SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3570-20

TATYANA GOLBIN,

Plaintiff-Respondent,

v.

MIKHAIL GOLBIN,

Defendant-Appellant.

———————————————

Submitted April 25, 2022 – Decided May 26, 2022

Before Judges Vernoia and Petrillo.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FM-12-2457-14.

Mikhail Golbin, appellant pro se.

Tatyana Golbin, respondent pro se.

PER CURIAM

This is an appeal by defendant, Mikhail Golbin, from two orders of the Chancery Division, Family Part, regarding a post-judgment matrimonial dispute

over child support and contributions for college expenses. The underlying relief was sought by plaintiff, Tatyana Golbin, to enforce the parties' Property Settlement Agreement (PSA), and to secure reimbursement of costs paid for the college expenses of the parties' eldest child and to fix a contribution towards certain upcoming college costs from defendant. Defendant filed opposition and a cross-motion seeking a lesser college contribution percentage than plaintiff demanded and a credit in that calculation for child support paid. The first order and opinion, dated May 27, 2021, largely granted much of the relief sought by plaintiff and denied most of the relief sought by defendant on his cross-motion. The second order and opinion, dated July 9, 2021, denied defendant's motion for reconsideration. For the reasons explained, we affirm.

I.

We glean the facts from the record. The parties have three children: the oldest, born in 1999; a middle child, born in 2002; and their youngest, born in 2005.[1] The parties were divorced on May 29, 2014. The final judgment of divorce (FJOD) incorporated the PSA by reference.[2]

[1] At the time the challenged orders were entered, the oldest child was about to begin his fifth year of a six-year pharmacy program at Rutgers University; the middle child was about to begin his first year of college; the youngest was in high school.

[2] The PSA was executed three weeks earlier on May 9, 2014.

In paragraph 2.4 of the PSA, the parties agreed that they would "each contribute toward the post-secondary school education [tuition, fees, costs, and expenses] consistent with each party's then-existing ability to pay." The agreement provides no formula for calculating each party's contribution and does not provide even the slightest modicum of guidance as to how "ability to pay" should be determined in the event of a dispute.

Paragraph 2.1 of the PSA provides for the payment of child support. That section, entitled "Child Support," provides that:

> [Defendant] shall pay child support in the amount of $2,000 per month. The parties acknowledge that this amount constitutes a deviation from Child Support guidelines . . . . The amount of support agreed to takes into account all of the terms of the Agreement. For so long as [defendant's] income is approximately the same as he is currently earning (or greater), [defendant's] child support obligation of $2,000 per month shall continue as a minimum amount.

II.

A. Plaintiff's Motion & Defendant's Cross Motion

On April 1, 2021, plaintiff moved for enforcement of the PSA's college contribution provision. It is undisputed that the parties' eldest child has attended college since the fall of 2017. Despite efforts to reach an agreement concerning defendant's contribution towards college costs, including direct communications and mediation with a retired Superior Court Judge, no resolution was achieved.

According to plaintiff, defendant promised the oldest child that he would contribute $15,000 annually towards his college costs. Despite this supposed promise, defendant paid only $145 toward the eldest child's college costs for the fall of 2017 and no further monies until the spring of 2020, when he began to pay the eldest child $200 per month. The accumulated amount of these monthly payments was $3,000. This sum was applied to the 2020-2021 tuition.

The eldest child's total tuition costs for 2017-2018 were $29,172.50. After applying the child's student loan, there was a balance of $25,708.50, paid by plaintiff, less the $145 paid by defendant.

For the 2018-2019 academic year, the child resided at home instead of on campus, thereby reducing the annal tuition to $17,194.40. After applying a student loan taken by the child, there was a balance of $12,740.40 paid in full by plaintiff.

For the 2019-2020 academic year, the child resided on campus but paid for those costs himself. Tuition was $17,935.40, but a student loan reduced the college costs to $12,493.40, which plaintiff paid in full.

For the 2020-2021 academic year, the child resided at home due to the COVID-19 pandemic. The tuition for this academic year was $17,972.90 and the child did not take a student loan. Defendant's monthly payments through the 2020 calendar year totaled $3,000 and this amount was applied to the tuition.

