

A A v. B A

Decided Oct 9, 2020

File No.: CN16-05018 Petition No.: 16-26053

10-09-2020

Re: A A v. B A

FELICE GLENNON KERR JUDGE

Curtis P. Bounds, Esquire
Bayard P.A.
600 North King Street, Suite 400
Wilmington, DE 19801 Shawn Dougherty, Esquire
Weik, Nitsche & Dougherty
305 North Union Street, Second Floor
P.O. Box 2324
Wilmington, DE 19899

LETTER DECISION AND ORDER

Petition Type: Ancillary Matters Dear Counsel:

Before the Court are the ancillary matters of property division, alimony, and attorneys' fees and costs between A A ("Wife"), represented by Curtis P. Bounds, Esquire, and B A ("Husband") represented by Shawn Dougherty, Esquire. A hearing on this matter took place December 9-11, 2019. The Court heard testimony from both parties. Additionally, the Court heard testimony from expert financial evaluators G C and W B , and testimony from J N , Sr. An additional day of testimony was held on July 17, 2020. The parties were married on September 8, 1979, and separated on July 29, 2016. The parties were divorced on February 9, 2017. The parties have three children together who have all reached the age of majority.

PROCEDURAL HISTORY

On August 25, 2016 Wife filed for divorce citing irreconcilable differences and that there had been an irreparable breakdown of the marriage. Husband filed an answer and counter claim for divorce on October 18, 2016. Husband and Wife agreed to proceed to divorce without a hearing and were granted a divorce on February 9, 2017. At the time that divorce was granted, the Court issued a notice regarding the timelines for filing the Rule 16(c) Financial Disclosure Report for ancillary matters. After a long series of continuance stipulations, the Court received the 16c financial disclosure report on May 26, 2017. *2

At this time, extensive discovery was occurring and further stipulations for discovery extensions were being filed and granted by the Court. On August 7, 2018, Wife filed a Motion to Compel Husband to produce certain documents pertaining to his income and ownership of certain assets related to his business and investments. On

August 27, 2018, Husband filed an answer to the Motion to Compel stating that Wife's former position of Husband's book keeper gave her direct access to the additional information she was seeking. Wife subsequently filed a Motion to extend the discovery deadline on September 6, 2018. Husband then filed an answer to the Motion to extend the discovery deadline and filed a Motion for a Protective Order on September 10, 2018. Husband claimed that the continued third-party discovery and depositions were duplicative and unnecessary. Husband also claimed that Wife's counsel was seeking irrelevant information during the depositions. On September 11, 2018, the Court denied the Motion for Protective Order for third party discovery. The Motion to Compel was granted as the Court believed that Wife was entitled to the information she was seeking. The Court cautioned Wife that discovery was not to become a fishing expedition.

Wife filed a Motion to sell the 99 Salthouse lane, Kiawah Island, South Carolina ("Kiawah Property") on September 7, 2018. On September 17, 2018, Husband filed an answer to Wife's motion to sell the Kiawah Property. Husband agreed the property should be sold but requested to sell the home himself in exchange for an additional 3% added to his 50% share. Husband argued that if they were to use a realtor, commission would be paid to the realtor between 7-10% of the sale price. On September 18, 2018, the Court granted Husbands request to sell the Kiawah Property. The Court declined to rule on the commission argument and reserved it as an ancillary matter to be determined at trial. On November 28, 2018, Wife filed another Motion for the sale of the Kiawah Property. Wife stated in this motion that Husband was non-responsive and he had not completed the preparation to sell the home and was ignoring Wife's inquiry regarding offers for purchase. Husband answered the motion on December 14, 2018, detailing his efforts to prepare the Kiawah Property for sale. The Court issued an Order which denied Wife's motion to compel the sale of the Kiawah Property on December 18, 2018.

On April 24, 2019, Wife filed a Motion for Interim Alimony. In Wife's motion, she sought interim alimony in the amount of \$17,210 to meet her monthly expenses. On May 6, 2019, Husband filed an answer to the Motion for Interim Alimony. Husband sought denial of interim alimony and stated that Wife voluntarily elected not to work throughout the duration of their marriage. On May 10, 2019, the Court issued an Interim Alimony order in the amount of \$10,312¹ per month for Wife which was to begin on May 15, 2019.

¹ The Court notes that generally interim alimony calculations will not include certain expenses which would be included in the final alimony calculation and the interim alimony order was specifically made subject to retroactive adjustment.

3 Wife continued to file Motions to compel the production of Husband's documents regarding Newtech Limited Partnership. Motions regarding these documents were filed on October 25, 2019 and then again after denial by the Court, for re-argument, on November 25, 2019. Husband filed an answer to both Motions denying that documents were still outstanding regarding Newtech Limited. The parties submitted updated Wright Charts on December 6, 2019 and a three-day trial was held on December 9-11, 2019. The Court on its own motion scheduled a teleconference regarding the admission of evidence with respect to the expenses paid by Husband on the Kiawah Property. *3 Husband had initially sought to introduce these expenses during his testimony. The Court commented that given the extremely large income disparity between the parties and given that Wife needed interim alimony to meet her expenses during separation that only Husband would have the ability to pay and credits were therefore unlikely. Husband's counsel did not pursue the entry of this evidence based upon the Court's comments. However, later in Husband's testimony, his description of the timeframe involved in the earning of his commissions created an issue regarding the marital nature of Husband's commissions from his business post-separation, which in turn made the expenses on the Kiawah Property relevant. Essentially, if Wife

is awarded a portion of Husband's post-separation earnings in the disposition of the business, then Husband may be entitled to credits for the expenses as it would not be fair to give Wife a share of the income stream but have Husband paying for all the expenses.

Following the December hearing, the parties submitted written closing arguments. The Court scheduled a teleconference to discuss the issue mentioned above regarding the Kiawah Expenses. The Court provided the parties an opportunity to Stipulate to the amount of the expenses paid by Husband during separation for the Kiawah Property. The parties were unable to reach agreement on the amount and the Court scheduled an additional hearing date to address the Kiawah expenses and additional issues raised by Wife as a result, including whether Husband owed Wife for the fair rental value of the Kiawah Property. At that hearing on July 17, 2020, the Court heard testimony from Husband, Wife and Mr. C .

MATTERS IN AGREEMENT

The following matters are in agreement, either due to stipulations on the record or lack of disputes during the hearing or in closing summaries with Wright Charts.

1. The Parties were married on September 8, 1979, separated on July 29, 2016, and divorced on February 9, 2017. This was the first marriage for both parties and Husband has remarried.
2. The retirement assets shall be divided equally. Husband's business assets (the sole proprietorship and NewTech) shall be divided 60/40 with Husband receiving 60% and Wife 40% of these assets.
3. The parties have the following non-business, non-retirement assets which are agreed upon:
 - a. The proceeds from the sale of 119 St. Moritz Drive in the amount of \$1,072,672.00. Each party received \$536,336.00.
 - b. Citadel account No. - in the amount of \$135, which shall be divided.
 - c. Citadel FCU account No. - in the amount of \$3,082, which shall be divided.

