SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3196-20

ALLEN S. GREENE,

Plaintiff-Appellant/
Cross-Respondent,

v.

VERONIQUE MAAS-GREENE,

Defendant-Respondent/
Cross-Appellant.

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Argued April 19, 2023 – Decided August 4, 2023

Before Judges Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FM-20-1283-18.

Dale E. Console argued the cause for appellant/cross-respondent.

Karin Duchin Haber argued the cause for respondent/cross-appellant (Haber Silver Simpson & Russoniello and Seiden Family Law, attorneys; Karin Duchin Haber and Sheryl J. Seiden, of counsel and on

the briefs; Donald Schumacher, Melissa E. Gluck, and Lauren E. Sharp, on the briefs).

PER CURIAM

In September 1985, the parties signed an antenuptial agreement (the agreement). Four days later, they married. Nearly thirty-three years later, plaintiff Allen S. Greene filed a complaint for divorce and sought to summarily validate the agreement. Defendant Veronique Maas-Greene filed an answer, a counterclaim for divorce, and cross-moved to invalidate the agreement. After a plenary hearing, the Family Part judge ultimately invalidated the agreement, finding it unenforceable.

Plaintiff now appeals from the order invalidating the agreement, and both parties appeal from the final judgment of divorce (FJOD). We affirm the judge's order invalidating the agreement, and we affirm the judge's decision denying plaintiff's request for a credit for pendente lite support he paid. We reverse and vacate the FJOD and subsequent ruling to the extent the judge erred in awarding 100% of the investment experience on plaintiff's retirement accounts to plaintiff after the complaint for divorce was filed and remand for further proceedings on that issue. We also reverse and vacate the judge's decision reversing his counsel fee award to defendant following the plenary hearing on the validity of the

agreement and ordering the parties to be responsible for their own counsel fees and costs and remand for further proceedings on that issue.

I.

A.

The Parties' Background

The parties met in Florida in 1983 while plaintiff was visiting his mother with his two children from his prior marriage. Plaintiff was in the process of getting divorced. Defendant was born and raised in France and moved to Florida in 1983 at the age of twenty-six to live with her aunt. She worked in a French restaurant and bakery where she primarily spoke French. Plaintiff was thirty-seven years old at the time.

After they met and began dating, plaintiff would travel from his home in New York City to Florida to see defendant every other weekend, and defendant traveled to New York at plaintiff's expense to see him. When defendant faced losing her employment, she planned to return to France. But plaintiff persuaded defendant to live with him. She agreed and moved into his New York City apartment. In 1984, defendant enrolled in college and took English language courses. Defendant encountered difficulty keeping a job because her English skills were limited. In 1998, she obtained a bachelor's degree in finance.

In the summer of 1985, plaintiff proposed to defendant. Plaintiff made it clear that he would not marry defendant without an agreement because he had previously gone through a contentious divorce. Plaintiff did not provide defendant with any financial documents prior to the execution of the agreement. The agreement stated that both parties had independent counsel. Defendant claimed she did not engage in negotiations regarding the agreement with plaintiff and received no legal advice related to the agreement because the attorney identified in the agreement had no experience in family law matters. The agreement called for payments to defendant in lieu of alimony should the parties divorce, dependent on the length of the marriage as follows:

Years 1 to 5:	$10,000
Years 6 and beyond:	$25,000

The marriage lasted thirty-three years, thus the agreement provided defendant would receive a $25,000 payment in lieu of alimony. The agreement also provided that each party was self-supporting or capable of being self-supporting. The agreement stated that during the marriage each party could accumulate property and assets in their own names, which would not be subject to division, and any income generated during the marriage would remain separate. The agreement made no mention of counsel fees. The agreement

further provided the laws of the State of New York governed the execution and interpretation of the agreement.

After the parties married, defendant was a stay-at-home mom who raised the parties' one child, who is now emancipated. She also was the primary caregiver for plaintiff's children from his prior marriage during his parenting time. Defendant claimed she suffered significant medical issues that affected her ability to work outside the home.

Plaintiff was a successful businessman before the marriage and throughout the marriage with interests in real estate entities that own various properties in New York City. He was the chairman and chief executive officer of SmartPros, an educational consulting company, which was later acquired by Kaplan. Plaintiff earned a significant income and orchestrated the sale of SmartPros to Kaplan, resulting in a profit and deferred compensation. Prior to his employment with SmartPros, plaintiff was the president and chief executive officer of Veral, LLC, which was created as the entity providing his consulting services. Plaintiff made defendant a 5% owner of Veral, LLC, which allegedly is now defunct.

In December 2012, plaintiff established the Allen S. Greene Irrevocable Trust for estate planning purposes. The trust named plaintiff as the grantor,

settlor, and trustor, and an attorney as the co-trustee. The beneficiaries of the trust were plaintiff's "spouse" and children, although defendant was the only person who received distributions. The trust also provided that trust income would only be paid to defendant if the parties were married. Plaintiff claims the trust was funded with his interest in a premarital property and other real estate entities he owned. During the parties' marriage, the income from the trust—$120,000 to $160,000 annually—was deposited into a joint marital account to pay expenses.

Plaintiff also owns partnership interests in other real estate assets valued in excess of $2,100,000. After litigation ensued resulting from a falling out between his business partners, a New York court awarded plaintiff interest in properties valued at $1,115,000, which he transferred to the trust. On March 8, 2018, plaintiff filed a complaint for divorce.

