[Cite as *Wolf-Sabatino v. Sabatino*, 2011-Ohio-6819.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Linda A. Wolf-Sabatino,	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
	:	No. 10AP-1161
v.		(C.P.C. No. 08DR-07-2610)
	:	
Philip R. Sabatino,		(REGULAR CALENDAR)
	:	
Defendant-Appellee/ Cross-Appellant.	:	

D E C I S I O N

Rendered on December 30, 2011

Tyack, Blackmore, Liston & Nigh Co., L.P.A., Thomas M. Tyack and *Margaret L. Blackmore,* for appellant/cross-appellee.

Friedman & Mirman, Co., LPA, Scott Friedman and *Heather Gall; Jeffrey M. Lewis Co., LPA,* and *Jeffrey M. Lewis* for appellee/cross-appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations.

BRYANT, P.J.

{¶1} Plaintiff-appellant and cross-appellee, Linda A. Wolf-Sabatino, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, terminating her marriage to defendant-appellee and cross-appellant, Philip R.

Sabatino. Because (1) the trial court did not err in classifying certain assets as separate property pursuant to the terms of the parties' premarital agreement and in refusing to award plaintiff attorney fees, but (2) the court erred in failing to hold an evidentiary hearing before adopting defendant's proposed shared parenting plan and in calculating defendant's gross income for purposes of child support, we affirm in part and reverse in part.

I. Facts and Procedural History

{¶2} The parties were married on June 25, 1994, preceded by a premarital, or prenuptial, agreement executed on May 19, 1994; one child was born as issue of the marriage on November 26, 1997. On July 1, 2008, plaintiff filed a complaint for legal separation that she later amended to a complaint for divorce. Defendant responded on August 6, 2008 with an answer and counterclaim for divorce. The trial court appointed a guardian ad litem to represent the minor child's interests in the divorce proceeding.

{¶3} Defendant "is a real estate person." (Tr. Vol. I, 92.) Prior to and throughout the marriage, defendant's business consisted of purchasing and developing residential and commercial real estate. At the time of the parties' marriage, defendant's net worth was $30,556,640; according to defendant's expert, the appraised value of defendant's net worth at the time of divorce was $46,170,012. Plaintiff worked as an oncology nurse prior to the marriage but was predominately a homemaker throughout the marriage.

{¶4} Prior to trial, the parties stipulated to the validity of the premarital agreement, and on September 25, 2009 plaintiff voluntarily dismissed her complaint for divorce without prejudice. Among the disputed issues for trial were the nature of numerous assets as either marital or separate property, interpretation of certain

provisions in the premarital agreement, division of marital assets, allocation of parenting time under the shared parenting plan, child support, and attorney fees. The trial court conducted a trial on those issues over a period of 24 days between September 24, 2009 and January 21, 2010.

{¶5} On August 12, 2010, the court issued its Judgment Entry – Decree of Divorce granting the divorce and addressing the disputed issues. The trial court also allowed defendant additional time to submit tracing evidence relevant to two of defendant's business holdings. Although defendant and his forensic accountant, Rebekah Smith, submitted affidavits attempting to trace the properties to his premarital assets, the court determined the evidence was insufficient and classified the properties as marital property. With that determination, the court filed a supplemental judgment entry on December 10, 2010 affirming its original decree of August 12, 2010 and granting the divorce.

II. Assignments of Error

{¶6} Plaintiff appeals, assigning the following errors:

> **ASSIGNMENT OF ERROR NO. I:**
>
> **THE TRIAL COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF THE PARTIES' PRENUPTIAL AGREEMENT BY FAILING TO RECOGNIZE THAT MARITAL EFFORT WAS NOT BARRED BY THE TERMS OF THE PRENUPTIAL AGREEMENT AND THAT MARITAL EFFORT IN THE WITHIN CAUSE CREATED MARITAL ASSETS AND/OR CREATED A MARITAL COMPONENT TO A PREVIOUSLY RECOGNIZED SEPARATE ASSET.**

ASSIGNMENT OF ERROR NO. II:

THE TRIAL COURT ERRED IN FAILING TO PROPERLY MANDATE THAT THE BURDEN WAS UPON THE DEFENDANT TO PROVIDE APPROPRIATE TRACING TO DEMONSTRATE THAT CERTAIN ASSETS OR COMPONENTS THEREOF WERE SEPARATE PROPERTY.

