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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Daniel **WEAVER**, Plaintiff-Appellant/Cross-Respondent,

v.

Patricia **WEAVER**

Defendant-Respondent/Cross-Appellant.

No. A-1449-03T5.

Argued Feb. 2, 2005.

Decided July 5, 2005.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Mercer County Docket Number FM-11-603-01.

[Brian G. Paul](#) argued the cause for appellant/cross-respondent (Szaferman, Lakind, Blumenstein, Blader, Lehmann & Goldshore, attorneys; Mr. Paul, on the brief).

[James P. Manahan](#) argued the cause for respondent/cross-appellant ([Edward M. Bernstein](#), attorney; Mr. Manahan, and on the brief), of counsel.

Before Judges [FALL](#), [PAYNE](#) and C.S. FISHER.

PER CURIAM.

*1 In this matrimonial action, plaintiff Daniel Weaver appeals from those portions of the final judgment entered on October 10, 2003, after a non-jury trial, awarding permanent alimony to defendant Patricia Weaver, and equitably distributing the former marital domicile. Defendant cross-appeals, contending that the trial court misapplied its discretion in the manner in which it effected an equitable distribution of the marital domicile. The following factual and procedural history is relevant to our consideration of the arguments advanced on appeal.

The parties were married on September 14, 1986, and separated on May 27, 1999. Two children were born of the marriage: Allison, on May 18, 1993; and Nicholas, on

November 12, 1997. On December 13, 2000, plaintiff filed a complaint for divorce.

In 1990, defendant obtained a masters of science degree in taxation from American University and became a duly-licensed New Jersey certified public accountant (CPA). She was employed as a tax accountant by Lear & Pennypacker in Princeton, and had gross earnings of \$78,569.22 in 2001. In 1990 plaintiff received a doctorate degree in finance from Rutgers University and was employed as a professor at Baruch College in New York. He also did some private consulting work, and had gross earnings in 2001 of \$142,838. However, plaintiff was denied tenure at Baruch in September 2002. At the time of trial, plaintiff was seeking employment and had received a job offer from Manhattan College in New York City at a salary of approximately \$100,000.

Plaintiff worked full time during the marriage, as did defendant except for eight months after Allison's birth, and for three and one-half months after the birth of Nicholas.

The parties entered into a consent order issued on December 19, 2001, under which they agreed that, pendente lite, defendant would be the parent of primary residence of the children. In an order entered on February 22, 2002, plaintiff was ordered to pay defendant pendente lite alimony in the amount of \$1,500 per month and child support of \$1,157 per month, effective as of February 1, 2002.

The contested issues of support, equitable distribution and plaintiff's parenting time with the children were tried non-jury in the Family Part on February 25, 26, and 27, 2003.

At the conclusion of the trial, the judge granted a judgment dissolving the marriage, and reserved on the remaining issues. On October 10, 2003, the trial judge issued a detailed written decision and memorialized the rulings therein in a final judgment of divorce issued on that date. In her written decision, the judge noted in pertinent part:

At the outset of trial, the parties placed the following stipulations upon the record: (1) the date-of-marriage was September 14, 1986; (2) the date-of-separation was May 27, 1999; (3) for alimony purposes, the marriage is

deemed to have been of 12 years [and eight months in] duration; (4) as of the time of trial, plaintiff was 49 years old and defendant was 45 years old, and they are both in good physical and emotional health; (5) defendant holds a Bachelor of Science degree in accounting from Rutgers University and in 1990 received a Masters of Science Degree in taxation from American University, and as of time of trial, was a certified public accountant (CPA) duly licensed by the State of New Jersey, employed as a tax accountant by Lear & Pennypacker in Princeton, NJ, and had gross earnings of \$78,569.22 in 2001, which included a bonus; (6) plaintiff received a Bachelor of Arts degree in English from Seton Hall University and in 1990 received a doctorate degree in finance from Rutgers University, and, as of the time of trial, was employed as a professor at Baruch College in New York and also did some private consulting work, having earned gross income of \$142,838.00 in 2001, but having been denied tenure at Baruch in September 2002; (7) defendant stopped working for eight months after Allison's birth and for three-and-a-half months after Nicholas' birth; (8) neither party is currently absent from the job market, nor do either of them seek additional training or education to further their employment prospects; (9) plaintiff worked full time during the marriage, and defendant pursued her Masters degree while also working full time; (10) between the years 1996 through 1999, plaintiff's gross annual income increased from \$84,000.00 to \$134,994.00, and defendant's income increased from \$40,449.00 to \$67,397.00; (11) during the marriage, the parties would occasionally travel together in conjunction with plaintiff's employment, he drove a 1993 Toyota Camry and she drove a 1993 Honda Civic, both of which vehicles had been purchased new (with no loans or leases), and they paid all credit cards off in full each month; (12) plaintiff had voluntarily paid *pendente lite* support to defendant prior to entry of the court's February 22, 2002, order; (13) defendant is designated the parent of primary residence of Allison and Nicholas, with plaintiff to have liberal parenting time (to be determined by the court); (14) the monthly mortgage payment on the marital home at 7 Stuart Lane East, Princeton Junction, NJ, is \$1,676.69, water and sewer expenses are approximately \$101.25 quarterly, and the real estate taxes on that residence were

\$5,326.00 for the first half of the year 2003; (15) the marital residence was appraised at \$400,000.00 in value as of the date of the complaint, and at \$460,000.00 in value as of December 29, 2002; (16) as of December 30, 2002, the mortgage balance on the marital residence was \$148,924.32[;] (17) defendant's cable TV and internet access charges are \$100.00 per month; (18) there are no extraordinary factors bearing on either party's claim for separate maintenance.

*2 Also pursuant to stipulation, the following accounts are subject to equitable distribution: (1) the Strong Mutual Fund, # 716 02890-18; (2) the Sovereign Bank Money Market Account # 0742044823; (3) the Sovereign Bank checking account # 0741062824; (4) defendant's Aetna Pension Plan; (5) plaintiff's TIAA/CREF retirement account; and (6) plaintiff's Datek Stock Account (n/k/a AmeriTrade). It was further stipulated, on the record at trial, that the then-current value of the Sovereign Bank Money Market account was \$25,133.88. Regarding plaintiff's TIAA/CREF account, it was stipulated that the then-current value was \$207,656.44. However, the parties disagreed as to the date-of-separation value of that asset, plaintiff claiming it was \$217,231.10, and defendant asserting that value was \$270,216.93. The discrepancy in these amounts will be discussed below.

