

2017 IL App (2d) 160681-U
Nos. 2-16-0681 & 2-16-0864 cons.
Order filed October 17, 2017

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
CLARICE SCHMIDT,)	of Du Page County.
)	
Petitioner-Appellant)	
)	
and)	No. 2014-D-69
)	
ANDREW SCHMIDT,)	Honorable
)	Timothy McJoynt,
Respondent-Appellee)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court committed reversible error by *sua sponte* raising the affirmative defense of rescission to declare the parties' postnuptial agreement unenforceable, and the cause must be remanded for further marriage dissolution proceedings.

¶ 2 Petitioner, Clarice Schmidt, and respondent, Andrew Schmidt, had been married for 26 years when Andrew disclosed several extramarital affairs. The parties decided to enter into a postnuptial agreement. About a year later, Clarice filed a petition for dissolution of marriage, which remains pending.

¶ 3 Clarice moved for declaratory judgment to enforce the agreement. Andrew raised several affirmative defenses, including unconscionability and “equity.” After a long evidentiary hearing, the trial court found that the parties, through their conduct, had rescinded the agreement, rendering it unenforceable. The court expressly found that there was no procedural unconscionability but declined to rule on substantive unconscionability.

¶ 4 In this interlocutory appeal from the denial of declaratory judgment, Clarice argues two grounds for enforcing the agreement. First, she claims that the finding of rescission must be reversed because Andrew never raised rescission as an affirmative defense, and therefore, she was prejudiced and surprised by the ruling. Second, she argues that the evidence shows that the parties’ post-contractual conduct did not result in rescission. Andrew responds that he timely raised rescission as “an affirmative defense in equity;” the evidence established that the agreement had been abandoned and rescinded by the parties’ conduct; and substantive unconscionability is an alternative basis for affirming the invalidation of the agreement.

¶ 5 We agree with Clarice that rescission was not a proper ground for negating the agreement because the trial court raised the issue *sua sponte*, depriving Clarice of the opportunity to respond. To the limited extent that Andrew presented evidence of the parties’ post-contractual dealings, he did so only to demonstrate the unconscionability of their financial arrangement. The doctrine of rescission was simply never mentioned until the trial court entered its written order. We vacate the order and remand the cause for the trial court to determine whether the agreement should nevertheless be declared unenforceable based on substantive unconscionability.

¶ 6 I. BACKGROUND

¶ 7 The parties were married on July 12, 1986, and had four children, who are now adults. In August 2012, Andrew informed Clarice about his serial marital infidelities, and on January 23,

2013, the parties entered into a postnuptial agreement, ostensibly to repair the deteriorating marriage. By all accounts, Andrew was desperate to save the marriage and, against the advice of counsel, he agreed to terms that weigh heavily in favor of Clarice. She maintains that the uneven allocation is equitable and necessary to safeguard the marital estate after Andrew allegedly spent large sums on the extramarital affairs.

¶ 8 At Clarice's request, Andrew also sought mental health treatment for a sexual disorder, a personality disorder, substance abuse, and other mood issues. He moved from the marital residence in Woodridge to Mississippi, where he received those services from February 20, 2013, to July 3, 2013. While Andrew was in Mississippi, Clarice handled the family finances. In July 2013, Andrew returned to Woodridge and moved into an apartment.

¶ 9 A. Pleadings

¶ 10 The parties' efforts at reconciliation failed, and Clarice filed a petition for dissolution of marriage on January 13, 2014, about a year after entering into the agreement. On May 27, 2014, Clarice filed a motion for declaratory judgment, asking the trial court to find that the agreement is valid and enforceable.

¶ 11 On July 14, 2014, Andrew filed a response alleging the following: (1) ongoing discovery made any decision on the validity of the agreement premature; (2) a declaratory judgment would not terminate the controversy because the agreement does not address the pending dissolution of marriage; (3) the agreement was executed for estate planning purposes and Andrew had no donative intent; (4) the terms of the agreement are unconscionable; and (5) Andrew was under duress at the time of execution.

