2010 WL 10969671 (N.J.Super.A.D.) (Appellate Brief)
Superior Court of New Jersey, Appellate Division

Rhonda MCMANUS, Plaintiff/Appellant,
v.
Matthew SALEEBY, Defendant/Respondent.

No. A-4496-08T2.
August 4, 2010.

On Appeal From: Superior Court of New Jersey Somerset County Somerville, NJ 08876-1262
Sat Below: Hon. Julie M. Marino, J.S.C.

Brief and Appendices of Plaintiff/Appellant Rhonda McManus

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***i** *TABLE OF CONTENTS*

***iii TABLE OF AUTHORITIES**
CASES

5 *STATEMENT OF FACTS

PRELIMINARY STATEMENT

Plaintiff-Appellant Rhonda Jean McManus and Defendant-Respondent Mathew Saleeby were married on June 12, 1983. Two children were born of the marriage: Justin Saleeby, born XX/XX/1982; and Paige Saleeby, born XX/XX/1989. The parties separated on XX/XX/1990. On May 27, 1993. A final judgment of divorce was entered after a default hearing before Hon. Edward V. Gannon, J.S.C., wherein Defendant Mathew Saleeby did not appear. (Pa 76-78).

The instant appeal concerns several orders entered on various motions by the Trial Court during litigation to enforce a post-dissolution Consent Order entered on March 3, 2008. ("Consent Order") (Pa 79-81). The Consent Order directed Defendant to

pay Paige's college tuition in several installments, and child support of $100 per week for both children, inter *alia.* (Pa 80-81). The Consent Order also gave Plaintiff, in its first substantive clause, the right to vacate the Consent Order and reinstate all her claims disposed of in the Consent Order that were outstanding at the plenary hearing on October 30, 2007, and brought initially by Plaintiff's motion in October 2005. In the event Defendant was in breach of "any" of his obligations under the Consent Order. (Pa 79).

Defendant soon defaulted as to payment of Paige's college tuition per the Consent Order, and has continually done so since its entry. The sequellae of Defendant's willful violations of the Consent Order resulted in a July ***6** 9, 2008 Order by the Trial Court (Judge Robert B. Reed, J.S.C., presiding) which the Plaintiff now asks this court of appellate jurisdiction to restore. This is the essence of the instant appeal. The mechanism by which Plaintiff asks this Court to do so is to vacate the Order of Hon. Julie Marino, J.S.C., dated December 23, 2008 (Pa 147 -148), which effectively (though not expressly) vacated the July 9, 2008 Order and Decision of Judge Reed. (Pa 98-105). And as a housekeeping matter, this Appeal also seeks to vacate the February 27, 2009 Order denying Plaintiff's request for reconsideration of the December 23, 2008 Order. (Pa 159-162).

STATEMENT OF FACTS

Plaintiff and Defendant were married on June 12, 1983. Two children were born of the marriage: Justin Saleeby, born XX/XX/1982; and Paige Saleeby, born XX/XX/1989. The parties separated on XX/XX/1990. On May 27, 1993, a final judgment of divorce was entered after a default hearing before Hon. Edward V. Gannon, J.S.C, wherein Defendant Mathew Saleeby did not appear. (Pa 76-78). Plaintiff was represented by a Legal Aid Services provided attorney. (Pa 78).

The Judgment of Divorce continued a prior Order of child support under FD 14-726-91, but left open the issues of spousal support, equitable distribution and counsel fees. (Pa 77-78).

Defendant had largely absented himself from the lives of his children and was derelict as to any respectable measure of support for many years. During the interim, Defendant developed, among other things, a successful ***7** career as a restaurant impresario, a taste for the finer things in life, and a reputation as a "Diamond Jim" with the ladies. (Pa 18-22)(also originally attached in part to Plaintiff's motion papers before Judge Reed at Pa 213).

After several years of intermittent to non-existent payment of child support from Defendant to Plaintiff, Rhonda McManus brought an action for increased child support and arrears in October of 2005, venued in Morris County, alleging that the Defendant had been hiding assets and engaging in all manner of fraudulent shenanigans and misrepresentations in avoidance of his obligations to his children, and requesting a plenary hearing as to all the issues of **financial** support and Defendant's ability to pay not determined when the J.O.D. was entered. (Pa 76-78).

On Plaintiff's motion, the matter was ultimately transferred to Somerset County by Order dated December 20, 2005 of Judge Stephan C. Hansbury, J.S.C., (Pa 72-73), as it was then the place of residence of the two children, who resided with Plaintiff. (Pa 73). That Order also directed discovery and noted that Defendant was already in arrears "over $10,000". (Pa 73).

After transfer to Somerset County, there is indication both of some of the outstanding issues and case management as of May 11, 2007. (Pa 74-75). By October 30, 2006, the action had reached the point of a plenary hearing and opening statements were heard. (Pa 7-22.) The action was settled at or about that time, and culminated in the Consent Order, which was agreed upon at the eleventh hour during the plenary hearing as to Defendant's income, his ability to pay child support and college expenses, plus ***8** arrearages, all retroactive to the date of the filing of the Original motion in October 2005.

On March 3, 2008, Hon. Peter J. Buchsbaum, J. S. C., entered a Consent Order resolving all then outstanding issues regarding child support, Defendant's contribution to Paige Saleeby's college tuition and the issue of respective counsel fees raised in the motion. ("Consent Order")(Pa 7 9-81). Both parties were represented by counsel at that time: Plaintiff Rhonda McManus by Michael Resnik, Esq, of Budd, Larner, Gross, Greenberg & Sade, P.C., and Defendant Mathew Saleeby, by William M. Laufer,

Esq., of Laufer, Knapp, Torzewski, Dalena & Sposaro. Respective counsel had executed the Consent Order on November 16, 2007 and November 19, 2007, respectively. (Pa 81).

By the time of the plenary hearing, on October 30, 2006, Plaintiff had totally exhausted her resources insofar as counsel fees were concerned, had the prospect of Paige's college bills looming, and was obligated to Mr. Resnik's firm in an amount on excess of $18,000.00. Much of this was expended garnering evidence of Mr. Saleeby's **financial exploits**, much of which defies belief. This evidence was ultimately presented, in part before Judge Reed in May 2009, and was explored to great effect in his Statement of Reasons, as will be expanded upon herein.

The post-Consent Order landscape of this case begins to take shape at a hearing before Judge Reed that was held on May 9, 2008. (Pa 23-37.) On Plaintiff's motion to enforce the college tuition payment obligation in the Consent Order and for a plenary hearing under its express terms, Hon. Judge Robert B. Reed, J.S.C., found that ***9** Defendant violated the terms of the Consent Order, and granted Plaintiff substantial relief through an Order with attached Statement of Reasons dated May 9, 2008. (Pa 82-89). At that time, Judge Reed did not go so far as to order a plenary hearing. (Pa 82-83; Pa 29). The Trial Court did, however, find the Defendant to have made misrepresentations as to his **finances** in the past, but did not greatly expand on the topic. (Pa 87-88).

