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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6268-04T5

SONNY ENG,

Plaintiff-Respondent,

v.

LINDA NGUYEN,

Defendant-Appellant.

Submitted May 15, 2006 – Decided June 16, 2006

Before Judges Parrillo and Holston, Jr.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FM-03-909-03Z.

Hurley & Laughlin, attorneys for appellant (Thomas J. Hurley and Robyn M. Hill, on the brief).

Robert M. Schechter & Associates, attorneys for respondent (Robert M. Schechter, on the brief).

PER CURIAM

In this divorce action, defendant Linda Nguyen appeals from a post-judgment order denying reconsideration of the Family Part judge's original determinations regarding equitable distribution and the assessment of counsel and expert fees against her. Specifically, defendant argues that the court erred in equitably

distributing to plaintiff a 30% interest in a pre-marital asset known as the "Millington" property; in calculating plaintiff's share of the "Quonley Farm" proceeds based on her so-called dissipation of that asset; and in awarding plaintiff counsel and expert fees.

Plaintiff Sonny Eng and defendant were married in December 1997, but had a business relationship since 1986. There were no children born of the marriage, which lasted less than five years, and plaintiff filed for divorce in July 2002. At the time, plaintiff was fifty-five and defendant was sixty-three years of age.

By way of background, the parties met in 1986, when plaintiff agreed to allow defendant to pick left over vegetables from his father's farm properties to sell in Chinatown. Plaintiff had been farming his father's fields, growing Chinese vegetables. In 1987, when plaintiff's father retired from farming, plaintiff and his brother shared ownership of one of these properties, Quonley Farms, consisting of 300 acres on Orr Road in Burlington County.

Defendant emigrated to the United States from Vietnam in 1975, and shortly thereafter became employed as an administrative assistant with a construction company in Newark. In addition to her salaried employment, defendant earned extra

income by growing and selling Chinese vegetables on her own property and on leased land. She lived frugally, accumulated savings, and began investing in real estate.

In 1978, defendant purchased a home in Irvington, which she sold two years later for a profit. She then purchased a duplex in Plainfield in 1980, residing in one of the units and renting the other. Beginning in 1983, she leased land in Far Hills and then in 1987 she leased 100 acres of farmland from Loft Farm. In 1988, defendant sold the Plainfield property at a substantial profit which, together with savings and a $79,300 farm subsidy for drought losses at Loft Farm, helped finance defendant's October 24, 1988 purchase of rental property in Millington for $200,000. This purchase followed her earlier purchase of three adjacent parcels of unimproved realty for $52,000 in 1986 and 1987. The deed to the Millington property, recorded on October 28, 1989, was in defendant's name alone. Defendant resided in one of the four living units at the Millington property. Between 1990 and 1991, the Millington property was renovated at a total cost of $192,000. Defendant denied that plaintiff contributed any funds towards the purchase or renovation of the Millington property.

Plaintiff's account of this transaction differed markedly from that of defendant. He claimed that sometime in 1987, after

they had met, defendant advised him that the four-unit rental property would be a good investment for him. He supposedly agreed, even though it was in need of extensive renovation. According to plaintiff, defendant told him the purchase price was over $400,000, and he gave defendant $330,000 to purchase the property: $260,000 from his father and $70,000 from his own savings. Plaintiff, however, did not have any cancelled checks or other proof to substantiate this claim.

Plaintiff further claimed that from November 1990 to April 1991, prior to the parties' marriage, he worked with other laborers to renovate the Millington property. He tiled two bathrooms, a kitchen and a basement; he did teardown work; and he fixed plumbing. Also, whenever a tenant left, plaintiff cleaned the unit up and repainted it for the next tenant. Plaintiff also claimed that in 1990, he contributed $70,000 towards the renovation work - $40,000 from a loan on a life insurance policy and $30,000 in savings — and in 1992, an additional $20,000 borrowed from another life insurance policy. As with the alleged purchase monies, however, plaintiff offered no cancelled checks or other proof of his monetary contribution. Also, there was no proof of the current fair market value of the Millington rental property.

The only other property at issue in the underlying divorce matter was Quonley Farm, which, as noted, was owned equally by plaintiff and his brother. In 1995, when plaintiff's brother decided to quit farming, defendant convinced plaintiff to purchase his brother's 50% interest in the farm, continue to operate the farm with her assistance until his brother was paid off and a sale could be arranged, and to give defendant a 25% interest in the profits. Thus, in May 1995, plaintiff and defendant purchased the 50% interest of plaintiff's brother in Quonley Farms for $350,000, agreeing to assume the existing mortgage of approximately $130,000, and to pay the balance due plaintiff's brother in quarterly installments. Simultaneously, plaintiff and defendant entered into a partnership agreement whereby plaintiff was allocated a 75% interest in Quonley Farm and defendant, a 25% interest.

Even though the parties were not yet married, beginning in 1995, defendant began handling all of plaintiff's personal and business finances, apparently with plaintiff's consent. Plaintiff closed his savings and checking accounts, and defendant provided him with a monthly allowance of $1000 in cash. Defendant also handled the business of the farm. According to defendant, between 1995 and 1997, farm business was very bad and there was not enough profit to pay the mortgage and

plaintiff's brother. Consequently, to meet these other expenses, defendant supposedly used $200,000 of her own savings and began to sell off farm equipment. In 1997, defendant moved into plaintiff's residence and actively assisted with the farming. The parties were married in December 1997 and defendant continued, as before, to handle all the financial aspects of their lives.

That same year, defendant negotiated an agreement for the sale of Quonley Farm, and on February 24, 1997, Quonley Farm was sold for $2,265,000, resulting in net proceeds of approximately $1,681,495.17. Following the sale, the parties continued to reside in the farm residence on Orr Road paying about $650 a month in rent to the purchaser. They purchased 17 acres in Upper Freehold Township where they planned to build a new marital residence. According to defendant, she budgeted $100,000 a year for the parties' living expenses.

Neither party worked following the sale of Quonley Farm, and the couple's only sources of income were the Quonley Farm proceeds and Millington property rents. Plaintiff admittedly relied entirely upon defendant to manage the couple's financial affairs until the Fall of 2001, when he learned for the first time there was a delay in the construction of the marital residence on the Freehold property. When he asked defendant for

an accounting of the Quonley Farm proceeds, she allegedly ignored his repeated requests.

Plaintiff filed for divorce on July 18, 2002, seeking equitable distribution of the marital assets and counsel fees. Defendant counterclaimed for same, alleging however, that the Millington assets were pre-marital and immune from equitable distribution. Plaintiff thereafter, on October 30, 2003, was granted leave to file an amended complaint adding a claim for fraud and seeking, among other things, restitution or imposition of a constructive trust in order to recoup his share of the Quonley Farm proceeds that he alleged defendant dissipated or converted to her own use. He also sought an interest in the Millington rental property.