On June 2, 2020, plaintiff and the attorney/trustee were notified that the majority shareholder for each of the partnerships in the trust decided to terminate the trust as the minority shareholder from the partnerships. To effectuate the merger, plaintiff was terminated as an officer from each of the partnerships, and consideration paid to the trust for its interests in each of the partnerships totaled

$1,738,000. Plaintiff "gifted" bank accounts and assets to defendant during the marriage and jewelry estimated to be worth $200,000.

During the marriage, plaintiff sold his apartment in Manhattan where the parties initially resided. In 1995, the parties jointly purchased a home in Short Hills for $1,225,000 and moved there. Plaintiff paid off the mortgage from his exempt assets and paid $700,000 in renovations. In 2013, the parties sold their Short Hills home and purchased two luxury apartments in Summit, and paid for the units in cash. The parties resided in Unit 301, titled in plaintiff's name, and Unit 303 was used as an investment property and was titled in defendant's name. At trial, the parties stipulated the value of Unit 301 was $1,185,000, and the value of Unit 303 was $1,255,000, as of the date of the complaint. The parties agreed to keep their respective apartments and plaintiff paid defendant $50,000 to equalize the distribution.

B.

Motion Practice

Plaintiff moved for summary judgment seeking to enforce the agreement. Defendant cross-moved for pendente lite support, to vacate the agreement, and to establish a litigation fund. The judge denied plaintiff's summary judgment motion and defendant's cross-motion insofar as it sought to vacate the

agreement. The judge bifurcated the issue pertaining to the validity of the agreement, ordered discovery on that issue, and scheduled a plenary hearing. Regarding defendant's pendente lite support cross-motion, the judge ordered plaintiff to pay the parties' Schedule A and B expenses, maintain medical and life insurance, and pay defendant $8,000 a month in support. A consent order was later entered, which provided that in the event defendant received income from her 5% interest in Veral or trust distributions, those amounts would be credited against the $8,000 amount plaintiff was ordered to pay her each month.

C.

Hearing on the Agreement

The hearing on the agreement took place over five nonconsecutive days. Counsel for the parties were prepared to call experts to testify on New York law, but the judge ruled that was unnecessary because he could interpret New York law himself. Plaintiff testified that he retained George Bruckman, Esq. to draft the agreement. According to plaintiff, defendant asked him to refer her to an attorney for representation. To avoid any potential conflict of interest, plaintiff suggested defendant ask her immigration attorney, Harry Polatsek, Esq., who maintained offices in New York and Florida, to represent her or recommend someone. Plaintiff testified he and defendant discussed the essential terms of

the agreement would contain provisions to protect his present and future assets and that he would not make payments to her going forward because he was already making payments to his prior family.

Plaintiff admitted he did not provide any financial documents to defendant prior to the execution of the agreement despite language in the agreement to the contrary. He testified that the information set forth on his statement of financial condition dated February 22, 1985, annexed to the agreement, accurately reflected the assets and income he brought into the marriage. Plaintiff stated he kept his assets separate, and the parties maintained separate accounts, except for a joint checking and savings/money market account used to pay joint expenses, where he deposited his paychecks. Plaintiff added that defendant could have found information about his income by searching his apartment where it was kept.

Plaintiff testified Bruckman communicated directly with Polatsek one week after the parties' engagement. Plaintiff signed the agreement in his own office, and his signature was notarized by one of his employees. The signed agreement was hand-delivered to defendant's attorney so it could be signed by defendant the same day. Leonard Sclafani, Esq. notarized defendant's signature. The parties dispute whether Sclafani—Polatsek's law school friend—had a

professional relationship with Polatsek. However, the parties stipulated that Sclafani never performed any other legal services for defendant. Plaintiff contended there was no pressure exerted on defendant to sign the agreement or get married, and she did not pay for the wedding reception.

Defendant testified she had no recollection about the negotiation and execution of the agreement. She claims plaintiff discussed the agreement with her only once. Defendant authenticated her signature on the agreement. Defendant testified plaintiff wanted an agreement. She stated she did not receive any legal advice related to the agreement. Defendant testified she didn't know what "assets" or "liabilities" meant. The parties' statements of financial condition attached to the agreement indicated that defendant had a net worth of $500 and plaintiff had a net worth of $904,500.

A few days before signing the agreement and getting married, defendant testified she was seriously injured after falling from a walkway into the Hudson River while disembarking from a river boat cruise. As a result of the fall, defendant was transported to the hospital and diagnosed with a dislocated elbow. She was prescribed pain medication, which she took on the day the agreement was signed. Defendant did not postpone the wedding on account of her injuries or taking pain medication. She claimed the pain medication may have affected

her ability to comprehend the agreement when she signed it but did not proffer any other evidence to support this contention.

Defendant testified she was not involved in plaintiff's business. She had no income or assets when she married plaintiff. Defendant was "emphatic" that Polatsek only represented her one time. After their child was born, defendant stated the parties moved to a house they purchased in Short Hills. Defendant has been treated for depression and has undergone seven surgeries.

Bruckman testified he was primarily a business and corporate law attorney, but early in his career he practiced family law.[1] His testimony was based on his custom and practice, and he had no independent recollection of the agreement executed thirty-three years earlier. Bruckman acknowledged he formerly represented plaintiff. While it was Bruckman's practice to make sure that the other party had independent counsel with experience in drafting prenuptial agreements, he admitted if the other party had a prior relationship with that attorney, he would not inquire about their qualifications. Bruckman also testified he would not list the name of an attorney in an agreement who was not actually involved in the transaction.

[1] Bruckman's de bene esse deposition testimony was read into the record at trial.

Polatsek testified he practiced immigration law exclusively in Florida since 1982 and used to practice in New York City. Polatsek vaguely recalled defendant. Polatsek testified he is not familiar with the New York Domestic Relations Law (NYDRL), and never advised a client on family law.[2] He also had no knowledge of antenuptial law in the State of New York. Polatsek never maintained an office on Park Avenue as indicated in the agreement. Following the hearing, the judge requested written summations and certifications of services and reserved his decision.