Defendant sought reconsideration of May 9, 2008 Order. While Defendant's reconsideration motion was pending, Plaintiff brought an enforcement motion as an Order To Show Cause in Aid Of Litigant's Rights, which was granted, as Defendant was again in breach of now both the Consent Order and Judge Reed's May 9, 2008 Order. (Pa 90-92). At a hearing on June 26, 2008 (Pa 38-52), Judge Reed considered the matter at length, and issued an Order and attached Statement of Reasons Dated July 9, 2008, (Pa 17-24).

The July 9, 2008 Order and Statement of Reasons granted both the Defendant's Motion for Reconsideration and Plaintiff's enforcement motion relief in substantial part, and which substantially modified and effectively clarified that of May 9, 2008. (Pa 101-105).

The Statement of Reasons attached to the July 9, 2008 Order included findings by the Court that during an approximate three year period in which Defendant represented to the Court in sworn statements that he earned approximately $131,000: representations that formed the basis for the Consent Order calculations from the court's perspective. In truth, Defendant had passed nearly $900,000 through his personal bank account (Pa 102-103), paid over ***10** $51,000.00 off on his girlfriend's credit card in one year (Id.), and generally lived a lifestyle totally inconsistent with his reported income. The Trial Court also found that Defendant had used his son to conduct a straw transaction whereby his then brand new 2006 Mercedes 500 CL Coupe (Pa 103; Pa 118-119; Pa 280, originally attached to Plaintiff's Motion) - this is the big, ultra-sleek, eight cylinder boattail model: See *www.mbusa.com* to admire it - which was put free and clear in Justin Saleeby's name, and then transferred back into Mathew's name with a “lien” of $65,000.00 in the name of one of Defendant's frequent business cronies, Barry Daichman. (Pa 116-117, Originally attached to Plaintiff's Motion). It is hard to imagine any finder of fact not recognizing a fraudulent conveyance here.

It should also be noted that the record before Judge Reed also reflected the Defendant's recent acquisition of a Morris Township Moore Estate condominium residence then valued at about $500,000.00. (Pa 45-47). Judge Reed made these observations and concluded that Defendant had defrauded the Court, Plaintiff and his daughter, and very conservatively imputed $152,000.00 per year income during the relevant time period, and also, that because Defendant had already repeatedly violated the Consent Order, that he was in clear breach of its terms. (Pa 101-103).

Upon these findings, Judge Reed's July 9, 2008 Order mandated that a plenary hearing be conducted as to the relief originally requested in the Motion resolved by the Consent Order, and other interim relief: namely that Defendant pay a $20,000.00 counsel fee to Plaintiff *pendente lite* to conduct the plenary hearing as mandated by ***11** the Consent Order and Defendant's bad faith; interim child support to the Plaintiff in the amount of $278.00 per week, and interim payment of Paige's college

tuition, again, *pendente lite*. The plenary hearing was scheduled for August 5 and 6, 2008. This July 9, 2008 Order in all respects replaced the May 9, 2008 Order, is the Order which Plaintiff seeks to reinstate through this Appeal. (Pa 98-99).

The July 9, 2008 Order specifically granted Plaintiff's request for a plenary hearing to consider the issues of past and present income, fraud, and retroactive and future support. The plenary hearing was scheduled for August 5th and 6th, 2008. *Pendente lite*, Judge Reed increased the child support obligation to $278 per week retroactive to the date of filing of the original motion. The order on the reconsideration motion directed enforcement of the $15,000.00 per year college obligation and directed payment in full by August 1 of each year or enrollment in a suitable payment schedule. Finally, the judge awarded a $20,000.00 advance counsel fee to be paid by Defendant for the purpose of funding the prosecution of the plenary hearing.

While it is axiomatic that appeals are to be made from orders, not statements of reasons or opinions, Judge Reed's analysis and rationale for his decision, particularly as to Defendant's flagrant bad faith before the court, are worthy of taking into account. In page four (4) of Judge Reed's rather powerful statement, he notes a “incredible difference” between the claim by Defendant that he earned $131,000.00 over three (3) years, in stark contrast to the ***12** nearly $900,000.00 flowing through his personal checking account during the same period.

Judge Reed further cited evidence gleaned from “1 1/2 inches of documents” that the Defendant's income was very unlikely the amount he claimed, stating:

…his [Defendant's] lifestyle shows that his income is greatly in excess of that amount. Defendant hides income and possessions by placing them in other people's names. Defendant, his business partner, and Defendant's girlfriend, have apparently all been caught in lies with regard to the transfer and payment of monies.

(Pa 45-47).

The Court described as credible testimony elicited in Plaintiff's submissions which indicated $51,000.00 in credit card payments made to the Defendant's girlfriend's account, and the existence of a new convertible Mercedes worth $80,000.00 in his son's name engineered:

… [T]o escape detection, and [he] has otherwise engaged in a course of conduct for which a Court of Equity should have no tolerance.

(Id.).

Lacking a credible statement from Defendant in the form of a Case Information Statement, Judge Reed invoked the Court's equity power and reasonably imputed income in the amount of $150,000.00 gross per year to Defendant. From this imputed income, flowed the support award(s), and the award of a prospective counsel fee pendent elite to fund the impecunious Plaintiff's cause moving forward with the litigation. This number was not arbitrary and immutable, but rather, was to be either verified or ***13** otherwise through the plenary hearing scheduled by virtue of entry of the July 8, 2008, Order.

While awaiting the plenary hearing ordered by Judge Reed, which had been adjourned by the Court at its instance, Defendant failed to pay Paige's college tuition, yet again in violation of Judge Reed's July 9, 2008 Order, despite having brought a Motion by Order To Show Cause the very next day for a stay of that Order, which was denied (Pa 106), and also in contravention of the earlier Consent Order.

Defendant then moved before the Appellate Division for emergent interlocutory relief vacating the July 9, 2008 Order, which was denied on August 29, 2008, by Judge Christine L. Miniman, J.A.D. (Pa 107). The emergent classification requested for Defendant's interlocutory appeal was also denied, by Order of Ronald B. Graves, J.A.D., on July 30, 2008. (Pa 108). Much time money and effort for defense, but yet Defendant failed and or refused to comply with the Order in a timely manner.

Plaintiff consequently moved before Hon. Julie Marino, J.S.C. for relief enforcing Judge Reed's July 9, 2008 Order accordingly. Incredibly, Defendant filed a cross motion seeking to set aside Judge Reed's July 9, 2008 Order due to Defendant's "inability to comply with same". Judge Marino had been assigned the case upon Judge Reed's being moved to the Criminal Part with the beginning of the 2009 Superior Court Year.

