

[Cite as *Johnson v. Johnson*, 2011-Ohio-500.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

JOSEPH D. JOHNSON, II	:	
Plaintiff-Appellant/ Cross-Appellee	:	C.A. CASE NO. 2010 CA 2
v.	:	T.C. NO. 08DR418
DEBORAH S. JOHNSON	:	(Civil appeal from Common Pleas Court, Domestic Relations)
Defendant-Appellee/ Cross-Appellant	:	
	:	

**OPINION**

Rendered on the 4<sup>th</sup> day of February, 2011.

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FROELICH, J.

{¶ 1} Joseph D. Johnson II (“Johnson”) appeals from a Judgment and Decree of Divorce of the Miami County Court of Common Pleas, and his former wife, Deborah Cade Johnson (“Cade”), cross-appeals. Both parties challenge the trial court’s decisions with respect to their prenuptial agreement.

{¶ 2} For the following reasons, the trial court’s judgment will be affirmed.

I

{¶ 3} Before their marriage, Johnson had substantial assets, including a car dealership; Cade’s assets were much more limited. Both parties had been married previously, and Johnson made it clear to Cade that he would not remarry without a prenuptial agreement. Thus, Johnson and Cade negotiated a prenuptial agreement, and they were both represented by counsel during the negotiations. They signed the prenuptial agreement and were married in the summer of 2004. No children were born of the marriage.<sup>1</sup>

{¶ 4} Generally, the prenuptial agreement provided that the parties’ separate property would remain separate, and only appreciation or depreciation in their separate assets during the marriage would be treated as marital property. The agreement also provided that joint assets would be divided equally upon divorce. Many provisions of the prenuptial agreement are relevant to the arguments raised under the assignments of error, and we will address these provisions more fully below.

{¶ 5} The parties had purchased a residence in Troy prior to their marriage under a joint purchase agreement. Johnson contributed \$225,000 toward the purchase of the home from his separate property, and Cade contributed \$50,000. The parties also purchased a condominium in Port Clinton, Ohio, during their marriage (“the Marin Woods condo”). Johnson contributed \$361,000 toward this purchase and the redecoration of the condo from his separate property, and Cade did not contribute any assets. There were mortgages on both properties. Both the marital home and the Marin Woods condo were titled jointly. During the marriage, both parties drove

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<sup>1</sup>Both parties had adult children from previous marriages.

cars provided by Johnson's car dealership and leasing company; they did not own the vehicles. After the parties were married, Cade quit her job so that she would have more freedom to travel with Johnson.

{¶ 6} Johnson filed a Complaint for Divorce on December 4, 2008. Three weeks after he filed his Complaint, Johnson filed a Motion to Enforce the Prenuptial Agreement. Cade opposed this motion, claiming that the prenuptial agreement was unenforceable or had been breached by Johnson, and she sought an equitable distribution of the marital assets. In July 2009, a hearing was held before a magistrate on the Complaint for Divorce, which focused primarily on the prenuptial agreement. On September 22, 2009, the magistrate filed his decision, concluding that the prenuptial agreement was valid and enforceable. Specifically, the magistrate concluded that Johnson had "adequately disclosed" all of his assets to Cade and that she had had "full knowledge, and understanding, of the value and extent of Johnson's property" before the prenuptial agreement was executed. With respect to the parties' jointly-owned assets, the magistrate found that the condominium had been purchased with Johnson's separate property, had a fair market value of \$400,000, and should be listed for sale. The magistrate ordered that, after the sale of the condo and the payment of all related expenses, Johnson would receive the first \$361,000 (the amount of separate property he had used to purchase the property), and any remaining funds would be divided equally. The magistrate valued the marital home at \$440,000 and ordered that Johnson would keep the home subject to all outstanding encumbrances. The magistrate found that Johnson had contributed \$225,000 to the purchase of the home, and Cade had contributed \$50,000. After accounting for the debt owed on the property, the magistrate credited each party with the amount he or she had contributed to the

purchase of the home, and then divided the value in excess of these amounts equally between the parties. Pursuant to these computations, Johnson was ordered to pay Cade \$91,707.13 as her share of the marital home.<sup>2</sup> The magistrate did not address the Will and Trust provisions of the prenuptial agreement.

{¶ 7} Cade filed objections to the magistrate’s decision in which she argued that the prenuptial agreement was unenforceable because Johnson had not disclosed all of his assets before it was signed. She also argued that the magistrate erred: 1) in failing to award her half of the equity in the condominium and the marital home, irrespective of the parties’ contributions to the purchase of those properties; 2) in failing to award her a car or the value of a car; and 3) in failing to address “the vast majority of legal and factual issues presented.” She further asserted that Johnson had breached the agreement by modifying his Trust and Will after he had initiated the divorce, in violation of the terms of the prenuptial agreement.

{¶ 8} The trial court affirmed the magistrate’s decision in part and modified it in part. The trial court agreed with Cade’s argument that the condominium and marital home should have been divided equally under the terms of the prenuptial agreement, despite the fact that Johnson had contributed more toward the purchase of these properties. The trial court also ordered Johnson to provide Cade with the car she was then driving (a Chevy Trailblazer) for one year, or to pay her an equivalent value. The court rejected Cade’s other arguments without discussion, stating that “[a]ny objections not specifically addressed herein, are overruled without comment.”

{¶ 9} Both parties filed notices of appeal. Johnson raises two assignments of error, and

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<sup>2</sup>The parties also had a second mortgage on this property, referenced as “Harmony,” which was factored into the trial court’s calculations.

Cade raises six assignments, all of which relate to the terms and enforceability of the prenuptial agreement.