In addition, it was stipulated that [plaintiff] is in possession of the 1993 Toyota Camry, valued at \$3,660.00, and defendant is in possession of the 1993 Honda Civic, valued at \$2,910.00. Defendant is also in possession of household furnishings valued at \$6,300.00. Plaintiff is in possession of New Jersey state tax refunds for 1998 and 1999 totaling \$3,743.00.

[Footnote omitted.]

The following provisions of the final judgment are relevant to the issues advanced on appeal:

1. Defendant is awarded sole right, title and interest in the marital residence at 7 Stuart Lane East, Princeton Junction, NJ, subject to plaintiff's equitable distribution share set forth in paragraph 2, below; effective immediately, she is responsible for all carrying costs on that residence; within 14 days plaintiff shall execute a quitclaim deed to defendant, relinquishing his interest in that property; within 30 days defendant shall take all

necessary steps to remove [plaintiff's] name from the note, mortgage and home equity line on the marital home.

2. The equitable distribution value of the marital residence is \$311,065.68 and is hereby allocated equally (50% to each) between the parties, in the amount of \$155,532.84 apiece; plaintiff shall realize his equitable distribution share by one of the following two methods, and within 14 days he shall inform defendant of which option he chooses: either (1) the amount of \$155,532.84 shall be hereby awarded to him subject to the accrual of interest at the rate of 7.4% per annum to the date of realization of his distributive share upon sale of the residence; or (2) he shall receive 50% of the net proceeds of the ultimate sale, subject only to a credit to defendant for the amount of principal on the mortgage she will have paid as of that closing.

* * *

12. Effective as of the date of this judgment, plaintiff shall pay defendant permanent alimony in the amount of \$2,000.00 per month; his alimony obligation shall terminate upon the earliest of the following events: (1) defendant's remarriage; (2) defendant's death; or (3) plaintiff's death, except as addressed through life insurance hereinafter.

***3** The court awarded the parties joint legal custody of the children, with defendant designated as the parent of primary residence subject to plaintiff's parenting time. The judgment also required plaintiff to pay defendant the sum of \$1,148 per month in child support, and ordered the parties to share the cost of work-related child care in proportion to their incomes, as set forth on the child support guidelines worksheet.

In reaching these conclusions, the trial judge made the following findings, in relevant part:

The marital standard of living can best be described as a comfortable middle-to-upper-middle class lifestyle.... Plaintiff's only testimony as to marital lifestyle was that the family ate at restaurants such as Charlie Brown's, and that the parties took vacations, before the children were born, in connection with his business travel and, after the children were born, to visit family; they took a family vacation to Disney World in 1999. He acknowledged that

he "out-earned" defendant throughout the marriage. However, he did not contend that she is underemployed; nor did he feel she had given up employment opportunities to stay home with the children. Defendant testified the parties shopped for clothing at Macy's and other department stores; she has her hair done every week; they had domestic help in the form of a cleaning service every two weeks from the time they lived in Gaithersburg until 1999; they did not belong to any country clubs; vacations included trips to Europe, Barbados, Cancun and Disney World.... Defendant acknowledged that she had no receipts to document other expenses listed on her CIS, such as \$500.00 for repairs/maintenance, \$50.00 for snow removal, \$215.00 for lawn care, \$218.00 per week daycare for Nicholas.

* * *

The economic circumstances of the parties at this time when the division of property becomes effective are somewhat divergent. Plaintiff, whose change of employment was imminent as of the time of trial because of his loss of tenure, has acknowledged that income in the range of \$125,000.00 to \$135,000.00 should be imputed to him. In 2002, defendant earned \$72,204.00 gross annual income.... Defendant is the parent of primary residence for the two children. Plaintiff seeks liberal parenting time; however, it is likely defendant will bear the greater share of responsibility for the children's daily care and supervision. Plaintiff has significantly greater retirement assets, as can be seen from comparing his TIAA/CREF account (in excess of \$200,000.00) to defendant's Aetna pension (approximately \$25,000.00).

The income and earning capacity of each party continues the marital pattern. Plaintiff continued to "out-earn" defendant with gross annual income that is close to twice the amount of hers. The parties have stipulated that neither is currently absent from the job market, nor does either of them seek additional training or education to further their employment prospects....

***4** Each party, in effect, contributed to the other's advanced education. Each acquired advanced degrees during the marriage. Neither party seeks reimbursement from the other for any such "contributions" during the marriage.

Both parties contributed to the acquisition of marital property during the marriage. Defendant received the parties' joint Sovereign Bank Money Market Account immediately after separation and has been solely responsible for any dissipation of that account since May 1999, with the exception of plaintiff's withdrawal at that time. Joint assets contributed to the purchase of each residence during the marriage. Plaintiff's TIAA/CFRE has been an essentially passive investment asset, made available to him through his years of employment in the education field.

* * *

Plaintiff has acknowledged defendant's need to remain in the marital residence to enable the children to remain in the West Windsor school district.

The current debts and liabilities of the parties consist of: (1) a mortgage balance on the marital home in the amount of \$148,924.32 as of December 30, 2002; (2) a tax liability to New York State in the net amount of \$4,034.00, which both parties have acknowledged is a marital debt; and (3) an outstanding balance on a home equity line of \$16,663.62 as of February 10, 2003 which was incurred by defendant starting in February 2002. Other than the mortgage on the marital home, plaintiff lists no other debts/liabilities on his CIS.... Defendant lists "revolving charges" of \$1,200, legal expenses of \$9,000.00, and personal loans of \$5,000.00, all as of December 31, 2002.

* * *

As will be further discussed below with respect to alimony, this was a 12 1/2 -year marriage throughout which plaintiff's income significantly exceeded defendant's. Therefore, the court considers this a case in which some form of alimony award is clearly appropriate to afford defendant the financial wherewithal to achieve a lifestyle as reasonably comparable to the marital level as possible and on a level commensurate with plaintiff's ability to do the same.