Immediately before the enforcement motion was heard on December 12, 2008 (December 12, 2008 Transcript; Pa 52-59), again at court. Defendant finally paid the college tuition ***14** that was overdue under both the Consent Order and the July 9, 2008 Order. At the oral argument, the Trial Court told the Plaintiff she could not have the plenary hearing under the Consent Order's language, and still pursue and enforcement action (Pa 57, L4-18), which was directly contrary to the July 9, 2008 Order, which ordered the plenary hearing AND *pendente lite* support and counsel fees to be paid to Plaintiff.

On December 23, 2008, Judge Marino entered an Order and Statement of Reasons (Pa 147-153), denying Plaintiff's enforcement motion as being essentially moot, and went the further steps of cancelling the plenary hearing, reducing the support obligation back to $100.00, and taking away the *pendente lite* counsel fee award. (Pa 159).

Defendant continued to be late in his obligations under even the December 23, 2008 Order, and on January 22, 2009, Plaintiff filed an Order To Show Cause to compel Defendant to pay for Paige Saleeby's College tuition under the Consent Order, as the July 9, 2008 Order was now vacated. (Pa 154-158). Immediately before the return hearing, Defendant paid the obligation, and the motion was denied.

Plaintiff sought reconsideration of the December 23, 2008 Order separately before Judge Marino and on February 27, 2009, and that motion was denied in its entirety. (Pa 159-162).

Plaintiff now argues in this appeal that the Trial Court (Hon. Judge Julie M. Marino, J.S.C., presiding) improperly reversed and vacated the Order of Hon. Judge Robert B. Reed, J.S.C, entered July 9, 2008, by and ***15** through Judge Marino's Order of December 23, 2008, and seeks to have the December 23, 2008 Order and the February 27, 2009 Order both vacated, and further to have Judge Reed's July 9, 2008 Order re-instated as to all aspects.

Note: Owing in part to the poor quality of the Plaintiff's file following her becoming a pro se litigant, the Plaintiff's Appendix, Volumes II through IV, are renumbered verbatim copies of Defendant's Appendix Volumes I through III, as submitted to the Appellate Division for Defendant's earlier application for Leave to Appeal the July 9, 2008 Order. While admittedly unorthodox, Plaintiff's Appendix Volume I contains the several transcripts of the hearings from October 30, 2007 through February 27, 2009. Because the matter did not involve a single coherent trial transcript, using the "T1" "T2" designations was not practicable, and the several hearing transcripts are referenced in Plaintiff's Appendix. Plaintiff's Counsel's problems were greatly increased by the Plaintiff's well-intended practice of re-using previously submitted attachments to certifications, and the like, and resubmitting them, and not retaining a whole filed copy of any of the documents she filed. The file, as it were, was a pile of paper. The request to copy the file out of the Somerset Family Division's records in Somerville upon receiving the Order permitting supplementation of the record, resulted in the presentation of approximately 3/4" of documents, consisting of a few filed case information statements and a later filed motion for enforcement.

***16** During the period concerned here. Defendant has had a substantial ownership stake in a business known as the Chester Diner on Route 206, in Chester New Jersey: to that issue was produced a loan document with one Barry Daichman demonstrating that in 2005, Defendant's half interest was pledged as collateral, and the total value of the business shared with his partner being recited as $1,700,000. (Pa 116-117). Defendant's multifarious transactions with Mr. Daichman were included in Plaintiff's submission before Judge Reed, and show money flowing freely between the two men. (Pa 236-254).

Defendant's subsequent (and current) business interests are in the Long Valley Brew Pub and its affiliates. (Defendant's April 26, 2006 Certification, Pa 668; Pa 164; Pa 173). A feel for the nature of the business may be had at: *www.restaurantvillageatlongvalley.com*. Additionally, Defendant is the part owner of the Metro Grille, on Route 206 in Flanders (Mt. Olive), New Jersey. (Pa 669; Pa 164; Pa 173).

The March 3, 2007, Consent Order required the Defendant to contribute $15,000.00 per year for (4) four years of Paige Saleeby's college expenses. The Defendant was further required to make an initial payment to Plaintiff in the amount of $15,000.00 on or before September 1, 2007 on account of said tuition, in recognition of both Paige's stellar academic trajectory, and the Defendant's poor payment history. This initial payment was nominally intended for Paige's fourth year at the University of Amherst College, Amherst Massachusetts. It was further agreed that should Paige not attend her ***17** fourth year at Amherst College, the $15,000.00 for the fourth year would not be repaid to Defendant. (Pa 79-81).

Defendant failed to meet his obligation to timely pay the initial $15,000.00 in full, which resulted in a motion being filed on March 26, 2008, by Plaintiff. While perhaps not a conventional matter of judicial notice, the requirement of prompt payment of college tuition and fees before registration for a coming semester's classes, and the inflexibility of college admittance offices in this regard is a matter the general public is well-acquainted with, indeed, the Consent Order specifically addressed the issue, stating:

The defendant shall pay to the University directly the $15,000.00 representing his total contribution towards Paige's college expenses for Paige's Freshman, Sophomore and Junior Years. The Defendant shall be permitted to elect a monthly payment plan with the University and is responsible for effectuating same, *so long as payment are made timely such that Paige's attendance is not jeopardized*.

(Pa 80-81, emphasis supplied).

In any event, the Consent Order was almost immediately violated by Defendant following its entry, causing great uncertainty and frankly, chaos, for Paige Saleeby, during registration and class selection for the Spring Semester of 2008. As had been the pattern, once brought to Court by Plaintiff, the Defendant satisfied the obligation, albeit somewhat past the eleventh hour.

The overall record reflects that from the time of the entry of the Consent Order, the Defendant has habitually ***18** failed to meet his obligations under same to the detriment of his daughter and Plaintiff, acting in Paige's interest.

Part of the motivation behind the payment arrangement embodied in the March 2007 Consent Order, was the fact that Paige's diligence as a student made it likely that she would graduate in three (3) years. This fact, being known at the time, was the rational behind not repaying of the initial $15,000.00, in the event Paige did not attend a fourth year at Amherst. The Consent Order reflects, as do all such agreements, a totality of circumstances and a conditional compromise. For Plaintiff's part, the major sacrifice was not having a careful and considered analysis of Defendant's **finances** and his general course of conduct before the Court, which would have revealed the very massive disparity between Defendant's **finances** as represented, and reality.

Indeed, paragraph four (4) of the March 2007, Consent Order recites a child support obligation for Paige in the amount of $100 per week. Prior to that Order, the Defendant's obligation was $147 per week, a rather weighty concession by Plaintiff for the other terms in the Consent Order. (Pa 79-81).

Plaintiff filed numerous Case Information Statements during the protracted course of litigation with Defendant. (Pa 120-146). The most recent of which was on June 22, 2007. (Pa 138). Plaintiff filed a **financial** statement with her May 26, 2008 Motion before Judge Reed. (Pa 211-212).

Defendant did not file any Case Information Statements with respect to the motions before either Judge Reed, or Judge Marino.