## II

### Prenuptial Agreements

{¶ 10} “It is well settled in Ohio that public policy allows the enforcement of prenuptial agreements.” *Fletcher v. Fletcher*, 68 Ohio St.3d 464, 466, 1994-Ohio-434. The Supreme Court has held that “[s]uch agreements are valid and enforceable (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse’s property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce.” *Gross v. Gross* (1984), 11 Ohio St.3d 99, paragraph two of the syllabus. Although a prenuptial agreement must meet these three “special” conditions, in all other respects, prenuptial agreements are contracts, and the law of contracts will generally apply to their application and interpretation. *Fletcher*, 68 Ohio St.3d at 467; *Saari v. Saari*, Lorain App. No. 08CA9507, 2009-Ohio-4940, ¶25. We will affirm a trial court’s interpretation of such a contract if the record contains competent evidence to support it. *Fletcher*, 68 Ohio St.3d at 468; *Badger v. Badger*, Medina App. No. 3197-M, 2002-Ohio-448.

{¶ 11} The primary role of the court in reviewing a contract is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 1999-Ohio-16. A contract that is, by its terms, clear and unambiguous requires no real interpretation or construction and will be given the effect called for by the plain language of the contract. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 55. A contract is ambiguous if its provisions are susceptible to two or more reasonable interpretations.

*Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, ¶18. Whether a contract's terms are clear or ambiguous is a question of law for the court. *Westfield Ins. Co. v. HULS Am., Inc.* (1998) 128 Ohio App.3d 270, 291; *Cooper v. Chateau Estate Homes, L.L.C.*, Warren App. No. CA2010-07-061, 2010-Ohio-5186, ¶12.

{¶ 12} A prenuptial agreement that is freely and voluntarily entered into after full disclosure of a spouse's property will not be invalidated because it makes a disproportionate distribution. *Fletcher*, 68 Ohio St.3d at 466. “[V]irtually every prenuptial agreement provides for the disproportionate distribution of assets in favor of the spouse who brings those assets to the marriage \*\*\* [given that] the very purpose of a prenuptial agreement is to avoid by contract the equitable distribution of property mandated by statute.” *Saari*, 2009-Ohio-4940, ¶9 (citations omitted). In fact, Ohio law permits the parties to a prenuptial agreement to cut one another off entirely from participation in the other's estate. *Hook v. Hook* (1982), 69 Ohio St.2d 234, 235; *Roseman v. Glanz*, Cuyahoga App. No. 93628, 2010-Ohio-680, ¶15. A prospective wife or husband waives any particular right arising out of the marriage contract, including statutory rights, “where the agreement by its clear wording shows that such a result was intended.” *Troha v. Sneller* (1959), 169 Ohio St. 397, syllabus.

{¶ 13} Because Cade's arguments on cross-appeal challenge the enforceability of the prenuptial agreement, rather than its interpretation, we begin with those arguments.

{¶ 14} Cade's first assignment of error states:

{¶ 15} “THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT JOSEPH JOHNSON BREACHED THE PRENUPTIAL AGREEMENT AND FAILED TO REMEDY THAT BREACH.”

{¶ 16} Cade claims that the trial court erred in failing to enforce the prenuptial agreement's requirement that Johnson maintain a Trust for her benefit for the rest of her life and fund the Trust through his Will. She contends that Johnson breached the prenuptial agreement by altering the provisions of his Will and Trust after he filed for divorce and that the trial court should have recognized this breach by invalidating the prenuptial agreement or awarding her damages.

{¶ 17} The prenuptial agreement contains several provisions that are relevant to Cade's argument. She relies on the provisions under "Agreement to Make Wills" and "Joe's Revocable Living Trust." Under "Agreement to Make Wills" ("the Will provision"), Johnson was required to execute a Will that included several provisions for Cade's benefit, including a provision that he would leave his entire residuary estate to his Revocable Living Trust.<sup>3</sup> The section entitled "Joe's Revocable Living Trust" ("the Trust provision") provided:

{¶ 18} "Joe has established a Revocable Living Trust, wherein he serves as his own Trustee. He may name whatever alternate Trustees he desires. Joe agrees to execute and maintain a provision in his Trust leaving one-third (1/3) of his residuary estate in Trust for Debbie. \*\*\* The one-third (1/3) interest held in Trust for Debbie shall provide for a five percent (5%) uni-trust yield to her each year, based on the value of the Trust at December 31<sup>st</sup> of the immediate prior year for the remainder of her life. In addition, the Trustee, in its sole discretion, shall distribute any amounts of income or principal necessary, in the opinion of the trustee, for Debbie's health, education, maintenance and support for the remainder of her life. In addition

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<sup>3</sup>The Will provision also required the parties to leave all of their tangible personal property, all motor vehicles, and the marital home to one another, and to name one another as executor.

thereto, the Trustee is authorized and shall provide vacation funds to Debbie in an amount not to exceed \$10,000 per year. The Trustee shall purchase a new automobile for Debbie as soon as practicable after Joe's death from Debbie's share or [sic] the Trust. At Debbie's death, the Trustee shall distribute the remainder of her one-third (1/3) interest in the Trust as follows: One-third (1/3) to Debbie's daughter Emily Dilworth. Joe shall be free to distribute the remaining two-thirds (2/3) to whomever he chooses."