ASSIGNMENT OF ERROR NO. III:

THE TRIAL COURT ERRED IN FINDING THAT BUSINESS ENTITIES AND ASSETS CREATED AFTER THE PARTIES' MARRIAGE AND INCREASED VALUES BASED ON EFFORTS OF ONE OR MORE OF THE PARTIES WERE SEPARATE PROPERTY AS OPPOSED TO MARITAL PROPERTY.

ASSIGNMENT OF ERROR NO. IV:

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT MODIFIED THE PARTIES' AGREED INTERIM SHARED PARENTING PLAN WITHOUT A TRIAL ON THE MERITS AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. V:

THE TRIAL COURT ERRED IN ITS DETERMINATION OF CHILD SUPPORT.

ASSIGNMENT OF ERROR VI:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY REFUSING TO AWARD ATTORNEY'S FEES AND LITIGATION EXPENSES THAT WERE REASONABLE AND NECESSARY.

{¶7} Defendant cross-appeals, assigning the following error:

Assignment of Error #1: The Court erred when it awarded the parties' marital residence to Plaintiff-Appellant/Cross-Appellee as her separate property.

III. Plaintiff's First, Second, and Third Assignments of Error – Defendant's Business Entities and "Marital Effort"

{¶8} Plaintiff's first assignment of error asserts the trial court erred in interpreting and applying the parties' premarital agreement. Plaintiff contends the agreement does not define separate property to include assets created during the marriage or the increased value of separate properties that resulted from the efforts of one or both parties during the marriage. Plaintiff thus contends that many of defendant's business entities, determined to be defendant's separate property, are either marital property or have a marital component. Plaintiff's third assignment of error identifies five specific entities that plaintiff believes demonstrate the trial court's alleged error. Plaintiff's second assignment of error asserts the trial court failed to properly place the burden on defendant to trace his separate property assets.

A. *Applicable Law*

{¶9} In divorce proceedings, the trial court must "determine what constitutes marital property and what constitutes separate property." R.C. 3105.171(B). The court then must "divide the marital and separate property equitably between the spouses" in accordance with the statute, disbursing a spouse's separate property to that spouse unless otherwise directed under the statute. Id.; R.C. 3105.171(D). "Marital property" includes, as relevant here, (1) "[a]ll real and personal property that currently is owned by either or both of the spouses * * * and that was acquired by either or both of the spouses during the marriage," (2) "[a]ll interest that either or both of the spouses currently has in any real or personal property * * * and that was acquired by either or both of the spouses during the marriage," and (3) "all income and appreciation on separate property, due to

the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage." R.C. 3105.171(A)(3)(a)(i)-(iii).

{¶10} Marital property does not include separate property. R.C. 3105.171(A)(3)(b). "Separate property," is, as relevant here, "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of marriage, * * * [p]assive income and appreciation acquired from separate property by one spouse during the marriage," and "[a]ny real or personal property or interest in real or personal property that is excluded by a valid antenuptial agreement." R.C. 3105.171(A)(6)(a)(ii), (iii), (v). "Thus, Ohio law specifically allows for property that would normally be considered marital property to be excluded from a division of marital property by a valid antenuptial agreement." *Todd v. Todd* (May 4, 2000), 10th Dist. No. 99AP-659, appeal not allowed, 90 Ohio St.3d 1413.