D.

The Judge's Decision On The Agreement

On May 7, 2019, the judge issued a letter decision finding the agreement was invalid and unenforceable. The judge found Bruckman and Polatsek "credible." The judge determined Polatsek exclusively practiced immigration law in Florida and "would not have had the capacity to effectively represent [d]efendant" in connection with the agreement, and found Polatsek "would not have agreed to do so." Based on the testimony, the judge noted there was no evidence that Bruckman had an initial conversation with Polatsek about the

[2] Polatsek also gave de bene esse deposition testimony that was read into the record at trial.

agreement because "had he done so, [Bruckman] would have realized that . . . Polatsek wasn't in New York and wasn't familiar with this area of law." The judge found defendant was not represented by counsel when the agreement was signed and emphasized if she had counsel, "the attorney would have immediately realized that there were serious misrepresentations in that document, starting with the recital that claimed [d]efendant was self-sufficient."

On its face, the judge found the agreement was "materially false." The judge highlighted "patently false" statements in the agreement, such as: (1) the parties had independent counsel and received advice; (2) each party represents their attorney has advised them of the legal and financial means and resources of the other party; (3) each party provided full financial disclosure; (4) each party had explained to them the applicable section of the NYDRL; (5) plaintiff fully informed defendant about his income, net worth, and financial resources in a separate financial statement, which she received; (6) each party waives their rights under the Estate, Powers and Trust Laws of New York; (7) both parties are self-supporting; (8) defendant was represented by Polatsek; and (9) each party was fully informed of their rights and obligations and apprised of recent changes in the law. The judge concluded these material falsehoods rendered the agreement "manifestly unfair and inequitable, and therefore unenforceable."

The judge found defendant was a "temporary visitor to this country" with only a "passable understanding and ability to speak English," which was insufficient to enter the agreement without "competent counsel" to represent her. The agreement was signed four days before the wedding with family and guests traveling from overseas. The judge did not find defendant was incapacitated in any way from her elbow injury or taking pain medication because she participated at the wedding and did not claim she was impaired when she got married. The judge determined the agreement itself and the circumstances under which it was executed "scream total inequality."

The burden shifted to plaintiff to prove there was no overreaching, and he was unable to do so. In addition, the judge noted that no attorney required payment for defendant's legal services. The judge concluded that defendant had no permanent legal status and was "completely dependent" on plaintiff. The judge concluded "[u]nder these overwhelming circumstances, even the 'cloak of validity' New York affords [antenuptial] agreements cannot save this one."

The judge considered both parties' requests for counsel fees incurred in connection with the hearing on the agreement. After analyzing Rule 4:42-9(a)(1), N.J.S.A. 2A:34-23, and Rule 5:3-5(c), the judge awarded defendant $327,000 in counsel fees, the amount she requested. The judge determined

"there is no evidence that either party acted in bad faith," or was "unreasonable" in their positions. The judge found defendant had already paid her attorneys $200,000, thereby essentially depleting her liquid assets and noted plaintiff controls the "purse strings."

Plaintiff moved to stay the May 7, 2019 order before the trial judge, which was denied. Plaintiff then moved for leave to file an interlocutory appeal, which we denied. He then paid the $327,000 counsel fee award to defendant. The parties then engaged in discovery and retained experts for the dissolution trial.

E.

The Dissolution Trial

The parties retained forensic accounting experts. Plaintiff's expert, Mark Bloomfield, evaluated the investment growth on the premarital portion of the retirement accounts. Bloomfield opined that the passive gain from 1985 equaled $1,679,768. Defendant's expert, Thomas Hoberman, evaluated plaintiff's minority interests in his New York real estate entities. Both experts prepared reports on the parties' assets, cash flow analyses, and traced marital and pre-marital assets. The parties engaged in discovery before the trial.

The dissolution trial took place over the course of several days in August 2020. The parties stipulated to a net worth in excess of $11,000,000 as of the

date of the complaint. The issues presented were what assets are subject to equitable distribution, what assets plaintiff could prove were exempt from equitable distribution, whether defendant was entitled to alimony, credits for pendente lite support payments, and counsel fees. At the time of trial, the parties stipulated that plaintiff's average pre-tax cash flow for the years 2017 to 2019 was $433,268 annually from all sources—real estate entities, dividends, interest, and Social Security payments. In 2015, plaintiff retired at the age of sixty-nine. He claimed to have some health issues. Plaintiff did not retain records of his premarital accounts and retirement accounts because he claimed he relied on the parties' agreement, and it wasn't necessary to do so.

Bloomfield testified on behalf of plaintiff and stated financial institutions do not keep records, but he could rely on industry standards in rendering his opinion. Based on a conservative approach, Bloomfield estimated plaintiff's funds would be allocated 70% stocks, 24% bonds, and 6% cash. Bloomfield applied the Standard and Poor return rate to the stock portion and industry standards to the bond portion and concluded that the passive gain from 1985 was $1,679,768.

Defendant's expert, Hoberman, opined on the value of plaintiff's minority interests in the New York entities. Hoberman did not offer any opinion on the

increased value of plaintiff's retirement accounts because there were no interim statements to base such a calculation on, but he did not disagree with Bloomfield's conservative approach.

Defendant testified about her claim for alimony but did not admit her amended case information statement into evidence and did not testify as to her need for alimony. Following the close of the evidence, the parties submitted written summations.

F.