¶ 12 A year later, on July 28, 2015, and over Clarice's objection, the trial court granted Andrew leave to plead an additional affirmative defense that he labeled "equity." The equity

defense alleged that, before the agreement, Andrew's income was deposited into and the parties' expenses were paid from an account held by Clarice's trust. After Andrew was "incapacitated and confined" in the rehabilitation in-patient facility in Mississippi, Clarice allegedly took control of all of the parties' "liquid assets" in their respective trust accounts. Clarice allegedly arranged for the parties' expenses to be paid from an account in Andrew's trust, which had been allocated to him under the agreement. Meanwhile, Clarice allegedly retained all the assets held in her trust account and had all of Andrew's income deposited in an account held by her trust. Both before and after filing the petition for dissolution, Clarice allegedly "manipulated" the parties' finances and "spent and substantially depleted" Andrew's "liquid funds/assets" while "safeguarding" the assets held by her trust and depositing Andrew's income into her accounts.

¶ 13 The equity defense alleged that "[n]ot only is the agreement unconscionable, procured under duress and there being an absence of donative intent, but Clarice's use of the assets awarded to Andrew and her preservation of her own assets, is contrary to the principles of equity, is unfair, unjust and contrary to right dealing." Noting the trial court's "inherent equitable powers," Andrew asserted that the court "should refuse to enforce the terms of the agreement under the principles of equity."

¶ 14 Clarice filed a written reply to Andrew's equity defense, arguing that his "argument in regards to equity does not shine any further light on the issue of the declaratory action currently pending." Clarice argued that enforcement of the agreement would be equitable because she has always managed the household finances responsibly, while Andrew "has spent a substantial amount of the parties' marital funds and assets for the conduct of his extramarital affairs." Clarice disputed the notion that she had "somehow manipulated the parties' finances to the detriment of the marital estate." Clarice claimed that releasing Andrew from his obligations

“would serve to only infuse the parties with further uncertainty as to the disposition of property prior to a final judgment of dissolution.” She also asserted that all the expenses were legitimate and paid from her accounts.

¶ 15 B. Declaratory Judgment Hearing

¶ 16 The trial court heard the declaratory judgment motion over eight days from April 2016 through July 2016. The parties offered extensive evidence of the formation of the agreement, its terms, and Andrew’s treatment.

¶ 17 Considering the hearing’s long duration, there was relatively little evidence adduced regarding the post-contractual financial conduct of the parties. Clarice testified that she understood that the agreement divided certain assets between the parties, removing them from the marital estate. The agreement provides that items not listed in the schedules of assets are to be divided equally. Clarice testified that, in December 2012, while the agreement was being negotiated, Andrew bought her a new Audi automobile and a Tiffany engagement ring, neither of which were included in her asset schedule.

¶ 18 At the close of Clarice’s evidence, Andrew moved for a directed finding against enforcement of the agreement. Andrew’s counsel mentioned the change in valuation of certain marital assets since the execution of the agreement. Counsel argued that the diminution of Andrew’s accounts had “skewed the percentages” so much that the agreement had become “wholly one-sided.” Counsel asserted repeatedly that Clarice’s spending had made the agreement even more unfair and inequitable, but counsel never suggested that the parties’ post-contractual financial conduct was an independent basis for invalidating the agreement. The term “rescission” was never uttered.

¶ 19 The trial court denied Andrew’s motion for a directed finding. The court characterized Andrew’s argument regarding “missing assets” as one of mutual mistake. The court remarked that “there’s been enough elements shown or touched upon that the contract I think can be enforceable without further evidence. I think there has been a *prima facie* case shown so far despite what appears to be a very unequal agreement. But the court I think is compelled to hear more evidence as to how the parties arrived at that – I’ll call it again – an unequal agreement.”

¶ 20 Later, on adverse examination of Clarice during Andrew’s case, her counsel objected to testimony about the parties’ finances after execution of the contract. The court asked how such evidence was relevant, and the following colloquy occurred:

“[ANDREW’S COUNSEL]: I think the Court’s a court of equity and it can take into consideration these factors. Because it’s our position that these assets were awarded to [Andrew], but then [Clarice] went and spent down all the assets that my client was supposed to receive under the postnuptial agreement, thereby leaving him with no assets pursuant to the postnuptial agreement besides retirement.