{¶11} When parties contest whether an asset is marital or separate property, the asset is presumed marital property unless proven otherwise. *Miller v. Miller*, 7th Dist. No. 08 JE 26, 2009-Ohio-3330, ¶20, citing *Sanor v. Sanor*, 7th Dist. No. 2001 CO 37, 2002-Ohio-5248, ¶53. "The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." R.C. 3105.171(A)(6)(b). Traceability is "the focus when determining whether separate property has lost its separate character after being commingled with marital property." *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. A party requesting that an asset be classified as separate property bears the burden of tracing that asset to his or her separate property. *Dunham v. Dunham*, 171 Ohio App.3d

147, 2007-Ohio-1167, ¶20, discretionary appeal not allowed, 115 Ohio St.3d 1408, 2007-Ohio-4884.

{¶12} A domestic court has broad discretion to make divisions of property. *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 401, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318. The characterization of property as marital or separate is a factual inquiry. *Taub v. Taub,* 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶15. An appellate court's job is not to reweigh the evidence but to determine whether competent, credible evidence in the record supports the trial court's findings. *Dunham* at ¶27; *Taub* at ¶15 (noting that we review the trial court's classification of property as either marital or separate "under a manifest weight of the evidence standard").

B. *The Premarital Agreement and "Marital Efforts"*

{¶13} Throughout the trial, plaintiff attempted to persuade the court that, because their premarital agreement failed to reject the concept of "marital effort," some portion of defendant's numerous business holdings was marital property subject to division.

{¶14} An antenuptial agreement is a contract two persons entered into in contemplation of marriage that defines the property rights and economic rights of the parties, usually upon the termination of the marriage or death of one of the parties. *Gross v. Gross* (1984), 11 Ohio St.3d 99, 102. "Antenuptial agreements are contracts and generally the law of contracts applies to their interpretation and application." *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 466.

{¶15} The purpose of contract construction is to effectuate the intent of the parties, presumed to reside in the language they chose for the agreement. *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, paragraph one of the syllabus. "Common

words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus. The construction of a written contract is a matter of law for the court. As such, we review the trial court's determination de novo. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 1996-Ohio-393. (Internal quotations omitted.)

{¶16} The parties' premarital agreement provides that each party would "continue to own and to solely and independently control, manage, direct, enjoy, use, and dispose of all of his or her separate non-marital property as set forth on Schedules 'L-1' and 'R-1' and 'R-2' including all separate non-marital property hereafter acquired by either of them." (Premarital Agreement, §1.1.) Defendant disclosed all of his business holdings as they existed on December 31, 1993 on Schedules "R-1" and "R-2."

{¶17} Section 1.1 of the agreement defines separate property to include, in relevant part (1) "[a]ny increase, accretion, or earnings of property separately owned before the marriage" and (2) "[a]ll cash proceeds from or property acquired in exchange or substitution for property or the cash proceeds from proceeds separately owned before the marriage, but not necessarily an exchange or substitution in kind so long as the property can be reasonably traced or identified." The agreement also provided that "[a]ll property acquired after the marriage which [was] not separate property, or the source of which [was] not separate property, shall be deemed marital property." (Premarital Agreement, §1.5.)

{¶18} In light of the nature of defendant's business, the premarital agreement sought to avoid the need "to try to unwind some of the complications that exist[ed] in [defendant's] existing and the future business." (Tr. Vol. III, 634.) The agreement "specifically reject[ed] the concepts of (i) unintentional creation of marital property or (ii) unintentional transmutation of non-marital or separate property into marital property." (Premarital Agreement, §1.4(A).) It thus provided that the parties could convert separate property into marital property only if the record owner of the property "cause[d] title to such property to be placed in joint tenancy, tenancy in common, or any other form of co-ownership, as evidenced by a written instrument." (Premarital Agreement, §1.4(A).)

{¶19} The agreement also addressed the parties' wages and salaries, stating that such were "deemed marital property (subject to the provisions of Section 1.7)." (Premarital Agreement, §1.6.) The agreement "capped" defendant's yearly salary at "an amount equal to $150,000, multiplied by a fraction, the numerator of which is the Consumer Price Index for the month during which this Premarital Agreement shall be executed, and the denominator of which is the Consumer Price Index for the first month of such Computation Year." (Premarital Agreement, §1.7.)