* * *

The parties have stipulated that the marital residence was appraised at \$400,000.00 in value as of the date of complaint, and had increased in value to \$460,000.00 as

of December 28, 2002. The[y] also stipulated that, as of December 30, 2002, the mortgage balance on the residence was \$148,934.32. Therefore, as of that date, the net equity in the marital residence was \$311,065.68.

The court awards defendant sole right, title and interest in the marital residence, subject to a credit to defendant for 50% of the net equity, in the amount of \$155,532.84.... As will be discussed further, below, with respect to custody, the parties have agreed that defendant shall be the parent of primary residence of the two children. Allison and Nicholas both attend the West Windsor public schools. They have known only this home, community and school system for the past five years.

*5 As noted above, plaintiff's equitable distribution share of the marital residence is valued at \$155,532.84. No other asset subject to equitable distribution is of sufficient value to afford him a credit in this amount against defendant's interest in such asset. The only other major asset is plaintiff's TIAA/CFRE account; however, as will be discussed below, defendant's allocated interest in that asset will be insufficient to offset this credit.

Therefore, the court deems it equitable to protect plaintiff's allocated interest in the marital residence by affording him the choice of one of the following two methods of deferred payment: either (1) the amount of \$155,532.84 will be awarded to him in the final judgment subject to the accrual of interest at the rate of 7.4% per annum payable to the date of realization of his distributive share upon sale of the residence; or (2) plaintiff may choose to receive 50% of the net proceeds of the ultimate sale, subject only to a credit to defendant for the amount of principal on the mortgage she will have paid as of that closing. The final judgment herein shall provide[] that, within 14 days of the entry of the judgment, plaintiff shall inform defendant of which option he chooses for protecting this equitable distribution award.

* * *

The factors guiding a court's discretion in determining alimony are set forth in [N.J.S.A. 2A:34-23b](#). Here the parties' stipulations have addressed many of these factors[.] ...

* * *

The marital lifestyle, as established by the testimony, reflects a middle-to-upper-middle class level, including the stipulations as to the types of cars they drove and purchased for cash (no loans or leases), the travel connected to plaintiff's employment, and their ability to pay off credit card debt each month during the marriage. Other than those stipulations, neither party testified to any extensive degree as to the other aspects of their lifestyle[.]

...

The critical issue to be resolved by the court is defendant's need, and plaintiff's ability to pay, alimony. The threshold determination is whether such alimony should be permanent, as defendant seeks, or of a limited duration, as plaintiff asserts.

The court concludes this is a case in which an award of permanent alimony to defendant is fit and proper. This was a marriage of 12 1/2 years' duration, during which plaintiff's gross annual income consistently exceeded defendant's by a ratio of almost 2 to 1.... Given the historic earning patterns during the marriage, the court concludes that plaintiff will likely continue to "out-earn" defendant in a comparable ratio. Notwithstanding the somewhat disproportionate equitable distribution of assets in defendant's "favor," the major asset distributed to her is the marital residence which she will now be required to maintain for herself and the children. She will continue to be the parent of primary residence, albeit with plaintiff having liberal parenting time with the children.

*6 Plaintiff's argument in support of limited duration alimony essentially consists of his unsupported claims that defendant is "on a partnership track at her firm," her income is "going up quite a bit," and she "does not need more." Defendant testified that she was "not likely" to make partner because her work hours were limited by her child care responsibilities. Her 2002 W-2 income was \$72,204.00, significantly lower than her 2001 gross earnings of \$78,572.00. Moreover, as noted above, the court concludes she will "need more" than a limited period of spousal support in order to maintain a lifestyle reasonably comparable to the marital level.... Under these circumstances, the court finds an award of permanent alimony is warranted....

* * *

Defendant asserts a "need" for permanent alimony of \$2,500.00 per month. Her CIS reflected combined monthly out-of-pocket expenses of \$9,007.00.... However, aside from the expenses stipulated above, defendant provided no supporting documentation for her claimed expenses such as repairs/maintenance, snow removal/law care, and all of her Schedule C items.

Plaintiff's CIS ... reflected his current expenses, rather than the marital lifestyle. As noted in the summary of trial testimony above, his only comments on that lifestyle were regarding restaurants and vacations.

For his part, plaintiff testified the parties lived "frugally" because defendant wanted to "accumulate assets." It is true, as of the time of the separation, their Sovereign Bank money-market account--which both parties acknowledged grew from joint funds including their paychecks--had accumulated approximately \$40,000.00.... Interestingly, in Schedule C of her CIS, defendant lists *no* savings/investment expense, although clearly savings was a component of the marital lifestyle, give[n] the accumulation of funds in the Money Market account.

In considering plaintiff's ability to pay alimony, the court has considered two alternative fact scenarios. In the first, income is imputed to each party at the highest level each has demonstrated the ability to earn, namely \$142,838.00 for plaintiff and \$78,569.22 for defendant. In the second, income of \$135,000.00 is imputed to plaintiff pursuant to his trial testimony and \$72,204.00 is imputed to defendant based on her W-2 for 2002.

Under the first scenario, before any alimony is considered, the parties' net monthly incomes are \$7,890.00 for plaintiff and \$4,562.00 for defendant. Under the second scenario, also before alimony, their respective net monthly incomes are \$7,486.00 and \$4,241.00.

Although the family court is generally admonished to determine an alimony award before calculating child support, the reverse procedure has received appellate review and approval where appropriate....

Here, the court has run various child support calculations [using the child support guidelines] based on the two income scenarios posited above, and factoring in alimony in a range between zero and \$2,500.00 per month.

* * *

*7 When these net income figures are weighed against defendant's CIS-- claiming over \$9,000.00 combined monthly out-of-pocket expenses just for herself and the two children and \$10,283.00 total expenses "paid for spouse and/or children not residing with [her]"--the court must conclude her CIS expenses are significantly overstated. As noted above, she provided no supporting documentation whatsoever either for substantial claimed Schedule A expenses or for any Schedule C expenses.

* * *

Plaintiff's Schedule A, B and C expenses total \$7,488.81. This figure includes \$4,050.00 in expenses he pays on behalf of defendant and the children. Thus, his personal expenses total \$3,438.81.... Plaintiff has re-married since this trial, as evidenced by the parties' post-trial supplemental certifications. The trial record is completely devoid of what, if any, financial support his current spouse lends to his lifestyle.

