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UNPUBLISHED OPINION. CHECK COURT RULES  
 BEFORE CITING.

Superior Court of New Jersey, Appellate Division.  
 Patricia **MORSE**, Plaintiff-Appellant,  
 v.  
 Paul J. **MORSE**, Defendant-Respondent.  
 Argued Sept. 11, 2007.  
 Decided Oct. 25, 2007.

On appeal from the Superior Court of New Jersey,  
 Chancery Division, Family Part, Camden County, FM-  
 04-1340-04B.

Brian G. Paul argued the cause for appellant  
 (Szaferman, Lakind, Blumstein, Blader & Lehmann, at-  
 torneys; Mr. Paul, of counsel and on the brief).  
 Ted M. Rosenberg argued the cause for respondent (J.  
 Rosenberg, L.L.C., attorney; James T. Rosenberg, of  
 counsel and on the brief; Ted M. Rosenberg, on the brief).

Before Judges PAYNE and SAPP-PETERSON.

PER CURIAM.

\*1 Plaintiff Patricia Morse appeals from that portion of  
 a final judgment of divorce denying her request for ali-  
 imony. The court determined that based upon assets she  
 acquired through equitable distribution, income from  
 employment and investments, as well as assets she ac-  
 quired through inheritance, there was no basis to award  
 alimony, irrespective of the duration of the marriage.  
 We reverse.

I.

The parties were married on September 30, 1978, and  
 three sons were born to the couple in 1980, 1981, and  
 1983, respectively. The parties separated in late July  
 2003, and plaintiff filed for divorce on March 26, 2004.

Trial commenced nearly eighteen months later. Prior to  
 commencing testimony, the parties resolved their equit-  
 able distribution issues, and there were no child support  
 or custody issues. Thus, the focus of the trial was on ali-  
 imony, counsel fees, expert fees, and retroactive increase  
 or decrease in pendente lite support.

Both plaintiff and defendant testified. In addition, each  
 party produced expert testimony regarding the parties'  
 financial history and lifestyle. At the time of trial,  
 plaintiff was fifty-seven years old and employed as an  
 office manager with American Quality Vinyl (AQV), a  
 company she and defendant started along with another  
 couple in 2003. Defendant, at the time of trial, was  
 fifty-three years old and employed with Guidant Cor-  
 poration as a sales representative.

During the marriage, the parties lived in a Cherry Hill  
 home valued at \$309,000 as of June 2005. In 1981, the  
 parties purchased a condominium in Pennsylvania for  
 \$72,000, where they enjoyed winter vacations until they  
 sold it in 2003 for \$39,000. The family frequently vaca-  
 tioned at plaintiff's parents' Ocean City, New Jersey,  
 home at no cost and often took trips to New England.  
 Plaintiff and defendant participated in several trips to  
 Colorado and one to Europe that were sponsored by de-  
 fendant's company. The parties also went on a Western  
 Caribbean cruise and to the Dominican Republic, both  
 at their own expense.

Plaintiff, in her testimony, described herself as in  
 "good" health, although on medication for high blood  
 pressure. She received a bachelor's degree in 1969 from  
 the University of Arkansas. After college, she worked at  
 Gasworks for eleven years demonstrating to customers  
 the proper use of appliances and ranges. She was earn-  
 ing a salary of approximately \$20,000 but resigned to  
 become a full-time homemaker sometime after her eld-  
 est son was born in 1980. As a result of her mother's  
 death in February 2005, plaintiff inherited the Ocean  
 City home valued at \$500,000. In November 2005,  
 plaintiff's father also passed away, leaving plaintiff a  
 \$50,000 Merrill Lynch investment account, a \$645,327  
 Individual Retirement Account (IRA), and \$314,906 in

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life insurance.