* * *

[CLARICE’S COUNSEL]: Judge, I stand on the argument that [the relevant valuation of the accounts] is where it was immediately – at the time or immediately following [execution of the agreement]. If we get to the trial of this matter, depending on the outcome of the ruling on the motion for declaratory, that may or may not be fertile ground for testimony and examination, but not at this point, plus the remoteness of time. [Andrew’s counsel is] now asking currently where things are at in May of 2016 on an account.

THE COURT: Well, we're only here in May of 2016 because the parties have gone through oodles of time and discovery and lawyers, so –

[CLARICE'S COUNSEL]: Understood.

THE COURT: – to some extent that's both of their faults. The issue is whether or not it's probative to any of the matters that I have to consider with regards to the declaratory judgment. One of the arguments, I guess, is substantive unconscionability. All the case law says you take a snapshot of – at the time of the execution of the agreement. Post execution conduct generally is not admissible. In this case there was sort of a conspiracy theory being espoused and pled by [Andrew] as to what's happened since that during the pendency of these proceedings. And I would remind everyone, this case was filed [on] January 13, 2014. Neither party should benefit from delay. Therefore, I'm going to allow it because of the delay. Overruled.”

¶ 21 At that point, Andrew's counsel elicited testimony from Clarice that Schwab account No. 1608, which was in Andrew's trust and had been allocated to him under the agreement, no longer existed. Clarice explained that, on February 3, 2013, about two weeks after the agreement, the parties added her name to the account. According to Clarice, the parties agreed that Andrew would deposit his paychecks in the account and Clarice would draw from it to pay household expenses, although they had never done so before. When asked why she did not just continue to pay the family bills from her account where Andrew's paychecks were already being deposited, Clarice replied “[b]ecause that [account] was my money, and I didn't want my money to be spending – to be spent on sexual activities.” Clarice acknowledged that family expenses such as their child's tuition were not illicit. Clarice further conceded that the parties probably should

have opened an entirely new account to deposit Andrew's paychecks and fund the household expenses.

¶ 22 Also on adverse examination, Clarice testified to the change in value of some of her accounts, which caused her counsel to renew a continuing objection based on relevance. Overruling the objection, the court commented "[w]ell, this bridge was crossed on the last trial date and the court ruling then, as it is now, is that one of the issues is substantive unconscionability and because of the duration of this litigation, I think the Court is entitled and should hear what the current economic status of the parties is and the result of enforcing the contract that I'm asking be enforced."

¶ 23 In closing argument, Andrew's counsel argued unconscionability but never mentioned rescission. As to procedural unconscionability, counsel recounted the events during the five and one-half month period between Andrew's disclosure of his infidelities and the execution of the agreement: the household was in turmoil; Clarice controlled Andrew's behavior by threatening divorce with increasingly unreasonable ultimatums; and Andrew's health and performance at work suffered. Counsel also summarized the treating physician's testimony of Andrew's "severely impaired" mental state while in treatment in Mississippi.

¶ 24 Andrew's counsel emphasized evidence that Clarice consulted divorce attorneys in the months preceding the agreement. In contrast, Andrew only briefly consulted an attorney recommended by Clarice. The attorney advised against signing the agreement.

¶ 25 As to substantive unconscionability, Andrew's counsel discussed the agreement's terms at length, including asset distribution and Andrew's obligations regarding maintenance, life insurance, and mortgage debt.

¶ 26 At one point during Andrew's argument, both attorneys offered demonstrative exhibits showing certain accounts. The trial court inquired whether the exhibits showed the accounts' current values or their values at the time of the agreement. Both sides clarified that they were addressing the values at the time of the agreement.

¶ 27 Finally, Andrew argued the equity defense as follows:

“[T]he basis of that argument is not all the different transactions in the particular accounts, because I would agree we would need much more than a half hour closing to go through all of them. But what started out with [Andrew's] Schwab 1608 account, he had \$412,280 at the time or right about the time of signing the post-nuptial agreement.

Right afterwards, [Clarice] put her name on the account. And per her testimony, she did so because Andy had asked her for some money, and she didn't want to have to be involved in his indiscretions, and so she asked to have her name added to his account.