For the purpose of determining alimony, the court will attribute income to each party at the lower ranges noted above, namely \$135,000.00 for plaintiff and \$72,204.00 for defendant. At those income levels, and given the analysis of the marital lifestyle to the extent it was discernible from the trial evidence, the court concludes that plaintiff has the ability to pay, and the defendant has the need to receive, permanent alimony in the amount of \$2,000.00 per month. The court determines this amount to be necessary to enable defendant to maintain a lifestyle comparable to the marital level while continuing to live in West Windsor. Further, based on the expenses set forth in plaintiff's CIS and the fact that he has re-married and, presumably, has gained a financial benefit from that remarriage, he will be able to maintain his lifestyle on the income remaining to him, particularly as enhanced by the tax deduction he will receive on the alimony paid.

[Footnotes and citations are omitted.]

The trial judge stated that the 7.4% per annum interest rate accruing on the amount of plaintiff's defined, but deferred, equitable distribution interest in the marital domicile was derived by applying the formula approved in [Miller v. Miller](#), 160 N.J. 408, 424-25 (1999), "based on the average

long-term corporate bond rate of return over the preceding five years (1998 through 2002), as established by Moody's Composite Index on A-rated Corporate Bonds."

On appeal, plaintiff presents the following arguments for our consideration:

POINT I

ALIMONY STANDARD OF REVIEW.

- A. Abuse of Discretion Standard.
- B. Factual Findings Not Based Upon Substantial Credible Evidence.
- C. Failure to Follow Controlling Legal Principles.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION AND FAILED TO FOLLOW CONTROLLING LEGAL PRINCIPLES WHEN AWARDING DEFENDANT PERMANENT ALIMONY.

A. WHEN A SPOUSE IN AN "INTERMEDIATE LENGTH" MARRIAGE (SUCH AS THIS 12 YEAR MARRIAGE) REQUESTS PERMANENT ALIMONY, THE TRIAL COURT MUST CONSIDER WHAT OCCURRED TO BOTH PARTIES DURING THE MARRIAGE IN ORDER TO DETERMINE WHETHER THE SPOUSE HAS AN ENTITLEMENT TO PERMANENT ALIMONY, OR WHETHER LIMITED DURATION ALIMONY IS WARRANTED.

*8 B. THE TRIAL COURT FAILED TO GIVE DUE WEIGHT TO THE FACT THAT WIFE WORKED FULL-TIME FOR VIRTUALLY THE ENTIRE MARRIAGE, AND THAT SHE EARNED HER MASTERS IN TAXATION AND C.P.A. LICENSE DURING THE MARRIAGE, WHEN AWARDING HER PERMANENT ALIMONY.

C. THE TRIAL COURT FOCUSED ALMOST EXCLUSIVELY ON THE DISPARITY IN INCOME AND LENGTH AND LENGTH OF THE MARRIAGE WHEN AWARDING WIFE PERMANENT ALIMONY, DESPITE THE FACT THAT THEY ARE JUST 2 OF 13 FACTORS TO BE CONSIDERED.

D. THE TRIAL COURT FAILED TO CONSIDER LIMITED DURATION ALIMONY.

POINT III

THE ALIMONY AWARD MUST BE REVERSED AND REMANDED INASMUCH AS THE TRIAL COURT

FAILED TO MAKE A FACTUAL FINDING REGARDING WIFE'S ACTUAL NEEDS IN LIGHT OF THE MARITAL LIFESTYLE.

A. WHEN THE PARTIES IN A MATRIMONIAL ACTION FAIL TO PROVIDE THE TRIAL COURT WITH SUFFICIENT INFORMATION FOR IT TO PROPERLY DETERMINE BOTH OF THEIR REASONABLE POST-DIVORCE BUDGETS IN LIGHT OF THE MARITAL LIFESTYLE, THE TRIAL COURT IS REQUIRED AS A MATTER OF LAW TO ELICIT SUCH TESTIMONY AND EVIDENCE ITSELF.

B. THE TRIAL COURT'S FACTUAL FINDING THAT THE PARTIES LIVED A "MIDDLE-TO-UPPER-MIDDLE CLASS" LIFESTYLE WAS NOT BASED UPON SUBSTANTIAL CREDIBLE EVIDENCE.

POINT IV

THE TRIAL COURT'S DECISION TO PERMIT WIFE TO REMAIN IN THE MARITAL RESIDENCE INDEFINITELY WITHOUT SETTING A DEADLINE FOR HER REFINANCING OR SELLING THE PROPERTY IN ORDER TO PROVIDE PLAINTIFF WITH THE MONIES AWARDED TO HIM IN EQUITABLE DISTRIBUTION FAILED TO FOLLOW CONTROLLING LEGAL PRINCIPLES AND WAS AN ABUSE OF DISCRETION.

POINT V

THE TRIAL COURT FAILED TO FOLLOW CONTROLLING LEGAL PRINCIPLES AND ABUSED ITS DISCRETION WHEN IT FAILED TO SECURE DR. WEAVER'S INTEREST IN THE MARITAL RESIDENCE WITH A MORTGAGE.

On her cross-appeal, defendant argues:

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION AND FAILED TO FOLLOW CONTROLLING LEGAL PRINCIPLES WHEN AWARDED PLAINTIFF A SHARE OF THE FORMER MARITAL RESIDENCE.

I.

We begin our analysis of the issues in this case by reviewing certain applicable principles. In all actions tried

without a jury, the trial court is required to make factual findings and state its conclusions of law. *R. 1:7- 4(a)*; [Rolnick v. Rolnick, 290 N.J.Super. 35, 41-42 \(App.Div.1996\)](#). Appellate review of the factual findings of a trial judge are binding on appeal when they are supported by adequate, substantial, credible evidence contained in the record on appeal. [Cesare v. Cesare, 154 N.J. 394, 412 \(1998\)](#); [Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 \(1974\)](#). "[A]n appellate court should not disturb the 'factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" *Cesare, supra, 154 N.J. at 412* (quoting [Rova Farms, supra, 65 N.J. at 484](#)).