{¶20} The resulting calculated amount comprised defendant's "deemed salary amount." (Premarital Agreement, §1.7.) The amount of marital wages and salaries under §1.6 of the agreement was not to "exceed the amount of Ron's Deemed Salary Amount for such year." (Premarital Agreement, §1.7.) Defendant's expert, Richard Ferguson, testified that, "from an accounting interpretation of the agreement," everything over $150,000 "or over the deemed calculated amount would be Mr. Sabatino's separate property." (Tr. Vol. I, 109.) The trial evidence indicated that every year of the marriage

until 2007 defendant deposited funds into a bank account which plaintiff managed and controlled.

{¶21} Given those provisions, plaintiff contends the trial court's "suggestion that the premarital agreement rejects the concept of marital effort simply misstates the terms of the prenuptial agreement," as the parties did not use the term "marital effort" in the agreement. (Appellant's brief, 12.) Defendant responds that " **'any'** means what it says" in §1.1(A) of the premarital agreement "and includes all contingencies, even 'marital labor.' " (Emphasis sic.) (Appellee's brief, 18.)

{¶22} Plaintiff correctly notes the term "marital effort" is not contained in the agreement. The premarital agreement, however, specifically states that any increase to one of the party's premarital properties during the marriage remains that party's separate property. (Premarital Agreement §1.1(A).) See *Hyslop v. Hyslop*, 6th Dist. No. WD 01-059, 2002-Ohio-4656, ¶20, appeal not allowed, 98 Ohio St.3d 1422, 2003-Ohio-259 (stating that "to prevent nonpassive increases in separate property from being denominated 'marital' property, an antenuptial agreement should contain * * * specific terms referring to the future of that property").

{¶23} The parties' intent, reflected in the agreement, that defines separate property to include "any" increase to premarital property and "all" exchanges or substitutions for premarital property, was to permit defendant to use his time and effort to increase and exchange his premarital properties and to have the resulting entities remain defendant's separate property. (Premarital Agreement, §1.1(A), (B).) See *Millstein v. Millstein*, 8th Dist. No. 79617, 2002-Ohio-4783, ¶98-102, appeal not allowed, 98 Ohio St.3d 1462, 2003-Ohio-644 (concluding the "parties intended any appreciation from

separate property to remain separate property" based on language of the prenuptial agreement stating the parties waived any interest in property acquired by the other party during the marriage "***as well as any rights and interest in or to any of the income, profits and gains therefrom***") (Emphasis sic); *Steinke v. Steinke*, 3d Dist. No. 2-05-28, 2006-Ohio-4185, ¶13 (determining trial court erred in awarding wife the growth in husband's monthly pension due to his continued employment throughout the marriage where "the antenuptial agreement provide[d] that increases in listed assets, regardless of the reason for the assets increase, remain that party's separate property").

{¶24} Plaintiff nonetheless contends the terms of the premarital agreement do not permit the trial court to classify an entity created under defendant's construction pattern as defendant's separate property. Plaintiff explains defendant's construction pattern involved defendant's borrowing money to acquire ground, then "buildings were built and paid for by construction loans," and eventually the property was "secured through permanent financing and the debt paid by the rents collected or the sale of the assets after they were built." (Appellant's brief, 12.)

{¶25} Although plaintiff does not reject defendant's assertion that he leveraged his separate property assets to obtain funds to acquire new entities, plaintiff contends defendant failed "to trace certain assets to the leveraging of separate property ***only***" because defendant utilized an RCR Disbursement account. As the trial court noted in its decree, defendant's RCR Disbursement Company, which appeared on defendant's premarital property schedule, "only handles disbursements for Defendant's other property related entities; it owns no assets." (Decree, 39.) The court concluded the entity merely existed as a clearinghouse, and as defendant "tied the account to property listed on the

original balance sheet, he ha[d] satisfied his tracing burden sufficient for the entity to be deemed his separate property." (Decree, 39.)