According to plaintiff, he first learned that defendant lost $1,200,000 of the Quonley Farm proceeds in the stock market during her testimony at a pretrial hearing in the matrimonial action, even though she maintains she advised him of the loss in 2000 and, in fact, the loss was reported on the parties' 2000 federal joint tax return.

In this regard, defendant claimed that the bulk of the Quonley Farm proceeds were lost in bad investments, and that the remainder had been expended on the parties' living expenses and asset purchases between 1999 and 2002. She explained that in

1997 she deposited $600,000 of the Quonley Farm proceeds into a "Ryan Beck Account". The remaining $1,000,000 was deposited into an account at PNC Bank. Thereafter, she transferred over $1,000,000 of Quonley Farm proceeds into a joint brokerage account at Prudential. Although both parties signed the brokerage agreement, plaintiff also signed an account waiver authorizing defendant to make investment decisions.

Defendant admitted that she used several savings and checking accounts, which were in her name alone, as depositories for funds withdrawn from the investment accounts. Defendant also deposited interest and dividend checks from the parties' investments into her accounts, ultimately using funds from these separate accounts to pay marital expenses. Defendant, however, did not maintain a separate account for expenses and rental income from the Millington property. Defendant denied secreting any of these funds.

Plaintiff did not dispute that Quonley Farm proceeds were used to pay for living expenses; to repay a $50,000 loan from his father; to purchase two vehicles; for a $16,000 down payment on a boat for him; to purchase the Freehold property and related expenses; and to pay plaintiff's brother the balance due for his interest in the farm. Plaintiff also acknowledged that defendant purchased life insurance on his life from Family Farm

and pre-paid premiums for five years at a total cost of $65,000, using Quonley Farm proceeds. Moreover, these proceeds were also used to pay the Millington properties' real estate taxes and utility expenses in the documented amount of $25,174.70. However, plaintiff asserted that notwithstanding the stock market losses and marital expenditures, there were additional funds remaining from the Quonley Farm proceeds that defendant had failed to account for and presumably misappropriated. He calculated that defendant had made in excess of $300,000 in unexplained cash withdrawals.

It appears that by 1991, there was only $360,232.03 remaining in the Prudential account. In August 2000, these funds were transferred into a joint account with Morgan Stanley (Morgan). In fact, defendant acknowledged that as of August 31, 2000, there was a balance of $363,000 in the Morgan account. She transferred these funds to various bank accounts and closed the Morgan account in 2001. Defendant insisted that she had used most of the withdrawn funds to meet marital expenses, although, as noted, she did acknowledge that joint funds were used to pay expenses for the Millington property.

Plaintiff retained a forensic accountant, Jeffrey D. Urbach, who reviewed four to five thousand documents dating from 1998 through 2001, including the closing statement for the sale

of Quonley Farm, the account statements for the joint investment accounts with Prudential and Morgan, cancelled checks, tax returns and defendant's bank account statements. He found that plaintiff received approximately $1,800,000 from the sale of Quonley Farm, and after deducting stock market losses of $1,200,000, $600,000 remained from the sale proceeds to be accounted for. Of this amount, defendant converted $300,000 to cash and wrote checks for various expenditures against the remaining $300,000.

More specifically, Urbach determined that beginning in 1998, defendant transferred approximately $300,000 in Quonley Farm proceeds from the joint accounts with Prudential and Morgan to various bank accounts in her name. She then made repeated cash withdrawals, generally in denominations just under $10,000, until the funds were depleted. According to Urbach, it was "common knowledge" that cash transactions for amounts less than $10,000 "come under the radar, so to speak, with IRS reporting."

As to the $300,000 amount that was not converted to cash, Urbach found "that there were checks expended for a variety of personal means." In particular, defendant wrote checks to pay for health insurance, Millington expenses, the foundation on the Freehold property, a car for plaintiff in the amount of $53,000,

landscaping, and several $15,000 life insurance premiums on plaintiff's policy with Prudential.

According to Urbach, in addition to the Quonley Farm proceeds, the parties received $90,000 in joint tax refunds in 2000, which defendant deposited in her Summit bank account. From this account, defendant wrote one check for $5000 to the Wall Street Underground (an investment magazine) and another for $20,000 to open "a new account" with a company called Alaron Futures and Options. Defendant also wrote several checks to pay quarterly taxes for the Millington rental property and the three unimproved parcels. The balance of the funds in the Summit account were withdrawn by a check drawn to cash.

Defendant acknowledged each of the cash withdrawals identified by Urbach, but claimed that more than $300,000 in cash was used on marital expenditures. She paid cash for many household and personal expenses, including food, clothing, shoes, cars, and for entertainment or "pleasure". But these withdrawals did not even meet their needs between 1998 and 2002, requiring her, from time to time, to sell diamonds that she had smuggled into the country to raise extra cash. After reviewing Urbach's report, defendant herself prepared an accounting of her expenditures from 1999 through 2002. The total expenditures claimed for each year were as follows: $288,335 for 1999, which

included the purchase of the Freehold property ($152,136), and related building expenses; $57,640 for 2000; $70,712 for 2001; and $61,300 for 2002. For each year there was an additional unexplained amount denominated 15% "emergency reserved". Also, each accounting included a yearly expenditure for the "maintenance" of the Millington property. Defendant's accountings consisted solely of claimed expenditures and did not reflect any incoming funds such as unearned income from investments, rental income from the Millington property, or tax refunds.

When asked his opinion of defendant's yearly accountings for the cash withdrawals, Urbach responded:

> I'm frankly not sure what they are. It seems to me to be an accounting of both living expenses, expenses related to perhaps the rental property, as well as other things that were paid for during the course of their marriage.

He noted that many of the items listed by defendant were not cash expenditures and were paid for by check. For example, defendant's 1998 accounting included an expenditure of $152,000 for the Freehold property. However, this property was purchased by check at the time of the Quonley Farm closing and not from money subsequently withdrawn by defendant from her accounts. In addition, in Urbach's view, defendant's inclusion of estimated

expenditures for maintenance, as well as the emergency reserve figures, constituted "undocumented leaps of faith".

Defendant acknowledged that she paid for the following items by check: the Freehold property, excavation work for the marital residence, cars for each party, a boat down payment of $16,000, and various life insurance premiums. When asked why she wrote numerous checks to cash in denominations approximating $9000, defendant responded that it was "just convenient".

With respect to the $20,000 transferred from her Summit account to Alaron, defendant explained that the money was used to open a trading account for futures and options and then "lost."