The child took a summer course in 2020 at a cost of $1,082, thus total tuition for this year was $19,054.90. This sum was paid by plaintiff.[3]

In her motion, plaintiff calculated that she had paid a total of $69,977.20 towards the eldest child's tuition since 2017. Plaintiff also asserted that based on her calculations, defendant earned 53% of the parties' combined gross income. As such, plaintiff demanded that the court order defendant to contribute that percentage of the college costs incurred thus far and going forward. Plaintiff acknowledged the $2,000 per month she receives in child support but asserted that child support is unrelated to defendant's obligation to contribute his proportionate share of the college costs.

In his opposition and cross-motion, defendant did not quarrel with the idea that the children should attend college and that both parties should contribute towards those costs. His disagreement was rooted in the allocation of costs and the proposed method of calculating the respective contributions of each party. Defendant relies on the same PSA sections as plaintiff but argues for a different construction. The theme of defendant's argument is that the two sections, child support and college contribution, are connected and that the exclusion of child

[3] Though she asserts that the $3,000 paid by defendant in 2020 was credited towards the 2020-2021, plaintiff claims to have paid the full-year's tuition herself.

support from the college contribution calculus is unfair and gives plaintiff a lopsided economic advantage. The thrust of his argument is that the $24,000 in annual child support cannot be excised from the college contribution calculation; it must figure in somehow.

Following a rather granular review of his earnings and expenses, defendant argued that an accurate assessment of his ability to pay requires the conclusion he should contribute only 37% of college costs. He highlighted what he asserts were meaningful fluctuations in his earnings over the past several years such that he would likely have been allowed a reduction in child support had he sought one. Defendant argued that the matter should be subject to a forensic accounting and court ordered mediation so that a retroactive recalculation could be done to adjust his past child support more equitably in the form of a present college contribution discount or other credit to avoid a "windfall" to plaintiff.

Defendant opposed the utilization of gross income as the primary means of calculating his college contribution. Defendant argued that applying the gross income formula advanced by plaintiff would be "unjust," "oppressive," and "inequitable." Describing himself as "vulnerable prey" being taken advantage of by a "predator," he insisted his calculation is fairer because ability to pay "should be based on net cash left after all taxes are paid, child support is paid

(or received) and reasonable living expenses are covered . . . ." Defendant cited plaintiff's tax advantages in having the children as deductions, and the difference between California state taxes (where he lives) and New Jersey state taxes. Defendant utilized various illustrations to demonstrate that under plaintiff's formula "a quarter of his rather substantial savings of $240,000 will be gone with [zero] retirement savings over the next [seven] years."

Ultimately, defendant proposed that he contribute just $7,700 towards the college costs already incurred. Since he argued he would have been entitled to a reduction of child support in the years prior to 2019 had he sought one, defendant maintained that he should contribute only a total of $7,700 in tuition for the two years, 2019-2020 and 2020-2021. Defendant's support for the suggested $3,750 per year college cost contribution was set forth in an illustration that sought to provide mathematical back up for the points he raised in his argument.

Moreover, defendant maintains that the parties should not jointly incur more than $18,000 per year, per child, in college costs. Included in this assessment is his belief that at least the eldest child's earnings should continue as they have, they should be devoted towards college costs, and neither parent should get credit for the child's own contribution. Instead, defendant argued the

parties should share the difference left over after the child's contribution, up to his proposed cap.

In reply, plaintiff restated her position that the child support was never intended as a credit against the college contribution obligation. Citing the language of both sections of the PSA, she highlighted that by its express language, the child support provision "takes into account all of the terms of the Agreement." She asserted that the child support provision should be construed to mean that payment of child support is a separate obligation, connected to the parties' alimony waiver, and child support was never expected to provide for anything other than day-to-day care of the children.

Plaintiff argued that defendant's income representations in his Case Information Statement were, to a degree, misleading or at least incomplete, and that despite whatever income fluctuations he might have had, he nevertheless has significant investments and other assets. She further argued his forecasts for college costs were unrealistic and unfair to the children, and she rejected defendant's proposal that would require the children to commute to school from home or to pay their own on-campus residence costs. Plaintiff argued that residing at home would deprive them of advantages associated with on campus living and to require that the children bear their own costs to live on campus is contrary to the parties' agreement, which specifically requires that each party

contribute to "post-secondary education costs and expenses incurred by their children, including, without limitation, tuition, room, board, miscellaneous school fees, books, transportation, and any related costs and expenses."