- d. Citadel FCU account No. - in the amount of \$3,924, which shall be divided.
- e. Husband's Fidelity account No. with cash in the amount of \$4,885.00; Brighthouse financial shares in the amount of \$2,111.00; 673 shares of MetLife totaling \$34,027.00; MetLife options totaling \$71,350.00, and 298 MetLife Restricted Units in the amount of \$14,996. The disposition of these assets, whether divided or retained by Husband and set-off, have not been decided.
- f. The parties have agreed to sell the two Atlas America accounts and divide the proceeds if possible. If they cannot be sold, they will be divided in kind.
- g. Wife has a New Square Capital account No. with a value of \$687,499 on the marital balance sheet.
- h. Wife has a Ridgewood X Fund account in the amount of \$100,000.00 and a Ridgewood Z Fund account in the amount of \$100,000.00. The parties agree that these accounts will be sold if possible and if not possible they will be divided in kind.
- i. The parties agree that Husband shall retain the boat at 99 Salthouse Lane, in exchange for Wife retaining the 2016 BMW X3.
- j. The parties divided their household furnishings and personal property.
- k. The parties divided the Jekyll Island Hotel interests.
- l. The parties agreed that the Kiawah Island Golf Club membership was included in the sale of the Kiawah Island property.
- m. The Kiawah Island property sold for \$4.8 million. Husband received \$1,677,961.80 and Wife received \$1,677,961.81.
- n. Husband shall retain the Caves Golf Membership in exchange for Wife retaining the Fieldstone Membership.
- o. The New Square Capital LLC 2016 Profits Interest Plan shall be divided on an "if, as and when" basis, according to the percentage distribution.

4. The parties have the following life insurance cash surrender values which they have agreed upon.

a. Wife's MetLife Graded Premium account No. with a cash surrender value of \$60,141.00.

5 *5

b. Wife's MetLife Variable Universal Life NKA Brighthouse account with a cash surrender value of \$80,945.00.

5. Husband has the following B J. A Pension and/or Profit Sharing Plan Retirement assets which the parties have recognized and agreed upon, but have not decided the method of distribution.

- a. Charles Schwab account No. in the amount of \$47,661.00.²
- b. Charles Schwab account No. with a value of \$259,698.00.
- c. Ridgewood V Fund in the amount of \$100,000.00 and Ridgewood W Fund in the amount of \$50,000.00. As with Wife's Ridgewood Funds, these investments will be redeemed if they can be sold or otherwise divided in kind.
- d. Prudential account No. with a value of \$393,332.00.
- e. MML Investors account No. with a value of \$244,591.00.
- f. Jackson National account No. with a value of \$320,660.00

6. Husband has the following MetLife/NEF retirement accounts which the parties have recognized and agreed upon, but have not decided the method of distribution.³

- a. MetLife Supplemental Retirement Plan fka NEF Agent Supplemental with a value of \$784,962.00.
 - b. MetLife Renewal Trails Deferred Comp. fka NEF Renewal Trails Deferred Comp. Plan in the amount of \$667,686.00.
 - c. NEF Agents Retirement Plan in the amount of \$389,411.00.
 - d. MetLife Deferred Comp. for Travelers in the amount of \$84,759.00.
 - e. MetLife Auxiliary SIP in the amount of \$22,024.00. This Plan asset was withdrawn.
 - f. MetLife Savings and Investment Plan in the amount of \$809,134.00.
 - g. NELICO Agents Retirement Plan in the amount of \$419,154.00.
- 6 *6
- h. MetLife Retirement Plan Personal Retirement account in the amount of \$46,223.00.
 - i. MetLife Auxiliary Pension Plan Personal Retirement Plan in the amount of \$48,519.00. This Plan asset was withdrawn.
 - j. MetLife Ordinary Life (Husband's MMPP) in the amount of \$238,967.00. This plan asset is a cash value insurance policy within a pension plan.
 - k. MetLife Graded Premium (H) in the amount of \$350,255.00.
 - l. The NEF Supplemental Agents' Retirement Plan, NEF Agents' Deferred Compensation Plan, and Metlife Field Excess Plan shall be divided equally, to the extent that they are not accounted for elsewhere, such as by being rolled into a successor plan, and provided that they are still in existence.

7. Husband has a Metlife Premier Client Group Voluntary Deferred Compensation Plan with a current balance of \$153,368.00.

8. The parties shall take all necessary steps and provide all income information to Husband's accountant, B B , in order to amend and file joint 2016 Federal and State Income Tax Returns and divide the refunds, if any.

9. Wife received the Barclay's account in the amount of \$250,000.00.

10. The tax-deferred retirement assets shall be divided equally and Husband's sole proprietorship and New Tech shall be divided 60/40 in Husband's favor.

11. The New Square Capital LLC 2016 Profits Interest Plan shall be divided on if, as and when basis according to the percentage division of non-retirement and non-business assets.

² Wife appears to have listed the value of the Charles Schwab account ending in - for this account for both Schwab accounts.

³ Wife noted that conflicting information was received as to the existence of some of the listed accounts. Wife stated that she does not want to receive QDRO interest in assets that do not exist, or are named improperly such that she has no recognized interest in a Plan.

MATTERS IN DISPUTE

The following matters are in dispute.

1. Division percentage of the marital estate - Excluding business and retirement assets

Wife is seeking a 60/40 division of the non-business/non-retirement assets, and insurance assets in favor of Wife, with an equal division of the retirement assets, and all in conjunction with a 60/40 division of the business assets. Husband is seeking an equal division of all marital assets, with the exception of husband's sole proprietorship, which Husband is seeking 60/40 division. This issue is discussed in the analysis of the property division factors below.

2. Alimony

7 *7

Wife is seeking permanent alimony. Husband's position is no alimony and credit for interim alimony payments Husband has already made. This issue is discussed below in the analysis of the alimony factors.

3. Wells Fargo Account No.

Husband's position is that the funds in this account were from post-separation deposits made into this account. Wife's position is that Husband voluntarily funded the joint account, including proceeds from marital assets, and that Husband withdrew \$208,788.00 of joint funds when he closed the accounts. The Court notes that the \$208,788.00 was withdrawn in May, 2019, almost three years after the parties' separated. The Court also considered that Husband began paying interim alimony at approximately the same time. Prior to that date, the joint funds in this account were used by both parties. Since Husband was essentially supporting Wife and since the Court, as discussed below, will be utilizing the cash flow paid to Husband from his sole proprietorship, the Court will not attribute him with the cash in this account and will therefore consider this in calculating credits for the payments made by Husband on the Kiawah Property. The Court also notes that this account is included in the analysis of the payments made by Husband on the Kiawah Island Property after separation.

4. Wells Fargo Account No.

Husband submits that the funds in this account include the 2015 tax return deposited by Wife and was mostly used to pay his tax liability. It is Wife's position that Husband withdrew \$439,190.00 of marital funds from this joint account, and that she withdrew \$110,000.00 of marital funds from this joint account. A review of the statements for this account and the summary prepared by Wife's expert indicates that the account had a balance of \$217,545.00 at separation on July 16, 2016 and the 2015 Federal Tax Refund was transferred into this account from the checking account ending in - on November 21, 2016 in the amount of \$330,370. Other amounts were transferred in and out by both parties but there is little detail in the analysis as to what the amounts were used for. One transfer of \$50,000.00 is labeled as being for taxes in November, 2017. This would be about one year after the tax refund was deposited the year before. There were two additional transfers for \$100,000.00 each in December, 2017, presumably also for taxes. The Court declines to treat this account as a marital asset. First, the account was primarily funded through the tax refund from the prior year and primarily used to pay taxes for 2016. The Court cannot discern from the statements what each of the parties used the transferred funds for except for the taxes and the Kiawah Property expenses. To the extent the account was funded through Husband's post-separation commissions, Husband's post-separation income stream is factored into the valuation of his sole proprietorship. Additionally, the Court will take into consideration that these accounts are not going into the asset spread sheet in determining Husband's credits for the Kiawah Property.

5. Wells Fargo Account No.

8 *8

Neither party lists this account on their proposed Wright charts as having any value. Husband transferred funds in and out of this account after separation. Wife had moved \$250,000.00 into her own separate account at Barclay's which is not in dispute. The \$250,000.00 is listed as Barclay's on Wife's side of the Wright chart.