At the conclusion of evidence, on June 28, 2004, the court granted the parties a dual judgment of divorce on the basis of eighteen-months separation. On February 25, 2005, the court issued a 41-page written decision resolving the outstanding issues of equitable distribution and counsel fees. The court found that plaintiff had not proven fraud with respect to either the Quonley Farm proceeds or the Millington property. It applied concepts of equitable distribution to award plaintiff a 30% interest in the Millington property; a 75% interest in the Freehold property; $323,601.66, representing his equitable share

of the Quonley Farm proceeds, and $25,000 in attorney's fees and $7962 in accountant's fees.

Specifically, the judge made the following relevant findings of fact and conclusions of law:

> Contrary to plaintiff's assertions, insufficient support exists to find plaintiff purchased the Millington real estate. First, plaintiff offers few facts to support his claim. No terms of his interest in the realty other than the suggestion defendant was "buying the property for him" are presented. He claims to have provided $330,000 towards the requisite $200,000 purchase price. The provision of the excess cash was not explained. Plaintiff himself had no money for such a deal. He contradicted his own testimony by first stating he used $130,000 of savings, then admitted he had no savings, and finally stated his father gave him $330,000. Mr. Eng although he had funds from the sale of his Freehold farm gave differing versions of when, how much, and why he gave plaintiff money. Plaintiff's testimony is neither reliable nor convincing.
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> Overall the conditions surrounding the real estate purchase as related by plaintiff do not make sense. Plaintiff's lack of credible testimony as to the alleged oral agreement, coupled with no written proofs evidencing any reasonable arrangement or the transfer of funds to him by his father and by him to defendant, dooms his claim to own some or all of the Millington purchase.
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> . . . .

Defendant has carried her burden by providing the contract for sale and deed solely in her name entered into several years before the parties' marriage. Plaintiff thereafter has the burden of persuasion to present facts supporting why the assets should not be excluded from equitable distribution as asserted by defendant. His suggestion the home was purchased "in contemplation of marriage" has no factual support. Unlike in Weiss v. Weiss, plaintiff fails to show any intention on behalf of the parties to marry in 1988 or 1989. 226 N.J. Super. 281 (App. Div. 1988). The Millington house never served as the marital residence; it was defendant's primary residence alone. There was no "intended and active status as a marital asset" shown. Also, plaintiff fails to prove defendant acted as his agent to form a constructive trust.

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Plaintiff fails to meet this burden and his claim for ownership of the Millington property as a result of an alleged oral agreement with defendant to purchase is dismissed.

It is further ordered the remaining Millington lots . . . are defendant's premarital assets not subject to equitable distribution. No evidence challenging her premarital ownership was presented.

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The reported expense for the renovations for both 1990 and 1991 totaled $192,319. This excludes capitalized costs incurred.

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In the instant case the plaintiff's asserted contributions were premarital but

benefited the premarital asset of the defendant. Additionally he presents a claim for the use of marital funds used to maintain the defendant's exempt asset. The court accepts plaintiff's testimony he assisted in the renovations of Millington thus expending efforts towards its improvement . . . . Plaintiff's father provided $50,000 and plaintiff's reconstruction of life insurance liquidations results in another $60,000.

Plaintiff satisfies a total individual contribution to Millington of $60,000 plus seventy-five percent of the $50,000 loaned by his father. (Because the Quonley proceeds were generated 75% from plaintiff and 25% from defendant, plaintiff gets credit for 75% of the loan repaid to Mr. Eng). The total is $97,500. Also, defendant's use of the Quonley proceeds to pay her individual realty taxes and utilities of $25,174.70 must be repaid to plaintiff in full.

Plaintiff presents no support for the impact on the realty's value by his contribution. No evidence of the current Millington value was provided. Based on the limited evidence the court finds plaintiff's interest in Millington is 30% computed by allocating 5% for sweat equity for plaintiff's efforts and 25% representing the percentage of his funds contributed to the overall cost of purchase and renovation. That is, $200,000 to buy the realty from Mr. Northrup and $192,000 to provide renovations. Thus the $97,500 attributed to plaintiff represents 25% of the total $392,000.

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The facts show plaintiff fully assented to the opening of the stock accounts for the speculative purposes for which they were

used. His failure to be involved and to acquiesce to defendant's judgment resulting in poor investments cannot now be reconstituted as "fraud." Numerous facts support this conclusion.

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Therefore, he cannot now hide behind this inaction suggesting he was duped when defendant invested the family fortune in 1999 and lost it all on risky ventures.

The court finds plaintiff made a concerted choice to be uninvolved with his financial affairs before and after the marriage. Contrary to his assertion defendant hid the information from him; he did not care to know. He had every opportunity but declined to be involved because in his words "her business acumen wad better than mine." He trusted her financial judgment. The fact that this proved to be flawed resulting in capital losses rather than capital gains does not result in a claim for waste or wrongful deliberate disposition of marital assets. Such a claim is dismissed.

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With these principals in mind the facts surrounding the disposition of marital assets must be made. The question ultimately to be answered by a weighing of these considerations is whether the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate at a time when the marriage was irretrievably broken. There is no case that charges a spouse with dissipation of marital funds at a time when the marriage is viable and not bad faith exists. Here defendant's motives were simple: she wanted to make more money quickly. Believing she had the requisite

ability and knowledge to engage in such risky markets transactions with most of the marital estate, she was not trying to deprive her husband of his assets. Her only motive was to increase the marital estate.

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This court is one of equity and has no basis to pin fault on a marital party who makes a mistake. Defendant was not deliberately or maliciously losing the assets, which were to serve the parties in their retirement. No claim for the lost stock funds exists.

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Bank Transfers and Dissipation of Assets

Plaintiff proffers defendant appropriated significant sums of money originating from the sale of the Quonley Farm sale proceeds for her own use and benefit. Presenting the bank account obtained, he suggests the transfers from the jointly held brokerage account were for defendant's sole use and therefore she is liable to return the funds to him.

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In summary the following sums were not accounted for:

PNC	$79,000
First Fidelity CD	$50,000
Morgan to Summit	$63,468.88
Alaron	$20,000
Wachovia CD	$100,000
Morgan to Commerce	$50,000
Morgan to Commerce	$19,000
Morgan to defendant in Oct.	$50,000
	$431,468.88

Defendant's "accounting" is woefully deficient in tracing the monies she alone controlled and withdrew from the joint account. To merely take the proceeds from the farm and make deduction therefrom ignores the other substantial deposits of cash. For example, her reconciliation fails to include the monies she did realize as gains early in the investment life. She does not account for the life insurance payment from Met Life of over $13,000; the over $80,000 in income tax refunds and other dividend and interest payments received. Defendant remains responsible for these funds. Her failure to provide candid disclosure requires her to repay plaintiff for his equitable distribution interest. Only she can show the path of the funds. She chooses not to, evidencing bad faith.

Therefore, defendant shall repay plaintiff his equitable share of these funds.