As to defendant's proposed contribution of $7,700 for costs already incurred, plaintiff argued the amount was insufficient and unfair. Plaintiff listed various day-to-day expenses she bears for the children, compared and contrasted the parties' incomes based on the Case Information Statements that each had provided, and highlighted the differences in their financial situations. Separate and apart from W-2 wages, defendant had $833,000 in his 401(k); $240,000 in cash; and an investment portfolio in excess of $107,000. Plaintiff had $542,000 in her 401(k); $72,000 in cash; and an investment account of approximately $10,000. According to plaintiff, this disparity was sufficient grounds for the court to at least compel repayment in the amounts demanded and to fix a formula going forward that would be consistent with the PSA.

B. May 27, 2021, Trial Court Decision

The trial court began its review of the matter by noting that the "parties' PSA remains in full force and effect." After a brief verbatim recitation of the language, the court stated that despite the lack of a formula in the PSA regarding how much each parent would contribute towards college expenses, "a total contribution of $3,145 by [d]efendant for four (4) academic years of college by

[the eldest child] is clearly not consistent with the [d]efendant's ability to pay as provided in the parties' PSA." The court distinguished this case from Gac v. Gac, 186 N.J. 535 (2006), where the Court considered a demand for contributions to college expenses after they were incurred. In this case, unlike Gac, college contribution was contemplated well in advance of the children's attendance at college, as an essential term of the parties' PSA. All that is at issue here is enforcement of that obligation.

The court agreed with defendant that college expense contributions for the parties' children, while obligatory as per the PSA, are only required to the extent of the parties "ability to pay," which, as argued by defendant, is "not necessarily based solely on the parties' gross incomes." As already described, the defendant urged the court to consider his child support, the differences in retirement saving amounts, employer matches, California versus New Jersey tax differentials, and the benefit of deducting the children as dependents for income tax purposes as the plaintiff has the right to do.

The judge was clear that although certain of these considerations raised by defendant might be relevant to an allocation of college costs expenses in some instances, under the facts of this case, and given the entirety of the record, including income, assets, and debt, these considerations did not cause the court

to stray from the parties' gross income as the predominant factor in making its determination of the allocation of college contributions between them.

The court dealt with a number of these considerations in specific fashion. As to the argument that California taxes were higher than New Jersey taxes, the court noted that defendant moved to California voluntarily, and as to the tax benefit enjoyed by plaintiff for deducting the three children, the court found that was a bargained for agreement as per paragraph 6.1 of the PSA. The court concluded that if those were financial disadvantages, both were contemplated and within the control of defendant.

The court discussed defendant's ability to pay by reference to his Case Information Statement. The court noted that the statement was incomplete inasmuch as bonuses for which defendant was eligible were not included in any amount, and the court observed $24,000 per year was being contributed to defendant's 401(k) account that had a value of approximately $850,000; defendant's home (like plaintiff's) was unencumbered by a mortgage; and defendant had a net worth of over $1,200,000 and "no debt whatsoever." The court was unpersuaded by defendant's argument as to the alleged unfairness of the PSA, finding it was an agreement freely entered into by the parties seven years earlier and incorporated into the FJOD.

The court compared the parties' earnings for 2016, 2017, 2018, 2019, and 2020. Defendant reported higher wages than plaintiff in every year except 2016.[4] The court found that, "[i]n the absence of any other relevant considerations set forth by the parties," the college expense allocation should be based on their respective incomes on a year-to-year basis, using the parties' respective prior year's income to determine the subsequent year's allocation. The court determined the parties' respective percentage shares of the college expenses as follows: for 2017-2018 academic year, based on 2016 income, plaintiff was ordered to pay 56% and defendant 44%; for 2018-2019 academic year, based on 2017 income, plaintiff was ordered to pay 49% and defendant 51%; for 2019-2020 academic year, based on 2018 income, plaintiff was ordered to pay 49% and defendant 51%; for 2020-2021 academic year, based on 2019 income, plaintiff was ordered to pay 49% and defendant 51%.

In light of these findings, the court concluded that defendant had not complied with paragraph 2.4 of the PSA and that his failure to make these contributions violated plaintiff's rights. The court found no reason to conclude

[4] For 2019, and possibly other years, the wages defendant earned might even have been higher but reduced for income tax reporting purposes by the substantial retirement contributions the court noted were reflected on recent paystubs.

that the $2,000 monthly child support payment was, in whole or in part, a contribution towards college costs, finding "[t]he [d]efendant's position in this regard is not at all supported by the plain language of the parties' PSA which addresses child support and college contribution separately."