[Andrew] goes into rehab, [Clarice] has access to his account. And when he gets back from rehab four months later, his account has decreased by \$90,000. There is no evidence that [Andrew] had taken that \$90,000 out of the 1608 account. In fact, the one account that [Andrew] was spending money out of is not linked to the 1608 account, but was linked to a different Schwab account.

The only evidence that was shown was that when he was in rehab there was a few thousand dollars of checks for miscellaneous expenses. But the other \$90,000, regardless of where it was spent or what it was spent on, was spent by [Clarice]. And [Clarice], during this time frame, had her own funds and also had the money from [Andrew's] work and income being deposited into the accounts.

Then we move onto [Clarice's] accounts. And she definitely was spending some of her own money. But ironically when we get to June of 2014, when the divorce is actually in place, it's been filed, but the litigation is heating up. What we find is that the balance of [Andrew's] 1608 account is now \$108,892, and [Clarice's] 5487 Schwab account, which she was awarded under the post-nuptial agreement in June of 2014 is now \$681,273.

So what this means to the Court is that during this time frame, [Andrew's] assets have decreased by \$303,000, while [Clarice's] assets increased by \$20,000. And it's our position that, again, regardless of what these expenses were being paid for, both parties were assigned money under the post-nuptial agreement, both parties were using [Andrew's] income during this time period, too, but [Clarice] had the ability to transfer the monies between the accounts to make sure that it wasn't her account that was being depleted, but it was [Andrew's].

And if we look at all of this, when we look at the immediate economic circumstances of the parties after the signing of the post-nuptial agreement, I believe case law would support that the post-nuptial agreement was inequitable and should be invalidated.

But then if we look at the equity argument that the Court allowed [Andrew] to make, it becomes even more inequitable when you look at when [Andrew] would walk away in June of 2014 or even today versus what [Clarice] would walk away [with], because her actions of making sure that her assets were preserved and his was spent.

And, Judge, I believe any way you look at it, under procedural, substantive or the equity argument, this agreement is unconscionable and should be invalidated.”

¶ 28 On August 16, 2016, the trial court entered a 13-page written order denying Clarice's motion for declaratory judgment. The court characterized Andrew's affirmative defenses as follows: "(1) substantive unconscionability; (2) procedural unconscionability along with duress and coercion; (3) incapacity to contract on the part of [Andrew]; (4) no consideration; (5) mistake; [and] (6) modification of contract causing rescission." After summarizing and commenting on the witnesses' testimony, the court ruled that "[t]aking all these claims individually, none prove procedural unconscionability, duress, coercion, lack of choice, lack of capacity, or lack of consideration." In the written order, the court called the substantive unconscionability defense "an extremely close call" but found "it unnecessary to resolve this issue."

¶ 29 As to rescission, the court made the following findings:

"[Clarice] did concede to, after signing the contract, spending down marital money earned by [Andrew] but also spending down monies from the accounts mentioned in the contract. *** The monies primarily used [were] again monies [Andrew] was to receive when and if the contract was enforced. *** And it does appear that at times the money handling by [Clarice] was at least tacitly condoned by him. He offered no resistance to these activities. The effect of these transactions with or without [Andrew's] approval was to alter the terms of the contract though."

* * *

[Andrew's] closing remarks reiterated the various defenses to the contract he felt he proved at trial. *** The most compelling part of [Andrew's counsel's] comments was the claim of total unfairness when viewing demonstrative Exhibit A and that the percentages resulting from the contract are completely unfair. And the percentages really

do not take into account the life insurance and pay off of the mortgage issues directly either. This comment really went beyond unfairness and into the area of the contract being enforced was changed by the parties' conduct and thus cannot be enforced. This is relevant argument by [Andrew]. In rebuttal comments, [Clarice] primarily went back to the percentages – they claim to be 74% and 26%.

* * *

The contract sought to be enforced in this litigation is no longer the same contract entered into the parties on 1/23/13. For good or bad reasons, the parties by their post-contract signing conduct changed the terms of the contract. Simply put, the number in Schedule A of the contract no longer exists along with some of the identified accounts. New accounts now exist, created by the parties post-contract using funds from the contract. Over the one and a half years of litigation, monies earmarked for one party or the other were used to pay expenses and thousands of dollars in attorney fees – whether by agreement or not, is not relevant. The contract sought to be enforced by [Clarice] in her declaratory action is not the same contract. *** The conduct of both parties post-contract execution changed the contract, which makes the contract unenforceable by either party.”