Confronted with the evidence of the withdrawals she offers one and only one explanation: "I used it to pay bills." This is not enough. Defendant shall repay plaintiff from her share of the existing marital assets or her premarital assets 75% of the appropriated cash assets or $323,601.66. Defendant shall within 30 days provide to plaintiff what assets she will liquidate to provide payment.

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[As to counsel fees,]

Nevertheless [defendant] remains in the superior financial position vis a vis the plaintiff. Her failure to disclose information and to provide documents required unnecessary cost and expense. Weighing the factors, the court finds defendant shall bear $25,000 of counsel's

fees and the outstanding sums due Mr. Urbach.

On appeal, defendant raises the following issues:

I. THE TRIAL COURT ERRED IN AWARDING PLAINTIFF A THIRTY PERCENT INTEREST IN THE MILLINGTON PROPERTY, WHICH WAS DETERMINED BY THAT SAME COURT TO BE A PREMARITAL ASSET NOT SUBJECT TO EQUITABLE DISTRIBUTION, AND FURTHER ERRED IN DIRECTING PAYMENT TO PLAINTIFF OF MORE THAN $25,000 FOR REPAYMENT OF QUONLEY FARMS PROCEEDS ALLEGEDLY USED TO PAY MILLINGTON TAXES.

II. THE TRIAL COURT ERRED IN ITS CALCULATION OF UNACCOUNTED FOR SUMS TO BE PAID TO PLAINTIFF BY DEFENDANT BY FAILING TO CREDIT DEFENDANT WITH SIGNIFICANT EXPENDITURES ON BEHALF OF THE PARTIES FROM 1999 THROUGH 2004. IN SO DOING, THE COURT HAS ATTEMPTED TO GIVE PLAINTIFF THROUGH THE BACK DOOR THAT TO WHICH HE WAS NOT ENTITLED THROUGH THE FRONT DOOR.

III. THE COURT ERRED IN FAILING TO CREDIT THE PAYMENTS FOR LIFE INSURANCE POLICIES AS PART OF THE DISTRIBUTION OF THE QUONLEY FARMS PROCEEDS.

IV. THE COURT ERRED IN ITS AWARD OF COUNEL FEES TO THE PLAINTIFF AND AS WELL AS IN ITS ORDER THAT DEFENDANT PAY PLAINTIFF'S ACCOUNTANT'S FEES.

(i)

Defendant first argues that the court erred in awarding plaintiff a 30% interest in the Millington property, which was correctly determined to be a premarital asset not subject to equitable distribution. As such, the burden shifted to

plaintiff to overcome the rebuttable presumption that any subsequent increase in value was also immune. In defendant's view, plaintiff failed to satisfy this burden inasmuch as there was no proof that the value of the property increased during the marriage as a result of plaintiff's efforts.

In addition, defendant argues that there was no basis in law or fact for the court's determination that defendant used $25,174.70 in Quonley Farm proceeds to pay the Millington property taxes and utilities warranting reimbursement to plaintiff in this amount. To the contrary, she argues that the Millington property's rental income was commingled with other marital funds, including the Quonley Farm proceeds, in defendant's checking accounts and consequently, there was no equitable basis for reimbursement to plaintiff. As an alternative argument, defendant asserts that even assuming that the $25,174.70 was derived exclusively from the Quonley Farm proceeds, any amount due plaintiff should not have exceeded 75% of that amount, or $18,881.03.

Defendant's arguments have merit. The award to plaintiff of a 30% interest in the Millington property has no basis in the law of equitable distribution. As an exempt pre-marital asset of defendant, plaintiff's interest therein was limited to the portion of that asset's growth or appreciation during the

marriage directly derived from his efforts. In addition, the court erred in requiring direct reimbursement to plaintiff for the full $25,174.70 expended upon taxes and utilities for the Millington properties.

The trial court found that defendant had satisfied her burden of establishing that the Millington property was a separate pre-marital asset immune from equitable distribution. The court then went on to address plaintiff's claim that he was nonetheless entitled to an equitable share of that property because his efforts and contributions enhanced its value.

The court stated that "plaintiff's asserted contributions were premarital but benefited the premarital asset of the defendant." The court accepted "plaintiff's testimony [that] he assisted in the renovations of Millington thus expending efforts towards its improvement." The court also found that plaintiff contributed $60,000 in liquidated life insurance proceeds, and that plaintiff's father "provided $50,000" towards the renovations. The court credited plaintiff with contributing 75% of the $50,000 loan from his father (or $37,500), because the parties ultimately used Quonley Farm proceeds (allocated 75% to plaintiff) to repay this loan.

The court calculated that plaintiff's total monetary contribution to the Millington property was $97,500 ($60,000 +

$37,500). The cost of purchase ($200,000) and renovation ($192,000) totaled $392,000. Thus, plaintiff's contribution of $97,500, represented 25% of the total cost of purchase and renovation.

The court also observed, however, that "[p]laintiff present[ed] no support for the impact on the realty's value by his contribution." Nonetheless, "[b]ased on the limited evidence," the court awarded plaintiff a 30% interest in the Millington property, "computed by allocating 5% for sweat equity for plaintiff's efforts and 25% representing the percentage of his funds contributed to the overall cost of purchase and renovation."

Because there was "[n]o evidence of the current Millington value", the court directed the parties to obtain a joint appraisal within thirty days. Thereafter, defendant was required to either "buy out" plaintiff's interest through a home equity loan, or list the property for sale. Alternatively, the parties were invited to "discern another course of disposition to provide for example offsets or a deed fixing the respective interests as tenants in common to be held for some future time period . . . ."

In addition, defendant was required to reimburse plaintiff in the amount of $25,174.70 based upon the court's finding that

defendant had used Quonley Farm proceeds to pay real property taxes and utilities for the Millington property. In the court's view, plaintiff was entitled to be "compensated for the monies used to pay the proven bills."

The trial court considered and rejected alternative equitable theories raised by plaintiff in support of his claimed interest in the Millington property, including his request for the imposition of a constructive trust based on fraud, the claimed existence of an alleged oral contract, and his argument that the property was purchased in contemplation of marriage.

The trial court is vested with broad authority to divide the parties' property, and "[a]ppellate review pertaining to the division of marital assets is narrow." Valentino v. Valentino, 309 N.J. Super. 334, 339 (App. Div. 1998) (citing Wadlow v. Wadlow, 200 N.J. Super. 372, 377 (App. Div. 1985)). The appellate court considers only whether the trial court "mistakenly exercised its broad authority to divide the parties' property and whether the result was 'reached by the trial judge on the evidence, or whether it is clearly unfair or unjustly distorted by a misconception of law or findings of fact that are contrary to the evidence.'" Id. at 339. (quoting Wadlow, supra, 200 N.J. Super. at 382). "'A sharp departure from reasonableness must be demonstrated before [appellate]

intercession can be expected.'" Wadlow, supra, 200 N.J. Super. at 382 (quoting Perkins v. Perkins, 159 N.J. Super. 243, 248 (App. Div. 1978)).