6. Value of NewTech III, LP t/a 16 Campus Boulevard

Wife's position is that Husband's 4.658% interest in this asset has a material value of \$455,000.00. Husband's position is that he has sold his interest in this asset in an arm's length transaction to G D and F N and that he is to receive the sum of \$276,799.00. Wife argues that there was no testimony from Husband or J N that the sale was an arm's length transaction and cites *R.S.W. v. L.W.*, Del. Fam., 2000WL 33200937, *slip op.* at 7, in support of this contention. However, *R.S.W.* can be distinguished from the present case in that the Husband executed the buy/sell agreement three weeks after separation. In the present case, the purchase and sale agreement was executed years after separation and was done in conjunction with other partners also selling their interests at a time when Husband is making retirement plans. The Court finds that the actual sales price is the best evidence of the fair market value of this asset in this case. There is no benefit to Husband to sell this asset below market value. He is a willing seller and is selling to a willing buyer. He has a very small minority interest in the LP and as such his interest is less appealing to outside buyers. He has no control with such a minor percentage interest and it is reasonable to sell to the other partners. The Court finds no basis to second-guess Husband's business decision to sell his interest in New Tech III. While he may have a relationship with the other principals in the LP through Creative Financial, the Court does not find this sufficient to set aside the actual sales price as the best evidence of the value of Husband's minority interest.

7. Husband's Sole Proprietorship

This was by far the most significant issue in this ancillary hearing. Husband argues that this asset has a value of \$255,000.00 while Wife alleges the value is \$3,488,00.00. The experts valued this asset as of late 2016 or early 2017. Of course at that time, the business was a going concern and is still operating as of this date. Since that time, Husband has received far more from this asset than even the value placed on it by Wife's expert. Whether or not he could have sold it back then for the amount he claims, he was able to extract over \$4,000,000.00 from the sole proprietorship between separation and the ancillary hearing, which included commissions stemming from work done during the marriage. This does not include what Husband earned in 2020. Husband's expert, Mr. B testified in response to a question from the Court that if Husband could transfer the income stream to a buyer then he could receive the amount assigned by Wife's expert of \$3,488,000.00 - \$3,500, 000.00.⁵ Husband testified that the one commission received in 2018 of \$600,000.00 was a long time in the making, and clarified upon questioning by the Court that it was 3-3 1/2 years. Husband believed he received the large \$600,000.00 commission in

9 *9

June or July of 2018. Thus, the parties were married for a year or more during the time this commission was earned. Husband referred to the policy sales transaction as being one "case". Husband also stated that it could take 18 months up to the 3.5 years or so to complete a "case". Additionally, a portion of Husband's income stream includes commission tails, which were earned during the marriage. The Court cannot determine specifically what amount of Husband's income during this time was from work done before the separation and divorce and what was after but Husband clearly already obtained value from the business since separation based on work in process during the marriage. Husband's valuation did not take these receivables or work in process into consideration. Furthermore, Wife's counsel aggressively sought this type of information from Husband, which was not provided. Husband claims not to have this information, which the Court does not find credible given that Husband is a successful and sophisticated financial advisor.

The Court also notes that Husband's expert heavily relied upon Delaware case law in making a decision to value the company without professional goodwill, as he was of the belief that Delaware case law does not permit the use of good will in valuing a sole proprietorship under any circumstances. Husband's closing argument states that "Husband's expert excluded goodwill due to the fact that Husband is a sole proprietor and, based on controlling Delaware case law, goodwill is not to be considered." The Court does not agree with this premise. There is one Delaware Supreme Court case on the issue of good will in the valuation of a sole proprietorship during a divorce, decided in 1983, which involved the valuation of a law firm owned by a sole practitioner.⁶ While many trial court decisions cite *EEC*, there is no other decision by the Delaware Supreme Court cited by Husband on the issue of valuation of a sole proprietorship for divorce purposes, which provides additional guidance on whether or not it is appropriate to ever include a value for professional good will in such a business. The Court in *EEC v. EJC* essentially determined that the use of a capitalization of income or of excess income approach to the valuation of a sole proprietorship was not appropriate for the valuation of the husband's law firm.⁷ The Delaware Supreme Court determined that the husband's earning capacity or future income flow was not relevant to the determination of the present value of the sole proprietorship.⁸ Wife's expert in part relies upon a capitalization of income approach.

The *EEC* decision has been cited many times since 1983 for the premise that capitalization of income or discounting a future flow of income is not an appropriate method for valuation of any solely held business. The case has also been argued to articulate that there is no business or professional good will in a sole proprietorship. The Court notes that Husband's business in the present case is not a law firm and the practice and means of generating income are different. The Court does not read *EEC* as stating that every sole proprietorship in every case has no professional good will.

As noted by the Delaware Supreme Court, every business is different and the accepted techniques and methods used by financial experts to value businesses also vary.⁹ The task

of placing a value on a business "is complicated by the clash of contrary, and often antagonistic, expert opinions of value', prompting 'the trial court to wade through widely divergent views reflecting partisan positions' in arriving at its determination" of the value to place on the business.¹⁰ It may be that a single methodology is the most reliable evidence of the value or it may be that weighing a variety of metrics is the best resolution. The Court must justify its methodology to the facts of the case and relevant, accepted financial principles.¹¹ Both valuations were conducted using accepted financial principles, yet yielded vastly different values.

The *Bostwick*¹² decision, a Family Court decision cited by both parties, also recognizes that not all businesses are the same and laments the quality of the expert testimony offered in the case, noting that not every CPA has business valuation experience and recognizing that not all businesses are the same and methods of valuation vary depending upon the business.¹³ The *Bostwick*¹⁴ Court summarizes the various methods for performing business valuations and, like *Dell*, emphasizes the inconsistency of results. Fortunately, for the Court in this case, the parties both presented experts with significant experience in the field of business valuation who each came to different conclusions, based upon accepted financial principles.

Even if the Court were to use a book value approach as in *EEC*, Husband's expert's opinion is still not reliable. In *EEC*, the Court notes that the husband's expert, who rendered the opinion ultimately supported by the appellate Court, recognized that the approach he used would take into consideration any receivables and work in process.¹⁵ His approach was essentially a book value of the business. This approach, however, considers receivables and work in process, in determining the value of the business.¹⁶

Husband's expert did not include receivables or work in process in his analysis. Likewise, he did not know how much Husband received from the residual insurance premiums due to him, referred to at times as "tails." Husband's expert notes the personal nature of the investment portion of his business is probably less than 20% of the total revenues. Husband's expert had to make up a balance sheet by researching "business entities that did report their balance sheets."¹⁷

While receivables and work in process have not yet been collected, including such items is in accord with other Delaware Supreme Court and trial court decisions, which recognize that property can be "acquired" or earned during a marriage although the tangible asset is not materialized until after divorce.¹⁸ Other examples of this definition of "acquired" include

11 *11

vested and unvested pensions, bonuses, deferred compensation and stock options.¹⁹ Given Husband's testimony that it often takes years of work to secure a deal and a commission, the application of *EEC* in the manner suggested by Husband and the valuation performed by Husband's expert are not reconcilable with these other court decisions.

The Court has been adapting the definition of when something is "acquired" for marital property distribution purposes to meet its equitable requirements. The actual transfer of title or receipt or tax consequences are not definitive.²⁰ Rather, the Court has adopted a more fluid approach, looking at when the actions were taken which resulted in the asset or the asset's value.²¹ In *In Re Marriage of Fatora and Sullivan*, 1998 WL 918836, *6-8, the Family Court applied the "time rule" used in *Albanese* to stock options stating, " to the extent the options were received at least in part for services rendered during marriage (whether compensation for past services, an incentive for future services, or both) they are ... marital property."