*9 When a court is requested, as here, to make findings and adjudicate issues of equitable distribution, alimony, and child support, it is axiomatic that those issues are interrelated and intertwined. [Claffey v. Claffey, 360 N.J.Super. 240, 263 \(App.Div.2003\)](#). Clearly, the question of support is intimately related to the question of equitable distribution, [Conforti v. Guliadis, 128 N.J. 318, 324 \(1992\)](#), because a court is required to consider the equitable distribution of property when determining alimony. [N.J.S.A. 2A:34- 23b\(10\)](#). And, in effecting equitable distribution, the court must consider the economic circumstances, income and earning capacity of each party. [N.J.S.A. 2A:34-23.1\(f\) and \(g\)](#). Recently, our Supreme Court has held "that a trial court's determination of the interplay between an alimony award and equitable distribution is subject to an overarching concept of fairness, bearing in mind the interrelated yet separate purposes of alimony versus equitable distribution." *Steneken v. Steneken, ___ N.J. ___, ___* (May 18, 2005) (slip op. at 1).

Although the issues of equitable distribution and alimony are "clearly interrelated, the structural purposes of alimony and equitable distribution are different." *Id.* at 4. In [Crews v. Crews, 164 N.J. 11, 16 \(2000\)](#), the Court "reaffirm[ed] the [Lepis v. Lepis, 83 N.J. 139 \(1980\)](#)] principle that the goal of a proper alimony award is to assist the supported spouse in achieving a lifestyle that is reasonably comparable to the one enjoyed while living with the supporting spouse during

the marriage." "Accordingly, the supporting spouse has a continuing responsibility 'to contribute to the maintenance of the dependent spouse at the standard of living formerly shared.'" Glass v. Glass, 366 N.J.Super. 357, 369 (App.Div.), certif. denied, 180 N.J. 354 (2004) (quoting Lepis, supra, 83 N.J. at 150).

"In contrast, equitable distribution determinations are intended to be in addition to, and not as substitutes for, alimony awards" so as to effect a fair and just division of marital assets. Steneken, supra, at 4-5. Thus,

[t]he conclusion that alimony and equitable distribution are separate yet interrelated and ultimately subject to an overriding sense of fairness is buttressed by our statutory scheme, where the separate powers to award alimony and determine equitable distribution are codified. N.J.S.A. 2A:34-23b sets forth the power of the trial court to award alimony and lists, on a non-exclusive basis, those factors the trial court must consider in that context. Again, in contrast, N.J.S.A. 2A:34-23.1 implements the trial court's powers to award equitable distribution, also listing those non-exclusive factors that the trial court must consider. There are strong parallels between these two statutorily required lists of factors; they, however, are not entirely congruent.... Each of the statutory considerations for an award of alimony and the considerations for equitable distribution remains true to its respective original and independent goals--for alimony, "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, supra, 164 N.J. at 16, and for equitable distribution, "to effect a fair and just division of marital assets." Steneken v. Steneken, [367 N.J.Super. 427, 434 (App.Div.2004).] Principles of fairness that properly account for the dichotomy between alimony, on the one hand, and equitable distribution, on the other, are what inform our analysis.

*10 [Steneken, supra, slip op. at 5 (footnote omitted).]

II.

With those principles in mind, we first examine the equitable distribution ordered of the marital domicile. Among the factors to be considered by a court in effecting

an equitable distribution of property legally or beneficially acquired by the parties during the marriage is:

The need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own the household effects.

[N.J.S.A. 2A:34-23.1(1).]

It is evident from our review of the record that the distribution of the marital home to the defendant was based on findings that the parties had agreed that defendant would serve as the parent of primary residence of the children; that both children were attending the West Windsor public school system where the marital residence was located; that the children "have known only this home, community and school system for the past five years[;]" and that the continuation of the children in the marital domicile best reflected a continuation of their lifestyle after the separation and divorce of their parents. Stated differently, the record fully supports the conclusion that the best interests of the children were served by permitting them to continue to reside in the marital domicile following the separation and divorce of their parents.

Based on this premise, the trial judge distributed the marital domicile to the defendant. The court valued the equity of each party in the marital domicile to be \$155,532.84. The method for the distribution of plaintiff's share chosen by the court permitted plaintiff to select from either of the following options:

(1) the amount of \$155,532.84 shall be hereby awarded to him subject to the accrual of interest at the rate of 7.4% per annum payable to the date of realization of his distributive share upon sale of the residence; or (2) he shall receive 50% of the net proceeds of the ultimate sale, subject only to a credit to defendant for the amount of principal on the mortgage she will have paid as of that closing.

For obvious reasons, plaintiff selected the first option. As plaintiff has noted, however, the trial court set no time parameters for the ultimate sale of the marital residence, nor did the court provide any security for plaintiff's defined interest in the marital domicile, such as a mortgage or other equitable lien. Although those observations are correct, our concerns are with respect to the method of equitable

distribution of the marital domicile chosen by the court.

In reaching her conclusion concerning distribution of the marital domicile, the trial judge found that

[n]o other asset subject to equitable distribution is of sufficient value to afford him a credit in this amount [\$155,532.84] against defendant's interest in such asset. The only other major asset is plaintiff's TIAA/CREF account; however, as will be discussed below, defendant's allocated interest in that asset will be insufficient to offset this credit.

*11 Therefore, assuming that it was inappropriate to order an immediate sale of the marital domicile, the use of the present-value, asset off-set method of property distribution was not appropriate. See [Moore v. Moore](#), 114 N.J. 147, 161-62 (1989) (noting that the preferable method of equitable distribution of assets ___ there, a pension ___ was a present distribution to the parties through the exchange, or off-setting, of assets based on their comparable value, to avoid prolonging relations and interactions between the parties); see also [Scavone v. Scavone](#), 243 N.J.Super. 134, 139-40 (App.Div.1990) (same).