Pursuant to N.J.S.A. 2A:34-23h, the trial court in an action for divorce may

> effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by [the parties] or either of them during the marriage . . . .
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> [N.J.S.A. 2A:34-23h (emphasis added).]

In effectuating equitable distribution, the trial court is required to identify the specific assets determined to be subject to equitable distribution, determine the value of each asset, and equitably distribute the assets. Rothman v. Rothman, 65 N.J. 219, 233 (1974). This three-step process has been incorporated by the Legislature in N.J.S.A. 2A:34-23.1, which requires that "[i]n every case, the court shall make specific findings of fact on the evidence relative to all issues pertaining to asset eligibility or ineligibility, asset valuation, and equitable distribution . . . ." N.J.S.A. 2A:34-23.1. The court should also consider the relevant statutory guideline criteria set forth in N.J.S.A. 2A:34-23.1. Ibid.

Under these statutory strictures, property owned by a party at the time of marriage and held separately is generally

considered an "immune" asset, not eligible for distribution. Painter v. Painter, 65 N.J. 196, 214 (1974); Valentino, supra, 309 N.J. Super. at 338; Orgler v. Orgler, 237 N.J. Super. 342, 350-51 (App. Div. 1989). The Painter court explained:

> Clearly any property owned by a husband or wife at the time of marriage will remain the separate property of such spouse and in the event of divorce will not qualify as an asset eligible for distribution. As to this the statute is explicit. We also hold that if such property, owned at the time of the marriage, later increases in value, such increment enjoys a like immunity. Furthermore, the income or other usufruct derived from such property, as well as any asset for which the original property may be exchanged or into which it, or the proceeds of its sale, may be traceable shall similarly be considered the separate property of the particular spouse.
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> [Painter, supra, 65 N.J. at 214 (footnote omitted).]

Stated otherwise, the courts have recognized that if an immune asset is also "passive," meaning that changes in value "are based exclusively on market conditions," then any increase in value during the marriage will also be viewed as the owner's separate property and not eligible for distribution. Valentino, supra, 309 N.J. Super. at 338.

Conversely, if the immune asset is "active," meaning that "contributions and efforts by one or both spouses towards the asset's growth and development" during the marriage "directly

increase[d] its value", then the portion of the asset's appreciation during the marriage that was "derived, in part or in whole, from the efforts of the non-owner . . . is subject to distribution." Ibid.; Orgler, supra, 237 N.J. Super. at 351.

Scherzer v. Scherzer, 136 N.J. Super. 397 (App. Div. 1975), certif. denied, 69 N.J. 391 (1976), cited by the trial court in its decision, is illustrative. There, the trial court refused to award the wife equitable distribution of the husband's interest in a close corporation on the theory that the husband owned the stock prior to the marriage. In remanding the matter to the trial court for the purpose of determining the wife's equitable interest in the corporation, we explained

> The value of defendant's [husband's] interest in the corporation which predated the marriage is, of course, immune from distribution. However, any increase in value occurring after the marriage should be considered eligible to the extent that it may be attributable to the expenditures of the effort of plaintiff wife.
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> In determining the value of such interest, the judge should determine the extent to which defendant's original investment has been enhanced by the contributions of either spouse.
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> [Id. at 401 (citing Painter, supra, 65 N.J. at 196; Chalmers v. Chalmers, 65 N.J. 186 (1974)) (emphasis added).]

The burden of establishing that an asset is immune rests on the party who asserts that it was his or her sole property at the time of the marriage. Pascale v. Pascale, 140 N.J. 583, 609 (1995); Valentino, supra, 309 N.J. Super. at 338; Orgler, supra, 237 N.J. Super. at 351. Once immunity is established, the party seeking to overcome immunity has the burden of showing that

> 1) there has been an increase in the value of the asset during the term of the marriage;
>
> 2) the asset was one which had the capacity to increase in value as a result of the parties' effort (an active immune asset); and
>
> 3) the increase in value can be linked in some fashion to the efforts of the non-owner spouse.
>
> [Sculler v. Sculler, 348 N.J. Super. 374, 381 (Ch. Div. 2001) (footnote omitted).]

Aside from direct monetary contributions, the efforts of the non-owner spouse may include "contributions to the home and children which allowed the [owner] to work at" increasing the value of the asset. Valentino, supra, 309 N.J. Super. at 340. Any increase in value occurring in an "active immune asset" after the marriage, is generally eligible for equitable distribution. Id. at 337-40.

Thus, in Valentino, supra, 309 N.J. Super. at 337-40, we declined to disturb an equitable distribution award giving the

wife 10% of the appreciation in value of real property acquired by the husband prior to the marriage which he converted from a strip-mall to a gas station. We rejected the husband's argument that the gas station property was a "totally passive asset," such as "a stock or a house . . . owned prior to the marriage, whose value increased solely due to market forces." Id. at 339. Rather, the gas station "property was an active immune asset, that is, a premarital asset that increased due to contributions toward its growth and development." Ibid. (emphasis added). While the wife's direct contributions to the operation of the gas station were minimal, "her contributions to the home and children allowed [the husband] to work at his business and thus pay down the mortgage on the property." Id. at 340.

Thus, if a husband and wife actively work together to increase a pre-marital asset owned by one of them, both are entitled to share in the active increase of the value of the asset. However, the trial court here did not apply this principle in awarding plaintiff a 30% interest in the Millington property. In fact, there was no reasoned application of the statute and case law to the evidence proffered by plaintiff regarding any post-marital contributions which might have increased the value of the Millington property.

To be sure, the trial court correctly recognized that once defendant had satisfied her burden of establishing that the Millington property was an immune pre-marital asset, the burden of proof on this issue shifted to plaintiff. However, plaintiff presented no proof of the value of the Millington property at the times of the marriage and the filing of the divorce complaint. Proof of these values was required in order to perform the requisite analysis under Rothman, supra, 65 N.J. at 232: determining whether the Millington property was "eligible for distribution", fixing the value of the property, and determining an equitable allocation. The trial court recognized that plaintiff failed to present any evidence regarding the property's "current value". This finding should have led to the conclusion that plaintiff failed to overcome the rebuttable presumption that the Millington property remained an immune asset. Alternatively, the court could have directed the parties to obtain a joint appraisal prior to making its decision. However, the trial court overlooked this gap in the evidence, indicating that it awarded plaintiff an interest in the Millington property "[b]ased on the limited evidence".

Furthermore, although the trial court referenced controlling precedent, including Painter, Valentino and Scherzer, it failed to apply those cases to the facts at hand.