***19** Defendant filed for reconsideration of the May 9, 2008 Order. While that motion was pending, astonishingly, Defendant tried to pull a "fast one" and got caught in the act. Defendant was not only delinquent paying for Paige's tuition bill just as registration was imminent, but actually attempted to profit from a mistake at the registrar's office. Apparently, there was a balance of Paige's and Plaintiff's funds on account with the University, a balance to be carried forward and applied to the spring 2008 tuition and fees. As Paige's registration was overdue, and Defendant's name, address, account information were also on the account, the amount of $7,500 was accidentally credited to Defendant, a fact that he concealed until confronted with it in court before Judge Reed, who was justifiably incensed. (Pa 46).

Defendant's blithe "excuse" did little to assuage the Court. His explanation: "I did not realize it was a mistake." Thus, Defendant was caught pocketing nearly a month and a half of his claimed gross income and pretended not to notice that the math was wrong. *Id*. This was his own daughter's college money. The court fully realized why the Consent Order had such a strident provision to allow Plaintiff to nullify its terms and go to court for a full examination of the realities. The court then fully grasped the Defendant's nature, and went out of its way to make the point. About the Defendant's behavior the Court stated:

It was the considered opinion of this Court that Defendant was no more likely to obey the Order when originally entered. Further, that Defendant's conduct was so egregious and incredibly dishonest that he was not entitled to a plenary hearing to be provided with another opportunity to perpetrate a fraud on the ***20** Plaintiff and upon the court. Defendant claims he paid the balance owed to Plaintiff under the Consent Order on the date of the motion hearing (obviously motivated by its pendency) ....

(Pa 100, emphasis in original).

The subject of counsel fees was deliberated and considered carefully by the Trial Court. Judge Reed demonstrated his willingness to review his own decision when upon Defendant's motion for reconsideration of the May 9, 2008 Order, he clarified the meaning of the counsel fee award as being prospective, rather than retrospective, and thus not capable of being reduced to a Certification of Services. Indeed, the retrospective counsel fees were to be very much at issue in the plenary hearing, wherein prior counsel's fees and the reasonableness thereof would have been examined upon either live testimony of counsel, and/or submission of a Certification of Services, etc.

In light of Defendant's history of delinquency, default and the disparity not only between Plaintiff's and Defendant's stated salaries, but the even more dramatic disparity between the Defendant's fiscal representations and what the Court found credible from his bank account statements, a full examination of Defendant's income and cash flow were entirely warranted. A hearing on the merits was justified in order to have any hope at achieving a fair result for the parties' children, and to right the obvious wrong perpetrated by the Defendant. To that effect, it was ordered that the Defendant pay in advance the $20,000.00 to Plaintiff for counsel fees within twenty (20) days of the entry of Order, and also, that the issue of past counsel ***21** fees paid by Plaintiff would be among those issues to be considered at the then pending plenary hearing.

Despite the obvious degree of scrutiny Defendant was under with the plenary hearing pending, he nonetheless failed to meet his obligation to pay his daughter Paige's college tuition in a timely manner, or ever pay the counsel fee. Plaintiff was yet again compelled to seek the court's intervention to get Paige enrolled in classes at the beginning of the semester. Only by this time, Judge Reed had been re-assigned to the Criminal Part, and the matter was before the re-assigned Judge Marino.

Simply put, Plaintiff accepted a compromise on March 3, 2007, on the eve of a plenary hearing at which she was convinced she could prove substantial fraud on the part of the Defendant. Part and parcel of this compromise was her insistence on a substantial remedy in the event that Defendant resumed his normal pattern of delinquent payment and fraudulent misrepresentations. This remedy, that of the ability to consider the issues regarding Defendant's **finances** de novo, was not merely intended as a threat of further litigation, but rather a means for Plaintiff to obtain a fair hearing in court, should the substantial benefit of the bargain to her - the assurance that constant court appearances would not be required in order to obtain timely payments - be dishonored by Defendant. It was an assurance that her need for security from constant violation of the Consent Order, and would not be something easily "swept under the rug" should the Defendant fail in his obligations. (Pa 79-81).

***22** Despite the Plaintiff having to file no less than three (3) enforcement type motions subsequent to the March 3, 2007, Consent Order, Judge Marino did indeed, sweep that provision under the rug. As a further note, it is noted that all of this litigation does not benefit the Plaintiff personally, the issues presented, other than counsel fees stent entirely seeking enforcement of prior orders, and for Defendant to pay his fair share of support to his children.

Interestingly, Judge Marino seized upon the same language in the Consent Order as Judge Reed in reaching an opposite result, stating:

[T]he terms of this Consent Order shall be non-modifiable except in the event of Defendant's default with regard to any of the provisions. In the event that the Defendant defaults, the Plaintiff may make an application to the court for enforcement and or to reinstate her original claims that were to be heard by way of plenary hearing. (Pa151).

Judge Marino's reasoning had a decidedly contractual bent, albeit in contravention to the very plain reading of the Consent Order, and Judge Reed's prior ruling. The possibility that the Plaintiff could make an application for enforcement “and or” to reinstate her original claims, was cited, but passed upon without comment. (Pa 57).

Rather, the Trial Court's statement that: “she cannot have both …” (Pa57) flies in the face of the language of the Consent Order, and Judge Reed's practical approach. It also defies the fact that the Consent Order was basically a very simple document, plain in its language and had as its ***23** nearly entire purpose the timely payment of Paige's college expenses by Defendant. Yet, under the reasoning employed by Judge Marino, a person in Plaintiff's position, where the recalcitrant Defendant is not paying the substantial monies required to be paid in the Consent Order, would be left to await the entirety of a plenary hearing for any payment at all, so that the Defendant was free to violate the Consent Order and the prior Order, so long as Defendant paid after motions to compel were filed. This was precisely the result the Plaintiff sought to avoid in the Consent Order, exactly what Judge Reed ultimately recognized he had to avoid, and exactly the bad result that flowed from the December 23, 2008 Order.

As it turned out, Defendant was well-rewarded by failing to pay the college tuition in a timely manner as per Judge Reed's Order and the Consent Order. By violating both, he got a reduction in an obligation he could not achieve at the appellate level, and nearly kept an over seven thousand dollar windfall, without consequence from the Court. Such a result reveals the illogic of the judge's reasoning insofar as Plaintiff would be left without a remedy or means of support pending what was proving to be a prolonged course of litigation. Further, it is important to note exactly which provisions were sought to be enforced by the Plaintiff.

With the entry of Judge Julie Marino's December 23, 2008 Order, the Plaintiff was stripped of all the rights and benefits properly awarded by Judge Reed. The payment of the $20,000.00 counsel fee had by the time of the December 12, 2008 hearing been overdue under the July 8, 2008 Order by approximately four and one half months. This, despite ***24** denial of an application for a stay before the Trial Court, and the Appellate Division, both of which were denied. Judge Marino took no notice of this violation and flouting of a valid court order, but rewarded Defendant's cunning. The February 27, 2009 Order merely perpetuated the same injustice.