{¶26} Mortgaging separate real property in order to finance the purchase of a new asset "is the same as if the [party] had sold the real property, or a portion of it, outright to obtain the sum of money used to purchase the" new asset. *Radcliffe v. Radcliffe* (Apr. 27, 1994), 2d Dist. No. 14130 (determining a mobile home, purchased with a loan collateralized by the wife's separate real property, remained the wife's separate property under the terms of the parties' prenuptial agreement that provided separate property included one parties' using a premarital asset to produce an after-marriage asset). See also *Fox v. Fox*, 10th Dist. No. 01AP-83, 2002-Ohio-2010. The new assets acquired through defendant's business practice of leveraging separate property assets to acquire new assets were defendant's separate property under §1.1(B) of the premarital agreement, as defendant acquired the resulting asset in exchange or substitution for his separate property.

{¶27} Further, defendant's practice of leveraging separate assets and using the rents from a property he acquired to pay off the loan attached to the property did not result in the property becoming marital, as the funds used to pay the loan derived from a separate property asset. Cf. *Steinke* at ¶20-24 (concluding properties husband purchased during the marriage could not be classified as separate property under the terms of the parties' prenuptial agreement where the husband acquired the properties using funds borrowed from the bank, but the "loan payments on the properties were made with undocumented funds from [the husband's] mother, undocumented payments from the sale of other real estate, or were partially paid by joint tax refunds which had been

deposited in [the husband's] Fifth Third checking account" making it "impossible to trace the exact source of the funds used to repay the loan").

{¶28} As a result, the trial court did not err in rejecting plaintiff's general argument about "marital efforts." The parties' intent, as expressed in the language of their premarital agreement, was to permit defendant to acquire and develop land much as he had before the marriage and to permit defendant's business ventures to remain his separate property. Plaintiff also challenges defendant's tracing related to specific businesses.

C. *Tracing regarding Specific Entities*

1. Presidential Construction Company

{¶29} Plaintiff asserts the trial court erred in determining the increase in value of Presidential Construction Company during the marriage was defendant's separate property. Presidential is an entity involved in construction, maintenance, and repairs; defendant is the chief executive officer of the company. At the time of marriage, Presidential had a fair market value of $3,664,504; at the time of divorce, its fair market value increased to $10,367,796. Defendant listed Presidential on the premarital property schedules attached to the agreement. The trial court properly determined Presidential was defendant's separate property pursuant to the premarital agreement, as the agreement defined separate property to include "[a]ny increase, accretion, or earning of property separately owned before the marriage." (Premarital Agreement, §1.1(A).)

2. Mount Pisgah Development, LLC

{¶30} Plaintiff asserts the trial court erred in classifying Mount Pisgah Development, LLC, an entity created after the parties' marriage, as defendant's separate property. Defendant created Mount Pisgah in February 2001 "for the purpose of

purchasing and * * * eventually developing land," owned it, and did not personally contribute any funds to the entity. (Tr. Vol. V, 967.) At the time of the divorce, Mount Pisgah owned land in Cecil Township, Pennsylvania and had a fair market value of $6,670,306.

{¶31} Defendant's expert, Robert Weiler, described the Mount Pisgah property as "vacant land and improved residential homesites with various outbuildings"; defendant testified the outbuildings existed at the time of purchase. (Tr. Vol. X, 2149.) Plaintiff's expert, Dana Lavelle, opined the "property is not vacant land sitting there growing grass," as the tax returns and defendant's exhibits showed development costs and income. (Tr. Vol. IX, 1891.) Defendant explained the income on the property came from "a cellular tower that existed at the time of the purchase" and from an oil and gas lease entered into in 2008. (Tr. Vol. X, 2149-50.)