{¶ 19} Cade relies on the statement that the Trustee "shall distribute \*\*\* income or principal \*\*\* for [her] health, education, maintenance and support *for the remainder of her life*" in support of her claim that the Trust provisions of the prenuptial agreement were intended to be binding until her death, notwithstanding the parties' divorce. The provision relating to health and maintenance in the Trust provision is confusing; it could mean if Johnson dies during the marriage, thus funding the Trust from the pouring over of his residuary estate,<sup>4</sup> the Trust will pay Cade's health, education, maintenance, and support for life. But another provision of the prenuptial agreement provides that, in the event of a divorce, each party's medical and long-term care expenses are to be paid by the party for whose benefit the cost was incurred. This "Medical and Long Term Care Expenses" provision, requiring Cade to pay her own medical expenses upon divorce, is inconsistent with Cade's position that Johnson was required, after a divorce, to provide for her health and maintenance through the Trust upon his death. Under Cade's interpretation of these provisions, she would have been required to pay her own health care costs for a period after the divorce – perhaps many years – until Johnson died, predeceasing

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<sup>4</sup>The Trust could be otherwise funded during Johnson's life from other assets and/or, depending on circumstances, there could be no residue in his estate when he dies and no assets in the Trust.



her, whereupon her health care costs would be paid by the Trust. It seems unlikely that the parties envisioned and bargained for such an arrangement. Similarly, it is doubtful that the parties intended that the requirement for Johnson's Will to leave all personal property and their marital home to Cade would survive divorce, especially when they specifically provided for the disposition of such property in other parts of the prenuptial agreement.

{¶ 20} Cade contends that interpreting the agreement such that the Trust provisions ended upon divorce would be "absurd" and illogical, because such an interpretation would mean that she had "contract[ed] to have the option of receiving a smaller share of her husband's estate than she was entitled to under statute" upon his death. However, this is what she agreed to do in the provision waiving, relinquishing, and releasing all rights, claims or demands against the estate by reason of the marriage or as surviving spouse. The language of the Trust provision itself does not provide any insight into whether the parties intended for it to be binding in the event of a divorce. However, when they signed the prenuptial agreement, the parties waived their "right to elect to take against" the other's Will as a surviving spouse. See "General Waiver of Claims." This waiver arguably suggests that the Trust provision was included in exchange for Cade's waiver of her statutory right to a spousal share of Johnson's estate upon death. Because a former spouse would not be entitled to the statutory share of a decedent's estate, the trial court could have reasonably concluded that the parties did not intend for the Trust provision to be binding after a divorce.

{¶ 21} Neither the magistrate nor the trial court expressly addressed the Will and Trust provisions in their decisions. The trial court implicitly rejected Cade's argument, however, by overruling her objection to the magistrate's failure to find that Johnson had breached or

repudiated the agreement by “revoking his trust and modifying his will” and by not incorporating into the final decree a requirement that Johnson continue to provide for Cade through his Will and Trust.

{¶ 22} It is undisputed that the prenuptial agreement required the Trust to provide for Cade “for the remainder of her life” *if* Johnson had died during the marriage, an event which would have triggered the funding of the Trust. This fact, however, does not compel the conclusion that the parties intended for Cade to remain a beneficiary of the Trust if the parties divorced. The agreement is silent with respect to the effect of a divorce on the Will and Trust provisions, and some parts of the Will and Trust provisions are confusing and contradictory. The prenuptial agreement directs the disposition of property upon divorce. Provisions regarding the disposition of property in a will or trust, were they to survive a divorce, would be inconsistent with the prenuptial agreement’s directions.

{¶ 23} We agree with Cade that the revocable nature of the Trust did not, in itself, entitle Johnson to change the Trust provisions upon the parties’ divorce, if he had agreed to do otherwise in the prenuptial agreement; however, we do not find this argument to be controlling in determining the parties’ intent with respect to the Trust upon their divorce.<sup>5</sup> We must look at the entire prenuptial agreement to determine whether the trial court reasonably omitted from the final decree any requirement that Johnson provide for Cade through his Will and Trust after the divorce.

{¶ 24} The language in the prenuptial agreement with respect to Cade’s benefits under

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<sup>5</sup>A revocable trust is an estate planning tool, and its primary purpose is to avoid probate for the assets held in the trust. Ohio Elder Law §7:15 (2010); Baldwin’s Ohio Prac. Merrick-Ripper Prob.L. §3:5(2009).

the Trust document suggests that the parties contemplated Johnson's death prior to the Trust's taking effect. His residuary estate funds the Trust, and the Trustee is instructed to purchase a car for Cade "as soon as practicable after Joe's death."

{¶ 25} In addition to the Will and Trust provisions cited by Cade, the prenuptial agreement contained a section entitled "Rights Upon Divorce or Dissolution of Marriage," which sets forth several rights and obligations in the event of a divorce. This section did not include a requirement that Johnson leave the Will and Trust provisions in effect upon divorce. The trial court could have reasonably concluded that such a requirement would have been included under "Rights Upon Divorce" if the parties had intended for the Will and Trust provisions to be incorporated into a divorce decree, especially because parties to a divorce would not normally be expected to inherit from one another.

{¶ 26} At the hearing before the magistrate, neither party testified about his or her intentions with respect to the Will and Trust provisions. The attorney who represented Johnson in the preparation of the agreement testified that, in a prenuptial agreement, the provisions related to death and to divorce are generally separate and that the provisions concerning death have no application after a divorce. Although the attorney acknowledged that the parties to a prenuptial agreement could express an intent to provide for the one or both spouses beyond divorce and/or in death, he testified that such an arrangement was not contemplated in this case.