1** ***PROCEDURAL HISTORY

EARLY TRIAL COURTS

Plaintiff-Appellant Rhonda Jean McManus and Defendant-Respondent Mathew Saleeby were married on June 12, 1983. Two children were born of the marriage: Justin Saleeby, born XX/XX/1982; and Paige Saleeby, born XX/XX/1989. The parties separated on XX/XX/1990. A default Judgment of Divorce was entered May 27, 1993. (Pa 77-79)

The Judgment of Divorce continued a prior Order of child support under FD 14-726-91, but left open the issues of spousal support, equitable distribution and counsel fees. (Pa 77-78).

In October 2005, Plaintiff initiated an action for modification of child support and other relief. On Plaintiff's motion, the matter was transferred to Somerset County by Order dated December 20, 2005, Judge Stephan C. Hansbury, J.S.C., presiding. (Pa 72-73). After the transfer to Somerset County, there is indication as to some of the outstanding issues and the status of case management in a May 11, 2007 Order. (Pa 74-75). By October 30, 2006, after numerous depositions and substantial discovery, the action had reached the point of a plenary hearing: opening statements were heard, and the first witnesses examined. (Pa 7-22).

On March 3, 2008, a Consent Order was entered by Judge Peter J. Buchsbaum, J.S.C. ("Consent Order"). The Consent Order was intended to be a final Order disposing of all ***2** issues then before the Court, but conditional in the event its terms were breached by Defendant. (Pa 79-81).

BEFORE JUDGE REED

Defendant breached his obligations under the Consent Order, and Plaintiff filed a motion for its enforcement on March 26, 2008. Because Defendant was substantially in breach of the Consent Order, and was $5,000 in arrears for their daughter's college tuition, Plaintiff sought to enforce the express term of the Consent Order providing for reinstatement of all claims and for a plenary hearing in the event of such breach. The Trial Court entered an order on May 9, 2008, increasing Defendant's child support child obligation, directing Defendant to pay the outstanding college education expenses for their daughter, and granting a $20,000.00 counsel fee award to Plaintiff. (Pa 87-89). However, Judge Robert B. Reed, J.S.C., did not enter an order for a plenary hearing at that time. (Pa 87).

Upon entry of the May 9, 2008 Order, Defendant promptly filed a Motion for Reconsideration before Judge Reed. On May 29, 2008, Plaintiff filed a motion for enforcement of the May 9, 2008 Order, and for sanctions against Defendant for misappropriating an over seven thousand dollar accidental refund of Paige Saleeby's funds from Amherst College, University of Massachusetts. The Motion Judge found Defendant in breach of the Consent Order and the May 9, 2008 Order, and with unsparing language about the Defendant's conduct, Defendant's and Plaintiff's motions were each granted in part. The Court modified the grant of counsel fees to reflect the Judge's intent to provide a prospective *pendente lite* counsel fee so that ***3** Plaintiff could pursue a plenary action, setting down plenary hearing dates for August 5 and 6, 2008, and confirming the balance of the prior Order, as pendente *lite* relief. (Pa 98).

Defendant filed an Order To Show Cause for a stay of the July 9, 2008 Order before Judge Reed immediately, which was denied in its entirety on July 10, 2008.

PRIOR APPELLATE HISTORY

Defendant filed an application for emergent relief to stay the Trial Court's July 9, 2008 Order and for leave to take an interlocutory appeal with the Appellate Division on July 15, 2008. The request for leave to pursue emergent relief in the Appellate Division was denied in its entirety by Judge Ronald B. Graves, J.A.D. on July 30, 2008. (Pa 108). The interlocutory relief sought was denied in its entirety by Judge Christine L. Miniman, J.A.D. on August 29, 2008. (Pa 107). Having not been stayed by the Trial Court, nor by the Appellate Division, Defendant unequivocally and willfully remained in violation of pendente *lite* the July 9, 2008 Order.

BEFORE JUDGE MARINO

Due to the Court's scheduling concerns, the plenary hearing dates were adjourned to a date in October before Judge Reed yet to be determined. On September 1, 2008, judge Reed was reassigned to the Criminal Part, and Judge Marino was assigned to the portion of the family court docket including this matter.

***4** Subsequent to the denial of the emergent appeal, the Defendant again failed to meet his obligation with respect to the college tuition for Paige Saleeby, resulting in problems with the registrar at Fordham University. Plaintiff was compelled to file a motion for relief accordingly, and requested that the plenary hearing be scheduled as ordered by Judge Reed. Defendant filed a cross motion primarily seeking to vacate Judge Reed's July 9, 2008 Order.

The parties appeared before Judge Julie M. Marino, J.S.C. on December 12, 2008. An Order was entered on December 23, 2008, effectively vacating the July 9, 2008 Order.

The parties again appeared on February 27, 2009 on Plaintiff's motion for reconsideration of the December 23, 2008 Order, and for enforcement of the prior Orders. Plaintiff was denied all relief.

CURRENT APPEAL

Leave to appeal the February 27, 2009 Trial Court Order was granted on May 19, 2009. (Pa 3).

Leave to appeal the December 12, 2008 Trial Court Order was granted on February 23, 2010. (Pa 1-2).

An Order to permit Plaintiff to Supplement the Record and for additional time to file the brief was granted on June 21, 2010. (Pa 4-5).

An Order extending time to file Appellant's Brief was granted July 21, 2010. (Pa 6).

25** ***LEGAL ARGUMENT

POINT I

IT WAS HARMFUL ERROR TO ARBITRARILY AND CAPRICIOUSLY REVERSE AND VACATE A PRIOR ORDER ENTERED IN THE ACTION WITHOUT DEMONSTRATING ANY CHANGE OF FACTS OR CIRCUMSTANCES TO JUSTIFY THE REVERSAL, AN INVASION OF APPELLATE JURISDICTION, AND AN ABUSE OF DISCRETION

Harmful error is that which is “clearly capable of producing an unjust result.” R. 2:10-2.

Entry of the Trial Court's December 23, 2008 Order taking away Plaintiff's right to a plenary hearing and reducing the increased child support was harmful error. To take away Plaintiff's award and hearing right, which were based on credible findings of fraud and violations f the express term(s) of the Consent Order was arbitrary and capricious and invasive of the province of Appellate jurisdiction. Negating the ruling imputing income to the Defendant without making any new or contrary findings similarly arbitrary and capricious, and was a patently unjust result.

Any abuse of that discretion resulting in harmful error is reversible. The Appellate Division will disturb an equitable distribution or other discretionary award only if there is some departure from a general standard of reasonableness or a result distorted by a misconception or ***26** misapplication of the law or by factual findings unsupported by the record. *Perkins v. Perkins*, 159 N.J. Super. 243, 247-48 (App. Div. 1978).