For example, the court correctly referenced Scherzer for the proposition that an increase in the value of a pre-marital asset "'occurring after the marriage'" should be considered eligible for equitable distribution to the extent that the increased value may be attributable to the contributions of the non-owner spouse (emphasis added). The contributions found by the court included plaintiff's monetary contribution of $60,000 towards renovations and 75% of the $50,000 loan made by his father which was repaid using the Quonley Farm proceeds. The court calculated that plaintiff's monetary contributions constituted 25% of "the overall cost of purchase and renovation." However, defendant purchased the Millington property in 1988 and the renovations were completed in 1991. Thus, these contributions were all made before the marriage in 1997. Under these circumstances, plaintiff clearly failed to satisfy his burden of demonstrating that any post-marital contributions or efforts on his part were somehow linked to an increase in the property's value.

Despite the fact that his contributions were "premarital", and that he had failed to present evidence regarding the impact of his contributions on the present value of the Millington property, plaintiff nevertheless was awarded a 30% interest in the total value of the exempt property, rather than a percentage

interest limited to the marital appreciation portion. In so doing, the court disregarded the statutory classification of separate and marital property, and essentially applied the concept of marital partnership theory underlying the equitable distribution statute to an asset acquired and improved prior to the marriage.

In conclusion, the award of a 30% interest in the Millington property to plaintiff is in error, and therefore a remand is necessary for re-determination of plaintiff's claim for an equitable share of the Millington rental property with appropriate fact-findings regarding pre-marital value, any post-marital increase in value, and marital contributions.

We also find error in the court's award to plaintiff of $25,174.70. The trial court failed to differentiate between the unimproved Millington properties and the Millington rental property, finding generally that defendant used $25,174.70 in Quonley Farm proceeds to pay property taxes and utilities on "all" four of the Millington properties. In requiring defendant to reimburse plaintiff for the $25,174.70 expended on "all" of these properties, the court reasoned that defendant had used joint assets "to pay her individual realty taxes and utilities". However, according to the court's own findings, this is true

only to the extent that defendant diverted joint assets to pay for the expenses of the immune unimproved properties.

To the extent joint assets were diverted to the Millington rental property found eligible for equitable distribution, reimbursement was inappropriate. Defendant, of course, cannot be charged with having dissipated marital funds if the funds were contributed to the maintenance of an asset subject to equitable distribution. Consequently, defendant is required to reimburse plaintiff only for payments that inured exclusively to her benefit.

Further, to the extent defendant diverted marital funds to the immune properties, she should be required to make reimbursement for only 75% of the amount diverted consistent with the percentage allocation of the Quonley Farm proceeds for equitable distribution purposes.

As previously explained, however, there was not a proper determination of eligibility of the Millington rental property for equitable distribution. If plaintiff can establish on remand that the value of Millington increased after the marriage making it an active immune asset, then any contribution of marital funds to this property would be relevant in determining his equitable interest in the appreciation, but it would not be subject to reimbursement. As such, the amount subject to

reimbursement, if any, must be re-determined on remand consistent with the trial court's determination of the Millington property's eligibility for equitable distribution.

In conclusion, the award of a 30% interest in the Millington property to plaintiff and direct reimbursement in the amount of $25,174.70 is reversed. In addition, we remand for re-determination of plaintiff's claim for an equitable share of the Millington rental property with appropriate fact-findings regarding pre-marital value, any post-marital increase in value, and marital contributions. Further, plaintiff's demand for reimbursement of $25,174.70, used to pay expenses for all four Millington properties, must be resolved consistent with the court's determination of the rental property's eligibility for equitable distribution.

(ii)

Defendant next argues that the court erred in finding she dissipated $431,468.88 of the Quonley Farms proceeds and in awarding plaintiff a 75% share ($230,601.66) of the dissipated asset. We disagree.

To the extent that Quonley Farm proceeds were lost in the stock market, the court declined to award plaintiff reimbursement, finding that there was no evidence of bad faith,

as defendant's only motive in investing in risky market transactions was to increase the marital estate.

However, the court also found that defendant had failed to "fully account" for the remaining Quonley Farm proceeds. She also failed to account for over $80,000 in income tax refunds, "other dividend and interest payments received", the monies realized as gains "early in the investment life," and a payment from Met Life of over $13,000. In the court's view, defendant's accounting was "woefully deficient in tracing the monies she alone controlled and withdrew from the joint account." Further, there were "few proofs supporting the claimed expenses." Bank documents showed that defendant transferred the balance of the Quonley Farm proceeds from joint investment accounts to her own accounts and then made numerous cash withdrawals. The court cited defendant's "failure to provide candid disclosure" regarding the "path of the funds" as evidence of bad faith.

In particular, the court found that defendant had failed to account for the following cash withdrawals, made between 1998 and 2002, and derived from the Quonley Farm proceeds:

PNC	$79,000
First Fidelity CD	$50,000
Morgan to Summit	$63,468.88
Alaron	$20,000
Wachovia CD	$100,000
Morgan to Commerce	$50,000
Morgan to Commerce	$19,000
Morgan to defendant in Oct.	$50,000

$431,468.88

The court deemed insufficient defendant's explanation that she had used this cash to pay bills. It stated that "[t]o merely take the proceeds from the farm and make deduction therefrom ignores the other substantial deposits of cash" including the initial gains realized on the Quonley Farm investments; $13,000 in Met Life insurance proceeds; over $80,000 in income tax refunds; and other dividend and interest payments. Accordingly, defendant was required to reimburse plaintiff for 75% of the $431,468.88 ($323,601) in unaccounted for cash withdrawals from marital assets.

On reconsideration, the court adhered to its original determination regarding the dissipated sums. It found that defendant "offer[ed] nothing new just the same suggestions made at trial." The court emphasized that the parties had other funds beside the Quonley farm proceeds, including rental income, insurance rebates, income tax refunds and unearned income. Therefore, "[d]efendant's calculation of expenses against the Quonley proceeds is incorrect." The court rejected defendant's argument that it had not properly credited her for expenditures made during the marriage, explaining that "claimed expenses which were documented were credited" including the purchase of

the Freehold property and related expenses, as well as other expenses for which defendant had produced receipts.

The trial court stated its view on this issue as follows:

> The problem in this matter is defendant's general assumptions were not accepted. Her credibility was nullified and thus her general assertions that she spent money on living expenses were rejected. She alone controlled the funds. She alone took thousands of dollars and failed to reveal what happened to the funds. Assertions such as $50,000 was stolen by a thief were absolutely rejected. The withdrawal of $50,000 with no explanation of where the money was deposited or used was not accepted by the court. Defendant had the burden of proving the disposition of those assets. She held sole control of all monies in numerous depository accounts. She failed to show she used the money for the marital enterprise.