In setting an interest rate of 7.4% per annum that would accrue on plaintiff's equitable distribution interest of \$155,532.84, until closing on the ultimate sale of the marital residence occurred, the trial judge relied on [Miller, supra](#), 160 N.J. at 424-25. In our view, the court's reliance on [Miller](#) was misplaced. First, in [Miller](#), the Court utilized the average long-term corporate bond rate of return over the preceding five years, as established by Moody's Composite Index on A-rated Corporate Bonds, for purposes of *imputing income* to an ex-husband's investment assets in order to determine his ability to pay alimony pursuant to the terms of the parties' property settlement agreement. [160 N.J. at 424-26](#). Here, as posed by the trial judge, the issue was not what income plaintiff should reasonably derive from \$155,532.84; rather, it was what was a fair return to plaintiff for his deferred dollar interest in the marital domicile until its ultimate sale. The analysis, if made at all, should have been more akin to that of determining a fair and equitable mortgage interest rate on real property. See [Gemignani v. Gemignani](#), 146 N.J.Super. 278, 284 (App.Div.1977).

Moreover, there is merit in defendant's contention that the

interest rate chosen by the trial court could substantially deplete her equitable-distribution interest in the marital domicile, since the value of her equity therein would be subject to an unpredictable, and different, rate of return ___ the increase or decrease in the real estate market ___ as well as potentially being subjected to reduction in order to satisfy plaintiff's return of a 7.4% per annum interest rate. Additionally, the analysis of the trial judge did not consider the fact that the distribution of the marital domicile to defendant, as opposed to its immediate sale and division of the net proceeds, was based on the needs and best interests of the children. Indeed,

[t]he hybrid nature of the exclusive possession right, as constituting a combination of equitable distribution, alimony and support is, of course, further compounded by the fact that the significance of those components and the ratio of each to the other is dependent upon the circumstances of each marital relationship and the whole complex of financial and personal factors unique to each family situation. The determination of what is fair and practical and workable in terms of the interests of all the family members is consequently not subject to definitive rule or standard but must, rather, be dictated by the factual predicates inherent in each set of circumstances subject only to general equitable principles.

*12 [[Schaeffer v. Schaeffer](#), 184 N.J.Super. 423, 428 (App.Div.1982).]

Rather than have the value of defendant's ultimate equity distribution interest in the marital domicile being based on fluctuations in the real estate market, while at the same time having the value of plaintiff's defined equitable distribution interest in the marital domicile being treated as a growth asset subject to variables in the financial market, we deem the more equitable approach to distribution of the marital domicile, under the facts of this case, to be that described in [Daly v. Daly](#), 179 N.J.Super. 344 (App.Div.1981). There, we noted that

predicting fluctuations in interest rates and the appreciation, or depreciation, of single-family residential real estate over the next ten years is an unsettling prospect for economists, judges or even soothsayers.

[*Id.* at 349-50.]

Here, the youngest child, Nicholas, will not turn eighteen,

most likely during his senior year in high school, until November 15, 2015. Without determining what might be an appropriate time for the court-mandated sale of the marital domicile, it is clear that the driving force for the exclusive right of the children, and hence defendant, to reside therein revolves around the best interests of the children. Therefore, it is likely that such an ordered sale might not occur for several years. As in *Daly*, future predictions of the fluctuations in real-estate values, or a fair rate of return to plaintiff on his undistributed interest in the marital domicile, would be speculative, at best. We explained the dilemma in *Daly, supra*, as follows:

Often, as here, the principal asset subject to distribution is the marital residence. Underlying the permission to the wife to remain in the home is the joint duty of the parties to provide suitable shelter for the children.... A correlative is the recognition that available economic resources are usually not sufficient to provide a comparable residence if the asset is liquidated. The husband's realization of his distributive share is delayed, perhaps until emancipation of the youngest child. This delayed realization must be recognized by a reasonable rate of interest, ... or an equity interest in the asset. Imaginative counsel and trial judges must always consider the interrelationship between alimony, child support and the cost of maintenance and the ultimate disposition of the marital home in arriving at contested or consent judgments, just as they do in negotiated property settlement agreements.... Any final decisions should recognize (1) a fair return for delayed realization, (2) or an equity interest, and (3) the extent of each party's contribution to the protection and enhancement of the asset prior to sale.

[179 *N.J.Super.* at 35-51 (citations omitted).]

In applying these criteria to the facts in *Daly*, we concluded that "transfer of title to the [wife] with reservation of an equity interest in the [husband] [was] most appropriate." *Id.* at 350. We noted that the device of a mortgage, as suggested in *Gemignani*, with a realistic or flexible interest rate tied to a recognized indicator, might be appropriate where the property is likely to be sold in a shorter time. *Ibid.* We further ruled that

*13 [the wife], as occupant of the home, will be responsible for ordinary and reasonable maintenance. Any

structural repairs or replacement of capital items are to be shared on the same proportionate basis as the distributive shares of the net equity. In the present situation, where both parties are employed and child support is paid by defendant, we agree that [the wife] should make the mortgage payments. At the time of distribution plaintiff should receive credit against [the husband's] share for one-half of the principal reduction of the mortgage and insurance premiums paid to protect the asset. Interest on the mortgage, utility payments and real estate taxes are in the nature of cost of occupancy or rent and are not reimbursable to [the wife]. At the time of sale [the husband] will receive his one-half share of the net proceeds less the above credits to [the wife].

[*Daly, supra*, 179 *N.J.Super.* at 351.]

Accordingly, we vacate the method of distribution of the marital residence set forth in the final judgment, and remand the matter for entry of judgment fixing plaintiff's equitable interest therein at one-half of the net equity in the property at the time of its sale, less the credits to defendant and the allocation of repairs as set forth above in *Daly*. We conclude that this method of distribution subjects both parties to the same variables concerning the value of their defined equal interest in the marital domicile; gives recognition to the best interests of the children and the parties' joint obligation to those interests; and fulfills the court's responsibility to protect children who fall victim to a divorce. See *Pascale v. Pascale*, 274 *N.J.Super.* 429, 435 (App.Div.1994) (holding that it was not a misapplication of discretion for the trial court to permit the wife, who was given residential custody of the parties' ten-year-old son and eight-year-old twins, to remain in the marital home for five years until the older child began high school and the twins began their new school), *affirmed in part, reversed in part on other grounds*, 140 *N.J.* 583 (1995).