It was an abuse of discretion, and harmful error under R. 2-10-2 to take away Plaintiff's relief granted by the July 9, 2008 Order when that Order was supported by an extensive examination of the facts and where the findings of fact and the inference of bad faith and fraud on the court were manifestly spelled out. That the Trial Court caused harmful error when the Order effectively vacated is manifest, as the July 8, 2008 Order was not properly subject to the Trial Court's review absent a "change of circumstances."

Appellate Courts are obliged to give due regard to a trial judge's credibility determinations and his feel of the case, based upon their unique opportunity to see and hear the witnesses. *Cesare v. Cesare*, 154 N.J. 394, 411-12 (1998); *Pascale v. Pascale*, 113 N.J. 20, 33 (1988). Additionally, "[b]ecause of the [Family Part's] special jurisdiction and expertise in family matters, appellate courts should accord deference to family court fact finding," and the conclusions that flow logically from those findings of fact. *Cesare, supra*, 154 N.J. at 413. Consequently, appellate courts will not disturb a judge's findings unless they are demonstrated to lack support in the record with substantial, credible evidence. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 483-84 (1974).

Matrimonial trial court judges are vested with considerable discretion in, valuing assets, determining ***27** what assets are distributable and making awards, the court's discretion is subject to the sufficient credible evidence rule. *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 443-44 (App. Div. 1978).

If a court of appellate jurisdiction would have been required to give the July 8, 2008 Order of the Trial Court this degree of deference under the sufficient credible evidence rule, and in the instant case did, it should be beyond argument that a parallel court should do the same. To allow otherwise would be to eliminate any degree of certainty to interlocutory Orders. Indeed, the court of competent appellate jurisdiction was given an opportunity to review the July 8, 2008 Order, which it DECLINED. Thus, in the instant matter, the Trial Court invaded the province of the Appellate Division in an arbitrary and capricious manner when it subsequently vacated the prior Order and rulings of law without making any findings of fact that differed from those of the prior Trial Court motion judge's findings and decision. That the Trial Court's December 23, 2008 Order supplanted the decision the earlier Trial Court made as a matter of law, that Defendant's violation of the Consent Order was material constituted an abuse of discretion, is harmful error, and should be reversed.

A *pendente lite* order may be modified prior to or at the time of the entry of final judgment in a divorce action. *Mallamo v. Mallamo*, 280 N.J. Super. 8, 12 (App. Div. 1995). It is not argued here that a pendente lite order in a matrimonial case is not subject to possible modification at a later date during the litigation, ***28** however, it must be true that a modification or nullification of a *pendente lite* order should only be done upon the kind of analysis and findings of fact, or change of circumstances that would otherwise constitute a valid order. This simple premise, while perhaps obvious enough, does not appear to have been addressed specifically by the appellate courts of this state.

However, when a trial court acts under a misconception of the applicable law, the appellate court need not give the usual deference to the court's discretion. The court instead must adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided. *State v. Steele*, 92 N.J. Super. 498, 507 (App. Div. 1966); *Kavanaugh v. Quigley*, 63 N.J. Super. 153, 158 (App. Div. 1960). In any case, a "trial court's interpretation of the law and the conseguences that flow from established fact are not entitled to any special deference." *Manalapan Realty v. Manalapan Tp. Comm.*, 140 N.J. 366, 378 (1995). Here, the Trial Court, *vis a vis* the December 23, 2008 Order made an erroneous ruling of law when it applied the exact same facts to the exact same Consent Order's language as the July 8, 2008 Order, and produced a different result. This cannot be tolerated by the appellate court properly vested with such a right of review. The July 8, 2008 Order has not been made the subject of review again here before this Court. No leave has been sought in this Appeal to include its review. The December 23, 2008 Order has, and is properly brought before this Court by Order, on motion, which was granted.

The trial court acted arbitrarily and capriciously by reversing a prior Order entered by another judge with valid ***29** jurisdiction over the matter. Judge Marino's December 23, 2008 Order eviscerated the Order entered July 9, 2008, entered by Judge Reed, and invaded the province of the Appellate Division. This was done without making any findings of fact contrary to those entered

on the record in the Statement of Reasons, or in his findings on the record. In so doing, Judge Marino exceeded her discretion by delivering de facto reversal of the July 9, 2008, which was an invasion of appellate jurisdiction.

The December 12, 2008 Order was entered without any justification, and without the sort of reasoned analysis employed by Judge Reed in making his decision. In the order and statement of reasons, Judge Marino recognized that the Defendant had filed for reconsideration of Judge Reed's May 9, 2008, Order and that the July 9, 2008, Order was the culmination of those efforts.

***30 POINT II**

THE TRIAL COURT MADE A HARMFUL EROR WHEN IT MISINTERPRETED THE TERMS OF THE CONSENT ORDER AS A MATTER OF CONTRACT LAW AND IN CONTRAVENTION OF THE PRIOR RULING IN THE CASE

"In order for a contract to form … there must be a 'meeting of the minds,' as evidenced by each side's express agreement to every term of the contract." *State v. Ernst & Young, L.L.P.*, 386 N.J. Super. 600, 612 (App. Div. 2006) (quoting *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 538 (1953)). "A meeting of the minds occurs when there has been a common understanding and mutual assent of all the terms of a contract." *Knight v. New England Mut. Life Ins. Co.*, 220 N.J Super. 560, 565 (App. Div. 1987), certif. denied, 110 N.J. 184 (1988). A "contract does not come into being unless there [is] a manifestation of mutual assent by the parties to the same terms." *Johnson & Johnson*, supra, 11 N.J. at 538.

The Consent Order at issue has all of the hallmarks of a valid contract, in particular as it was the product of extensive prior litigation, and was not only negotiated and agreed to by experienced matrimonial counsel, but entered and presumably reviewed to some extent by the Trial Court.

Indeed, "the basic contractual nature of matrimonial agreements has long been recognized." *Pacifico v. Pacifico*, 190 N.J. 258, 265 (2007). "Marital agreements are essentially consensual and voluntary and as a result, they are approached with a predisposition in favor of their ***31** validity and enforceability." *Massar v. Massar*, 279 N.J. Super. 89, 93 (App. Div. 1995). Trial courts should enforce a marital agreement as the parties intended. Pacifico, supra, 190 N.J. at 266. "'[W]hen the parties and their attorneys have bargained at arm's length and there is no showing of unfairness, the trial court should not supply terms which the parties obviously considered and yet did not adopt.'" *Rolnick v. Rolnick*, 262 N.J. Super. 343, 352 (App. Div. 1993) (*quoting Berkowitz v. Berkowitz*, 55 N.J. 564, 569 (1970)).

