing *Sheridan v. Sheridan,* 247 *N.J. Super.* 552 (Ch. Div. 1990).

5 The martial residence has been sold and the escrowed funds released to Bonnie.

6 The analysis for RV Flying relies largely on the valuation by Bonnie's expert, but deducts the two-thirds gift value of the company as of January 1, 2000, based on phase one of the trial, resulting in a value subject to equitable distribution of $14,690, of which Bonnie was awarded $7,345 or 50%.

7 The parties do not challenge that Kenneth obtained his interest in Princeton Aero before their marriage and that he ran its airport operations, making Princeton Aero an active, immune asset.

8 Both parties cite us to the recent case of *In re Child by J.E.V.,* —— *N.J.* —— (2016), in support of their respective positions. The case is inapposite here because it involved the appointment of counsel for an indigent parent who faced the termination of parental rights in a contested private adoption proceeding.