The court then calculated defendant's indebtedness to plaintiff, crediting defendant with $4,045 for monies paid, and directing that he pay $29,853.97 to plaintiff within thirty days. The court ordered that a failure to pay would result in the order being reduced to a judgment against defendant.

Based on the earnings information then before the court, the judge ordered that 2021-2022 costs be shared equally with all payments to be made directly to the school after any other aid, grants, or loans were first applied to the outstanding balance. This conclusion was premised on the same "ability to pay" analysis and relied on the same asset and income information considered for purposes of ordering reimbursement. In the upcoming 2021-2022 academic year the middle child would begin college and the costs of same were recounted by the court along with its review of the anticipated tuition and board costs that would be incurred by the already-college-enrolled eldest child.

The court then granted plaintiff's motion seeking continuation of the $2,000 per month in child support. The court once again recited the language of the agreement and found no basis to order any reduction given the PSA's plain

language that child support would continue at $2,000 per month as long as defendant's income remained at or above the level of earning at the time of the divorce. The court again found no intersection between child support and college contribution as per the language of the PSA, concluding "[t]hat very detailed PSA does not provide for a modification to the minimum amount [of $2,000 per month] when a child attends college." The court noted that no increase was being sought, which would have required a different analysis, but that plaintiff merely sought maintenance of the status quo. The court also ordered that the child support be paid through probation as plaintiff had requested in her motion. The court declined to grant plaintiff's motion for legal fees, finding defendant's failure to contribute to college costs did not constitute bad faith and thus the court saw no basis for an award of fees.

The court denied defendant's cross-motion to retroactively reduce child support and his alternative request to apply child support to his college contribution obligation. The court rejected defendant's motion based on the reasoning provided in support of its decision granting plaintiff's motion, and the court further cited N.J.S.A. 2A:17-56.23a, which prohibits retroactive modification of child support beyond the date on which a modification motion is first filed. Moreover, the court noted that defendant's claimed financial circumstances entitling him to relief were not well documented even if the

request was not barred by the statute, and the PSA was clear regarding his obligation. The court also found plaintiff's income was irrelevant to defendant's child support obligation under the PSA, which made defendant's child support obligation contingent on his income only. The court determined that although there might have been a basis for relief in the past, no such relief was timely sought and retroactive relief was not available. Defendant's request for college contribution to be set in the formula he proposed was denied for the reasons explained by the court in granting plaintiff's motion to fix an allocation formula.[5]

The court rejected plaintiff's motion for relief pursuant to Rule 4:50-1(f). The relief sought was from the negotiated PSA, which was incorporated at the parties' request into the FJOD. Under Rule 4:50-2, such a motion must be brought within a "reasonable time." Given that the PSA was negotiated more than seven years prior, and nothing in it was unknown to the parties, the court found no reason to disturb the agreement they had entered into and was incorporated into their FJOD. The court found "[e]ssentially, [d]efendant's objection is to enforcement of the plain language of the PSA." The court

[5] Defendant's motion, like plaintiff's, sought both the fixing of an allocation and a specific amount, and, like plaintiff's, was granted in part and denied in part. The court granted both parties' requests to allocate their respective shares of the college expenses but denied the allocation formulas submitted by the parties and fixed its own.

concluded "[t]here [was] no evidence that [defendant] was unaware of the terms the parties bound themselves to; there [was] no evidence that the terms were 'unjust, oppressive, and inequitable' as defendant claims; nor [was] there evidence that [d]efendant lack[ed] the ability to comply with same." The court entered its order memorializing its ruling on May 27, 2021.

C. Defendant's Motion for Reconsideration & Plaintiff's Cross-Motion

On June 27, 2021, defendant filed a motion for reconsideration. Plaintiff filed opposition and a cross-motion. On reconsideration, defendant sought a reduction of his college contribution to 36% "if child support stays at $2[,]000 per month." Plaintiff cross-moved for enforcement of the May 27, 2021, order and renewed her request for counsel fees.

Defendant's motion expressed palpable disagreement with nearly every aspect of the court's decision. Nothing new was added to his arguments other than additional complaints as to the unfairness and injustice of the decision.