Because of the method of distribution chosen, the trial judge did not reach the issue of whether it was more appropriate for title in the marital domicile to be jointly retained in the parties, or whether title should be vested in defendant, subject to plaintiff's equitable lien on the property to protect his interest. Therefore, the trial judge should re-visit that issue. Additionally, the trial court must consider the unique

financial and personal factors of these family circumstances, and set a date for the sale of the marital domicile, taking into consideration what is fair, equitable, practical and workable in terms of the interests of all family members.

III.

In making her findings, the judge found that the only other major asset subject to equitable distribution was plaintiff's TIAA/CREF account, and noted that defendant's allocated interest in that asset would be insufficient to offset plaintiff's interest in the marital domicile.

***14** The TIAA/CREF retirement account of plaintiff's had a value of \$237,921.92 as of May 31, 1999, although its value had dipped to \$207,656.44 as of December 31, 2002. The record concerning the valuation and distribution of this retirement asset is unclear. At one point in the her opinion, the judge stated that plaintiff has had that account since 1980, which pre-dated the marriage by approximately six years. Therefore, unless comingled, the portion of that asset acquired prior to the marriage would normally not be subject to equitable distribution, and the defendant's interest in plaintiff's retirement account would be subject to distribution through use of a coverture factor, with distribution either deferred through use of a qualified domestic relations order, or, depending upon the requirements of the plan, rolled over, as here, into a separate retirement account for defendant. See [Claffey v. Claffey](#), 360 N.J.Super. 240, 255 (App.Div.2003); [Risoldi v. Risoldi](#), 320 N.J.Super. 524, 537-45 (App.Div.), certif. denied, 161 N.J. 335 (1999).

Here, the trial judge used the \$207,656.44 value for equitable distribution purposes and deemed "it fair and reasonable to award defendant 50% of the established marital portion of this retirement asset by way of equitable distribution." However, despite the court's reference to the "marital portion" of plaintiff's retirement asset as being subject to equitable distribution, the court stated that "[a] 50-50 allocation would render defendant's share \$103,828.22." The court then gave plaintiff some credits for other items owed to him, and reduced that amount down to \$98,661.22, ordering that amount be rolled-into defendant's retirement account.

We cannot discern from this record whether the equal division by the court of this asset was based upon an evaluation of that portion of plaintiff's retirement account that accrued during the marriage, or was based on an equal division of the value of the entire account. Certainly, if the latter is the case, we recognize that a court may, upon a full and proper analysis of the factors outlined in [N.J.S.A. 2A:34-23.1](#), distribute property in an uneven fashion. [Perkins v. Perkins](#) 159 N.J.Super. 243, 247 (App.Div.1978). That, however, appears not to have been the case here, and we are unable to reach any conclusions concerning that asset. Although we recognize that this issue has not been raised by the parties on appeal, this apparent inconsistency in the record dictates that we remand the matter for clarifications and, if necessary, further findings.

IV.

Plaintiff argues that the trial court misapplied its discretion in making an award of permanent alimony to defendant, asserting that the court improperly rejected his request for an award to defendant of limited duration alimony.

[N.J.S.A. 2A:34-23b](#) authorizes a trial court to "award one or more of the following types of alimony: permanent alimony; rehabilitative alimony; limited duration alimony or reimbursement alimony to either party." When making an alimony award, the court must consider the non-exclusive list of factors set forth in that statute. In all cases where there is a request for an award of permanent alimony, as here, the court must first consider and "make specific findings on the evidence about the above factors [in [N.J.S.A. 2A:34-23b](#)]." [N.J.S.A. 2A:34-23c](#). The court must then consider whether limited duration, rehabilitative, or reimbursement alimony is appropriate and "shall consider and make specific findings on the evidence about factors set forth above." *Ibid*. With respect to limited duration alimony, the statute further provides, as follows:

***15** The court shall not award limited duration alimony as a substitute for permanent alimony in those cases where permanent alimony would otherwise be awarded.

An award of alimony for a limited duration may be modified based either upon changed circumstances, or upon the nonoccurrence of circumstances that the court found would occur at the time of the award. The court

may modify the amount of such award, but shall not modify the length of the term except in unusual circumstances.

In determining the length of the term, the court shall consider the length of time it would reasonably take for the recipient to improve his or her earning capacity to a level where limited duration alimony is no longer appropriate.

[*Ibid.*]

"In reviewing an alimony award, '[w]e give deference to a trial judge's findings as to issues of alimony, if those findings are supported by substantial credible evidence in the record as a whole.'" *Cox v. Cox*, 335 N.J.Super. 465, 473 (App.Div.2000) (quoting *Reid v. Reid*, 310 N.J.Super. 12, 22 (App.Div.), certif. denied, 154 N.J. 608 (1998)).

After discussing the legislative history of the various forms of alimony in *Cox*, *supra*, Judge Carchman stated:

The focus of limited duration alimony is distinctly different from that of rehabilitative or reimbursement alimony. Limited duration alimony is not intended to facilitate the earning capacity of a dependent spouse or to make a sacrificing spouse whole, but rather to address those circumstances where an economic need for alimony is established, but the marriage was of short-term duration such that permanent alimony is not appropriate. Those circumstances stand in sharp contrast to marriages of long duration where economic need is also demonstrated. In the former instance, limited duration alimony provides an equitable and proper remedy. In the latter circumstances, permanent alimony is appropriate and an award of limited duration alimony is clearly circumscribed, both by equitable considerations and by statute.

[335 N.J.Super. at 476.]

The *Cox* court made it clear that, on an application for an award of permanent alimony, the trial judge must first consider and make specific findings on the evidence as to the statutory factors set forth in *N.J.S.A. 2A:34-23b*. *Id.* at 478. Consideration of any other form of alimony may follow only after those determinations and findings have been made. *Id.* at 479.

In providing further guidance, the court stated:

Clearly, limited duration alimony is neither an available option nor an appropriate remedy in all dissolution cases. In considering alimony applications under the new statutory scheme, judges should bear in mind that an award of limited duration alimony must reflect the underlying policy considerations which distinguish this form of alimony from rehabilitative and reimbursement alimony. Conceptually, limited duration alimony is more closely related to permanent alimony than to rehabilitative or reimbursement alimony. The latter two types of alimony represent forms of limited spousal support for specified purposes; once the purpose is achieved, entitlement to that form of alimony ceases. Permanent and limited duration alimony, by contrast, reflect the important policy of recognizing that marriage is an adaptive economic and social partnership, and an award of either validates that principle.