The experts appear to agree that the issue is the goodwill and that if Husband can transfer the goodwill, such that he could transfer to a buyer the client base and stream of income, or even 95% of the income, resulting from that customer base, he could receive sums like the \$3,488,000.00 - \$3,500,000.00 listed above. Mr. C opined that the personal good will of the sole proprietorship was 5% and that the remainder of the good will was enterprise good will. He bases this on the value given to the no compete clause of 5%. This makes sense. Mr. C also disagrees with the Private Company Adjustment applied in Mr. B 's income approach, as it is misapplied and thus double-counted in husband's expert's analysis, as the risks associated with a private company transaction is already factored into the associated risk used to build the Capital Asset Pricing Model. Regarding the market approach, Mr. C disagrees with the application of the discount for consulting services and the discount for seller financing. Regarding the discount for consulting services, Mr. C explained that the consideration for consulting services or agreements are, according to the available market data on these transactions, over and above the purchase price for the business entity. Mr. C rejects the seller-financing discount as there is insufficient data available for market analyses of these transactions.

Wife's expert used a weighted analysis of various methodologies in arriving at the valuation figure. Mr. C analyzed the income approach - direct capitalization methodology and the market approach - transactional methodology and guideline public company methodology. Mr. C concluded that the cost approach was not appropriate for the sole proprietorship as it is a professional services firm. Mr. C also considered but did not give weight to Husband's own statements of value of the business in the parties' joint financial statements. Husband lists the value of "B J. A , LTD" as \$10,000,000.00 in 2015 and 2016. While there is no testimony as to where this number

came from, its existence suggests that Husband believed, until this divorce proceeding, that his business was worth millions of dollars. The Court does not find that Husband's testimony to be credible, that Wife is the one who placed the value on the statement with no input from him. Ultimately, Mr. C determined that it was most appropriate to give the income approach and the market approach transactional methodology equal weight. He did not give weight to the guideline public company methodology which would have resulted in a much higher number.

After a review of the case law, the testimony of Husband and the testimony and reports of both experts the Court finds that the report by Husband's expert must be rejected. From the outset, Husband's expert's opinion was limited by his belief that Delaware law was settled that there could not be good will in a sole proprietorship. Additionally, the asset approach or book value, did not consider the sums earned but not yet paid as of separation. The Court determines that the sole proprietorship received significant amounts which resulted in income to Husband which were at least in part earned during the marriage and thus resulted in a benefits to Husband which exceeded both values arrived at by the experts. Given the immense value actually received by Husband from the business following separation and divorce which was in significant part "earned" or "acquired" during the marriage the Court has determined that the value arrived at by Wife's expert is the more realistic value. Husband continued to run the business and the value receive by Husband through receivables, work in process or residual commission tails was well beyond the amount placed on it by Husband's expert. This would probably explain why Husband himself placed a value of \$10 million on the business in his financial statements. The commissions, earned but not paid, would be marital and would be comparable to work in process or receivables on a balance sheet. These amounts are not speculative as they have already been received. The Court finds that Wife's expert's opinion is more realistic and that it is based upon accepted financial principles.

This asset is valued at \$3,488,000.00. The parties agree that Husband is to receive 60% of this asset. Given the value placed on the business and the methodology employed to arrive at this figure, the Court will consider that Wife is receiving essentially a portion of the business income after separation and will therefore take this into consideration when discussing credits for the expenses on the Kiawah Property and interim alimony.

8. MSI Financial x (H) and MSI Financial x (H)

Husband identified these two accounts on his Rule 16(c) Financial Report, valued at \$381,692, and \$213,983, respectively but has produced no documentation about the designation or distribution of these funds. Wife seeks set-off rights to these accounts in Husband's name. Husband contends that these accounts do not exist and were placed on the Financial Disclosure Report in error by his prior attorney. Husband would not be able to produce non-existent documents. It is not clear why these accounts were listed on the Financial Disclosure Report but there is no documentation regarding the existence of these accounts. Given the numerous accounts disclosed and valued, the Court does not find it likely that Husband would be attempting to hide these two assets. Certainly, he would not have listed them if he were trying to hide them. Additionally, at times "MSI" and "MML"

are used interchangeably. For example, in Husband's the B J. A Profit Sharing Plan, Husband lists MSI Financial account x and Wife lists MML Investors x referring to the same account. The Court will not place these accounts on the Wright Chart and will not attribute Husband with having the accounts.

9. Value of the following life insurance policies:

a. **MetLife variable Ordinary Life nka Brighthouse No.**

Wife values the asset at the current value of \$405,167.00. Husband's position is that the value should be \$238,800.00, which is the cash surrender value as of the date of separation. Given the Court is considering husband's post-separation income stream in the analysis of the business valuation, the Court finds it equitable to use the date of separation balance for this asset.

b. **Husband's Brighthouse Secure Flex Universal Life**

Husband claims that Wife's position is that it should be valued at \$74,180.00, which is the current cash value without considering the surrender charge. Husband's position is that it should be valued at \$36,059.00, which is the cash surrender value as of the date of separation, as he has been making premium payments. Wife's closing however lists the value at \$28,736.00 which is the current value less the surrender charge. The Court will use the current value as it is supported by documentation while Husband's value is not clear as to whether surrender charges are included.

c. **Brighthouse Irrevocable Trust Life Insurance Policy N. and**

The parties are in agreement that the cash values of these policies would not be included in the marital estate. Husband is requesting that the Court utilize the cash surrender values of \$72,277.00 and \$326,554.00 in the alimony analysis as funds available to Wife when determining her dependency upon Husband. The Court reviewed the Trust documentation and does not find that the principal or interest from the trust is available to Wife for her expenses. Any payment to Wife²² would need to be approved by the parties' son who is the other trustee. The payments of income or principal are in the "absolute discretion of the Trustee" and the "Trustee" is collectively Wife and the parties' son. The Court cannot speculate that this consent would be given. Moreover, these funds are not necessary to the analysis of whether or not Wife is dependent as the overall estate is very significant and the

14 *14

parties close to retirement as discussed below. The Court also has no information to suggest that Wife is entitled to any funds pursuant to the Demand Beneficiary Clause and it appears that Wife has no death benefit as she is no longer married to Husband and there are no children under the age of 21.

10. Husband's NEF Top Producer Incentive Plan

Wife's position is that the account should be valued at \$766,769.00, the total vested and unvested. Husband's position is that the account should be valued at \$648,950.00, which is the vested portion. The Court notes that unvested retirement benefits are considered marital property.²³ Husband testified that this is a non-qualified plan and would not be subject to a Qualified Domestic Relations Order which would allow the parties to divide the funds in kind and potentially avoid the vested versus unvested dispute. The Court has two options, one is to use the vested amount and require Husband to pay Wife the unvested portion if, as and when he receives it. The second is to use the total vested and unvested amounts and require Husband to provide Wife with verification that he will not be receiving the unvested portion. Since Husband would be the only one with access to the information, the second option makes the most sense. As it would be in Husband's interest to notify Wife in order to get the amount refunded he has incentive to do so. Wife has no access to the information and would not know if Husband obtained the unvested portion and Husband would not have any incentive to notify Wife if he owed her money.

11. MassMutual Thrift Plan

Wife values this asset at \$103,502.00. Husband's position is that the account should be valued at \$0 as he claims it is all post-separation. The Court will use Husband's value as there is documentation that there was no balance at separation. The first statement from 2018 shows an opening balance of zero. Again, given that Husband's income stream was considered in the business valuation, it is equitable to use the separation value as otherwise it could count Husband's post-separation income twice.

12. MassMutual Retail Deferred Comp. Plan

Wife Values this asset at \$142,270.00. Husband's position is that it should be valued at \$81,011.00, due to post-separation contributions. The Court shall use the date of separation consistent with the other rulings in this decision. Due to the consideration given to the cash flow following the date of separation in the business valuation, using the date of separation and excluding post-separation contributions from Husband is equitable. Wife shall also

15 *15

receive gains/losses on the \$81,011.00 amount from date of separation to date of distribution.