As previously stated, N.J.S.A. 2A:34-23h vests the trial court in an action for divorce with broad authority to divide the parties' property and appellate review pertaining to the division of marital assets is narrow. Wadlow, supra, 200 N.J. Super. at 377. Indeed, "[t]he general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Id. at 413. Based on our review of the record,

we are satisfied that there was sufficient credible evidence to support the trial judge's award to plaintiff of a 75% distributive share of the dissipated marital asset. Pascale v. Pascale, 113 N.J. 20, 33 (1988); Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974); see also Bonnco Petrol, Inc. v. Epstein, 115 N.J. 599, 607 (1989) (holding that trial court's fact findings bind appellate court if supported by evidence, especially when the evidence is testimonial and trial court has had opportunity to observe witnesses and evaluate their credibility).

Here, the statutory criteria most relevant in determining the equitable distribution of the Quonley Farm proceeds was "[t]he contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a party as a homemaker . . . ." N.J.S.A. 2A:34-23.1i. Also relevant was "[a]ny written agreement made by the parties before or during the marriage concerning an arrangement of property distribution . . . ." N.J.S.A. 2A:34-23.1e.

The source of the assets identified for equitable distribution were the pre-marital Quonley Farm proceeds, which the parties had originally agreed to allocate 25% to defendant and 75% to plaintiff. Thus, the court adopted this percentage

allocation for purposes of equitable distribution. This was entirely proper.

So too was the court's determination as to what remained, or should have remained, of these proceeds. As noted, the court declined to charge defendant with $1,200,000, in stock market losses that occurred in 1999 and 2000, based upon its findings that: defendant "was not trying to deprive her husband of his assets;" "[h]er only motive was to increase the marital estate;" and "[n]o evidence show[ed] the parties' marriage was in trouble in 1999 or 2000". The real dispute arises as to the remaining sums, defendant claiming they were spent on marital expenses and plaintiff maintaining they were dissipated.

We have explained the parameters of dissipation of marital assets as follows:

> The implicit premise of defendant's argument is that dissipation of marital property can only occur after the filing date of the divorce complaint. We reject that proposition and conclude that the power to order equitable distribution does not depend upon the "existence" of marital property on the filing date of the divorce complaint. Where property has been dissipated during the marriage the asset subject to distribution may take the form of a cash indebtedness to be imposed by the court upon one spouse in favor of the other.
>
> [Kothari v. Kothari, 255 N.J. Super. 500, 510 (App. Div. 1992).]

The factors in determining whether a marital asset was dissipated include proximity of challenged expenditures to separation, whether such expenditures were typical of expenditures made prior to the breakdown of the marriage, whether the expenditures benefited only one spouse, and the need for, and amount of, such expenditures. Id. at 506-10; see also Monte v. Monte, 212 N.J. Super. 557, 567-68 (App. Div. 1986) (one party's "'intentional dissipation'" of marital assets constitutes a "'fraud on marital rights'", and "the [resulting] debt will not be charged to the" other party (quoting Sharp v. Sharp, 473 A.2d 499, 505, cert. denied, 481 A.2d 240 (Md. 1984)). The question ultimately to be answered is whether marital assets were expended with the intent of diminishing the other spouse's share of the marital estate. Kothari, supra, 255 N.J. Super. at 507.

Here, the trial court properly found dissipation based on, among other things, defendant's conduct in making $431,468.99 in "unexplained" cash withdrawals beginning in Spring 1998. We conclude this finding is supported by sufficient credible evidence in the record, and the award to plaintiff of 75% of this dissipated asset in equitable distribution comports with applicable legal principles. We find no reason to disturb this particular result.

(iii)

Defendant next argues that the court ignored documentary evidence presented on reconsideration demonstrating that an additional $182,000 of the Quonley Farm proceeds was used to purchase various life insurance policies between 1999 and 2004. According to defendant, these expenditures offset the $431,468.88 in "unaccounted for" funds found by the court. Defendant also contends that there must be a remand because the court failed to equitably distribute all the life insurance policies.

In its original decision, the court made the following determinations regarding the parties' various life insurance policies:

> 1) A whole life Farm Family policy having a cash surrender value of $53,060.72, was to be liquidated with the proceeds allocated 75% to defendant and 25% to plaintiff.
>
> 2) A whole life Prudential policy having a cash surrender value of $43,731.48, was to be liquidated and applied in the same percentages. In the event plaintiff sought to retain the policy, he was required to reimburse defendant for her equitable share.
>
> 3) The court observed that in 2001 plaintiff received a dividend check from Metropolitan Life in the amount of $13,986.35. However, there was "no trial testimony" concerning a policy with Metropolitan Life.

Nonetheless, the court stated that if there was such a policy obtained during the marriage, then the parties were required to divide its value pursuant to the same percentage allocation.

4) The court observed that in 2000 and 2001 defendant wrote checks, each in the amount of $3190, to Great American Life Insurance Company. However, defendant did not provide evidence disclosing the "nature or value of this policy".

5) The court observed that there was some suggestion that defendant owned a $1,000,000 term policy on her life. Defendant would be permitted to retain this policy "upon proof [that] it was not combined with a whole life type component such as a universal life policy". Further, "[a]ny cash surrender value must be divided in the above stated percentages".

On reconsideration, defendant attempted to introduce additional evidence regarding premium payments on these life insurance policies. More specifically, she claims to have had expended $182,555 from the Quonley Farm proceeds to pay insurance premiums as follows:

1) $27,060 for a Farm Family whole life policy;

2) $14,260 on a Great American Insurance term policy;

3) $19,534 on a Prudential term policy;

4) $94,605 on a Prudential whole life policy;

5) $27,096 on a $1,000,000 Prudential term policy on defendant's life.

Defendant requested that the court "add back" these amounts against the "unaccounted for" sums derived from the Quonley Farm proceeds. On reconsideration, however, defendant did not raise any issues with respect to the equitable distribution of these policies.

The court declined to consider the additional evidence relating to the life insurance premium payments, reasoning that defendant could have presented such evidence at trial, but chose not to. The court commented that "[r]ethinking unsuccessful trial strategy cannot be a basis for reconsideration." We agree.

The reconsideration of a prior decision under Rule 4:49-2 "'is a matter within the sound discretion of the court, to be exercised in the interest of justice.'" Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). In fact, "[t]he standards for reconsideration are substantially harder to meet than are those for a reversal of a judgment on appeal." Regent Care Ctr., Inc. v. Hackensack City, 20 N.J. Tax 181, 184 (Tax 2001), aff'd, 362 N.J. Super. 403 (App. Div.), certif.

denied, 178 N.J. 373 (2003). Courts should grant reconsideration only under certain circumstances:

> "Reconsideration should be used only for those cases which fall into that narrow corridor in which either 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence . . . .
>
> Alternatively, if a litigant wishes to bring new or additional information to the Court's attention which it could not have provided on the first application, the Court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the Court must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration."
>
> [Cummings, supra, 295 N.J. Super. at 384 (quoting D'Atria, 242 N.J. Super. at 401-02).]