Defendant testified that he suffered from high blood pressure, narcolepsy, and sleep apnea, but was not taking any prescription medication for these conditions. After receiving a bachelor's degree from Glassboro State College (now Rowan University) in biology in 1974, he worked as a salesman for Johnson & Johnson for three-and-one-half years earning \$35,000 a year. From 1977 until around the time he married plaintiff in 1978, he worked for a New York Company, Gaymar Incorporated, selling heating and cooling equipment for patient care, earning \$36,000 a year. From 1978 to 1985, defendant worked as a pacemaker sales representative, earning a beginning salary of \$45,000, which increased to nearly \$228,000 based upon commissions and product availability. From 1985 to 1989, defendant worked for another pacemaker manufacturer, earning approximately \$200,000 to \$275,000 a year. From 1989 to 1994, he was employed as a salesman with CPI Company, where he earned approximately \$250,000 to \$275,000 annually.

\*2 In 1994, defendant contracted with Guidant, a subsidiary of CPI Company, to sell pacemakers and defibrillators in the New Jersey, Pennsylvania, and Delaware region, with a beginning salary of \$200,000 to \$250,000. Defendant earned \$378,000 in 1998; \$355,000 in 1999; \$548,000 in 2000; \$759,000 in 2001; \$679,000 in 2002; \$826,000 in 2003; and \$789,000 in 2004. His gross salary throughout those years included commissions, auto allowances, awards, moving expenses and stock options. Defendant's employment contract with Guidant, which was signed in July 2004 and modified in October of 2005, guaranteed an annual base salary of no less than \$400,000, plus commissions, until October 2008.

In 2003, the parties invested with Victoria and Michael DiMedio in AQV, a company formed to manufacture and sell vinyl products wholesale. Plaintiff used \$150,000 from an inheritance to purchase twenty-four shares of AQV, while she and defendant used marital funds to purchase another twenty-four shares of the company, resulting in a forty-eight percent interest in the company. The DiMedios held the remaining fifty-

two percent interest in AQV. Plaintiff worked part-time running the business with the DiMedios and began accepting an annual salary of \$37,000 two weeks prior to trial.

Plaintiff's expert, Bruce R. Mulford (Mulford), C.P.A., prepared an expert report that included a lifestyle analysis. He testified that in order to maintain her marital lifestyle, plaintiff required \$16,611 in after-tax dollars per month. Defendant's expert did not prepare a lifestyle analysis but, based upon data defendant provided, disputed those numbers.

The court rendered an oral opinion on June 16, 2006. On the issue of alimony, the court considered plaintiff's available assets acquired as a result of (1) equitable distribution and inheritance, which the court found totaled \$2,341,905 and upon which the court imposed a five percent annual rate of interest, equaling \$117,059 of unearned income; (2) \$37,000 in annual income from her employment with AQV; and (3) \$69,000 in annual distributions from AQV, based upon her thirty-six percent interest in AQV that she acquired as part of equitable distribution. However, we note that only twelve percent of this amount was received by plaintiff through equitable distribution. The remainder was purchased with her own funds. From these assets, the court concluded that plaintiff's net monthly income was \$12,084. The court found this amount sufficient to meet the \$11,416 monthly budget it determined plaintiff required to reasonably maintain her marital lifestyle. Because plaintiff's monthly available assets exceeded the reasonable monthly budget as determined by the court, the court denied plaintiff's request for alimony.

The court also denied both parties' requests for counsel and expert fees, noting each party was "rather well off." Further, the court denied the parties' respective requests for retroactive pendente lite relief. In denying defendant's application for retroactive modification, which is not the subject of a cross-appeal, the court noted that "much of what [plaintiff] is able to do now she was not able to do then. She didn't have the inheritance, she didn't have the [equitable distribution]...." As to plaintiff's request, the court reasoned, "there will be no retroactive increase as a matter of fundamental fair-

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ness.”

\*3 On July 28, 2006, the court entered a post-judgment order correcting a mathematical error concerning the amount it had determined defendant owed plaintiff for unilaterally exercising Guidant stock options.<sup>FN1</sup>The present appeal followed.

FN1. The July 28, 2006 order is not part of this appeal.