¶ 30 In support of the rescission finding, the trial court cited *In re Marriage of Vella*, 237 Ill. App. 3d 194 (1992), for the proposition that “the parties post-contract conduct can rescind the contract, causing the contract to be unenforceable.” The court concluded that “the parties simply disregarded and did not follow the agreement, thus causing rescission of same.” However, it appears from the record that Andrew neither cited *Vella* nor the principle of rescission relied

upon by the trial court. In fact, Clarice's rebuttal argument shows that *she* brought the case to the court's attention in support of enforcing the agreement.

¶ 31 On the day the trial court entered its written order, Clarice filed a *pro se* notice of appeal, which this court docketed under appeal No. 2-16-0681. Clarice retained new counsel, and on October 7, 2016, the trial court entered a written finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason for delaying enforcement or appeal of the August 16, 2016, order denying declaratory judgment. On October 11, 2016, Clarice filed a second notice of appeal, which this court docketed under appeal No. 2-16-0864, and she filed an amended notice of appeal on October 17, 2016. This court consolidated the appeals on October 28, 2016.

¶ 32

II. ANALYSIS

¶ 33 Clarice appeals the denial of her motion for declaratory judgment. Section 2-701 of the Code of Civil Procedure (Code) provides that a circuit court may, "in cases of actual controversy, make binding declarations of rights, having the force of final judgments." 735 ILCS 5/2-701 (West 2016). The declaratory judgment statute is liberally construed and should not be restricted by unduly technical interpretations, but its application must still follow the general rule that a court may not pass judgment on mere abstract propositions of law, render advisory opinions, or give legal advice as to future events. *Babbitt Municipalities, Inc. v. Health Care Service Corp.*, 2016 IL App (1st) 152662, ¶ 43. Declaratory relief is proper only if there is an actual legal controversy between the parties in that "there is a concrete dispute admitting of an immediate and definite determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof." *Babbitt Municipalities*, 2016 IL App

(1st) 152662, ¶ 43 (quoting *Underground Contractors Ass'n v. City of Chicago*, 66 Ill. 2d 371, 375 (1977)).

¶ 34

A. Rescission

¶ 35 Clarice challenges the trial court's finding that the parties' conduct after signing the agreement resulted in rescission. Clarice contends that Andrew never raised rescission as an affirmative defense, and therefore, the court committed reversible error in raising it *sua sponte*. We agree.

¶ 36 In the context of an agreement to divide marital assets, the parties may choose to ignore their agreement and thereby rescind it as they would any other contract. *Vella*, 237 Ill. App. 3d 194, 200 (1992). Section 2-613(d) of the Code provides that facts constituting an affirmative defense, which includes "any defense which by other affirmative matter seeks to avoid the legal effect of or defeat the cause of action set forth in the complaint," must be plainly set forth in the answer or the reply. 735 ILCS 5/2-613(d) (West 2016). The test for determining the factual sufficiency of an affirmative defense is the same as that applied in deciding a motion to dismiss; the facts constituting the defense must be plainly set forth and the court will disregard any conclusions of law or fact not supported by allegations of specific fact. *Farmers Auto. Ins. Ass'n v. Neumann*, 2015 IL App (3d) 140026, ¶ 16. An affirmative defense does not negate the essential elements of the plaintiff's cause of action, but rather admits the legal sufficiency of the cause of action, asserting new matter by which the plaintiff's apparent right of recovery is defeated. *Neumann*, 2015 IL App (3d) 140026, ¶ 16.

¶ 37 Section 2-613(d) further provides that facts constituting any affirmative defense must be plainly set forth in the answer or reply if those facts are not expressly stated in the pleading and would likely take the opposite party by surprise. 735 ILCS 5/2-613(d) (West 2016). Because

rescission is an affirmative defense, Andrew was required to specifically plead it. See *Bank of America, N.A. v. Basile*, 2014 IL App (3d) 130204, ¶ 34 (citing 735 ILCS 5/2-613(d) (West 2010)). The failure to assert the affirmative defense of rescission of contract precludes a trial court from granting such relief. *Hajicek v. Nauvoo Restoration, Inc.*, 2014 IL App (3d) 121013, ¶ 18. In *Hajicek*, the defendants did not assert the affirmative defense of rescission in their answer or in their motion for summary judgment. Where the defendants raised rescission as a defense for the first time in a motion for reconsideration, the appellate court concluded that the trial court erred in granting summary judgment for the defendants on a theory that was not pled and was not raised until reconsideration. *Hajicek*, 2014 IL App (3d) 121013, ¶ 18.