The Judge's Decision and FJOD

On May 27, 2021, the judge entered the FJOD accompanied by a letter opinion. Aside from two of plaintiff's pre-marital entities, the judge determined that the parties shall equally share all of the assets of the marriage as of the date of the complaint.[3] The judge ordered the parties to share equally any tax consequences arising from the division of the subject assets. The judge did not order an adjustment for market conditions after the date of the complaint, which

[3] Ordinal 4 of the FJOD incorrectly refers to "'defendant's' request to find any of the assets are exempt as pre-marital (with the exception of items of personalty) are DENIED." This is a clerical error. The reference should be to "plaintiff's" request.

meant plaintiff retained 100% of the investment experience on the parties' marital assets.

The judge ruled he had no jurisdiction over the trust, which did not intervene in the action, and therefore, the trust was not subject to equitable distribution. The judge found creation of the trust and withdrawals therefrom did not constitute a dissipation of marital assets by plaintiff, and the judge noted that trust dispersions went to defendant.

Defendant's request for alimony was denied.[4] The judge cited N.J.S.A. 2A:34-23(j)(1), which provides a "rebuttable presumption that alimony shall terminate upon the obligor spouse or partner attaining full retirement age." Since plaintiff was seventy-four years old when the FJOD was entered, the judge found it would be inappropriate to order him to pay alimony, especially in light of the parties' substantial marital estate and plaintiff's age and health issues.

The judge denied plaintiff's request for a credit for pendente lite support he paid to defendant under Mallamo v. Mallamo, 280 N.J. Super. 8, 12 (App. Div. 1995). Plaintiff did not present evidence to support a Mallamo credit. He testified that in 2018, $36,500 of pendente lite support was paid by the trust to defendant; in 2019, the trust paid defendant $112,023 and Veral paid $2,760, for

[4] Defendant does not challenge the denial of alimony ruling on appeal.

a total of $151,283 in support payments. Plaintiff instructed the trust to make distributions to defendant to pay her Schedule A and B expenses without her initial consent.

The judge denied plaintiff's request for a Mallamo credit for the following reasons: (1) a significant portion of the pendente lite support was paid from the trust distributions instead of plaintiff's income or marital assets; (2) plaintiff controlled the martial assets and had the benefit of the investment experience to pay his expenses and the balance of his pendente lite obligation; (3) plaintiff had the benefit of income tax refunds, which he used to pay expenses. Defendant had no access to these marital resources.

On the issue of counsel fees, the judge ordered each party to be responsible for their respective counsel fees and costs, and plaintiff was awarded a 100% credit for any fees he was previously ordered to contribute to defendant's fees and costs. Plaintiff incurred counsel fees and costs totaling $632,726.83, and defendant's counsel fees and costs, exclusive of the $327,000 amount she incurred to address the enforceability of the antenuptial agreement, totaled $531,757.48.

The judge analyzed the Rule 4:42-9(a)(1), N.J.S.A. 2A:34-23, and Rule 5:3-5(c) factors, the financial needs of the parties as required by our Supreme

Court in Mani v. Mani, 183 N.J. 70, 94 (2005), and the reasonableness of the fees in light of the extent of the services rendered under Williams v. Williams, 59 N.J. 229, 233 (1971). The judge emphasized "the parties are entitled to counsel of their choice" and was unpersuaded by plaintiff's argument that defendant was represented by counsel from two different law firms.

In addition, the judge requested and received sealed envelopes containing the parties' respective settlement correspondence, which he reviewed prior to deciding the counsel fee issue. Counsels' letters included proposals made before the judge conducted the hearing on the enforceability of the antenuptial agreement. The judge reiterated his prior finding on the counsel fee issue following the hearing on the agreement that neither party acted in "bad faith," and there was no evidence to support defendant's argument that plaintiff "willfully held back discovery" of thirty-five years of documents that might substantiate his position a portion of his assets were not subject to equitable distribution. The judge highlighted that plaintiff ultimately failed in carrying his burden of proof on this issue.

The judge emphasized that in the beginning stages of the divorce case, plaintiff "held virtually all of the assets of the marriage" but "[t]hat is no longer

the case." The judge determined each party should be responsible for their own counsel fees and costs.

After the entry of the FJOD, the parties disagreed as to whether defendant was entitled to receive the investment experience on her portion of the retirement assets from the date the complaint was filed—March 8, 2018—until the FJOD was issued—May 27, 2021—because the FJOD and accompanying decision did not address this issue. The parties' counsel sent letters to the judge advocating for their clients' respective positions: plaintiff sought to have the retirement accounts distributed as of the date of the complaint with no adjustment for market experience; defendant requested the retirement accounts be divided as of the date of the filing of the complaint and that she receives 50% of the investment experience for those accounts.

On July 8, 2021, plaintiff's counsel sent a letter to the judge requesting a decision on this issue. But, before the judge issued a corrective decision, under Rule 1:13-1,[5] plaintiff filed a notice of appeal. We dismissed plaintiff's appeal

[5] Rule 1:13-1 provides:

> Clerical mistakes in judgment, orders, or other parts of the record and errors therein arising from oversight and omission may at any time be corrected by the court on its own initiative or on the motion of any party, and on

without prejudice because the order appealed from was not a final order. On September 1, 2021, the judge issued his decision and determined he made no oversights or omissions when the FJOD and accompanying letter opinion were entered. Therefore, all of the investment experience was awarded to plaintiff. Based on the judge's final decision, we reinstated plaintiff's appeal and denied defendant's motion for an award of counsel fees and costs for appellate legal services.

II.

Appellate "review of a trial court's fact-finding function is limited." Cesare v. Cesare, 154 N.J. 394, 411 (1998). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). This is particularly true in matters emanating from the Family Part, because of its special expertise. Ibid.