In its decision on defendant's motion, the court noted:

> The [d]efendant's [m]otion for [r]econsideration is flawed in various regards and he has not satisfied the legal criteria for reconsideration. Defendant's [m]otion is premised on a recitation of the same claims already previously made by [d]efendant and considered by the [c]ourt. In that regard, the [c]ourt relies upon the May 21 [sic], 2021, [o]rder in its entirety and the terms of that [o]rder are hereby

> incorporated by reference as if they were fully set forth herein.
>
> Defendant fails to set forth the matters or controlling decisions which he believes the [c]ourt has overlooked or as to which it has erred. Rather, [d]efendant repeats and realleges the same claims he already made, while suggesting the [c]ourt failed to consider them, notwithstanding the fact that this [c]ourt expressly analyzed and addressed said claims.

After undertaking yet another thorough review of the record, the arguments, and the basis for its first decision, the court concluded that "[d]efendant has failed to meet the standard for reconsideration and therefore the May 27, 2021, [o]rder remains in full force and effect." On this ground the court denied all relief requested but only after a comprehensive review of each issue presented, carefully, and repeatedly, explaining its decision.

Plaintiff's cross-motion to enforce the prior order was granted; her motion for fees was again denied. The court's order was entered on July 9, 2021.

III.

On appeal, defendant raises the following points:

I. NOT IN CONTEMPT OF COURT.

II. JUSTICE OR PREJUDICE.

III. EVIDENCE OR EMOTIONS.

IV. ONE SIDED ENFORCEMENT OF PSA.

V. THE TRIAL COURT ERRED IN DETERMINING THAT GROSS INCOME IS A REASONABLE MEASURMENT OF THEN EXISTING ABILITY TO PAY FOR COLLEGE EXPENSES IN OUR CASE.

VI. THE TRIAL COURT ERRED IN DETERMINING THAT REQUEST FOR RELIEF WAS NOT MADE IN REASONABLE TIME.

VII. WILLFULLY FALSE STATEMENT AND MISPLACED PUNISHMENT.

Addressing defendant's arguments, we begin with our well-settled standard of review. Our review of the Family Part's orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We owe substantial deference to the Family Part's findings of fact because of that court's special expertise in family matters. Id. at 413. Although we owe no special deference to the judge's legal conclusions, Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), "'the factual findings and legal conclusions of the trial judge'" should be left undisturbed unless we are "'convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice' or when we determine the court has palpably abused its discretion." Parish v. Parish, 412 N.J. Super. 39, 47 (App. Div. 2010) (quoting Cesare, 154 N.J. at 412). Thus, we will only reverse the judge's decision when it is necessary to "ensure that there is not a denial of justice because the family court's conclusions are [] clearly mistaken or wide of the mark." Id. at 48 (alteration in original) (internal quotation

marks omitted) (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008)).

This court reviews the denial of a motion for reconsideration to determine whether the judge abused his discretionary authority. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). This court "may only disturb the decision below if it finds error which is 'clearly capable of producing an unjust result.'" Casino Reinv. Dev. Auth. v. Teller, 384 N.J. Super. 408, 413 (App. Div. 2006). With these principles in mind, we turn to the substance of the appeal which, we find, fails, in every respect, to satisfy these strict standards.

IV.

In this case the parties entered into an agreement nearly eight years ago and settled the issues of child support and contributions towards the college education of their children. They agreed to both. Child support was set in a fixed amount subject to defendant's continued earning an amount equal to or greater than what he was earning at the time of the divorce. The parties agreed to contribute to the college tuition and related costs incurred in the post-secondary education of their children subject only to their "ability to pay." Thus, the court had no need to address the questions of whether child support was owed or to whom or in what amount; neither did the court have to answer whether the parties would, in fact, contribute to the college education of their children. This had all been agreed upon.

What the court was called upon to do was determine the contribution amount that the parties were able to pay towards college because, in drafting the PSA, they left "ability to pay" undefined. The court was further called to examine the PSA and to determine whether the child support provision should be interpreted to affect the college contribution obligation. The court did exactly these two things following its painstaking review of the record. The crux of this appeal are those decisions.

V.

In considering "ability to pay," it is instructive to look to the cases that have considered the same question even if in other contexts. The standard that governs an application for modification of a property settlement agreement, for example, is the same standard that applies at the time of the original judgment of divorce. "When support of an economically dependent spouse is at issue, the general considerations are the dependent spouse's needs, that spouse's ability to contribute to the fulfillment of those needs, and the supporting spouse's ability to maintain the dependent spouse at the former standard." Lepis v. Lepis, 83 N.J. 139, 152 (1980) (emphasis added).