On appeal, plaintiff argues that in denying her alimony, counsel fees, expert fees, and costs, the court abused its discretion and failed to adhere to controlling legal decisions. Specifically, plaintiff argues that the court limited its analysis of plaintiff's entitlement to alimony to needs and ability to pay rather than considering other relevant factors, especially the duration of the marriage, plaintiff's contribution to the enhancement of defendant's career by remaining a full-time homemaker throughout most of the marriage, and the fact that as a full-time homemaker, plaintiff sacrificed her own educational and employment opportunities. Additionally, plaintiff contends that if the trial court decision is reversed, she is entitled have the trial court revisit defendant's obligation to maintain life insurance on her behalf.

Defendant contends the trial court properly considered all of the relevant statutory factors set forth in *N.J.S.A. 2A:34-23(b)*. Defendant concedes the judge made a mathematical error resulting in a \$275 decrease in plaintiff's monthly budget, but submits the judge was “enormously generous” in affording plaintiff a monthly budget in excess of \$11,000.<sup>FN2</sup>The defendant also concedes the judge should not have imputed interest income from the retirement accounts and the marital home in determining plaintiff's annual income, as she received those assets in equitable distribution. Notwithstanding the conceded errors, defendant submits that the judge properly imputed a five percent rate of return on the IRA plaintiff inherited from her father in determining plaintiff's annual income. Defendant urges that the five percent annual rate of interest the judge imposed was conservative compared to the 5.94 percent return plaintiff's expert projected after he reviewed the IRA's investment portfolio. Furthermore, defendant contends

the \$69,000 the judge imputed as dividends from plaintiff's thirty-six percent interest in AQV stock was the figure provided by both experts and was thus properly applied to calculate plaintiff's annual income.

FN2. Defendant has not cross-appealed from the calculation of monthly expenses.

Our review of the factual findings of a judge sitting without a jury is quite limited. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 484 (1974). We accord deference to the judge's factual findings, and our task is to determine whether the findings are supported by substantial, credible evidence in the record. *Cesare v. Cesare*, 154 N.J. 394, 411-12 (1998); *Rova Farms, supra*, 65 N.J. at 483-84. If the judge's factual findings are supported by the evidence, an appellate court should not disturb them. *Rova Farms, supra*, 65 N.J. at 484. In particular, “[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding.” *Cesare, supra*, 154 N.J. at 413. However, “[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.” *Manalapan Realty, L.P. v. Township Comm. of Manalapan*, 140 N.J. 366, 378 (1995) (citations omitted). It is well established that a trial court's conclusions of law are subject to plenary review. *Lobiondo v. O'Callaghan*, 357 N.J.Super. 488, 495 (App.Div.), *certif. denied*, 177 N.J. 224 (2003).

## II.

\*4 The purpose of alimony 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). The Court in *Crews, supra*, reaffirmed that the critical inquiry in any alimony determination is the three-part analysis set forth in *Lepis v. Lepis*, 83 N.J. 139, 152 (1980): (1) “the dependent spouse's needs”; (2) “that spouse's ability to contribute to the fulfillment of those needs”; and (3) “the supporting spouse's ability to maintain the dependent spouse at

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the former standard.” *Crews, supra*, 164 *N.J.* at 24.

Here, relying upon Judge Carchman's opinion in *Glass v. Glass*, 366 *N.J.Super.* 357 (App.Div.), *certif. denied*, 180 *N.J.* 354 (2004), plaintiff urges that there is no bright-line rule that establishes the principle that a spouse who is able to meet the marital lifestyle without contribution from one's spouse is precluded from receiving an award of alimony. We disagree with plaintiff's application of *Glass* under the particular facts present here.