{¶ 27} Cade testified that, in the context of her decision to quit her job, she had expressed concern to Johnson about forfeiting contributions to her IRA, but Johnson had assured her that there was plenty of money in the Trust and that she would receive his Social Security upon his death. This discussion, like the Trust provisions in the prenuptial agreement, seems to have

contemplated Johnson's death during the marriage. In our view, the discussion recounted by Cade shed no light on the parties' intentions in the event of a divorce or on the parties' intentions at the time the prenuptial agreement was executed.

{¶ 28} Finally, due to the nature of the other Will provisions contained in the prenuptial agreement, common sense suggests that the parties did not intend for these requirements to remain in effect if the parties divorced. For example, as mentioned above, the Will provision stated that Johnson would draft a Will leaving all of his tangible personal property to Cade upon his death, providing that Cade would become the owner of the marital home, with the mortgage to be paid by his estate or Trust, and naming Cade to serve as executor of his estate. Cade also would have been required to name Johnson as her executor. If the trial court had adopted Cade's position that the Will provisions by which the Trust was funded were binding after divorce, the same logic would have compelled the trial court to enforce these other provisions as well. We presume that the trial court found it unreasonable to infer that the parties intended for these property rights and fiduciary duties to continue after their divorce in the absence of a clear expression of that intent. The trial court reasonably concluded that the parties had not intended for the Will and Trust provisions to be incorporated into the divorce decree or to otherwise be binding after a divorce.

{¶ 29} A prenuptial agreement is a contract made in anticipation of marriage; therefore, when that condition precedent (the marriage) takes place, the contract is binding on the parties. The parties' prenuptial agreement specifically provides that, absent their marriage, it "shall not be binding or effective for any purpose;" in the same paragraph, it provides that, if married, "their rights with respect to the property owned by either of them at the time of the marriage or acquired

after marriage to each other shall be subject to the terms of this Agreement.” Similarly, the prenuptial agreement provides that, upon marriage, it “shall continue in full force and effect until revoked in writing and signed by both parties.” There is nothing in the agreement that provides its mutual promises cease upon divorce. In fact, the prenuptial agreement contained an “Incorporation or Merger of Agreement” provision, which stated:

{¶ 30} “The provisions of this Agreement are to be incorporated in but not merged into any judgment or decree of divorce, separation, or annulment, it being intended that this Agreement survive any such decree or judgment and that the terms of this Agreement not be subject to modification by any court. \*\*\*”

{¶ 31} It is well established that a separation agreement incorporated into, but not merged with, a divorce decree remains a separate and enforceable contract between the parties, and the language of the separation agreement prevails. See *DeSantis v. Lara*, Hamilton App. No. C-080482, 2009-Ohio-2570; *Mandelbaum v. Mandelbaum*, Montgomery App. No. 21817, 2007-Ohio-6138. See, also, *Hoskins v. Skojec* (1999), 265 A.D.2d 706, 707, 696 N.Y.S.2d 303, 304; *Mundus v. Mundus* (2005), Conn. Super. FA990071258. Where the parties have entered into a prenuptial agreement, the courts likewise have limited authority to disturb the terms of the prenuptial agreement, because the parties have vested contractual rights. *Hoskins*, supra. That is to say, those parts of the agreement that relate to what happens in case of a breakup of the marriage are to be incorporated into the divorce judgment, but the entire agreement is not necessarily merged into the judgment (and hence out of existence); but rather that it shall “survive any such decree or judgment.”

{¶ 32} In this case, however, Cade does not rely on the “Incorporation or Merger of

Agreement” provision in the prenuptial agreement in arguing that portions of the agreement embodied in the prenuptial agreement were intended to be binding after divorce. Moreover, the disputed terms of the prenuptial agreement, in themselves, are ambiguous, as discussed above. After considering the previously-discussed ambiguities in the prenuptial agreement, the trial court did not err in concluding that the Will and Trust provisions of the prenuptial agreement were not intended to be enforceable after divorce or in failing to “incorporate” these provisions into the decree.

{¶ 33} Cade further contends that the absence of language expressly stating that the Will and Trust provisions of the prenuptial agreement terminated upon divorce should be construed against Johnson, because his attorney drafted the agreement.

{¶ 34} Both parties were represented by counsel in the prenuptial negotiations, and the agreement specifically provided under “Interpretation of Agreement” that “[n]o provision in this Agreement is to be interpreted for or against any party because that party or that party’s legal representative drafted the provision.” Even if Cade is somehow arguing that a provision that states that no provision should be interpreted for or against any party should, itself, be construed against the drafter, this contention is not well taken. We are unpersuaded by Cade’s assertion that general principles of contractual interpretation, such as construing ambiguity in a contract against its drafter, ought to outweigh a provision that the parties deliberately inserted into their agreement calling for a different interpretation. Even when the parties have engaged in extensive negotiation over a contract, one party or the other must prepare the final document for signature. Where both parties were represented by counsel and expressed their agreement that the provisions would not be construed against the drafter, there is no reason not to enforce the

parties' expressed intent. The trial court did not err in concluding that Cade was not entitled to have the terms of the agreement construed in her favor or against Johnson.

{¶ 35} Cade also argues that the trial court should have awarded damages to her for Johnson's breach of the prenuptial agreement. Because we have concluded that Johnson's modification of the Will and Trust provisions after the divorce did not violate the prenuptial agreement, no damages were appropriate. Moreover, Cade never asked for "damages" in the trial court.

{¶ 36} Cade's final argument under this assignment of error is that the trial court should have allowed her expert witness, James Kelly, to testify "about what Joseph Johnson's net worth would have been at the time of his death." At the hearing, Johnson challenged the relevance of the expert's testimony on the basis that, in light of the divorce, Cade would have no interest in his estate at the time of his death.