Consequently, the factual findings and legal conclusions reached by the Family Part trial judge will not be set aside unless the court is "'convinced that they are so manifestly unsupported by or inconsistent with the competent,

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such notice and terms as the court directs, notwithstanding the pendency of an appeal.

relevant and reasonably credible evidence as to offend the interests of justice' or . . . 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). However, no special deference is owed to the trial court's conclusions of law. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (citations omitted).

III.

We first address the issues raised by plaintiff in his appeal. Plaintiff argues the judge erred by failing to apply New York law in interpreting the agreement and erred in finding the agreement was unenforceable. Plaintiff also contends the judge erred in failing to give him a credit for the pendente lite support paid because the assets were distributed equally as of the filing date of the complaint.

A.

The Agreement

Under New York law, antenuptial agreements are enforceable assuming full disclosure and comprehension, and absent unconscionability. See Christian v. Christian, 365 N.E.2d 849, 855 (N.Y. 1977). NYDRL § 236(B)(3) (McKinney 2021) authorizes spouses or prospective spouses to provide for

matters such as inheritance, distribution or division of property, spousal support, and child custody and care in the event the marriage ends. An agreement made before or during the marriage must satisfy three requirements to be "valid and enforceable in a matrimonial action." Ibid. First, the agreement must be in writing. Ibid. Second, it must be subscribed by the parties. Ibid. Third, it must be "acknowledged or proven in the manner required to entitle a deed to be recorded." Ibid.

Reviewing courts "will view the agreement in its entirety and under the totality of the circumstances." Mizrahi v. Mizrahi, 171 A.D.3d 1161, 1164 (N.Y. App. Div. 2019) (citations and internal quotations omitted); see Kabir v. Kabir, 85 A.D.3d 1127, 1128 (N.Y. App. Div. 2011) ("[W]ithout a hearing to determine the totality of the circumstances, including the extent of the parties' assets, and the circumstances surrounding the execution of the agreement, it cannot be determined on this record whether or not equity should intervene to invalidate the parties' agreement.").

An antenuptial agreement is unconscionable if "no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience . . . of any person of common sense."

Schultz v. Schultz, 58 A.D.3d 616, 616 (N.Y. App. Div. 2009) (citations and internal quotations omitted). Moreover, "[a]n agreement that might not have been unconscionable when entered into may become unconscionable at the time a final judgment would be entered." Taha v. Elzemity, 157 A.D.3d 744, 745-46 (N.Y. App. Div. 2018) (citations omitted).

To demonstrate overreaching, no actual fraud need be shown, but "the challenging party must show overreaching in the execution, such as the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception." Gottlieb v. Gottlieb, 138 A.D.3d 30, 37 (N.Y. App. Div. 2016) (citations omitted). Further, "the challenging party must show that the overreaching resulted in terms so manifestly unfair as to warrant equity's intervention." Ibid.

In Smith v. Smith, a prenuptial agreement was held to be invalid where the wife had established "her prima facie entitlement to judgment as a matter of law by demonstrating that the terms of the prenuptial agreement were manifestly unfair given the nature and magnitude of the rights she waived and in light of the vast disparity in the parties' net worth." 129 A.D.3d 934, 935 (N.Y. App. Div. 2015). The court reasoned that "[t]he circumstances surrounding the signing of the agreement support[ed] a finding that the unfairness of the

agreement was the product of the [husband's] overreaching, including that the agreement was presented to the [wife] two days before the wedding as 'take-it or leave-it.'" Ibid.

Similarly, in Davis v. Davis, both the terms of the post-nuptial agreement and the circumstances surrounding the execution, including the wife's limited education and lack of independent legal counsel, raised an issue of fact as to whether the agreement was the product of the husband's overreaching. 149 A.D.3d 483, 484 (N.Y. App. Div. 2017). The court ordered financial discovery and a hearing to determine the validity of the agreement. Ibid.

In Taha, the New York Supreme Court, Appellate Division, overruled the trial court's determination that the parties' prenuptial agreement was enforceable. 157 A.D.3d at 744. The husband earned $300,000 per year and the wife did not work outside of the home during the marriage. Ibid. The court noted that "'[a]n agreement between spouses or prospective spouses . . . may be set aside upon a showing that it is unconscionable, or the result of fraud, or where it is shown to be so manifestly unfair to one spouse because of overreaching on the part of the other spouse.'" Ibid. (citations omitted).

Plaintiff contends under New York law, when there is a "deliberately prepared" and executed written agreement, there is a strong presumption of

validity under NYDRL, especially if the agreement is notarized and sets forth the name and address of counsel. Plaintiff also asserts pursuant to NYDRL § 236(B)(5)(a), a properly executed agreement must be enforced unless it is "unconscionable" or can be shown is the result of fraud or overreaching. He claims that defendant's signature and that of her notary was stipulated to and establish an irrebuttable presumption. Plaintiff maintains the application of New York law to the matter under review supports his argument that the agreement is valid and enforceable, and the trial court erred by concluding otherwise. Plaintiff further contends there is no requirement under New York law that the parties be represented by counsel, and instead, the judge erred by not focusing on whether undue influence was exerted upon defendant by plaintiff, and there is no evidence of undue influence in the record. We disagree.

Defendant demonstrated that the terms of the agreement were manifestly unfair given the substantial rights she was waiving to alimony and equitable distribution in light of the vast disparity in the parties' net worth. See Petracca v. Petracca, 101 A.D.3d 695, 699 (N.Y. App. Div. 2012). Here, defendant only had a few days to review the agreement, did not understand essential terms such as "assets" and "liabilities," and was not represented by counsel. The agreement

lacked a schedule of the parties' assets and did not identify plaintiff's business interests at the time it was entered.