Substantive modification of a negotiated equitable distribution scheme embodied in an agreement should be viewed with skepticism. An application to modify such an agreement may be made pursuant to R. 4:50-1(f). *Rosen v. Rosen*, 225 N.J. Super. 33, 541 A.2d 716 (App.Div.1988), cert. *den*, 111 N.J. 649, 546 A.2d 558 (1988); *Edgerton v. Edgerton*, 203 N.J. Super. 160, 496 A.2d 366 (App.Div.1985). The *R.* 4:50-1(f) standard requires a showing of fraud, misconduct or mistake in the negotiations or a showing of fundamental inequity or unfairness in the agreement in order for it to be modified by the Court. *Edgerton*, supra; *Berlin v. Berlin*, 200 N.J. Super. 275, 491 A.2d 63 (Ch.Div.1984). Relief is not available absent exceptional and compelling circumstances. *Schwartzman v. Schwartzman*, 248 N.J. Super. 73, 77, 590 A.2d 246 (App.Div.1991) *(citing Baumann v. Marinaro*, 95 N.J. 380, 392, 471 A.2d 395 (1984)); *Castiglioni v. Castiglioni*, 192 N.J. Super. 594, 471 A.2d 809 (Ch.Div.1984).

In the instant case, the "contract" at issue is a relatively simple three page document of eleven substantive ***32** paragraphs, witnessed by two very experienced counsel, each to the respective parties, and entered under the aegis of a sitting Superior Court Judge. If there were to be any doubt as to whether the plain language of the Consent Order should be looked at strictly, it should be noted that the document was generated by Defendant's counsel, and Plaintiff is subject to the benefit of the doubt should any ambiguities arise. (Pa 79).

No resort to arguments about ambiguity are required here. The language in the Consent Order that allowed Plaintiff the right to nullify the agreement appears not in some obscure addendum, nor in buried eight point type. It is the very first sentence of the document, and that specific term was violated and brought to the court's attention twice before Judge Reed, and twice before Judge Marino, if the enforcement/reconsideration motion is considered. And indeed, even after these four appearances, Defendant continued to violate the Consent Order.

The relief requested here in not strictly speaking subject only to the standards of review ordinarily applicable to the modification of prior orders, e.g. changed circumstances, but rather, Judge Reed's July 10, 2008 Order reflects the enforcement of an internal provision in the Consent Order requiring that Plaintiff be entitled to get back a right (to a plenary hearing on Defendant's **finances** and ability to pay) that she only conditionally relinquished, in exchange for the comfort and security of knowing that Paige's college would be paid promptly, and that Plaintiff would not be compelled to file endless motions to enforce the Consent Order. But yet ***33** again, it is important to note that Judge Reed's July 9, 2008 Order is not the subject of review in the instant appeal. Judge Marino's de facto reversal of the provisions of the July 9, 2008 Order are. And in that review, the Trial Court's failure to recognize the contractual right of Plaintiff to set aside the Consent Order, expressed in plain terms, on the face of an otherwise uncomplicated agreement, was manifestly erroneous. More so in light of the arguments supra, which question whether The Trial Court had any right at all to re-review the impact of the Consent Order as applied to the facts of the case.

***34 POINT III**

IT WAS HARMFUL ERROR TO DISTURB THE FINDINGS OF IMPUTED INCOME MADE BY THE PRIOR TRIAL COURT

It is true that Income should not be imputed where real figures are available, and that no rule of thumb or percentage should be applied. *Di Tolvo v. Di Tolvo*, 131 N.J. Super. 72, 328 A.2d 625 (App.Piv.1974).

However, current earnings are not the sole criterion to establish a party's obligation for support. *Lynn v. Lynn*, 165 N.J. Super. 328, 341 (App. Div.), certif. denied, 81 N.J. 52 (1979). The potential earning capacity of an individual, not his or her actual income, should be considered when determining the amount a supporting party must pay. *Mowery v. Mowery*, 38 N.J. Super. 92, 105 (App. Div. 1955), *cert.* den, 20 N.J. 307 (1956).

Both the guidelines and the case law of this State explicitly permit the imputation of income where earnings cannot be determined. Pressler, Current N.J. Court Rules, Appendix IX-A, "Considerations In Use Of Child Support Guidelines," subpart 12 (2002); *Bencivenga v. Bencivenga*, 254 N.J. Super. 328, 331-32 (App. Div. 1992); *Mowery v. Mowery*, 38 N.J. Super. 92, 102 (App. Div. 1955), *cert. den*, 20 N.J. 307 (1956). The failure of the defendant to provide adequate **financial** information placed the hearing judge in a position where he had to examine the defendant's health and work abilities and realistically impute income. The judge made a conscientious effort to fairly apply the child ***35** support guidelines in a manner reflective of income properly imputed to him. There was no abuse of discretion in the manner in which the child support was calculated or in the resulting support figure. See *McDermott v. McDermott*, 120 N.J. Super. 42, 44 (App. Div. 1972); *Weitzman v. Weitzman*, 228 N.J. Super. 346, 358 (App. Div. 1988), *cert. den*, 114 N.J. 505 (1989).

New Jersey case law has consistently held that when a parent, without just cause, is voluntarily unemployed or underemployed, income may be imputed to that parent to provide for the child's needs. See, e.g., *Tash v. Tash*, 353 N.J. Super. 94, 99 (App. Div. 2002) (noting that both the guidelines and case law of this State permit imputation of income when determining child support obligations); *Halliwell v. Halliwell*, 326 N.J. Super. 442, 448 (App. Div. 1999) (stating that "[t]he potential earning capacity of an individual, not his or her actual income, should be considered when determining the amount a supporting party must pay"); *Dorfman v. Dorfman*, 315 N.J. Super. 511, 516-17 (App. Div. 1998) (noting that although imputation of income rules apply when determining child support, involuntary termination of employment must be considered when deciding whether a parent's income level equates to that parent's ability to earn); *Connell v. Connell*, 313 N.J. Super. 426, 433-34 (App. Div. 1998) (noting that a court may consider the capacity to produce income when computing a child support obligation); *Bencivenga v.*

Bencivenga, 254 N.J. Super. 328, 331 (App. Div. 1992) (stating the fact that a court will not order a parent to work does not mean that it cannot impute income to that parent); ***36** *Weitzman v. Weitzman*, 228 N.J. Super. 346, 354 (App. Div. 1988) (recognizing the right of courts to realistically appraise a parent's earning capacity in determining child support), *cert. den*, 114 N.J. 505 (1989); *Lynn v. Lynn*, 165 N.J. Super. 328, 340-41 (App. Div.) (noting that in setting child support, the court has the right to appraise the supporting parent's earning capacity), cert. *den*, 81 N.J. 52 (1979).

In each of the above cases, income was imputed to a parent who claimed an inability to pay. Although that is not the same as the situation we face here, we are convinced that the imputation of income approach will have the salutary effect of promoting a fair and just allocation of the support obligation.

The Supreme Court expressed a view favorable to theHalliwell case sub *judice* in *Miller v. Miller*, 160 N.J. 408 (1999), an alimony case. In *Miller*, *supra*, an unemployed husband with a substantial underperforming portfolio sought modification of his alimony obligation. 160 N.J. at 415.