While this case has nothing to do with alimony, a considerable factor in a court's determination of modifying alimony, or granting it in the first instance, is "ability to pay." It would thus seem logically consistent that the trial court be guided by the criteria we and the Supreme Court have previously deemed

relevant to determining "ability to pay" any obligation contained in a PSA. The central issue in an "ability to pay" is, literally, whether the party being asked to pay is able to do so based on their resources and financial circumstances. Miller v. Miller, 160 N.J. 408, 419 (1999).

So how is a court to measure "ability to pay" in practice? We have held that a supporting spouse's potential to generate income is a significant factor when considering his or her ability to pay. Ibid. (first citing Mahoney v. Mahoney, 91 N.J. 488, 505 (1982), and then citing Stern v. Stern, 66 N.J. 340, 345 (1975)). Real property, capital assets, investment portfolios and capacity to earn through "diligent attention to . . . business" are all factors the court may consider in an alimony modification. Id. at 419-20 (citing Innes v. Innes, 117 N.J. 496, 503 (1990)). These criteria all align closely with what the trial court looked to in making its determination.

We see no reason why the deliberative model cited above should be any different when, as here, a parent is obliged to pay towards his children's college education but disputes the amount being asked of him. Given that the parties expressly agreed that such contribution would be based on "ability to pay," looking to the cited precedent to guide that calculation makes perfect sense.

That the parties entered into the PSA choosing the words "ability to pay" is both telling and instructive. Agreements that resolve a matrimonial dispute

are no less a contract than an agreement to resolve a business dispute. Quinn v. Quinn, 225 N.J. 34, 45 (2016).[6] Although we apply principles of equity to assure that a matrimonial settlement agreement is fair and just, see, e.g., Petersen v. Petersen, 85 N.J. 638, 642 (1981), we apply contract principles to ascertain an agreement's meaning, see Pacifico v. Pacifico, 190 N.J. 258, 266 (2007) (applying to a property settlement agreement the "basic rule of contractual interpretation that a court must discern and implement the common intention of the parties"); see also Aarvig v. Aarvig, 248 N.J. Super. 181, 185 (Ch. Div. 1991) ("The essentially contractual nature of property settlement agreements has always been recognized by our courts and they are to be construed in accordance with contract law."). Here the parties bound themselves to the PSA which, as a contract, is subject to interpretation by the court as a matter of law subject to de

[6] We should not be misunderstood to suggest that contract interpretation in the family context is on all fours with all other categories of contract disputes. It is not. Courts have denied enforcement of agreements reached between parents providing for a waiver of child support on the basis that the right of child support belongs to the child, not the parent. See Martinetti v. Hickman, 261 N.J. Super. 508, 512 (App. Div. 1993); see generally Wertlake v. Wertlake, 127 N.J. Super. 595 (Ch. Div. 1974). Courts may deny enforcement of agreements reached between parents concerning the custody of their children under the court's parens patriae jurisdiction if not being in the children's best interest. N.J.S.A. 9:2-4(d). In short, when it comes to family law matters, even when parties reach agreements, they can be enforced, invalidated, or modified, "in light of all the facts" bearing on what is equitable and fair. Smith v. Smith, 72 N.J. 350, 360 (1977). Given the broad equitable power of the family court, the facts and circumstances of a given case are of keen dispositive effect.

novo review. See Bradford v. Kupper Assocs., 283 N.J. Super. 556, 583 (App. Div.1995).

What is telling is that the parties chose the phrase "ability to pay" yet failed to define the meaning of those words. This phrase is commonly utilized in matrimonial settlement agreements which, as we have said, are contracts. By including an undefined term in a contract between them, the parties in effect surrendered the resolution of any conflict as to that undefined term's meaning to the court.

In having to give effect to that term, "ability to pay," a purely legal task, it is instructive to consider how appellate precedent commands such an "ability to pay" determination be made by looking to related cases and decisions. Despite not specifically citing any case or cases, the trial court's approach embodies the methodology prescribed in the cited "ability to pay" case law.

Before this court, without citation to any authority that would cause us to conclude the trial court's analysis was in any way defective, and armed with the same facts as below, defendant seeks a reversal of the trial court's decision. We can discern no reason to do so.

Defendant also argues the $24,000 per year in child support should be counted as either income to increase his wife's college contribution share or a credit against what he must pay. Alternately, he proposes that his child support

be reduced to a guidelines-based amount of almost $10,000 less per year. According to defendant, the trial court erred by not granting this relief. Defendant argues that he experienced a brief reduction in income for some of the years he has been paying child support and could have sought relief but did not. He complains that after the eldest child incurred large tuition costs, plaintiff unfairly sought retroactive reimbursement.[7] Defendant also complains that in order to abide by the court's order (which simply requires him to abide by the PSA) he will have to dip into savings year after year. This is unremarkable for a parent who is funding a child's education and does not impose the sort of inequitable drain on his financial well-being as argued by defendant.