Notwithstanding defendant's execution of the agreement in the presence of a notary, the judge properly concluded the agreement was not negotiated at arm's length, and defendant was not represented by counsel. Consequently, the attorney who notarized defendant's signature merely performed a ministerial act. There were no draft agreements exchanged, and defendant testified she did not recall having any discussions with an attorney about the agreement. Defendant also testified she was not fluent in speaking or writing the English language when she signed the agreement, which was written in English. Plaintiff did not present any contrary proof on this issue. Moreover, plaintiff could not specifically identify any communications between his attorney and Polatsek about the negotiation and execution of the agreement.

Here, the agreement bears the hallmarks of an unenforceable agreement. Plaintiff is a sophisticated businessman, who is well-educated and was represented by counsel when the agreement was prepared. On the other hand, defendant was not financially savvy, spoke English as a second language, and was not self-supporting when the agreement was executed or at any time thereafter during the marriage self-supporting. And, plaintiff overlooks a salient

fact—the maintenance waiver in the agreement is unenforceable under New York law, thereby invalidating the agreement even in the face of proper authentication.

In Maddaloni v. Maddaloni, the parties entered into a postnuptial agreement, which provided that, in the event the parties divorced after the first five years of marriage, the wife agreed to accept the sum of $50,000, payable in five equal annual installments of $10,000 "in full satisfaction of any and all claims of whatsoever kind and nature she may have at that time for past or future support or for distribution of assets." 142 A.D.3d 646, 647 (N.Y. App. Div. 2016).

Thereafter, the parties remained married for more than twenty-five years before filing for divorce. Ibid. The trial court determined that the provision providing for a payment of $50,000 in full satisfaction of all support claims, was unenforceable as unconscionable. Ibid. During more than twenty-five years of marriage, the husband's jewelry business underwent "tremendous growth," and the parties lived a "lavish lifestyle." Id. at 650. The Appellate Division agreed that the trial court properly determined that the maintenance provision in the postnuptial agreement was unconscionable and, thus, unenforceable. Ibid.

Similarly, in Siclari v. Siclari, a maintenance provision of a prenuptial agreement was held unconscionable. 142 A.D.2d 392, 392 (N.Y. App. Div. 2002). The court reasoned that the agreement was "not negotiated at arms' length" and was "facially unfair," as the prenuptial agreement was drafted by the husband's lawyer the night before the wedding, and was forced upon the wife, who was not represented by counsel. Id. at 393. Based on such factors, the court set aside the wife's waiver of maintenance. Ibid.

Whether "a contract is entire or severable generally is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted." Christian, 365 N.E.2d at 856. Where there is a severability clause, by contract terms, courts are "free to adjudge the validity of . . . the separation agreement without consequential effect on the remainder of the writing." Ibid. Where the provisions of a contract are intertwined with the consideration to be paid, the agreement is considered in its entirety and indivisible. Navilia v. Windsor Wolf Rd. Props. Co., 249 A.D.2d 658, 661 (N.Y. App. Div. 1998).

Here, because there is no severability clause contained in the agreement, no provision of the agreement can remain intact. The maintenance waiver, and waivers of equitable distribution and counsel fees are inextricably intertwined

with the payment of the unconscionable consideration of just $25,000 for a thirty-three-year marriage. Accordingly, plaintiff's argument that the agreement is valid under New York law because it was signed by defendant and notarized on her behalf is devoid of merit. The judge correctly determined the agreement is invalid and unenforceable.

B.

Mallamo Adjustment

Plaintiff contends that the judge abused his discretion when he denied plaintiff's request for a Mallamo adjustment for overpayment of pendente lite support. In particular, plaintiff asserts that because the judge ultimately divided the assets equally as of the date the complaint was filed, plaintiff is entitled to a Mallamo credit. Plaintiff contends he was ordered to pay pendente lite support because the assets that supported the marital lifestyle were titled in his name. When the complaint was filed, plaintiff claims he was "largely retired," but had some sporadic consulting income, which was insufficient to pay the marital expenses.

"[P]endente lite support orders are subject to modification prior to entry to final judgment . . . , and at the time of entry of final judgment. . . ." Mallamo, 280 N.J. Super. at 12 (citations omitted). "In many instances the motion judge"

hearing a pendente lite application "is presented reams of conflicting and, at times, incomplete information concerning the income, assets and lifestyles of the litigants." Id. at 16. Often "a judge will not receive a reasonably complete picture of the financial status of the parties until a full trial is conducted." Ibid.

In analyzing a request for a Mallamo adjustment, the court must consider whether the amount of pendente lite support paid "was consistent with the marital lifestyle." Slutsky v. Slutsky, 451 N.J. Super. 332, 369 (App. Div. 2017). "Any changes in the initial orders rest with the trial judge's discretion" and are therefore reviewed under an abuse of discretion standard. Id. at 368.

Here, the judge denied plaintiff's request for a Mallamo adjustment. The judge reasoned a large portion of the pendente lite support was paid from trust distributions; plaintiff controlled the marital assets; plaintiff had the benefit of investment income to pay his expenses plus the balance of his pendente lite obligation; plaintiff had the benefit of tax refunds that he used to pay expenses; and plaintiff took his girlfriend on expensive vacations. The record shows plaintiff spent $81,000 of marital funds in five months while the divorce was pending on trips and luxuries. In addition, the judge found defendant's lifestyle has been "static," but in contrast, plaintiff's lifestyle has not been static, "neither in earnings nor expenditures."