13. Husband's MassMutual Pension Plan

Wife Values this asset at \$69,167.00. Husband's position is that the Pension Plan is all post-separation. As noted above, using the date of separation is the most reasonable and equitable date. However, there is no documentation regarding the value of this account at separation or confirming that it did not begin until after separation. The closest documentation to separation shows a cash balance of \$6,693.00 in December, 2016 which is the value the Court will use.

14. MassMutual Excess Pension Plan

Wife values this asset at \$60,771.00. Husband's position is that the Excess Pension Plan is all post-separation. Unlike the Thrift Plan, Husband has not demonstrated when this plan began through any documentation. The Court will therefore use \$26,268.00 which is the closest value to the date of separation.

15. Attorney's Fees and Costs

Wife requests that her attorney's fees and costs be paid by Husband.

16. Kiawah Island Expenses.

Husband is seeking a credit of \$618,968.32 for expenses paid toward the Kiawah Island property. Wife opposes this request or in the alternative seeks to have any amounts paid by Husband from the joint bank accounts excluded if the Court does not attribute Husband with having received these amounts from the joint accounts. Wife also alleges that Husband did not produce the documentation requested to establish the payments made from the Bryn Mawr Trust Account and therefore should not receive credit for these amounts. Wife also alleges that Husband had sole use of the property and held up the sale and therefore he should not receive credit. Finally, Wife alleges that to the extent the Court gives Husband credit for any of the Kiawah Island expenses, that the Court should consider essentially charging Husband for the fair rental value of the property.

The Court notes that Wife had the ability to use the Kiawah Island residence as well as Husband. Wife testified that she had no desire to be at that residence for emotional reasons. Wife cites no Delaware authority for making Husband exclusively responsible for the cost of the maintenance and upkeep on the vacation property simply because Wife chose not to use it. Wife seems to want to bring in the element of "fault" until this portion of the analysis which is prohibited by the statute. The Court also does not find any basis for attributing Husband with paying rent for the same reason. The Court notes that it is often

16 *16

the case that one party to a divorce wishes to retain real estate and buy-out the interest of the other party and therefore chooses not to sell immediately, while the finances play out. The Court does not generally enter interim orders requiring parties to sell real estate when there is no danger of losing the property to foreclosure. In this case, no such threat existed. The Court denied Wife's Motions to force the sale of the property through an interim order.

However, since the Court is not attributing either party with the funds from the Wells Fargo joint accounts, the Court will not include these funds in the credits provided to Husband. The total amounts paid by Husband were \$618,488.00 and the amounts spent from the Wells Fargo accounts total \$247,404.00 for a total of \$371,084.00 in credit.

⁵ Transcript, December 9, 2019 at p. 242.

⁶ *E.E.C. v. E.J.C.*, 457 A.2d 688 (Del. 1982).

⁷ *Id.* at 693-694.

⁸ *Id.*

⁹ See *Dell v. Magnetar Global Event Driven Masterfund*, 177 A.3d 1,14 (Del. 2017).

¹⁰ *Id.* at 22.

¹¹ *Id.*

¹² *Bostwick v. Bostwick*, 1991 WL 42628 (Del. Fam. 1991).

¹³ *Id.* at *2,3.

14 *Id.*

15 *E.E.C. v. E. J. C.*, 457 A.2d at 693-694.

16 *Id.* at 694.

17 Husband's Trial Exhibit 2, Business Valuation, p. 38.

18 *Glanden v. Quirk*, 128 A.3d 994, 999 (Del. 2015).

19 *Id.* (bonus); *King v. Howard*, 158 A.3d 878 (Del. 2017) (transaction bonus); *Sayer v. Sayer*, 492 A.2d 238, 241 n. 4 (Del. 1985)(pension); *Donald R.R. v. Barbara S.R.*, 454 A.2d 1295(Del. 1983)(unvested pension); *Fatora v. Sullivan*, 1998 WL 918836 (Del Fam. 1998)(stock options).

20 *Glanden v. Quirk*, 128 A.3d at 999.

21 See *Albanese v. Albanese*, Del Supr., No. 113, 1995 (Feb. 8, 1996) (ORDER); *Fatora v. Sullivan*, 1998 WL 918836, *7,8..

22 There is even some question as to whether or not Wife would continue to be the beneficiary as she is no longer married to Husband.

23 *Donald R. R. v. Barbara S. R.*, 454 A. 2d 1295, 1296 (Del. 1982).

PROPERTY DIVISION - §1513 ANALYSIS

In determining how to divide the parties' marital property, the Court considers the following factors which are enumerated in 13 *Del. C. §1513(a)*.²⁴

24 13 *Del. C. §1513* states in pertinent part: (a) In a proceeding for divorce or annulment, the Court shall, upon request of either party, 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 all relevant factors including:

- (1) The length of the marriage;
- (2) Any prior marriage of the party;
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties;
- (4) Whether the property award is in lieu of or in addition to alimony;
- (5) The opportunity of each for future acquisitions of capital assets and income;
- (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;
- (7) The value of the property set apart to each party;
- (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;
- (9) Whether the property was acquired by gift, except those gifts excluded by paragraph (b)(1) of this section;
- (10) The debts of the parties; and
- (11) Tax consequences.

1. The length of the marriage;

The parties agree that they married on September 8, 1979, separated on July 29, 2016, and divorced on February 9, 2017. The parties were married for thirty seven years.

2. Any prior marriage of the party;

17 The marriage was both parties' first marriage. Husband has since remarried. *17

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

Husband

Husband is sixty two years old. Husband testified that he is currently in poor health. Husband stated that he has cardiovascular disease, atrial fibrillation, and diabetes. All of these ailments have side effects which Husband also testified to. Husband had open heart surgery seven years ago and since then is required to see a cardiologist every six months, an internist every three months, and takes daily medication to maintain his health. Husband also stated that he suffers from neuropathy in his feet and legs and also from depression. Husband explained that due to these illnesses, he is considering retirement early due to the contribution of stress from his job.

Husband has a Sole Proprietorship through which he currently works as an independent contractor for Creative Financial Group ("CFG"). Husband graduated from University of Scranton with a Bachelor's of Arts in Communications. Husband has been employed for the past thirty six years for CFG as an independent contractor. Husband does financial planning, estate and business succession planning, executive benefits and planning, and has a small role in investment management. Husband sells these products and strategizes with clients based on their needs. Husband puts these plans in motion and then maintains them throughout the life of their policies making income off of the initials sales and then again through the trails when the policies are renewed. Husband has three tiers of clients that all require different levels of contact and attention. Husband estimated that he worked about sixty to seventy hours weekly, throughout his marriage to Wife. The majority of Husband's job has been and is servicing the tier one clients, who he contacts about once a week or every other week. Husband stated that he is constantly socializing and plans major entertainment for these clients. Husband earned approximately \$1.5 million dollars for the tax year 2018.²⁵ Husband testified that he is planning on retiring at the age of sixty five. Husband stated that if he does not fully retire at sixty five, he will continue in his current line of work but on a part-time basis.

²⁵ See Exhibit "Wife's #7."

The only time that the Court received Husband's monthly expenses was at the time of filing the 16(c) disclosures. Husband did not submit a list of monthly expenses at the time of trial or within his written closing. The Court concludes that Husband is not disputing his ability to pay alimony.