{¶ 37} The trial court did not state its reason for excluding the expert witness's testimony about the projected value of Johnson's estate at death. However, the trial court could have reasonably found that this testimony was not relevant to Johnson's alleged breach of the prenuptial agreement. The trial court could also have reasonably concluded that the proffered testimony was speculative.

{¶ 38} We review a trial court's decision regarding the validity of a prenuptial agreement under an abuse of discretion standard. *Bisker v. Bisker*, 69 Ohio St.3d 608, 609-610, 1994-Ohio-307. See, also, *Zawahiri v. Zawahiri*, Franklin App. No. 07AP-925, 2008-Ohio-3473, ¶21; *In re Estate of Gates v. Gates*, Columbiana App. No. 06 CO 60, 2007-Ohio-5040, ¶13. An abuse of discretion occurs when the decision of a trial court is

unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 50 Ohio St.3d 217, 219. Further, determining the validity of a prenuptial agreement “is a question of fact best left to the trial court.” *Bisler*, 69 Ohio St.3d at 610. The trial court did not abuse its discretion.

{¶ 39} Cade’s first assignment of error is overruled.

#### IV

{¶ 40} Cade’s second assignment of error states:

{¶ 41} “THE TRIAL COURT ERRED BY FINDING THAT MS. CADE ENTERED THE AGREEMENT WITH FULL KNOWLEDGE OF MR. JOHNSON’S ASSETS DESPITE THE UNDISPUTED FACT THAT HE NEVER DISCUSSED HIS INTEREST IN A BUILDING OR HIS OWNERSHIP OF A TRUST FUND WITH HER.”

{¶ 42} Cade contends that Johnson did not disclose two of his assets on the financial disclosure form that was presented to her before the prenuptial agreement was signed: a one-third interest in a vacant building and his ownership of a trust fund. Cade claims that Johnson failed in his “fiduciary duty” and that the failure to disclose these assets rendered the prenuptial agreement unenforceable.

{¶ 43} Johnson testified at the hearing that, prior to his marriage to Cade, he and two other men had formed JET Leasing for the purpose of buying a building from an unethical competitor, which facilitated that competitor’s departure from the area. Johnson used the building briefly, but it had mostly been vacant, and JET Leasing had been unable to sell the building despite trying to do so for several years. Johnson claimed that he included the value of this building in the assets of “Joe Johnson Chevrolet” on the disclosure form presented to Cade and her attorney before the prenuptial agreement was signed. Cade did not present any evidence



contradicting this claim. Cade admitted at the hearing that she had known of Johnson's purchase of this property, and she believed that the dealership had made the purchase. Following the hearing, the magistrate concluded that Johnson "adequately disclosed his interest in JET Leasing by including the value of this business in the value of Joe Johnson Chevrolet Oldsmobile." The magistrate's factual conclusion that the value of JET Leasing had been included in the value of Johnson's car dealership on the disclosure form is supported by the record, and we see no reason to disturb this finding.

{¶ 44} Johnson admitted that he had not disclosed the value of a trust fund that he owned on the premarital disclosure forms. The magistrate found that he had "inadvertently failed to list" this asset, which had a value of \$125,000 in 1998 (several years prior to the marriage) but was valued at \$72,233 at the time of the hearing. The value at the time of the marriage was unclear. Notwithstanding this omission, the magistrate concluded that Johnson had adequately disclosed his assets and that Cade "had full knowledge, and understanding, of the value and extent" of Johnson's property. The magistrate noted that Johnson had disclosed his net worth as approximately \$5,777,866, and that the amount of the undisclosed trust was "immaterial" when compared with Johnson's net assets. Based on this finding, the magistrate concluded that the prenuptial agreement was valid and enforceable notwithstanding the omission. The trial court did not disturb this finding.

{¶ 45} In support of her argument that Johnson's failure to disclose the trust fund rendered the prenuptial agreement unenforceable, Cade relies on cases in which there were substantial omissions with respect to the value of property. For example, in *In re Estate of Bishop* (May 8, 1997), Muskingum App. No. 96-0039, the prenuptial disclosure listed several

pieces of real property, several savings accounts, partial ownership of a machine shop, several vehicles, insurance policies, and other items. Specific values were ascribed to the savings accounts, but not to the real property or the machine shop, nor was the extent of the husband's interest in the machine shop disclosed. The prenuptial agreement provided that the wife got nothing in event of death or divorce. After the husband's death, the wife challenged the enforceability of the prenuptial agreement based on inadequate disclosure of assets. The husband's attorney testified that he himself had not known the value of the husband's interest in machine shop. The husband's attorney also acknowledged that the husband had not disclosed the value or extent of his interest in the machine shop or the value of his real property prior to the execution of the prenuptial agreement; the attorney had not believed it was necessary to do so. The Fifth Appellate District held that, under the facts presented, the extent of the husband's assets had not been fully disclosed to the wife prior to entering the prenuptial agreement, and therefore the agreement was invalid and unenforceable.

{¶ 46} Cade also relies on *Juhasz v. Juhasz* (1938), 134 Ohio St. 257. In *Juhasz*, the wife consented in a prenuptial agreement to accept a provision in the husband's will that, upon his death, she would receive one-sixth of the husband's real property located in Cuyahoga County (or an equivalent value in stock or other securities); in exchange, the wife agreed to waive "all rights or claims of dower, inheritance, [and] descent \*\*\* and all rights or claims to a distributive share of his personal estate." The agreement was explained to the wife, who did not speak English well, through an interpreter. During this conversation, the disclosure of the nature and amount of the husband's property was "fairly full and complete," but no values were discussed. The Supreme Court held that the prenuptial agreement was unenforceable because

the wife, “with her limited knowledge of property values and of business could hardly be expected to know of her own accord the value of the undivided one-sixth of the real estate in Cuyahoga County in comparison with the value of all [the husband’s] property.” Thus, the court held that, as a matter of law, full disclosure had not been made in that case.