The trial court properly exercised its discretion in denying defendant's motion for reconsideration. First, the court did not fail to consider the evidence proffered by defendant. Second, we cannot find that the court's decision regarding the dissipated assets was based on plainly incorrect reasoning. Third, as the court below correctly pointed out, "the purpose of [a motion for reconsideration] is not to re-

argue the motion that has already been heard . . . ." State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995), remanded on other grounds, 143 N.J. 482 (1996). In this case, defendant did not make new or different arguments on reconsideration, but simply offered some additional documentary evidence to support her claim that she paid life insurance premiums. This evidence did not demonstrate that the life insurance premiums were paid from funds defendant was charged with having dissipated.

In addition, there is no need for a remand for reconsideration of the court's equitable distribution determination. Contrary to defendant's assertion, the court adequately determined the equitable distribution of the parties' life insurance policies in its original decision. Defendant did not challenge the court's equitable distribution determination on the basis of the newly submitted evidence. Rather, her challenge to the court's decision was limited to its alleged failure to credit premium payments against the Quonley Farm proceeds. "An issue not raised before the trial court is not appropriate for appellate review." Winterberg v. Lupo, 300 N.J. Super. 125, 134 (App. Div. 1997) (citing Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973)). Further, defendant's brief does not raise any specific claim of error with respect to the court's original equitable distribution determination, but

merely recites that the court did not address all of the policies. In fact, the court's original decision did address all of the policies and required the equitable distribution of any whole life components having a cash surrender value. The court did not order any specific distribution of the Great American policy because defendant provided no evidence of its "nature or value". However, on reconsideration, defendant disclosed that this was a term policy. As such, there was no cash surrender value subject to equitable distribution.

In sum, we find that the court did not err in failing to credit payments for life insurance premiums against the cash withdrawals that defendant failed to account for. Further, there is no need for a remand to effect the equitable distribution of any life insurance policies.

(iv)

Lastly, defendant argues that the court erred in requiring her to pay counsel fees of $25,000 and forensic accountant fees of $8000. We disagree.

"[T]he award of counsel fees and costs in a matrimonial action rests in the discretion of the [trial] court." Williams v. Williams, 59 N.J. 229, 233 (1971); Heinl v. Heinl, 287 N.J. Super. 337, 349-50 (App. Div. 1996). Absent a clear abuse of discretion, an appellate court will not disturb a trial court's

award of counsel fees. Chestone v. Chestone, 285 N.J. Super. 453, 468 (App. Div. 1995).

Pursuant to N.J.S.A. 2A:34-23, "[t]he [trial] court may order one party to pay a retainer on behalf of the other for expert and legal services when the respective financial circumstances of the parties make the award reasonable and just." In considering such an application, the court is required to "review the financial capacity of each party to conduct the litigation and the criteria for award of counsel fees that are then pertinent as set forth by court rule . . . . and the good or bad faith of either party." Ibid.

Rule 4:42-9 authorizes an award of legal fees and refers to Rule 5:3-5, which lists factors to be considered in awarding legal fees in a matrimonial matter. To the extent relevant here, in determining such an application, the court must consider the requesting party's need, the other party's ability to pay, the good and bad faith of each party, and the reasonableness of the positions advanced by each. R. 5:3-5(c).

Bad faith includes (1) "unwillingness or intransigence during . . . litigation . . . to fairly negotiate an equitable distribution" of marital property, (2) pursuit of relief to which one knew or should have known that he or she was not reasonably entitled under the facts or the law, (3) "intentional

misrepresentation of facts or law" to avoid or unfairly "limit equitable distribution", and (4) vexatious or wanton acts or acts initiated to oppress one's opponent. Borzillo v. Borzillo, 259 N.J. Super. 286, 293-94 (Ch. Div. 1992).

Applying these principles here, we find no basis to disturb the trial court's award of counsel and expert fees to plaintiff. The court properly evaluated the relevant factors and its findings of fact were amply supported by credible evidence in the record.

The trial court's comprehensive decision sets forth a litany of examples illustrative of defendant's failure to cooperate during the course of this litigation. For example, defendant was dilatory in responding to discovery requests, and behaved in an adversarial fashion during her deposition by reading a magazine during questioning, expressing impatience, and formulating answers that were not responsive to the questions. Also, defendant claimed that she had discarded relevant financial documentation; initially failed to produce documents evidencing specified bank accounts, claiming that thieves had taken them, and then produced some of the requested documents "late into the trial"; and revealed for the first time at trial that she had a quantity of diamonds that she sold as needed. Her trial and deposition testimony was inconsistent,

and her failure to comply with discovery requests required plaintiff's counsel to issue numerous subpoenas to banks, investment firms, and accountants to obtain the necessary financial documentation.

Although the court acknowledged that plaintiff too was guilty of some discovery violations, far more "troubling" was defendant's refusal to turn over her financial records, which were essential to any settlement or disposition of the case. The court found that defendant's refusal to provide the requested financial disclosure was in bad faith and required plaintiff to incur unnecessary costs to trace the funds that she alone controlled.

The court also considered that defendant was in a far superior financial position because she had income from rental properties with an intrinsic value in excess of $1,000,000. Further, the court indicated that it had reviewed the certification of services prepared by plaintiff's attorney, as well as Urbach's submissions. It acknowledged that the escalation in plaintiff's expert and attorney fees was attributable, in part, to plaintiff's unsuccessful claim that he owned Millington. Nonetheless, defendant's failure to disclose financial information and to provide documents "required

unnecessary cost and expense" in tracing the path of the Quonley Farm proceeds.

After weighing the foregoing considerations, the court required plaintiff to contribute only $25,000 towards plaintiff's legal fees totaling $100,906.15, and $7962 towards the accountant's fee of $21,077.47. Defendant's legal fees, on the other hand, were only $30,000.

The record amply supports the trial court's finding that defendant frustrated discovery of financial documentation regarding the Quonley Farm proceeds, claiming that she had thrown away some records. Further, in response to questioning, defendant obfuscated, refused to give simple "yes" or "no" answers, and speechified on irrelevant topics not responsive to questioning. This explains her four days of testimony comprising nearly seven-hundred pages of the transcripts.

Accordingly, we find no abuse of discretion in requiring defendant to contribute toward plaintiff's legal and expert fees in the amount set by the trial court.

The portion of the judgment awarding plaintiff a 30% interest in the current value of the Millington property and direct reimbursement of $25,174.70 is reversed and remanded for further proceedings consistent with this opinion. In all other

respects, the February 25, 2005 judgment and the July 8, 2005 order denying reconsideration are affirmed.