Wife

Wife is sixty three years old. Wife testified that she is in relatively good health. Wife exercises regularly and has a personal trainer. At this time, Wife must pay for health insurance either through her employer or out of pocket. Wife testified that when she is eligible, she will utilize Medicare. Wife further testified that she will be eligible to retire at the age of sixty seven and will then receive Social Security Income. Wife stated that she

18 intends to work as long as she is able. *18

During the marriage between Wife and Husband, Wife worked for the first five years for her father and then became a stay at home mother and home maker. Wife maintained up to three households that were owned by the family. Wife did all of the cooking and child rearing. Wife has a college degree in fashion merchandising, which she only used for a short time before becoming a stay at home mother. Wife also assisted Husband with his Sole Proprietorship by keeping the books, paying all required bills, and facilitating payroll. Wife also made sure all of the bills for their homes and children were taken care of. Wife testified that she raised their three children with limited involvement of Husband. At the time of separation, Wife was not working but was volunteering in the community. Wife transitioned back into the workforce by taking an office skills course offered by the Pennsylvania Unemployment Office. At this time, Wife works for a law firm as an executive assistant and also part time for a clothing store for supplemental income. Wife's future earning capacity is significantly less than that of Husband due to her many years of absence from the workforce and her proximity to retirement. Wife earned total income of \$22,894 for the tax year 2018.²⁶ Wife earns \$15 an hour and will work at least thirty five hours a week. Wife's approximate gross income is \$27,300 a year and gross take home pay, monthly, is \$2,275. Wife further testified that she earns an additional \$100 to \$200 a month in income from part-time work at a clothing store. Wife's total monthly income from wages is approximately \$2,375. Wife will also have significant income from her cash and investment assets. According to the attached Wright Chart, Wife will have close to \$4 million in assets (\$3,922,530.00) which would be available to invest. The Court will use a middle ground in Wife's expert's range of anticipated Rate of Return, of 4.3%. While Husband believes she can earn far more, this is not only reasonable given Wife's age, which would lead her to invest more conservatively to avoid risk, but it is in accord with the Court's findings in *Glandon v. Quirk*, where the wife was significantly younger.²⁷ Applying a rate of return of 4% on Wife's non-retirement assets would yield investment income of approximately \$168,000.00 per year or \$14,055.00 per month. Wife's total income available is approximately \$16,430.00 per month before taxes. The Court notes that a significant portion of the parties' assets are in life insurance policies and that some of the growth on their assets is not taxable. The Court equally apportioned the investment income into interest, dividend, capital gain and non-taxable income.²⁸ According to the attached budget report, Wife needs \$1,090.00 per month.

²⁶ See Exhibit "Wife's 7" under Tab O.

²⁷ *Glandon v. Quirk*, 128 A.3d at 1005.

²⁸ See Tab H, Wife's Expert Binder on market rates of return which includes a number of tax exempt options.

Wife testified that this income is not enough to meet her financial obligations and uses the money she made from the sale of the marital home and the interim alimony award from May 10, 2019, in the amount of \$10,312 a month in order to make ends meet. Wife listed her monthly expenses, which came to a total of \$18,783.75.²⁹ The Court made adjustments on those expenses, primarily on the health insurance, as Wife testified that she would have benefits from her employer and the cost would be \$400.00. The Court excluded the projected car payment as Wife did not have a car payment and with the amount of liquid funds at her disposal, she can purchase a car without financing. The Court also excluded the long-term care insurance as the Court does not find it equitable that Husband be responsible for subsidizing Wife's future costs when she is receiving half the retirement assets. Likewise, the Court eliminated life insurance as Wife has no dependents and there are no marital obligations to secure. The Court removed discretionary expenses as there is already a category for miscellaneous and there are ample amounts in the other categories to cover *19 any discretionary items. Finally, the Court removed the charitable donations as part of the expenses for alimony purposes as it defeats the purpose of charity if you are asking someone else to pay it and Wife has sufficient funds to donate should she choose to do so. Wife adjusted expenses are \$14,418.00 per month.

29 See Exhibit "Wife's #9."

Wife's Adjusted Expenses per month:

Mortgage (Line of Credit)	\$2,200.00
Mortgage line of credit monthly interest	\$1,213.00
Homeowner's insurance	\$55.00
Taxes: County of Chester	\$77.00
Taxes: Birmingham Municipal	\$28.00
Taxes: Unionville-Chadds Ford School	\$520.00
Homeowner's Association	\$417.00
Valuable Items Insurance Coverage	\$70.00
Umbrella Policy	\$20.00
Water	\$50.00
Sewer	\$51.00
Electric and Gas	\$245.00
Cable Television	\$190.00
Cell Phone	\$109.00
Household Items	\$200.00
Household Maintenance/ Repairs:	
General Upkeep and Maintenance	\$406.00
Housekeeping	\$200.00
Security Monitoring	\$7.50
Groceries	\$500.00
Clothing	\$500.00
Health Insurance	\$400.00
Out-of-pocket Medical/dental	\$471.00
Laundry and Dry Cleaning	\$25.00
Toys and Presents	\$750.00
Cosmetics and Toiletries	\$100.00

Hobbies	\$50.00
Hair dresser/Nails (including tips)	\$440.00
Newspaper and Magazine Subscriptions	\$10.00
Vacation	\$1,500.00
Entertainment/Misc./Dinning Out	\$1,725.00
Transportation	\$50.00
Automobile:	
Repairs and Maintenance	\$208.00
Insurance	\$85.00
Gasoline & Car Wash	\$300.00
AAA	\$16.75
Registration/License	\$5.00

Other:

20 *20

Sirius	\$19.00
Personal Trainer	\$500.00
Health Club	\$55.00
Massage/Reflexology	\$100.00
Professional Fees	\$200.00
Pet Expenses	\$320.00
Bank Fees	\$10.00
Postage	\$10.00
Identity Theft Protection	\$10.00
TOTAL	\$14,418.25

4. Whether the property award is in lieu of or in addition to alimony;

Wife has requested from the Court that alimony be awarded to her, in addition to the property division. Wife is requesting a lifetime alimony award. Husband's position is that Wife will receive significant assets upon division of property and that alimony will not be necessary. Under either position, the property division would not be "in lieu of alimony. The question is really whether or not Wife would be dependent upon Husband given the size of the estate and other factors.

5. The opportunity of each for future acquisitions of capital assets and income;

Husband has a greater opportunity based on his greater earnings, work experience, and historical yearly earnings. Upon division of assets and property, both parties will have the capability to purchase assets in the future. However, Husband has consistent high earning potential for the future. Wife's future earning potential will not enable her to continue to live the life she was accustomed to during the marriage. However, the Court notes that this greater opportunity will be for a limited period of time given the parties' proximity to retirement age. Husband indicated that he is planning to retire soon and has started taking steps toward retirement including selling his interest in the real estate partnership.

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;

Wife testified that during the marriage, she worked for the first five years but then became a stay at home mother and maintained the marital home and, at one point, two additional homes. Wife described it as she was responsible for "the driveway in" and Husband was responsible "from driveway out." Wife stated that she created warm and inviting homes and raised their three children without much assistance from Husband. Wife testified that she was responsible for all of the child rearing duties such as baths, homework, meals, school, and eventually college applications.

Wife additionally testified that she regularly helped Husband maintain his sole proprietorship and paid all of the bills for their homes. Wife stated that she kept track of expenses and income and prepared the documents to
21 be reviewed by the family accountant. Husband testified *21 that throughout their marriage, he did not remember ever opening a bill. Wife paid all of the bills on time for all of the homes that Husband and Wife owned together during their marriage.

Husband testified that throughout his thirty six year career, he regularly worked between sixty and seventy hours a week. Husband did not offer testimony to contradict Wife's contributions but maintained that he also contributed around their home and with raising the children. It is uncontroverted that Husband was the income earner throughout the pendency of the marriage and the parties have agreed that Husband would receive a greater portion of the business assets. Husband testified that he and Wife contributed equally to their marriage.