Moreover, defendant was not awarded alimony and was ordered to pay for her own counsel fees and expenses, which the judge accounted for in the Mallamo analysis. And, plaintiff's income was $433,000 at the time these proceedings were pending; while in contrast, defendant had no income. The judge declined to retroactively modify plaintiff's pendente lite support amount after presiding over two trials, and considering factual and expert testimony. The judge considered the equitable distribution award to the parties, and in particular, his ruling that the assets would be divided equally as of the date of complaint. Based upon our careful review of the record. we are satisfied the judge did not abuse his discretion in denying a Mallamo credit to plaintiff. The judge reasonably reached the result from the evidence presented, and we do not discern any error.

IV.

We next address the issues raised by defendant in her cross-appeal. Defendant argues the judge committed reversible error by failing to distribute the parties' retirement accounts subject to passive increases in the form of market gains and losses[6] and failed to make specific findings regarding equitable

[6] In her merits brief, defendant represents she waived the investment experience on the distributions plaintiff withdrew from his retirement assets while this matter was pending.

distribution of the parties' marital retirement assets. Defendant also contends the judge erred by reversing his prior counsel fee award to her and refunding $327,000 of counsel fees previously paid to her in accordance with the May 7, 2019 order because the judge made a "final decision" that the agreement is unenforceable, and the award of counsel fees was not granted without prejudice.

A.

Market Gains and Losses

"Appellate review pertaining to the division of marital assets is narrow." Valentino v. Valentino, 309 N.J. Super. 334, 339 (App. Div. 1998) (citing Wadlow v. Wadlow, 200 N.J. Super. 372, 377 (App. Div. 1985)). "We decide whether the trial [court] mistakenly exercised its broad authority to divide the parties' property and whether the result was 'reached by the trial judge on the evidence, or whether it is clearly unfair or unjustly distorted by a misconception of law or findings of fact that are contrary to the evidence.'" Ibid. (quoting Wadlow, 200 N.J. Super. at 382).

Generally, assets are valued at the time of the filing of the complaint. Bednar v. Bednar, 193 N.J. Super. 330, 332 (App. Div. 1984) (citation omitted). However, "[p]assive assets, the value of which fluctuate after the filing of the complaint by virtue of market forces, should be valued as of the date of trial or

distribution, not the date of the filing of the divorce complaint." Platt v. Platt, 384 N.J. Super. 418, 427 (App. Div. 2006) (citing Scavone v. Scavone, 243 N.J. Super. 134, 137 (App. Div. 1990)). If the increase in the asset's value is due to the actions of one party, then the increase is not subject to distribution. Addesa v. Addesa, 392 N.J. Super. 58, 77 (App. Div. 2007).

In Addesa, we held where there are fluctuations in the value of a marital asset between the date the divorce complaint was filed and the date of distribution, an analysis must be made as to the "driving force" behind the fluctuations. 392 N.J. Super. at 76-77. We concluded where the enhanced value of an asset is attributable to market factors or inflation, the increase will generally be divided between both parties. Id. at 77.

Likewise, in Scavone v. Scavone, the trial court defined different types of assets and opined as to the method of distribution related to same. 230 N.J. Super. 482, 486 (Ch. Div. 1988). Passive assets were "defined as those assets whose value fluctuations are based exclusively on market conditions," ibid., and "passive joint asset[s] acquired during marriage," are subject to equitable distribution, id. at 490. As to the distribution of such passive joint assets, the trial court reasoned:

> If the asset increases in value between the time controlling for purposes of inclusion and evaluation,

> i.e. ordinarily the date of filing the complaint, and the time of actual distribution ordered by the [c]ourt, (and) [i]f the increase in value is simply due to market factors or inflation, each party should share equitably in the increment.
>
> [Ibid. (quoting Bednar, 193 N.J. Super. at 333)].

Here, the judge initially ordered all the parties' assets to be divided as of the date of the filing of the complaint for divorce, pursuant to the FJOD but did not apply the principles established in Addesa, Scavone, or Bednar and did not explain how changes in the parties' accounts following the date of the complaint should be distributed. The judge also did not address or find whether the accounts increased in value due to market factors or inflation or the efforts of one or both parties. In a subsequent decision, however, the judge ruled that the investment experience on the non-retirement and retirement assets that accumulated between the date of the filing of the complaint for divorce until the actual distribution date would inure to plaintiff only.

Defendant argues the judge's decision deprives her of the passive increases[7] on the parties' retirement accounts from the date the complaint was

[7] In her merits brief defendant asserts the passive increases are estimated at $800,000 to $900,000. At oral argument, her attorney argued the passive increases are $1,600,000 to $1,800,000. The exact amount is not germane to our decision except that we note it is a large sum.

filed and the entry of the FJOD in derogation of the controlling case law, and the judge's decision on this issue is inequitable. Defendant claims the growth is "passive" as defined in Scavone and later case law. Defendant maintains that plaintiff did not present any evidence at trial to prove the increase in his retirement accounts from the date of the filing of the complaint to the date of distribution was active appreciation and not passive appreciation.

We are constrained to vacate, reverse, and remand and direct the trial judge to reconsider the issue, the evidence, and the parties' arguments and make specific findings of fact and conclusions of law in accordance with Rule 1:7-4(a). The judge did not specify his reasons for refusing to account for passive investment increases in plaintiff's retirement accounts in his equitable distribution award. We remand for the judge to reconsider the issue and make the appropriate findings supporting his determination. We decline to exercise original jurisdiction under Rule 2:10-5 on this issue because the judge may require further factfinding on the passive investment increases issue.

B.