As far as "ability" goes, there is little doubt that defendant can pay. The trial court noted defendant's liquid assets of $240,000 in cash (which does not include retirement savings in excess of $800,000 and more than $100,000 in investments) and noted that he contributes $24,000 annually to his retirement account. Neither party has a mortgage on their home. Defendant's argument regarding how net income should be the driver of this contribution calculation fails to consider how net income can be manipulated, particularly with regard to the amount one chooses to have deducted for a retirement plan.

[7] This is not accurate. Defendant was always obliged to pay what plaintiff was forced to compel in her original motion. This began as an enforcement motion.

Defendant argues that the order will erode his ability to save for retirement and may liquidate his cash savings. Although a parent's retirement planning cannot and should not be ignored, that is not what this order requires though it may result in a reduction of retirement contributions and some depletion of savings. A reduced voluntary contribution towards retirement savings while putting one's children through college is a common feature of parenting. There are, no doubt, instances of college-bound children requiring more from their divorced parents than the parents can reasonably be expected to contribute based upon their income and assets. The tuition costs at issue here are not in that realm.

Defendant's entire argument is equitable. He contends the court should have given weight to factors the court declined to rely upon, such as housing costs, tax differentials between California and New Jersey, and income tax benefits enjoyed by plaintiff based on the PSA's negotiated provision that she be allowed to claim the children as dependents. To the contrary, these factors were considered and, as the judge stated, were unpersuasive.

Defendant does not object to having to contribute to the college costs of his children. His grievance is with the court's formula and ultimate allocation. On appeal plaintiff acknowledges that he entered into an agreement seven years ago. Defendant says:

> I did not ask the court for relief from the PSA we signed [seven] years ago. I am perfectly content with the property split at the time of divorce. It was not equitable yet I voluntarily agreed to it in exchange for no alimony clause. I am perfectly fine with the $2[,]000 per month child support payment as well, I also voluntarily agreed to it. And I am perfectly fine with college contribution based on "then existing ability to pay." The order from May 27, 2021, which failed to recognize the impact of $2[,]000 per month child support payment on "then existing ability to pay," decided that gross incomes can be used for allocation of the college costs, and ordered that college costs should be paid 50/50 going forward is what makes current outcome oppressive and punitive towards me.

In addressing all of these arguments a second time on reconsideration, the trial court said:

> Defendant claims that the [c]ourt should base the parties' obligations on net incomes after taking into account only certain specific expenses which he contends should be taxes, child support and reasonable living expenses (which would also inherently include cost of living). In that regard, [d]efendant seeks to re-write the parties' PSA. The PSA provides that the parties are to pay consistent with then their current ability to pay. Thus, [d]efendant cannot unilaterally determine which factors the [c]ourt should and should not consider when determining the parties' ability to pay. As noted in great length in the [o]rder in question, the [c]ourt ultimately based its allocation on the parties' gross incomes, but only **after** considering all other arguments made by the parties as to other factors the [c]ourt should take into account. In other words, the [c]ourt did not rely exclusively on gross incomes. Rather, the [c]ourt considered all other arguments

> advanced by the parties to determine if there was any other factor which would warrant an allocation in some fashion other than in proportion to the parties' gross incomes.
>
> By way of example, [d]efendant again contends that he lacks the ability to comply with the PSA based on his net income - as he chooses to define net income. He argues that when the [c]ourt considered that he had excess disposable net income, the [c]ourt did not consider his child support obligation. That claim is inaccurate. The [c]ourt expressly took into account that he continues to have his child support obligation. In that regard, the [c]ourt noted [d]efendant's net income and his expenses wherein he had a surplus of over $2,000 per month which is the amount of his child support obligation. However, the [c]ourt also considered that [d]efendant contributes extensively to his retirement account (over $24,000 per year), which are monies that could be earmarked toward satisfying his obligations toward college. The [c]ourt also considered that [d]efendant had amassed significant savings from which he could contribute to the children's college education expenses. While the [d]efendant would have the [c]ourt ignore those significant savings he has amassed, it is clearly relevant when determining the parties' ability to pay as required by their PSA. In fact, [d]efendant claims that if he is required to utilize savings for any portion of his obligation, that is not fair or equitable. The [c]ourt does not concur and savings is clearly a factor that must be considered when determining ability to pay as required by the parties' PSA.
>
> [(Emphasis added).]