7. The value of the property set apart to each party;

The parties have business, non-business, and life insurance assets to be divided between them totaling several million dollars. The retirement assets alone exceed \$5 million. Husband and Wife have already split the proceeds of the sale of the marital home and Kiawah Island property equally, giving each party over \$2 million. The total non-retirement and non-business assets total approximately \$6.5 million. The assets are listed on the attached Wright chart.

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 has remarried and resides with his current wife. Wife resides by herself. The parties' children are grown. The parties' marital real estate has been sold and the proceeds have been divided. Both parties have purchased new homes which are not marital property.

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

Husband placed life insurance policies in an irrevocable trust and Wife is one of the beneficiaries and one of the Trustees, along with the parties' son. Husband has no access to these funds. Wife's ability to access the funds at this time is in dispute and any access would depend upon the approval of the parties' son. The Court cannot determine from the trust documents that Wife would have access to the funds in the irrevocable trust. The Court cannot determine that the parties' son would agree to Wife using the interest or principal during Husband's lifetime and Wife's access to the funds on Husband's death appears to be nothing.

10. The debts of the parties;

22 There are no marital debts. Husband is requesting credit for the payments since separation of the mortgage which had been against the Kiawah Island Property along with other expenses. *22

11. Tax consequences.

A significant portion of the parties' estate is tax-deferred. However, the parties are also over 59 ½ and are approaching retirement age and the purpose of the tax-deferred retirement accounts is to support them in their retirement. There would be taxes paid on the tax deferred accounts when they are removed. There could also be capital gains tax on the sale of securities. There was no testimony regarding any capital gain from the sale of Kiawah Island. However, the capital gain would be divided equally and any tax owed as a result of the gain would be borne equally. There was also some confusion regarding whether or not certain retirement plans were qualified or not and if and how the funds could be transferred if not subject to QDRO. The Court takes this into consideration in dividing the retirement assets such that Wife would receive most of the share through qualified plans which are divisible by QDRO.

CONCLUSION

The Court finds that it is equitable to divide the non-retirement and non-business assets 50/50. As noted above, the parties have accumulated significant assets over a lengthy period of time and there is not a considerable amount of time remaining to accumulate additional assets before retirement. Furthermore, while Husband has a superior earning ability, his future cash flow was taken into consideration in the valuation of the sole proprietorship.

ALIMONY

A party may be awarded alimony only if, pursuant to 13 Del. C. §1512(b), the Court finds that he or she is dependent, after consideration of all relevant factors, in that he or she"

- (1) Is dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment;
- (2) Lacks sufficient property, including any award of marital property made by the Court, to provide for his or her reasonable needs; and
- (3) Is unable to support himself or herself through appropriate employment.³⁰

³⁰ 13 Del. C. §1512(b).

23 The Court determines the fair amount and time period for an award of alimony based on the relevant factors outlined in 13 Del. C. §1512(c).³¹ *23

31 [13 Del. C. §1512\(c\)](#): The alimony order shall be in such amount and for such time as the Court deems just, without regard to marital misconduct, after consideration of all relevant factors, including, but not limited to:

- (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;
- (2) The time necessary and expense required to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment;
- (3) The standard of living established during the marriage;
- (4) The duration of the marriage;
- (5) The age, physical and emotional condition of both parties;
- (6) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party;
- (7) The ability of the other party to meet his or her needs while paying alimony;
- (8) Tax consequences;
- (9) Whether either party has foregone or postponed economic, education or other employment opportunities during the course of the marriage; and
- (10) Any other factor which the Court expressly finds is just and appropriate to consider.

Considering the statutory provisions, case law, the evidence submitted by the parties regarding their income and expenses, and the Family Law Software calculation performed by the Court which is appended hereto as Exhibit "A", the Court finds that Wife is not dependent as defined by [13 Del. C. §1512\(b\)](#).

The Court notes that the determination of alimony requires more just a mathematical calculation. In arriving at the conclusion that Wife is not dependent, the Court must analyze all of the statutory factors as follows:

(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;

As noted above, Wife has earned income of \$2375.00 per month and Wife will possess a number of income-producing assets upon the completion of the property division, which will give her substantial financial resources. As also noted above, Wife will receive approximately \$3,922,530.00 in non-retirement assets, and approximately \$2.8 million in retirement assets. At this time, Wife is receiving interim alimony because she was unable to maintain her living standard that was established during the thirty seven year marriage and she did not have the ability to use her portion of the property for her support due to the preliminary injunction and as much of it is in Husband's name. Prior to the interim alimony award, Husband continued to deposit funds into the parties' joint accounts which Wife was able to access. Wife's investment income in addition to her wages are sufficient to pay the vast majority of her reasonable monthly expenses. Wife's adjusted expenses of \$14,418.00 are listed and discussed in the property division factors above.

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

Wife has a college degree and has taken educational courses in order to refresh her office skill set. Wife's potential earning capacity was \$15-\$20 an hour as a book keeper. During trial, Wife testified that she earns \$15 an hour working as an executive assistant for thirty-five hours a week. At Wife's age, it would not be expected

24 that she would embark on a new career and the Court finds that she is appropriately employed. *24

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

Evidence presented shows that the parties lived an upper class lifestyle during their marriage. Wife testified that during the marriage, she was responsible for maintaining up to three households. Wife stated that she made a comfortable and inviting home atmosphere and raised all three of the couple's children with limited assistance from Husband. Wife said that she had assistance with maintaining the homes in the form of housekeepers who would assist with cleaning. Wife stated that she also received a new car about every three years and on average spent around \$50,000 on the vehicle. Husband and Wife's marital home sold for \$1,072,672 and their Kiawah Island Property sold for approximately \$5 million dollars. Wife testified that after Husband's sole proprietorship began making substantial income, they did not want for anything.

Wife further testified that outside of the home, she was accustomed to using a personal trainer regularly, as well as spending large amounts of money on yearly family vacations with their adult children and grandchildren. Wife stated that she regularly also spent hundreds of dollars monthly on gifts and presents for her grandchildren. The Court took this lifestyle into account when determining reasonable expenses.

Husband's testimony does not dispute this lifestyle. Husband and Wife had an expensive vacation property, belonged to multiple country clubs, took expensive vacations and drove luxury vehicles.

(4) The duration of the marriage;

The parties agree that they married on September 8, 1979, separated on July 29, 2016, and divorced on February 9, 2017. Husband and Wife were married for thirty seven years, five months, and one day.

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

Wife is sixty three years old. Wife testified that she is in relatively good health. Wife exercises regularly and has a personal trainer. Wife did not testify as to her emotional health condition.

Husband is almost sixty three years old and testified that he is in poor health. Husband stated that he has cardiovascular disease, atrial fibrillation, and diabetes. All of these ailments have side effects which Husband also testified to. Husband had open heart surgery seven years ago and since then is required to see a cardiologist every six months, an internist every three months, and takes daily medication to maintain his health. Husband also stated that he suffers from neuropathy in his feet and legs and also from depression. Husband was hospitalized within the last year for four days after he fell during a boating accident in the Bahamas. He testified that he plans to retire in a year.

25 (6) Any financial or other contribution made by either party to the education, training, vocational skills, career or earning capacity of the other party; *25

The parties did not offer testimony that contributions to their education was made during the marriage. There were contributions to the career of Husband that did occur. Wife was a stay at home Mother and a support to Husband throughout his career while they were married. Wife additionally took care of all of the financials for their homes and also assisted with the books for Husband's sole proprietorship. Wife made sure the home and children were taken care of while Husband worker between sixty and seventy hours a week to fund their life style. Wife also worked in Husband's sole proprietorship, assisting with the bookkeeping.

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

The Court did not receive another list of Husband's expense after receiving his 16(c) financial disclosures. However, when interim alimony was awarded to Wife, the Court did an analysis of Husband's expenses and deemed that he would have the ability to pay alimony and still meet his own needs. Husband did not present any testimony during the three day Ancillary Hearing that he would be unable to afford paying monthly alimony to Wife, just that he believed Wife would not need alimony after their assets were divided.

