[Cite as *Postiy v. Postiy*, 2003-Ohio-2146.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		:	JUDGES:
WILLIAM P. POSTIY		:	Hon. W. Scott Gwin, P. J.
		:	Hon. John W. Wise, J.
	Appellant	:	Hon. Julie A. Edwards, J.
		:	
-vs-		:	Case No. 2002CA00263
		:	
CYNTHIA L. POSTIY		:	
		:	
	Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2001DR00976
JUDGMENT:	Affirmed in Part; Reversed in Part and Remanded
DATE OF JUDGMENT ENTRY:	April 28, 2003

APPEARANCES:

For Appellant	For Appellee
DAVID S. AKE 401 Bank One Tower North Canton, Ohio 44702	FRANCIS G. FORCHIONE 500 Courtyard Centre 116 Cleveland Avenue Canton, Ohio 44702

{¶1} Appellant William P. Postiy appeals from his divorce in the Stark County Court of Common Pleas, Domestic Relations Division. Appellee Cynthia L. Postiy is his former spouse. The relevant facts leading to this appeal are as follows.

{¶2} The parties first met in 1979, and began living together shortly thereafter. Each had been married once previously. Appellant at that time owned and operated a meat distribution business; appellee was working as a waitress at a bar and restaurant in Canton. When the parties began living together, appellant requested a "palimony" agreement, to which appellee agreed. In the fall of 1982, they began discussing getting married. According to appellant, he went with appellee to his attorney's office to discuss a prenuptial agreement on December 2, 1982. (Appellee stated at trial that she did not see an agreement draft until December 8, 1982; moreover, she denied ever reviewing any such document with appellant's attorney.) Appellee signed two originals of the prenuptial agreement on December 10, 1982. Appellee testified appellant's financial statement, referred to in the agreement as "Exhibit A," was not attached, an assertion appellant disputes. Exhibit A stated, inter alia, that appellant had a seventy percent ownership in Postiy Meats equal to $490,000. His total assets were listed as over $1,500,000.

{¶3} On December 11, 1982, the parties' wedding ceremony took place in appellant's home, presided over by the mayor of North Canton. About twenty guests, mostly family, attended the event, which was followed by a dinner at Tangiers Restaurant in Akron. Appellant later testified that he would not have gone through with the wedding had appellee refused to sign the prenuptial agreement.

{¶4} In 1999, appellant obtained his cash share of Postiy Meats, approximately $670,000, when the business was sold to another concern. On July 16, 2001, appellant filed a complaint for divorce. Appellee timely answered. The case proceeded to trial on April 12, 2002. Both sides thereafter filed proposed findings of fact and conclusions of law.

{¶5} On August 5, 2002, the trial court filed a judgment entry granting a divorce. The court found the prenuptial agreement unenforceable, finding that appellant had failed to properly disclose his assets and/or the value of his assets. The court further found the prenuptial agreement was not entered into free of overreaching by appellant. The court thereupon rendered a division of marital property, which included real estate, bank accounts, and several automobiles. Appellant timely appealed, and herein raises the following six Assignments of Error:

{¶6} "I. THE TRIAL COURT ERRED IN ITS FINDING THAT THE ANTENUPTIAL AGREEMENT WAS NOT ENFORCEABLE BECAUSE ASSETS DISCLOSED BY THE APPELLANT IN CONNECTION WITH THE AGREEMENT WERE NOT LISTED AT THEIR ACTUAL VALUE, WHEN THERE WAS NO EVIDENCE IN THE RECORD THAT THE ACTUAL VALUE OF THE ASSETS WAS SUBSTANTIALLY DIFFERENT FROM EITHER THE VALUE STATED BY THE APPELLANT IN CONNECTION WITH THE ANTENUPTIAL AGREEMENT OR FROM THE KNOWLEDGE AND UNDERSTANDING THAT THE APPELLEE HAD OF THE APPELLANT'S FINANCIAL CIRCUMSTANCES.

{¶7} "II. THE TRIAL COURT ERRED BY FAILING TO ENTER WRITTEN FINDINGS OF FACT TO SUPPORT ITS DIVISION OF PROPERTY AS REQUIRED BY R.C. 3105.171(D) AND (G).

{¶8} "III. THE TRIAL COURT ERRED IN ITS FINDING THAT THE ANTENUPTIAL AGREEMENT WAS NOT ENFORCEABLE, WHEN THERE WAS NO EVIDENCE OF AN EFFORT BY THE APPELLANT TO MISLEAD THE APPELLEE CONCERNING THE NATURE AND EXTENT OF HIS ASSETS AND WHEN THE APPELLEE'S DECISION TO MARRY THE APPELLANT AND TO SIGN THE ANTENUPTIAL AGREEMENT WERE EACH INDEPENDENT OF THE EXTENT OF HIS PROPERTY OR WEALTH.