*Glass* involved a post-judgment motion to terminate alimony twelve years after the entry of judgment. The plaintiff, the supporting spouse, argued that at the time of the divorce, it was his understanding that his support obligation would continue for as long as the defendant needed it in order to become self-sufficient and that the defendant's current employment status was evidence that she had achieved self-sufficiency. *Id.* at 366-67. The trial court examined the plaintiff's expenses, compared them to defendant's total earned and support income, and concluded that the “numbers” did not justify a continuation of alimony. *Id.* at 369. We reversed and held that the supported spouse's needs and ability to meet those needs, though compelling, were not the sole factors the court was required to consider. *Id.* at 372. We observed that as part of the parties' property settlement agreement, the defendant waived any interest in the plaintiff's professional license, his practice, and other existing and future business endeavors in consideration of her future security provided by permanent alimony. *Id.* at 374-75. Under those particular facts, we reasoned that “[t]he agreement between the parties—the contract upon dissolution—is entitled to significant consideration.” *Id.* at 372.

The present matter involves an initial alimony determination unaccompanied by any unique facts the trial judge failed to consider. Following the dictates of *Lepis* and *Crews*, the judge considered the statutory factors set forth in *N.J.S.A.* 2A:34-23(b), in particular, marital lifestyle, *N.J.S.A.* 2A:34-23(b)4, “the touchstone for the initial alimony award.” *Crews, supra*, 164 *N.J.* at 16. The judge also referenced the remaining applicable statutory factors <sup>FN3</sup> before reaching his conclusion

that “there [was] no basis on which to award alimony, despite the duration of the marriage and the different income of the parties.”

FN3. The court did not consider *N.J.S.A.* 2A:34-23(b)(8) (requiring courts to consider the time and expense necessary to acquire education/training, the availability of training/employment, and the chance for future acquisitions of capital assets and income) obviously because of plaintiff's employment within her own company as its office manager.

\*5 We are satisfied that the trial judge's decision was guided by consideration of the appropriate factors and his evaluation of the credibility of the witnesses and the competency of the evidence presented, all of which is to be accorded considerable deference. *Cesare, supra*, 154 *N.J.* at 411-12. Moreover, although plaintiff argues that the failure to award alimony ignores her contributions to defendant's career advancement, the record reflects otherwise. The parties, as part of equitable distribution, agreed to equally divide defendant's Guidant stock options and retirement assets. In our view, such a division implicitly recognizes plaintiff's contribution to defendant's career advancement.

We disagree, however, with the judge's ultimate determination to deny alimony because we find that it was based upon a number of erroneous mathematical calculations, inappropriate double counting, and improper imputation of certain interest income. The cumulative effect of these errors led the court to conclude that plaintiff had the ability to continue the marital standard of living without the necessity of any contribution from defendant.

#### A. Plaintiff's Monthly Needs

We do not take issue with the court's fact-finding as to what amounts comprised plaintiff's monthly needs. The court rejected the projected budget reflected in the last of three Case Information Statements (CIS) submitted by plaintiff during the course of the divorce proceedings. The court found the figures “highly inflated, inac-

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curate, not believable, not credible, not substantiated” and that “[plaintiff] knew nothing about [the latest CIS], said it was a guess, [and] couldn't prove any of the contents[.]” From the evidence, the court arrived at a monthly budget it determined was fair, \$11,691.

We defer to the trial court's fact-finding on these figures. *Cesare, supra*, 154 *N.J.* at 411-12. We discern no basis to disturb that aspect of the court's determination. Nonetheless, as both parties agree, based upon the court's numbers, the correct calculation of the plaintiff's monthly expenses is \$11,691 rather than the \$11,416

|  |                        |
|--|------------------------|
| Plaintiff's portion of equitable distribution as settled upon  | \$788,620 <sup>4</sup> |
| Plaintiff's share of Duska Therapeutics stock equitably distributed but not included in the \$788,620 figure | \$ 37,500              |
| Plaintiff's share of Guidant Options equitably distributed but not included in the \$788,620 figure          | \$215,751              |
| Plaintiff's portion of retirement assets equitably distributed and included in the \$788,620 figure          | \$300,000              |

FN4. This figure was derived from the Final Equitable Distribution Worksheet, which computed plaintiff's distribution total as \$814,620 .43, and subtracting \$26,000 the parties agreed plaintiff would pay defendant pursuant to their equitable distribution agreement.