What is clear from this excerpt is that in setting the parties' college contribution percentages, the court determined exactly what the PSA

specifically states matters most: "ability to pay." Importantly, "ability to pay" is not, as defendant argues, to be based solely on income or cash flow. The suggestion that assets should be ignored is utterly without support.

In this case, as is apparent from the order, the court made factual findings based on the record which included each party's Case Information Statement. By hewing close to the conceptual framework described by the majority in Innes, in the face of an alimony modification, the trial court preserved the spirit of what is, for all intents and purposes, the very same question: how much can defendant afford? The trial court answered that question by "closely examining the circumstances of both parties" and by conducting "a complete and thorough analysis of the incomes, income capacities, and general financial circumstances, including assets and income, of both parties . . . ." Innes, 117 N.J. at 513.

As we explained above:

> "[f]indings by the trial judge are considered binding on appeal when supported by adequate, substantial, and credible evidence. ' . . .[An appellate court's] function is a limited one: [the appellate court does] not disturb the factual findings and legal conclusions of the trial judge unless [the appellate court is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice,' and the appellate court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions."

> [Mt. Hill v. Twp. Comm. of Middletown, 403 N.J. Super. 146, 192-93 (App. Div. 2008) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974))].

The court considered the income and financial information presented by the parties as required by Innes. The trial court's decision as to defendant's ability to pay the ordered reimbursement and going forward contributions towards college is more than adequately supported by competent, relevant, and reasonably credible, evidence.

VI.

The court's decision as to the exclusion of the monthly child support from the college contribution calculation is also well grounded. The parties entered into an agreement regarding child support that nowhere calls for a quid pro quo reduction, in any amount, when college contributions begin. As with "ability to pay" towards college contribution, the task of interpreting any interplay between these two provisions of the parties' PSA fell to the trial court.

"Courts enforce contracts 'based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.'" Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014) (quoting Caruso v. Ravenswood Dev., Inc., 337 N.J. Super. 499, 506 (App. Div. 2001)). Whether a contract term is clear or ambiguous amounts to a question of

law. Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997). A contract is ambiguous if it is reasonably susceptible to two interpretations. Potomac Ins. Co. of Illinois ex rel. OneBeacon Ins. Co. v. Pa. Mfrs. Ass'n Ins. Co., 425 N.J. Super. 305, 324 (App. Div. 2012). Contract terms must be given their plain and ordinary meaning. Nester, 301 N.J. Super. at 210. Courts should not "torture the language of a contract to create ambiguity." Stiefel v. Bayly, Martin & Fay of Conn., Inc., 242 N.J. Super. 643, 651 (App. Div. 1990). The court found this PSA to be clear on the points raised. We share this view.

The court read the PSA and found no basis to conclude that defendant was entitled to any relief in terms of a child support reduction or credit towards college support. The court specifically stated "[t]hat very detailed PSA does not provide for a modification to the minimum amount [of $2,000 per month] when a child attends college." This statement was not made in a vacuum. No such language can be found that explicitly or implicitly gives succor to such a construction. "[I]t is not the function of the court to make a better contract for the parties, or to supply terms that have not been agreed upon." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999) (citing Schenck v. HJI Assocs., 295 N.J. Super. 445, 450 (App. Div. 1996)). "If the terms of a contract are clear, we must enforce the contract as written and not make a better contract for either party." Ibid.

We read the PSA as the trial court did and we see nothing inequitable, on this record, in holding the parties to the deal they bargained for in their PSA. The child support provision of the PSA "takes into account all of the terms of the [a]greement" and affords defendant no respite from his child support obligation when college contributions begin. The prudence of this agreement is not the province of the court. This is the deal the parties made.

There is a third child yet to enroll in college. The future financial well-being of the parties is unknown. The "ability to pay" standard the parties incorporated into the PSA necessarily requires a fact specific determination based on the ever changing economic and financial circumstances of the parties. Defendant may always seek further review of his ability to pay in the trial court if his circumstances meaningfully change.

Inasmuch as we have affirmed the court's first order, we need not address defendant's appeal of the denial of his motion for reconsideration. To the extent we have not addressed any other remaining arguments offered by plaintiff, it is because we have concluded they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.