{¶9} "IV. THE TRIAL COURT ERRED BY FINDING THAT THE ANTENUPTIAL AGREEMENT WAS NOT ENFORCEABLE BECAUSE OF 'OVERREACHING' BY THE APPELLANT, WHEN THERE WAS NO EVIDENCE THAT THE APPELLANT WAS MOTIVATED BY ARTIFICE, CUNNING, OR A DESIRE TO OUTWIT OR CHEAT THE APPELLEE AND WHEN THERE WAS NO EVIDENCE THAT THE APPELLANT BENEFITTED FROM A SIGNIFICANT SUPERIORITY IN EDUCATION, INTELLECT OR LIFE EXPERIENCE.

{¶10} "V. THE TRIAL COURT ERRED IN ITS DISTRIBUTION OF ASSETS UNDER THE TOTALITY OF CIRCUMSTANCES AS PUNISHMENT FOR FINANCIAL MISCONDUCT BY THE APPELLANT DURING THE PENDENCY OF THE CASE, WHEN SUCH ASSETS PURSUANT TO THE ANTENUPTIAL AGREEMENT SHOULD HAVE PASSED TO THE APPELLANT, AND WHEN SUCH MISCONDUCT COULD

NOT HAVE FINANCIALLY DAMAGED THE APPELLEE TO THE EXTENT REFLECTED BY THE DISTRIBUTION.

{¶11} "VI. THE TRIAL COURT ERRED BY GRANTING SPOUSAL SUPPORT TO APPELLEE WHEN THE FACT FINDING RELATING TO THE APPELLANT'S INCOME TO BE CONSIDERED UNDER R.C. 3105.18 WAS NOT SUPPORTED BY ANY EVIDENCE."

{¶12} Appellee/Cross-Appellant Cynthia L. Postiy raises the following two Assignments of Error on cross-appeal:

{¶13} "I. THE TRIAL COURT ERRED IN FINDING APPELLANT'S NUMEROUS, UNEXPLAINED MONEY TRANSFERS IMMEDIATELY PRIOR TO HIS FILING FOR DIVORCE DID NOT CONSTITUTE FINANCIAL 'MISCONDUCT' PURSUANT TO R.C. 3105.171(E)(3).

{¶14} "II. THE TRIAL COURT ERRED IN ACCEPTING CROSS-APPELLEE'S VALUATIONS OF THE MARITAL PROPERTY."

Appellant William P. Postiy's Direct Appeal

I.

{¶15} In his First Assignment of Error, appellant argues the trial court erred in finding the parties' prenuptial agreement unenforceable. We disagree.

{¶16} Appellant first contends that rendering the prenuptial agreement unenforceable was in error where there were only two significant omissions from the agreement's 1982 financial statement, which showed appellant's aggregate worth of approximately $1,500,000. These omitted items consisted of an airplane worth $130,000 and gold assets worth between $10,000 and $20,000.

{¶17} The test in Ohio for the validity of an antenuptial agreement is set forth in *Gross v. Gross* (1984), 11 Ohio St.3d 99, 464 N.E.2d 500, paragraph two of the syllabus: "Such 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." The Ohio Supreme Court has also held that the validity of an antenuptial agreement is a question of fact for the trial court, and the trial court's decision will not be reversed absent an abuse of discretion. *Bisker v. Bisker* (1994), 69 Ohio St.3d 608, 609-610, 635 N.E.2d 308. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140.

{¶18} Appellant testified to arranging a meeting in early December 1982 with Attorney (presently Stark County Common Pleas Judge) Lee Sinclair to discuss the drafting of a prenuptial agreement. It is clearly apparent that the agreement makes reference to an Exhibit “A” financial statement. Appellant insisted at trial that his financial statement was attached when appellee signed it. Judge Sinclair testified that he had drafted hundreds of prenuptial agreements during his years of practicing domestic relations law. He affirmed that it was his usual practice to have any financial statements, if referenced in the prenuptial agreement, put in front of the parties at the time of signing and to have such statements become part of the agreement. Tr. at 127. Appellant directs us to the court's finding that "Mr. Postiy did not disclose all his assets

and assets that were disclosed did not reflect actual value ***." Divorce Decree at 2. Appellant submits that no testimony was presented that appellant advised appellee, in some other manner than his written financial statement, of the extent of his assets at that time, and thus suggests the aforesaid finding is an implicit determination by the court that appellant indeed presented the prenuptial agreement to appellee in 1982 with the financial statement attached, despite appellee's testimony to the contrary.