{¶ 47} *Bishop* and *Jurasz* do not stand for the sweeping proposition that every minor interest must be disclosed for a prenuptial agreement to be valid, and the cases are factually distinguishable from this case. The view taken by the Eighth District in an opinion authored by current Supreme Court Justice Terrence O’Donnell is more instructive. The Eighth District held that “general knowledge of the nature and extent of the other’s wealth and assets” is sufficient to satisfy the “full disclosure” requirement of *Gross*, 11 Ohio St.3d 99 (upon which Cade also relies). *Millstein v. Millstein*, Cuyahoga App. Nos. 79617, 79754, 80184, 80185, 80186, 80187, 80188, and 80963, 2002-Ohio-4783. Because the value of the undisclosed asset in this case was not significant when compared with all of Johnson’s assets, and there was no suggestion that Johnson had concealed the asset in bad faith, the trial court reasonably concluded that the omission did not invalidate the prenuptial agreement.

{¶ 48} Cade’s second assignment of error is overruled.

V

{¶ 49} Cade’s third assignment of error states:

{¶ 50} “THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT THE TERMS OF THE PRENUPTIAL AGREEMENT PROMOTED DIVORCE OR PROFITEERING FROM DIVORCE.”

{¶ 51} Cade asserts that the trial court erred in concluding that the prenuptial agreement

permitted Johnson to terminate his contractual obligations through divorce (i.e., finding that the Will and Trust provisions were not binding upon divorce), because such an interpretation promotes divorce or profiteering through divorce.

{¶ 52} As Johnson points out, Cade did not raise this argument in the trial court. We need not address an argument that is raised for the first time on appeal. *Rieger v. Montgomery County*, Montgomery App. Nos. 23145, 23162, 2009-Ohio-4125, ¶18. Moreover, the Ohio Supreme Court has recognized that a prenuptial agreement is a contract and that it is valid even if it effectuates a disproportionate distribution of assets, so long as certain conditions are met. *Gross*, 11 Ohio St.3d 99. The fact that one party gains a financial advantage from such a contract in terms of protecting his or her assets does not invalidate it, constitute “profiteering,” or make the agreement unenforceable.

{¶ 53} Cade’s third assignment of error is overruled.

## VI

{¶ 54} Cade’s fourth assignment of error states:

{¶ 55} “THE TRIAL COURT ERRED WHEN IT ENFORCED THE AGREEMENT ACCORDING TO MR. JOHNSON’S INTERPRETATION.”

{¶ 56} Under this assignment of error, Cade reasserts her arguments that the trial court erred in its interpretation of the Trust and Will provisions of the prenuptial agreement. She points out several alleged ambiguities in the prenuptial agreement and asserts that these ambiguities either made the agreement unenforceable or should have been construed against Johnson, because he drafted the agreement.

{¶ 57} As discussed above, the prenuptial agreement specifically provides that “[n]o

provision in this Agreement is to be interpreted for or against any party because that party or that party's legal representative drafted the provision." We reject Cade's suggestion that we should ignore this provision in the agreement.

{¶ 58} Cade alleges that the prenuptial agreement contains ambiguities with respect to the payment of her health care costs, the definitions of "business interests" and "assets", and how a breach of the agreement is to be identified and remedied. These "ambiguities" are inconsequential. The alleged ambiguity with respect to health care costs would have existed only if the Trust provisions were incorporated into the parties' divorce decree and went into effect on Johnson's death. Because the trial court reasonably concluded that Johnson was not required to keep Cade as a beneficiary of the Trust after the divorce, the "Medical and Long Term Care Expenses" provision of the prenuptial agreement controls payment of Cade's health care expenses, and there is no genuine ambiguity.

{¶ 59} Cade also argues that the distinction between the terms "business interests" and "assets," as those terms are used in the agreement, is unclear. We find no support for Cade's argument that the failure to define these terms made the agreement ambiguous or unenforceable.

{¶ 60} Finally, Cade contends that the terms "breach" and "remedy" are not defined in the prenuptial agreement, so "the Court has no way to know how to remedy a breach of the agreement or what constitutes a breach." As we have noted above, rules of contract interpretation generally apply to prenuptial agreements. The trial court was undoubtedly familiar with these concepts and could recognize a breach and/or craft a remedy for it without "defined" terms in the agreement.

{¶ 61} Cade's fourth assignment of error is overruled.

## VII

{¶ 62} Cade’s fifth assignment of error states:

{¶ 63} “THE TRIAL COURT ERRED BY ENFORCING A PRENUPTIAL AGREEMENT THAT ALLOWED MS. CADE TO LEAVE THIS MARRIAGE WITHOUT COMPENSATION EVEN AFTER SHE QUIT HER JOB TO FOCUS ON DOMESTIC DUTIES.”

{¶ 64} Cade claims that the prenuptial agreement was against public policy because it encouraged divorce and gave Johnson too much control over her. This argument is based on Cade’s claim that Johnson encouraged her to quit her job and to be a homemaker, to her financial detriment. She also claims that Johnson should not have been permitted to enforce the prenuptial agreement because he had an affair.