¶ 38 Andrew's amended response to the motion for declaratory judgment contained several affirmative defenses, none of which mentioned rescission or the parties' post-contractual financial conduct. The affirmative defense labeled "equity" alleged that, after the agreement was signed and Andrew moved to Mississippi for in-patient services, Clarice changed the way the household expenses were paid. Before the agreement, those expenses allegedly were paid from one of Clarice's accounts, but after Andrew left the marital residence, Clarice allegedly deposited his paychecks into her account while paying bills out of his account. The equity defense concluded that "[t]he enforcement of the agreement would be contrary to principals [*sic*] of equity. This Court should refuse to enforce the terms of the agreement under the principles of equity."

¶ 39 The equity defense alleged post-contractual financial conduct that potentially could support a finding of rescission, but Andrew never proposed that legal theory in the trial court. We agree with Clarice that "arguing from those facts that the agreement became too unfair to enforce is materially different than arguing those same facts compel the conclusion that the

parties’ ‘disregarded’ and ‘did not follow’ the contract and manifested an intent, by their actions, to no longer be bound by it such that rescission is appropriate.” The record shows that the parties and the trial court considered the post-contractual financial conduct only in the context of unconscionability. Andrew argued that the conduct resulted in a modification of the contract that made the terms even more inequitable. By citing rescission as the basis for finding the postnuptial contract unenforceable, the court was the first to mention the defense, which surely caught Clarice by surprise. Clarice did not have the opportunity to respond to the court’s rescission-by-conduct theory or the finding that the parties disregarded the agreement. The resulting prejudice to Clarice compels us to conclude that the trial court erred in *sua sponte* raising rescission as a basis for declaring the agreement unenforceable.

¶ 40 Clarice alternatively contends that the parties’ post-contractual conduct did not result in rescission because (1) the parties performed all acts required by the agreement; (2) the court misinterpreted the agreement’s terms; and (3) even if Andrew had raised rescission as a basis for negating the agreement, the parties’ conduct demonstrated there was no rescission. Andrew disputes these factual claims. We need not address the parties’ factual arguments about whether they actually rescinded the agreement. We conclude that the trial court’s order must be vacated because the court *sua sponte* raised the rescission defense on Andrew’s behalf.

¶ 41 **B. Unconscionability**

¶ 42 On appeal, Andrew argues that substantive unconscionability is an alternative basis for finding the agreement unenforceable and affirming the denial of declaratory judgment. Section 502(b) of the Illinois Marriage and Dissolution of Marriage Act (Dissolution Act) provides that a marital settlement agreement is not binding upon a trial court if “it finds, after considering the economic circumstances of the parties and other relevant evidence produced by the parties, on

their own motion or on request of the court, that the agreement is unconscionable.” 750 ILCS 5/502(b) (West 2016). A finding that an agreement is unconscionable may be based on either procedural or substantive unconscionability, or a combination of both. *In re Marriage of Labuz*, 2016 IL App (3d) 140990, ¶ 37. To determine whether an agreement is unconscionable, the court must consider two factors: (1) the circumstances and conditions under which the agreement was made; and (2) the economic circumstances of the parties that result from the agreement. *Labuz*, 2016 IL App (3d) 140990, ¶ 37.

¶ 43 A marital settlement agreement is procedurally unconscionable when an impropriety in the process of forming the contract deprived a party of a meaningful choice. *Labuz*, 2016 IL App (3d) 140990, ¶ 40. Duress may make an agreement between spouses unconscionable. Duress includes oppression, undue influence, or taking undue advantage of the stress of another to the point where another is deprived of the exercise of free will. Acts or threats must be legally or morally wrongful to constitute duress, and duress is measured by an objective test, rather than a subjective one. *Labuz*, 2016 IL App (3d) 140990, ¶ 40. In the August 16, 2016, written order, the trial court stated that “[t]aking all these claims individually, none prove procedural unconscionability, duress, coercion, lack of choice, lack of capacity, or lack of consideration.” Andrew does not challenge these findings on appeal by claiming that procedural unconscionability is an alternative basis to affirm the trial court.