The judge computed the total funds available from equitable distribution and inheritances to be \$2,341,905. In calculating the \$2,341,905 figure, both parties agree that the judge erred by improperly double-counting plaintiff's share of retirement assets worth \$300,000, which was already included in the \$788,620 figure. Thus, the total available funds from both equitable distribution and inheritances is \$2,041,905.<sup>FN5</sup>

FN5. \$788,620 (Equitable Distribution without considering plaintiff's portion of Duska Stock and Guidant Options) € \$37,500 (Duska Stock) € \$215,751 (Guidant Options) € 1,000,034 (inheritances as determined by trial court).

#### C. Distributions from Plaintiff's Thirty-Six Percent

figure calculated by the court.

#### B. Funds Available from Equitable Distribution and Inheritances

In determining the funds available to plaintiff from equitable distribution, the judge considered the following:

#### Share in AQV

\*6 The court, relying upon financial projections from plaintiff's expert and apparently adopted by defendant's expert, imputed \$69,000 in annual Chapter S corporate profits from AQV stock to plaintiff, who, as part of the parties' equitable distribution settlement, acquired a thirty-six percent interest in the corporation. The record, however, demonstrates that Mulford testified that any projections of 2005 distributions would be based on the financial data and, at that point, any projections would be speculative. He explained that the projection would be based on the financial data provided by AQV for only the first six months of 2005. Further, he testified that projecting distributions for the entire year based on six months assumes that the profits for the second half of the year would be identical to those received in the first half. Mulford noted the problems inherent in utiliz-

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ing this approach, especially considering that the company operated at a loss the year before.<sup>FN6</sup>Moreover, Mulford emphasized that the financial information available for the first half of 2005 did not take into account depreciation; thus, the profit figures provided by AQV were "overstated."

FN6. Defendant's expert Cooper testified that the loss resulted because the business utilized the cash basis method of accounting rather than the accrual basis method of accounting.

The judge acknowledged the speculative nature of utilizing the available six months of 2005 financial data to project profits and shareholder distributions for the entire year. For example, he did not permit defendant's expert to testify about projected profits for the second half of 2005, finding that any response would be too speculative. Additionally, when plaintiff's expert was asked whether he had an opinion as to the available distribution to shareholders in 2005, the court noted, "[i]t's not possible. He doesn't know what the numbers are ... [t]here's not the most remote accounting certainty by which he can answer that question, much less reasonable accounting certainty."The judge assured the parties he would not make an alimony decision based upon this asset unless he had the full year's financial records for AQV for 2005. However, after learning that the tax returns for the full year would not be available for trial, the judge determined that he would nonetheless render his decision on the projected AQV profit distributions based upon the financial records for the first six months of 2005. He informed the parties that they could file a post-judgment motion if his projections turned out to be over-or understated.<sup>FN7</sup>In light of our decision, upon remand, the parties may seek review of this issue, as the court invited the parties to do.

FN7. Plaintiff served defense counsel with a supplemental report dated April 15, 2006, in which Mulford noted that plaintiff took no distributions in 2005. Although the judge had not yet issued his decision, plaintiff made no motion to supplement the record. Thus, Mulford's letter was not part of the record before the trial court but was included, apparently without ob-

jection, as an exhibit in the appellate record.

#### D. Imputed Interest Income

Defendant concedes the judge should not have imputed interest income from the retirement accounts. Likewise, defendant also concedes the judge should not have imputed interest income from the marital home. See *N.J.S.A. 2A:34-23b* ("When a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony."); *Miller v. Miller*, 160 *N.J.* 408, 422-23, (1999) (since plaintiff is occupying the marital home and did not sell it, it does not have the potential to generate income and, thus, should not be imputed to plaintiff as interest income).