Equitable Distribution Findings

We are unpersuaded by defendant's argument the judge committed reversible error by failing to make specific findings regarding equitable

distribution of the parties' marital retirement assets under N.J.S.A. 2A:34-23.1. Defendant asserts the judge did not analyze the claims made by either party and did not conduct a categorization of the assets pursuant to Scavone.

We review a decision about equitably distributing marital assets for an abuse of discretion. La Sala v. La Sala, 335 N.J. Super. 1, 6 (App. Div. 2000). We will affirm the Family Part's decision as long as the court "could reasonably have reached the result from the evidence presented, and the award is not distorted by legal or factual mistake." Ibid. (citing Perkins v. Perkins, 159 N.J. Super. 243, 247-48 (App. Div. 1978)).

Turning to defendant's contentions, we conclude the judge properly exercised his discretion in awarding each party fifty percent of the assets with the exception of two properties plaintiff proved were his pre-marital assets: 54 Satellite Company and 12 W. 9th Street Company. Based on the testimony and expert opinions of two seasoned forensic accountants, the judge found there was "no paperwork showing the value of any retirement assets [plaintiff] owned prior to the marriage." The only documentary proof of retirement statements was dated 2013. In his decision, the judge noted there is "little question" that plaintiff had some retirement assets going into the marriage. Other than "overall value," the judge found plaintiff failed to meet his burden to claim his pre-

marital retirement assets were immune from equitable distribution. The judge therefore properly discerned the pre-marital retirement assets were part of the marital estate and divided them equally between the parties.

Based on the limited proofs available and the benefit of forensic accounting expert testimony, the judge provided his reasoning with regard to the division of marital assets based on the evidence presented. We discern no abuse of discretion in light of the fact defendant received fifty percent of the assets, save for two that plaintiff proved were exempt from equitable distribution.

C.

Counsel Fees

Defendant contends the judge initially ordered plaintiff to pay $327,000 in counsel fees to her because the judge found defendant was not represented by counsel when the agreement was entered, and the agreement was materially false for the many reasons expressed in his opinion on this issue. Defendant also claims she made a good faith effort to resolve the dispute without the need for litigation by attending several mediation sessions before the divorce complaint was filed. She also asserts plaintiff chose to "ignore" the "obvious flaws" of the agreement, which made it "blatantly unenforceable." Plaintiff argues defendant should be responsible for all of her counsel fees and costs because she received

approximately $6,000,000 in equitable distribution. The judge reversed his original $327,000 counsel fee award without adequate explanation. Based upon our careful review of the record, we vacate that portion of the court's order requiring defendant pay for the $327,000 counsel fee the court previously ordered plaintiff pay, reconsider the issue anew, and make appropriate findings of fact and conclusions of law supporting whatever determination it makes on the issue following remand.

The decision to award "attorney's fees rests within the sound discretion of the trial court." Maudsley v. State, 357 N.J. Super. 560, 590 (App. Div. 2003). "'[F]ee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion.'" Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)); accord Berkowitz v. Berkowitz, 55 N.J. 564, 570 (1970).

"Although New Jersey generally disfavors the shifting of attorney'[s] fees," a prevailing party may recover attorney's fees if expressly provided by statute, court rule, or contract. Bamberger, 167 N.J. at 440 (first citing N. Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999); and then citing Dep't of Env't Prot. v. Ventron Corp., 94 N.J. 473, 504 (1983)). A

Family Part judge may award counsel fees at their discretion subject to the provision of Rule 4:42-9. In determining the award, the judge should consider:

> (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).]

A judge "shall consider the factors set forth in [Rule 5:3-5(c)], the financial circumstances of the parties, and the good or bad faith of either party." N.J.S.A. 2A:34-23. In calculating the amount of reasonable attorney's fees, "an affidavit of services addressing the factors enumerated by RPC 1.5(a)" is

required. R. 4:42- 9(b); Twp. of W. Orange v. 769 Assocs., LLC, 198 N.J. 529, 542 (2009). RPC 1.5(a) sets forth the factors to be considered:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; [and]
>
> (8) whether the fee is fixed or contingent.

The judge noted the appropriate factors in his decision, but did not fully analyze each except to find there was no significant financial disparity between the parties because following the dissolution trial, the judge awarded each party

fifty percent of the assets as of the date of the complaint. The judge concluded each party had the same ability to pay their respective counsel fees and litigation expenses, and found both parties acted in good faith in advancing their arguments pendente lite and at the dissolution trial. However, the judge never explained why he reversed his original $327,000 attorney's fee award to defendant. Therefore, as noted, we vacate the court's order directly defendant pay the $327,000 in her counsel fees it previously directed plaintiff pay, remand for the court to reconsider that issue anew, and direct the court make appropriate findings of fact and conclusions of law. R. 1:7-4, supporting its determination of the issue on remand.

To the extent we have not specifically addressed any of the parties' remaining claims, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In sum, we:

> (1) affirm the order invalidating the agreement;
>
> (2) affirm the decision denying a Mallamo credit to plaintiff;
>
> (3) vacate the court's order directing defendant pay the $327,000 in her counsel fees it previously directed plaintiff pay, remand for the court to reconsider the issue anew, and direct that the court make appropriate

> findings of fact and conclusions of law, R. 1:7-4 supporting its determination of the issue on remand;
>
> (4) affirm the award of equitable distribution; and
>
> (5) vacate and remand as to the FJOD and subsequent ruling and direct the judge to reconsider anew his decision awarding all of the investment experience on the parties' retirement accounts to plaintiff.

We express no opinion as to the outcome of the judge's decisions on the investment experience and counsel fee issues. The court shall conduct such proceedings it deems appropriate on remand to address the issues and the parties' arguments.

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