Although the Court did not impute income from employment to the husband because he was involuntarily unemployed, it imputed income earned from his long-term corporate bonds because "justice cannot 'sit… by and be flaunted in case after case before a remedy is available."' Id. at 424. In describing how the litigant could be utilizing his earning capacity better, the Court explained that the husband "could invest his principal differently in higher yield investment options available to him, much in the same way that an underemployed spouse could obtain a higher paying job available to him to make a more productive use ***37** of his human capital." Id. at 423. Ultimately, the Court concluded that "it [wa]s appropriate to impute a reasonable income from [the husband's] investments comparable to a prudent use of his investments, like his human capital." Id. at 424. Thus, New Jersey courts are permitted to take a pro-active approach to determining whether a litigant is not making (or stating) income adequate to his abilities.

In *Caplan v. Caplan*, 182 N.J. 250, 268 (2005), the Court reasoned "that the imputation of income to one or both parents who have voluntarily remained underemployed or unemployed, without just cause, will promote a fair and just allocation of the child support responsibility of the parents." In assessing income, however, the court must first determine whether the parent has "just cause" to be voluntarily unemployed. Ibid. "In making that decision, the court should consider the employment status and earning capacity of that parent had the family remained intact; the reason for and intent behind the voluntary underemployment or unemployment; the extent other assets are available to pay support; and the ages of the children in the parent's household as well as child-care alternatives." Ibid.; see also R. 5:6. *Pressler*, New Jersey Rules of Court, supra, Appendix IX-A at 2293.

If the court finds that there is no "just cause" for the parent remaining unemployed or underemployed, the guidelines provide that income can be imputed "based on potential employment and earning capacity using the parent's work history, occupational qualifications, educational background and … job opportunities." Ibid. See, Pressler, supra, Appendix IX-A at 2292. The court also ***38** may impute income in accordance with the person's usual or former occupation. Ibid.

In the case now before this Court for review, the Defendant's history of spending vast sums on personal luxuries was found to be an indicia of substantial earnings, and substantial earning capacity, and imputed income accordingly by Judge Reed. It bears repeating to state that Judge Reed's July 9, 2008 Order is not the subject of this appeal. The Trial Court's unsubstantiated Order of December 23, 2008, purporting to reverse it, is.

POINT IV

THE PENDENTE LITE COUNSEL FEE WAS PROPERLY AWARDED BY THE PRIOR TRIAL COURT AND IT WAS HARMFUL ERROR TO DISTURB IT

Insofar as awarding counsel fees in matrimonial actions, courts are to be guided by the three factors set out in *Williams v. Williams*, 59 N.J. 229, 233 (1971). The trial judge listed those factors as "a finding of need of one party for such an award [of

counsel fees] and an ability to pay of the other party. The [c]court should also consider the good or bad faith of either party in pursuing one or more aspects of the litigation."

The Rules for awarding fees do not always require affidavits of service, namely when the fees are prospective, *pendente lite.*
39** ***Rule 5:3-5(c) Award of Attorney Fees. Subject to the provisions of R. 4:42-9(b), (c), and (d), the court in its discretion may make an allowance, both pendente lite and on final determination, to be paid by any party to the action, including, if deemed to be just, any party successful in the action, on any claim for divorce, nullity, support, alimony, custody, parenting time, equitable distribution, separate maintenance, enforcement of inter-spousal agreements relating to family type matters and claims relating to family type matters in actions between unmarried persons. A pendente lite allowance may include a fee based on an evaluation of prospective services likely to be performed and the respective **financial** circumstances of the parties. The court may also, on good cause shown, direct the parties to sell, mortgage, or otherwise encumber or pledge marital assets to the extent the court deems necessary to permit both parties to fund the litigation. In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to R. 4:42-9, the following factors: (1) the **financial** circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained: (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

R. 5:3-5(c).

As the New Jersey Supreme Court held in *Williams v. Williams*, 59 N.J. 229, 233, 281 A.2d 273 (1971):

> ***40** Under our practice, the award of counsel fees and costs in a matrimonial action rests in the discretion of the court. *Citing*, *Handelman v. Handelman*, 17 N.J. 1, 7 [109 A.2d 797] (1954); *Morrissey v. Morrissey*, 1 N.J. 448 [64 A.2d 209] (1949), overruled on other grounds, Meeker v. Meeker, 52 N.J. 59 [243 A.2d 801] (1968); *Lasasso v. Lasasso*, 1 N.J. 324 [63 A.2d 526] (1949); *Wheeler v. Wheeler*, 48 N.J. Super. 184, 191-195 [137 A.2d 84] (App.Div.1957); R. 4:42-8; R. 4:42-9(a) (1).

The *Williams* court further reasoned that, in deciding whether a wife is entitled to counsel fees and costs, our courts focus on several factors, including the wife's need, the husband's **financial** ability to pay and the wife's good faith in instituting or defending the action. 3 Nelson, Divorce and Annulment (2d ed. 1945), at pp. 215-220. Cf. *Capodanno v. Capodanno*, 58 N.J. 113 [275 A.2d 441] (1971); *Khalaf v. Khalaf*, 58 N.J. 63 [275 A.2d 132] (1971).

A spouse's need is determined by his or her income and available capital assets. See *D'Onofrio v. D'Onofrio*, 200 N.J. Super. 361, 371, 491 A.2d 752 (App.Div.1985). A disparity in income "would suggest some entitlement … to a fee allowance." *Lavene v. Lavene*, 148 N.J. Super. 267, 277, 372 A.2d 629 (App.Div.), *cert. den*, 75 N.J. 28, 379 A.2d 259 (1977).

Those factors being met, counsel fees and costs in matrimonial actions may be properly apportioned by a Trial Court judge and should by affirmed by courts of appellate jurisdiction.

Here, Judge Reed made numerous observations about the parties **finances**, particularly the disparity between ***41** Defendant's obvious access to substantial monies, luxury lifestyle items and huge sums of cash filtered through his account, and the impecunious nature of Plaintiff. Judge Reed appropriately imputed a fair income to Defendant and explained both the reasons for doing so, and for the amount. Based on the imputed income, the obvious bad faith of Defendant which required Plaintiff to go to extraordinary lengths to demonstrate her case due to Defendants' obstreperousness, the *pendente lite* counsel fee directed by the July 9, 2008 Order was entirely appropriate. Plaintiff's need was very much a part of the analysis. While the validity of

that Order is not the subject of review, the Order of December 23, 2008 purportedly invalidating it is very much at issue. That Order constituted harmful error, and it is requested that it be vacated.

*42 CONCLUSION

For the forgoing reasons, and in the interests of substantial justice, it is respectfully requested that the Orders of December 23, 2008, and February 27, 2009 be reversed and vacated, and the Order of July 9, 2008 be reinstated in its entirety.

Respectfully Submitted,

<<signature>>

Henry J. Aratow, Jr., Esq.

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