{¶19} However, even assuming, arguendo, there was no doubt that the financial statement was attached, there is no dispute that appellant left out roughly $150,000 of assets out of $1,500,000. Furthermore, appellant additionally admitted to stating the value of his Postiy's Meat ownership share based on an insurance amount of $700,000, even though he admitted that a value of $1,000,000 could have been used. He rationalized this undervaluation by indicating that he "didn't want to spend the extra money for insurance * * *." Tr. at 48. Finally, appellant utilized a value for his oil wells which, at the time of the drafting of the financial statement, was already three years old. Tr. at 169.

{¶20} Based on such facts and circumstances, we conclude the *Gross* test was not satisfied and the trial court did not abuse its discretion by finding that the prenuptial agreement was unenforceable. Accordingly, appellant's First Assignment of Error is overruled.

II.

{¶21} In his Second Assignment of Error, appellant argues the trial court erred by failing to render sufficient findings of fact in support of the court's division of property. We agree.

{¶22} Pursuant to R.C. 3105.171(B), "[i]n divorce proceedings, the court shall ... determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section." The party to a divorce action seeking to establish that an asset or portion of an asset is separate property, rather than marital property, has the burden of proof by a preponderance of evidence. *Zeefe v. Zeefe* (1998), 125 Ohio App.3d 600, 709 N.E.2d 208. Further, R.C. 3105.171(G) reads as follows: "In any order for the division or disbursement of property or a distributive award made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided and shall specify the dates it used in determining the meaning of 'during the marriage.' "

{¶23} The findings by the trial court pertaining to division of property read merely as follows: "Court finds that Condominium 506, Postiy's Meat Stock, Airplane and Applegrove [Street] property are premarital property of Plaintiff. Court further finds that with respect to other property there is a premarital set off." The trial court thereafter delineated its order for property division in a fifteen-item table, directing, for example, that appellant would be awarded Condo 803 and the Steiner property, while appellee would take the Anchorage property; each party also took two automobiles apiece. However, given the financial complexities of this case, and the apparent 54%/46% division of marital property, we conclude a remand is necessary in order to afford the parties findings of fact to support the division of property as required by R.C.

3105.171(G). See *Ungar v. Ungar,* 2002-Ohio-4387, Stark App.No. 2002CA00004; *Matic v. Matic* (July 27, 2001), Geauga App. No.2000-G-2266.

{¶24} Appellant's Second Assignment of Error is therefore sustained.

III.

{¶25} In his Third Assignment of Error, appellant argues the trial court erred in finding the parties' prenuptial agreement unenforceable, where allegedly no evidence was shown of appellant misleading appellee, and where the appellee's decisions to sign the agreement and pursue marriage were independent of appellant's wealth. We disagree.

{¶26} Appellant herein essentially argues the evidence would demonstrate neither an intent to deceive by appellant nor a belief on appellee's part that she had been misled in 1982. However, our reading of *Gross* does not comport with appellant's suggestion that an intention to deceive is a prerequisite to judicial invalidation of a prenuptial agreement. The three-part test of *Gross* has been in force for nearly two decades, and has uniformly been reiterated in its conjunctive form. See, e.g. *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 466-467. As we have previously found no abuse of discretion in the court's finding of unenforceability based on the failure of asset disclosure, we find appellant's argument without merit.

{¶27} Appellant's Third Assignment of Error is therefore overruled.

IV.

{¶28} In his Fourth Assignment of Error, appellant argues the trial court erred in finding the parties' prenuptial agreement unenforceable because of "overreaching" by appellant. We disagree.

{¶29} In *Fletcher,* supra at paragraph one of the syllabus, the Supreme Court of Ohio addressed the evidentiary burdens under the *Gross* test: "When an antenuptial agreement provides disproportionately less than the party challenging it would have received under an equitable distribution, the burden is on the one claiming the validity of the contract to show that the other party entered into it with the benefit of full knowledge or disclosure of the assets of the proponent. The burden of proving fraud, duress, coercion or overreaching, however, remains with the party challenging the agreement." Additionally, the Supreme Court indicated that a party receiving disproportionately less than what an equitable distribution would have provided must have had "a meaningful opportunity to consult with independent counsel." Id. at paragraph two of the syllabus.