{¶ 65} The magistrate made the following findings with respect to Cade’s decision to quit her employment during the marriage and the terms of the prenuptial agreement relevant to this argument: 1) neither party had been pressured into signing the agreement; 2) Cade knew, when she quit her job, that the prenuptial agreement did not contain a provision for lost wages; 3) Cade quit her job to enjoy an “extravagant lifestyle” provided by Johnson; 4) the parties agreed that Cade would quit her job so she could travel with Johnson more freely; and 5) Johnson paid Cade \$500 per week “to compensate for her lost wages” after she quit her job. No evidence was presented regarding her employability at the time of the divorce, and she had not looked for work since the parties’ separation.

{¶ 66} In the prenuptial agreement, the parties acknowledged that they entered the agreement freely and voluntarily, without force, pressure or undue influence, and that they

believed the agreement was fair. The record does not support Cade's claim that the provisions of the prenuptial agreement were unconscionable or that she was manipulated into making choices that she did not want to make. The evidence does not support the conclusion that Cade was compelled to quit her job, and the agreement did not provide for additional compensation to her if she decided to quit her job. Moreover, the magistrate stated that he took Cade's separation from her employment into account in deciding on spousal support. The enforcement of the prenuptial agreement under these circumstances did not violate public policy.

{¶ 67} Cade also claims that she did not waive her "right to mutual respect and fidelity" under R.C. 3103.01 and, thus, Johnson could not enforce the prenuptial agreement because he had an affair. Cade does not cite to any Ohio cases in support of her position.

{¶ 68} Nothing in the agreement suggests that it is unenforceable in the event of marital misconduct. The magistrate found that the "parties specifically elected not to have a fidelity clause. In other words, the executed prenuptial agreement did not provide for a monetary consequence if either party had an extra marital affair or extra marital sexual encounter." The "Entire Understanding" provision stated that the parties' agreement contained no additional conditions not stated therein. The prenuptial agreement cannot reasonably be construed to include a provision that it was unenforceable if Johnson had an affair.

{¶ 69} Cade's fifth assignment of error is overruled.

## VIII

{¶ 70} Cade's sixth assignment of error states:

{¶ 71} "THE TRIAL COURT ERRED IN ENFORCING THE PRENUPTIAL AGREEMENT BECAUSE THE AGREEMENT FOR MS. CADE TO QUIT HER JOB AND

BECOME A HOMEMAKER CONSTITUTED A WAIVER, MODIFICATION OR NOVATION.”

{¶ 72} Cade contends that the parties’ agreement that she would quit her job and become a homemaker constituted an oral modification or waiver of their prenuptial agreement. This argument contradicts the plain language of the agreement, which provided that the agreement “cannot be changed or terminated orally. No waiver of any provision of this Agreement shall be valid unless in writing signed by both parties.” See “Modification and Waivers” provision. Also, nothing in the language of the agreement indicates that the parties expected Cade to continue working full-time, so it is unclear what provision the change in her employment status would have modified or waived. Cade’s argument is without merit.

{¶ 73} Cade’s sixth assignment of error is overruled.

{¶ 74} Having rejected Cade’s arguments that the trial court erred in enforcing the prenuptial agreement, we turn to Johnson’s assignments, which challenge the trial court’s interpretation of the agreement.

## IX

{¶ 75} Johnson’s first assignment of error states:

{¶ 76} “THE TRIAL COURT ERRED AND ACTED CONTRARY TO LAW WITH RESPECT TO THE DIVISION OF THE MARITAL HOME AND THE CONDO AT MARIN WOODS.”

{¶ 77} Johnson claims that the prenuptial agreement “clearly sets forth that each party would keep their separate property whether it was acquired prior to, during, or after the termination of the marriage” and that only appreciation or depreciation in the value of separate



assets would be considered marital property. He also asserts that the commingling of separate property with other property does not destroy its identity as separate property. He thus claims that the trial court erred in modifying the magistrate's "sound and reasonable" interpretation of the prenuptial agreement regarding the distribution of the marital home and the Marin Woods condo. Cade contends that the trial court properly divided the assets in accordance with the provision in the prenuptial agreement that all jointly held assets would be divided equally. It is undisputed that the marital home and the Marin Woods condo were titled jointly.

{¶ 78} The parties rely on different provisions of the prenuptial agreement in support of their arguments. Johnson relies on a provision in the section entitled "Separate Property." This section stated:

{¶ 79} "Separate property shall mean the assets owned by Joe or Debbie prior to their marriage, any assets acquired by either party by inheritance or gift from third parties and any assets acquired by either party as a result of the sale, exchange, or investment of all or any portion of the assets described in this paragraph. Such assets shall be deemed to be the separate property of a party whether acquired prior to, during, or after the termination of the marriage. Separate property shall also mean any income generated on such assets. Any appreciation or depreciation in the value of such separate property assets after the date of Joe and Debbie's marriage shall be treated as marital property. \*\*\*

{¶ 80} "Marital property shall be limited to and shall only include appreciation or depreciation in the value of such separate assets after the date of Joe and Debbie's marriage \*\*\*."

{¶ 81} This section also provides that "[n]othing herein shall prevent the parties from

establishing joint accounts or jointly held assets during their marriage by mutual agreement.” A similar statement in the Recitals at the beginning of the document is also adopted under the “General Statement” provision of the agreement.

{¶ 82} Johnson’s argument is further supported by Paragraph A under “Rights Upon Divorce or Dissolution of Marriage,” which states that “[u]pon termination of marriage, any separate property \*\*\* described on Schedules A and B attached hereto \*\*\* shall not be divided between the parties upon a termination of the marriage \*\*\*.” Johnson listed the marital home on his schedule of real estate.