(8) Tax consequences;

There are no tax consequences for alimony awards issued after December 31, 2018. Thus, alimony would not be adjusted for taxes. The Court would look to Wife's net income to determine her need.

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

During the marriage, Wife was primarily a stay at home Mother. Due to this time away from the workforce, Mother has been significantly disadvantaged as an adult trying to re-enter the field. Mother has a degree in fashion merchandising that she had not used for thirty seven years. Mother refreshed her vocational skills with a four- month course after separation in anticipation of re-entering the workforce. Wife did assist Husband in his business doing bookkeeping.

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

The Court notes that Wife is receiving a significant amount from the valuation of the business based upon the business having an income stream, which Husband has received and will receive.

CONCLUSION

Taking everything into consideration, the Court does not find that Wife is dependent upon Husband for her support. Wife's available income is comparable to her expenses and the small amount she is short each month is minimal compared to the available assets. The Court notes that *26 this is a very long-term marriage where the parties accumulated significant assets over a lengthy period of time and are now approaching retirement when they would be expected to start using their retirement savings. While Wife would not be expected to have to liquidate her assets before receiving alimony as a general rule, in this case the parties are at a point in their lives when they would start living off their assets. Wife can meet the vast majority of her expenses through her earned income and investment income. While one does not have to liquidate their assets to be dependent, at some point that is what they are supposed to do. Additionally, Husband testified to having medical issues and he should not have to continue to work beyond retirement age in a stressful position at his age and in his condition. Wife will be receiving significant funds from the business, which represents a stream of income post-separation, which Husband was able to earn from the business and hence to a certain extent alimony would be double-dipping. Between Wife's income, her assets and the earnings from those assets, Wife is not dependent on Husband. This case is distinguishable from *Glandon v. Quirk* in that the parties are at a different station in life and are knocking on the door of retirement with very significant retirement savings.

ATTORNEY'S FEES

Wife seeks an award of attorney's fees pursuant to 13 Del. C. § 1515 or in accordance with *Mays v. Mays*, 552 A.2d 858 (Del. 1988). The Court may award attorneys' fees under this statute to a financially disadvantaged spouse to equalize the positions of the parties. *Gray v. Gray*, Del. Supr. 503 A.2d 198, 203 (1986). The Court notes that Wife has been making payments to her attorney throughout the pendency of this matter. The Court

finds that the other provisions of this Order have remedied the financial disparity, which existed at the outset of the case. If Wife believes she has a basis to obtain an award of fees based upon Husband's conduct during litigation, she may file a Motion and Affidavit within 20 days of this Order.

ORDER

In summation, the Court enters the following Order on the ancillary matters of property division, alimony, and attorney's fees:

- (1) Wife shall retain the assets in her column on the attached Wright Charts.
- (2) Husband shall retain the assets in his column on the attached Wright Charts.
- (3) Husband shall transfer to Wife the sum of \$978,306.00 representing the total cash adjustment on non-retirement assets and the Kiawah Island Credits and the interim alimony credit.
- (4) The Atlas America Investments shall be sold and the net proceeds divided between the parties.
- (5) The Ridgewood X, Ridgewood V, Ridgewood W and Ridgewood Y investments shall be redeemed/sold and the net proceeds divided equally between the parties if possible. If

27 *27

they cannot be sold, they shall be divided in kind which each party receiving half the units/shares.

(6) The retirement assets shall be divided equally as listed on the attached Wright Chart. The QDRO's shall be prepared by Wife's attorney and approved by Husband's attorney. The parties may upon mutual agreement divide the retirement accounts differently than the Wright Chart but equally.

(7) Wife shall remain beneficiary on Husband's life insurance policies until such time as Husband has paid her the \$978,000.00 owed to her in cash and the division of assets has been effected.

(8) Husband's Newsquare Capital LLC Profits Interest Plan shall be divided equally on an if, as and when basis.

(9) The NEF Supplemental Agents' Retirement Plan, the NEF Agents' Deferred Compensation Plan and the MetLife Field Agents' Plan shall be divided equally if, as and when received by Husband, provided they are not already included in another asset and are in existence. If possible, Wife's interest in these plans shall be secured by Qualified Domestic Relations Order prepared by Wife's counsel.

(10) Should Husband not receive the unvested portion of the NEF Top Producer Incentive Plan, he shall notify Wife and Wife shall reimburse Husband for one-half of the unvested amount of \$117,813.00.

(11) Wife is entitled to passive gains and losses on her portion of the retirement accounts since separation. The Court expects the parties to be able to handle the mechanics of carrying out this provision, recognizing that some retirement plans are entirely marital such that current values include the gains on Wife's portion while others include post-separation contributions by Husband.

(12) Wife shall retain the Fieldstone Membership and Husband shall retain the Caves Membership.

(13) The personal property has already been divided.

(14) The Jekyll Island Hotel interest has already been divided.

(15) Wife shall retain the BMW and Husband shall retain the boat.

(16) Wife's claim for alimony is denied.

(17) Either party may file a Motion for Attorneys' Fees if he or she believes that an award of fees is warranted pursuant to *Mays v. Mays*.

28 *28

(18) The parties shall cooperate in executing any and all documentation and performing any and all acts necessary to carry out the division of assets as set forth in this Order.

IT IS SO ORDERED this _____ day of October, 2020.

Very truly yours,

/s/ _____

Felice Glennon Kerr, Judge FGK/gg Attachments: Family Law Software Calculations, Wright Charts

29 Date Mailed: _____ Date emailed: _____ *29

Property Assests Marital value Wife Amount Husband Amount St. Moritz Proceeds \$ 1,072,672.00 \$ 536,336.00 \$ 536,336.00 99 Salthouse Proceeds \$ 3,355,923.60 \$ 1,677,961.80 \$ 1,677,961.80 Citadel \$ 315.00 \$ 67.50 \$ 67.50 Citadel \$ 3,082.00 \$ 1,541.00 \$ 1,541.00 Citadel \$ 3,924.00 \$ 1,962.00 \$ 1,962.00 \$ - Barclays (w) \$ 250,000.00 \$ 250,000.00 \$ - \$ - Husband's Fidelity- \$ 127,339.00 \$ - \$ 127,339.00 New Square Capital \$ 687,499.00 \$ 687,499.00 \$ - \$ - Life Insurance Metlife Graded Premium (W) \$ 60,141.00 \$ 60,141.00 \$ - MetLife Variable/Brighthouse \$ 80,845.00 \$ 80,945.00 MetLife Ord./Brighthouse \$ 238,800.00 \$ - \$ 238,800.00 Metlife Graded Premium(H) \$ 350,255.00 \$ 350,255.00 Brighthouse Secure Flex (H) \$ 28,736.00 \$ - \$ 28,736.00 \$ - \$ 6,259,531.60 \$ 3,296,453.30 \$ 2,962,998.30 Credit for Kiawah Expenses \$ (371,084.00) \$ (371,084.00) Net total \$ 5,888,447.60 \$ 3,296,453.30 \$ 2,591,914.30 Amount needed for 50/50 \$ 2,944, 224.80 \$ 2, 944, 224.80 W owes H - Subtotal \$ 352,310.00 Business Assets 40% 60% NewTech/ 16 Campus Blvd \$ 276,799.00 \$ - \$ 276,799.00 Sole Proprietorship \$ 3,488,000.00 \$ 3,488,000.00 \$ 3,764,799.00 \$ 3,764,799.00 H owes W - Subtotal \$ 1,505,920.00 Less what W owes H \$ (352,310.00) H owes W - Non retirement \$ 1,153,610.00 Credit for Interim Alimony \$ 175,304.00 Total cash offset \$ 978,306.00