¶ 44 A marital settlement agreement is substantively unconscionable if it contains terms which are unreasonably favorable to the other party. *Labuz*, 2016 IL App (3d) 140990, ¶ 51. An agreement is not unconscionable merely because it favors one party over another. To rise to the level of unconscionability, the agreement must be improvident, totally one-sided, oppressive, or harsh. Substantive unconscionability is based on the fairness and obligations of the contract’s

terms, and it can be shown by terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity. *Labuz*, 2016 IL App (3d) 140990, ¶ 51. An unconscionable bargain has been defined as one “which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other.” *Labuz*, 2016 IL App (3d) 140990, ¶ 51. In determining substantive unconscionability, a court considers the terms of the agreement and the economic circumstances of the parties that result from the agreement. *Labuz*, 2016 IL App (3d) 140990, ¶ 51.

¶ 45 Clarice argues that the Dissolution Act exempts postnuptial agreements from the test for unconscionability that applies to marital settlement agreements resulting from dissolution proceedings. Relying on *Vella*, Clarice concludes that Andrew’s unconscionability defense must fail because the agreement was expressly drawn pursuant to section 503(a)(4) rather than section 502(b) of the Dissolution Act. Section 503(a)(4) applies to postnuptial agreements, like the one between Andrew and Clarice. See 750 ILCS 5/503(a)(4) (West 2016); see *Vella*, 237 Ill. App. 3d at 200.

¶ 46 Clarice contends in her reply brief that “[a]t the time the agreement was made, neither Andrew nor Clarice had filed for divorce, the agreement was not subject to court approval, and thus [section 502(b)] and its conscionability requirement is not implicated here.” While this is technically correct, Clarice obscures the issue by disregarding the plain language of section 503(a)(4), which she admits *does* apply to the agreement.

¶ 47 Section 503(a)(4) defines “non-marital property” to include “property excluded by *valid* agreement of the parties, including a premarital agreement or a *postnuptial agreement*.” (Emphasis added.) 750 ILCS 5/503(a)(4) (West 2016). Clarice cites no authority to refute the

well-settled principle that unconscionable agreements are not valid, and therefore, an unconscionable agreement cannot operate to divide non-marital property under section 503(a)(4). See, e.g., *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 60 (2011) (substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed, asking whether the terms are so one-sided as to oppress or unfairly surprise an innocent party).

¶ 48 Although we conclude that a postnuptial agreement may be challenged on the ground of unconscionability, our consideration of the issue in this case would be premature. A trial court's factual determination regarding unconscionability should be reversed only if it is against the manifest weight of the evidence. *Labuz*, 2016 IL App (3d) 140990, ¶¶ 40, 57. Here, the trial court called the substantive unconscionability defense "an extremely close call" but found "it unnecessary to resolve this issue." The court never ruled on substantive unconscionability, but Andrew urges this court to weigh the evidence and enter our own findings, without the benefit of observing the witnesses and assessing their credibility. We decline to do so. A credibility determination is best resolved in the first instance by the trial court at an evidentiary hearing. *In re Julian K.*, 2012 IL App (1st) 112841, ¶ 66 (the trial court is in the best position to make credibility determinations). Because we believe it is appropriate for trial courts to resolve factual issues in the first instance, we remand the cause for the trial court to consider Andrew's substantive unconscionability defense and to conduct any other proceedings consistent with this disposition. See *General Auto Service Station, LLC v. Garrett*, 2016 IL App (1st) 151924, ¶ 26. We emphasize that we are expressing no opinion about the relative merit of the parties' positions on substantive unconscionability.

¶ 49 For the preceding reasons, the order of the circuit court of Du Page County denying declaratory judgment is vacated, and the cause is remanded for further proceedings consistent with this disposition.

¶ 50 Vacated and remanded.