{¶30} We first note, based on the conjunctive nature of the *Gross* test and our holding in regard to appellant's First Assignment of Error, that we need not reach the merits of this fourth assigned error. Nonetheless, a review of the record would indicate that an abuse of discretion has not been established as to the trial court's finding of overreaching. A reviewing court will not reweigh the evidence introduced in a trial court; rather, it will uphold the findings of the trial court when the record contains some competent evidence to sustain the trial court's conclusions. *Fletcher*, supra, at 468, citing *Ross v. Ross* (1980), 64 Ohio St.2d 203. According to appellee's testimony, she first saw the prenuptial agreement two days before the wedding. Appellee thereupon sought independent legal advice from Hyatt Legal Services, but was unable to secure an appointment due to the unavailability of any attorneys at that location. The next day, the day before the wedding, appellee had to go to work at 9 AM. Appellant, according to his testimony, insisted then that "we've got to get 'em signed." Tr. at 176. The

couple then procured a notary at a local bank, and appellee signed the agreement before going to her job. Although the wedding was not an elaborate affair, appellee testified that a postponement would have been problematic. Tr. at 32. Certainly, Judge Sinclair made it clear that it was his practice in those days to allow persons in appellee's position to take prenuptial drafts home for review and not to permit signing them in his office. Tr. at 125. However, under the facts and circumstances presented, we find the court's finding as to overreaching within the parameters of its discretion.

{¶31} Appellant's Fourth Assignment of Error is overruled.

V.

{¶32} In his Fifth Assignment of Error, appellant contends the trial court erred by distributing the parties' assets in a manner suggesting punishment of appellant for financial misconduct during the pendency of the case.

{¶33} Based on our holding in regard to appellant's Second Assignment of Error, we find analysis of the issues raised herein should await further findings regarding the division of property. Appellant's Fifth Assignment of Error is therefore found premature.

VI.

{¶34} In his Sixth Assignment of Error, appellant argues the trial court erred in granting spousal support of $3,500 per month, for sixty months, under the circumstances presented. We disagree.

{¶35} A trial court's decision concerning spousal support may only be altered if it constitutes an abuse of discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*

(1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140. R.C. 3105.18(C)(1)(a) thru (n), provides the factors that a trial court is to review in determining whether spousal support is appropriate and reasonable and in determining the nature, amount, terms of payment, and duration of spousal support. R.C. 3105.18(C)(1) provides:

{¶36} "(C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶37} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code; (b) The relative earning abilities of the parties; (c) The ages and the physical, mental, and emotional conditions of the parties; (d) The retirement benefits of the parties; (e) The duration of the marriage; (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home; (g) The standard of living of the parties established during the marriage; (h) The relative extent of education of the parties; (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties; (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party; (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and

employment is, in fact, sought; (l) The tax consequences, for each party, of an award of spousal support; (m) The lost income production capacity of either party that resulted from that party's marital responsibilities; (n) Any other factor that the court expressly finds to be relevant and equitable."

{¶38} Appellant specifically contends the trial court mistakenly found that appellant would receive $9000 per month in income from the sale of Postiy's Meats, when in fact that amount was to be split evenly between appellant and his brother. However, the trial court otherwise considered the factors of R.C. 3105.18(C)(1), including the evidence that appellant received income from a number of sources. These included dividends and investment returns ($100,000 in 2000), a small military pension, and rental property income ($20,000-$25,000). Moreover, appellant's income from the Postiy's Meat sale was scheduled to jump from $4500 to $7000 per month in 2004.

{¶39} A trial court judge is presumed to know the applicable law and apply it accordingly. *State v. Eley* (1996), 77 Ohio St.3d 174, 180-181. Upon review, we find no abuse of discretion by the trial court in the award of spousal support under these facts.

{¶40} Appellant's Sixth Assignment of Error is overruled.

Appellee/Cross-Appellant Cynthia L. Postiy's Cross-Appeal

I., II.

{¶41} In her First and Second Assignments of Error on cross-appeal, appellee argues that the court's findings as to appellant's lack of financial misconduct (R.C. 3105.171(E)(3)) and his representations of asset valuation were in error. However, we

find a review of these issues premature pending further findings by the trial court as per appellant's Second Assignment of Error above.[1]

{¶42} Appellee/Cross-Appellant's First and Second Assignments of Error are found premature.

{¶43} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Stark County, Ohio, is hereby affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

By: Wise, J.

Gwin, P. J., and

Edwards, J., concur.

Topic: Prenuptial Agreement.

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[1] We note the divorce decree states: "The Court has considered this conduct [of appellant] and has addressed it in its division of assets based on [appellant's] conduct." Judgment Entry in Divorce, para. 5.