*16 [*Cox*, *supra*, 335 N.J.Super. at 479.]

Citing to the "marital partnership principle," where a married couple forms an economic unit and the economic and non-economic contributions to that partnership are valuable, the court ruled that,

[w]here analysis of the statutory factors within the context of this marital partnership principle suggests an award of permanent alimony, the exclusive use of rehabilitative or reimbursement alimony is clearly contraindicated.

Limited duration alimony accommodates the marital partnership principle by "recogniz[ing] in certain marriages that a permanent alimony order--or no alimony order at all--is an injustice, and [that] the law must provide sufficient flexibility to enter orders fulfilling not only the statutory directives but the fundamental purposes of alimony." [Frank] Louis, *Limited Duration Alimony*, [11 N.J. Fam. Law. 133, 137 (1991).] This flexibility mandates an appropriate judicial analysis of the statutory factors when contemplating an award of more than reimbursement or rehabilitative alimony, the former being awarded to recognize past forbearances and the latter to meet fixed future needs.

[*Id.* at 480.]

Citing to Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 Fam. L.O. 573, 583-84 (1988), the court recognized that the most

commonly-expressed rationale for an award of permanent alimony is to compensate one spouse for benefits conferred on the other spouse by being responsible for homemaking and child rearing; to compensate that spouse for the opportunity costs of homemaking resulting in lost earning capacity by that spouse through the years of bearing the major responsibility for the home; and to compensate that spouse because of the "transfer of earning power" that occurs during a traditional marriage in which the homemaker spouse's efforts increased the earning capacity of the other spouse at the expense of his or her own earning capacity. [Cox, supra, 335 N.J.Super. at 482-83](#). Judge Carchman concluded:

This analysis [of permanent alimony] applies to limited duration alimony as well. Limited duration alimony is to be awarded in recognition of a dependent spouse's contributions to a relatively short-term marriage that nevertheless demonstrated the attributes of a "marital partnership[.]" ... In determining whether to award limited duration alimony, a trial judge must consider the same statutory factors considered in any application for permanent alimony, tempered only by the limited duration of the marriage. All other statutory factors being in equipoise, the duration of the marriage marks the defining distinction between whether permanent or limited duration alimony is warranted and awarded.

[*Id.* at 483.]

Applying these principles to this appeal, we conclude that the analysis of the trial court, although sufficiently comprehensive on the issue of permanent alimony, did not include sufficient consideration of the guidelines contained in *Cox* relating to the issue of limited duration alimony, nor did it include a complete consideration of the statutory factors enumerated in [N.J.S.A. 2A:34-23b](#) with respect to the claim for an award of limited duration alimony, most notably the limited duration of this marriage. The trial court seemingly rejected limited duration alimony as an option because plaintiff's annual income consistently exceeded defendant's income throughout the marriage; because the distribution of the marital domicile to defendant would require her to continue to maintain that residence for herself and the children; and because defendant will need more than a limited period of spousal support in order to maintain a

lifestyle reasonably comparable to the marital level.

*17 Although an award of permanent alimony, as opposed to limited duration alimony, may be ultimately warranted, the record on appeal does not support the traditional rationale for an award of permanent alimony, as outlined in [Cox, supra, 335 N.J.Super. at 482-83](#). Specifically, it does not appear that an award of permanent alimony was ordered by the trial court to compensate defendant for the value of benefits she conferred upon plaintiff by being responsible for homemaking and child rearing, with the primary benefit to plaintiff being an increase in his earning capacity. Here, the record reflects that both parties actively pursued their chosen careers, seemingly largely unaffected by their roles in the marriage. For the same reasons, the findings of the trial court do not support a conclusion that the permanent alimony award was to compensate defendant for the opportunity costs of homemaking causing lost earnings through the years due to her assuming the major responsibility for the home. We also discern no "transfer of earning power" to have occurred during the parties' marriage that would have been characterized by defendant's efforts to increase the earning capacity of plaintiff at the expense of her own. Rather, as noted, it appears that both parties advanced their education and careers, worked throughout the marriage, and both significantly increased their earning capacities during that time. Of course, without further findings, we can reach no definitive conclusions on the alimony issue. A remand is necessary for the court to address and assess these relevant considerations.

We also note that the amount of the permanent alimony award contained in the final judgment, \$2,000 per month, is not supported by the record. The trial judge described the marital standard of living as frugal, but comfortable, and middle-to-upper-middle class. The court noted that defendant asserted a need for permanent alimony of \$2,500 per month to meet her expenses. However, the court also found that "aside from the expenses stipulated above, defendant provided no supporting documentation for her claimed expenses[.]" and further concluded that "her CIS expenses are significantly overstated." The judge then awarded permanent alimony of \$2,000 per month on the basis that "this amount [is] necessary to enable the

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defendant to maintain a lifestyle comparable to the marital level *while continuing to live in West Windsor.*" (Emphasis added). Although such may be the case, the record does not support the conclusion that an award of \$2,000 monthly is needed to maintain the marital standard of living. Rather, the \$2,000 per month award seems more of an attempt to equalize the parties' incomes. We also note that, should the court on remand determine that this is an appropriate case for an award of limited duration alimony, inquiry should be made as to whether the term of such an award should be fixed so as to correspond with, for example, the period of time that defendant and the children will be residing in the marital domicile, or with the minority of the children.

V.

*18 In conclusion, we reverse the determinations of the court, as memorialized in the final judgment of divorce entered on October 10, 2003, on the issue of alimony and the manner of equitable distribution of the marital domicile, and remand for further proceedings consistent with this opinion. We also remand, for further findings, on the issue of the equitable distribution of plaintiff's TIAA/CREF retirement account. Although we affirm the final judgment in all other respects, we hasten to add that because of the recognized interrelationship between equitable distribution, alimony and child support, the trial court shall not be precluded, upon making proper findings and conclusions, from reexamining the findings and conclusions memorialized in the final judgment with respect to child support and the distribution of other assets and, in any event, shall at least take those uncontested distributions into consideration.

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

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