{¶ 83} Cade relies on a provision found in the section entitled “Rights Upon Divorce or Dissolution of Marriage,” which provided:

{¶ 84} “The parties agree that all jointly held assets and marital property assets would be divided equally between them.”

{¶ 85} Concerning the marital home, page one of the Agreement says this “residence [is] owned by both of them” and page three says it is “presently owned by Joe and Debbie.”

{¶ 86} Her argument also receives some support from Paragraph D under “Agreement to Make Wills,” which states that the marital residence is “held joint and survivorship between the parties” and that “upon the death of one of them the survivor shall be the sole owner of the residence.”

{¶ 87} “Contractual terms are ambiguous if the meaning of the terms cannot be deciphered from reading the entire contract or if the terms are reasonably susceptible of more than one interpretation.” *Lewis v. Mathes*, 161 Ohio App.3d 1, 2005-Ohio-1975, ¶19. In our view, the terms of the prenuptial agreement with respect to jointly held assets purchased with

separate property were ambiguous. Because the marital home and Marin Woods condo were titled jointly, the provision relied upon by Cade would require that they be divided equally; however, the provisions relied on by Johnson suggest that the “sale, exchange, or investment” of his separate property (i.e. Johnson’s investing of his premarital assets in the condo and house) did not change its character as separate property. The provisions that the parties can establish joint assets by agreement are also deserving of some weight. Although the trial court did not expressly find that the contract was ambiguous, it did, essentially, resolve the ambiguity in the contract by enforcing the provision that required jointly-held assets to be divided equally.

{¶ 88} Johnson had substantial assets, including a car dealership, a leasing company, and numerous parcels of real property, which clearly fell within the definition of “separate property.” Pursuant to the prenuptial agreement, Cade was not entitled to a share of any of these assets upon their divorce. Thus, the separate property provision effectively shielded the vast majority of Johnson’s assets from any claim during the divorce. The joint property provision, on the other hand, could only apply to the marital home and the Marin Woods condo. To conclude that property purchased with separate property, but titled jointly, can never fall within the definition of “jointly held assets” would render meaningless the provision in the Separate Property section of the agreement that “[n]othing herein shall prevent the parties from establishing joint accounts or jointly held assets during their marriage by mutual agreement.” The trial court could have reasonably concluded that, by titling and maintaining the assets jointly, the parties had elected to divide them equally upon divorce. The trial court did not abuse its discretion in concluding that the two jointly-held assets should be divided equally even though they were purchased with separate property.

{¶ 89} Johnson cites several cases for the proposition that the commingling of separate property does not destroy its character if it is traceable and that title to property is not critical in determining its status as separate or marital property. See *Peck v. Peck* (1994), 96 Ohio App.3d 731; *Oberly v. Oberly*, Greene App. No. 06-CA-90, 2007-Ohio-4571; *Williams-Booker v. Booker*, Montgomery App. Nos. 21752 and 21767, 2007-Ohio-4717. We do not disagree with the general propositions of law set forth in these cases. However, these cases are factually distinguishable, as none involved a prenuptial agreement that contained conflicting provisions regarding the treatment of separate and jointly-held properties. In *Cook v. Cook* (June 3, 1994), Montgomery App. No. 13849, also cited by Johnson, the husband and wife did have a prenuptial agreement, and the court observed that the sale of separate property during a marriage does “not automatically convert the proceeds to marital property.” Again, we agree with this general proposition. The *Cook* court could not determine whether the parties’ actions in that case had converted the separate property to marital property under the terms of their agreement. None of these cases is dispositive under the facts presented in our case.

{¶ 90} Johnson’s first assignment of error is overruled.

X

{¶ 91} Johnson’s second assignment of error states:

{¶ 92} “THE TRIAL COURT ERRED AND ACTED CONTRARY TO LAW BY GRANTING A VEHICLE TO DEFENDANT-APPELLEE.”

{¶ 93} Johnson contends that the trial court’s “award of a motor vehicle to [Cade] was contrary to the express language of the Prenuptial Agreement and Ohio law.”

{¶ 94} Under “Rights Upon Divorce or Dissolution of Marriage,” Subsection F, the

prenuptial agreement simply stated: “Each party would retain one motor vehicle.”

{¶ 95} The evidence established that the parties did not own the vehicles they drove during the marriage, and that they changed vehicles regularly. Cade drove six vehicles provided through Johnson’s businesses during the four-year marriage. The magistrate did not address this issue, but the trial court ordered Johnson to allow Cade to retain the vehicle she then possessed “for a period of one year \*\*\* under a standard dealership lease” or to pay her the value of such a lease. Johnson asserts that the trial court “tailored a remedy without any legal basis” and reached “a result unilaterally in favor of” Cade. He contends that, if the parties were *each* entitled to retain a vehicle under the prenuptial agreement, the trial court “should have also ordered that [he] was entitled to retain a motor vehicle at [Cade’s] expense.”

{¶ 96} Johnson implicitly concedes that the motor vehicle provision of the prenuptial agreement was not unambiguously drafted, and we agree. Under the circumstances presented and in light of the parties disparate resources, the trial court acted reasonably in ordering that Cade should be permitted the use of a vehicle, in the same manner she had during the marriage, for a period of one year.

{¶ 97} Johnson’s second assignment of error is overruled.

## XI

{¶ 98} The judgment of the trial court will be affirmed.

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GRADY, P.J. and FAIN, J., concur.

Copies mailed to:

Jose M. Lopez  
Dwight D. Brannon

Hon. Jeffrey M. Welbaum  
Hon. Christopher Gee