\*7 Next, the court imputed interest calculated at five percent per annum on the \$654,327 IRA that plaintiff inherited from her father. Plaintiff contends the court should have utilized a 3.7 percent per annum rate of interest, which plaintiff's expert claimed is the requisite minimum withdrawal necessary to avoid excise tax under the Internal Revenue Code. See 26 *U.S.C.A.* § 4974 and § 401(a)(9)(B). Plaintiff urges that imposition of the five percent rate of interest is inequitable because it forces her to invade a source of retirement funds when her current employment offers no retirement benefits, while defendant's employment enables him to defer up to \$20,000 annually towards his retirement fund.<sup>FN8</sup>In response, defendant contends that if the court were to apply the 3.7 percent per annum interest rate, utilizing Mulford's 5.94 percent projected per annum interest rate, 2.24 percent would be available as savings to plaintiff, yielding annually \$14,657, an amount that would fund the \$1,000 in monthly savings the trial judge found was necessary for plaintiff to maintain the savings aspect of her marital lifestyle.

FN8. Although defendant testified that he discontinued contributions towards his retirement fund after the complaint was filed, there is no dispute that this retirement savings was part of the marital lifestyle.

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Plaintiff points to no authority that limits the court's imputation of interest upon an IRA to the minimum withdrawal percentage in accordance with the Internal Revenue Code. Given that plaintiff's own expert projected a 5.94 percent rate of return, the judge's imposition of a five percent rate of return is supported by substantial credible evidence in the record. *Cesare, supra*, 154 N.J. at 411-12. Therefore, the court did not err when it imposed the five percent per annum interest rate upon the IRA.

In summary, based upon the trial court's cumulative errors, the following is a comparison of the results initially yielded by the trial court and a revised computation, taking into account the errors defendant concedes the court made:

|  | <b>Trial Court's Calculation</b> | <b>Revised Calculation</b>   |
|--|----------------------------------|--|
| Funds Received from Equitable Distribution and Inheritances            | <b>\$2,341,905</b>               | \$2,341,905-\$300,000<br>(Double-counted) = <b>\$2,041,905</b>   |
| Amount Eligible for Interest Income                                    | <b>\$2,331,905</b>               | \$2,041,905-\$309,000 ( <i>Marital Home received in ED</i> )<br>-\$306,490.29 ( <i>Retirement Assets</i> ) = <b>\$1,426,414.71</b> |
| 5% Annual Interest Income from Funds Received from ED and Inheritances | <b>\$117,059</b>                 | <b>\$71,320.74</b>   |
| AQV Annual Salary  | \$37,000                         | \$37,000   |
| AQV Shareholder's Distribution   | \$69,000                         | \$69,000   |
| Plaintiff's Projected Annual Gross Income                              | <b>\$214,793</b>                 | <b>\$177,320.74</b>  |
| Plaintiff's Projected Annual Net Income at 35% Tax Rate                | <b>\$145,011</b>                 | <b>\$115,258.48</b>  |
| Plaintiff's Monthly Net Income   | <b>\$12,084</b>                  | <b>\$9,604.87</b>  |

Comparing plaintiff's revised monthly net income of \$9,604 to the \$11,691 monthly budget as determined by the court, plaintiff's net income falls short of the amount necessary to reasonably maintain her former marital lifestyle. Additionally, if it is later determined that the \$69,000 in AQV dividends should not have been imputed to plaintiff's income, plaintiff's monthly net income would be even less than the revised monthly net income set forth in the above table. Thus, the court erred in finding that there was no basis for an award of alimony.

### III.

\*8 Finally, plaintiff argues that the court erred in denying her request for counsel and expert fees without rendering the required findings of fact and law. The defendant responds that a review of the record indicates that the court's decision was a reasonable exercise of discretion. In light of our reversal of the denial of alimony, the issue of counsel fees and costs, as well as whether defendant should be required to maintain life insurance on plaintiff's behalf, are appropriate issues for consideration by the trial court upon remand.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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