{¶32} Defendant traced Mount Pisgah to his premarital property through a series of Internal Revenue Code §1031 exchanges. As an expert witness explained, a §1031 exchange occurs "[w]here you have like-kind property. It's a tax deferral method of taking the property of A and transferring it for B. You get to swap. You get a new property and you don't have to pay taxes. The taxes are deferred." (Tr. Vol. I, 141.) See also 26 U.S.C. §1031(A).

{¶33} Prior to the marriage, defendant owned land known as Woodhill Gardens. In 1994, defendant sold Woodhill Gardens and completed a §1031 exchange for 95 acres of land located off Cooper Road in Columbus, Ohio. The parties stipulated the Cooper Road land was defendant's separate property. In 1998, defendant completed a §1031 exchange of 2.765 acres of the Cooper Road land for land located off of Liberty

Road. In 2000, defendant completed yet another §1031 exchange of the Liberty Road land for the Richardson Farm, consisting of 210 acres in Pennsylvania that became Mount Pisgah. Defendant financed the remaining portion of the purchase price for the Richardson Farm "with an advance from T&R Holding," a company defendant owned prior to the marriage, "to Mount Pisgah." (Tr. Vol. VIII, 1541-42.) As a result, any earnings T&R Holding Co. generated were defendant's separate property as well.

{¶34} Because defendant acquired Mount Pisgah in exchange or substitution for a premarital entity and from an advance of funds from a premarital entity, competent, credible evidence supports the trial court's determination that Mount Pisgah was defendant's separate property under the terms of the premarital agreement. (Premarital Agreement, §1.1.)

{¶35} Plaintiff nonetheless notes that Defendant's Exhibit Z reflects that, as of August 2009, Mount Pisgah had a payable to the shareholder in the amount of $1.2 million. Plaintiff contends the trial court did not address the tracing issue "to demonstrate that the payable actually came from the premarital asset." (Appellant's brief, 17.)

{¶36} The trial court stated that because "there was no substantive testimony relative to the alleged $1,234,167 payable to Defendant," the court lacked "sufficient evidence to form an opinion as to its relevance." (Decree, 35.) Section 1.3 of the premarital agreement provides that "[e]ach of the subparagraphs in Paragraph 1.1 shall refer to each other so that 'separately owned before the marriage' and 'separately acquired' shall include, for example, increases, accretions, and earnings on property acquired in exchange or substitution for property separately owned before the

marriage." Because defendant adequately traced Mount Pisgah to his premarital property, any earnings the entity generated also remained defendant's separate property.

3. T&R Gender, LLC

{¶37} Defendant owns T&R Gender, LLC, incorporated June 28, 2001, and did not personally invest any funds into the entity. The entity serves as a general partner in Gender Road Limited Partnership, which the parties stipulated was defendant's separate property. The parties also stipulated T&R Gender had a fair market value of $4,312,607 at the time of divorce.

{¶38} The Gender Road LP was "a premarital partnership * * * formed in the 1980s." (Tr. Vol. IV, 780.) Defendant personally served as a limited partner, and T&R Properties, another entity defendant owned prior to the marriage, served as a general partner. In the 1980s, the partnership "purchased vacant land, * * * built apartments on part of the vacant land, sold the apartments, and distributed a lot of the original investors' money back to them and retained undeveloped land." (Tr. Vol. IV, 787.)

{¶39} On July 1, 2001, T&R Properties assigned its general partner interest in Gender Road LP to T&R Gender. Defendant explained that "his accountants and lawyers suggested replacing" T&R Properties with a limited liability company because "the tax rules were changing, and the [limited liability companies] were then apparently provided [sic] some accounting benefit." (Tr. Vol. IV, 784-85.)

{¶40} At some point after the marriage in 1994, the Kroger Co. began negotiating with Gender Road LP to lease the partnership's undeveloped land for the purpose of constructing a grocery store. Kroger required more land than the partnership had and, in

order to accommodate Kroger, T&R Gender entered into a land lease with the adjacent landowner in December 2001. Gender Road LP then entered into a land lease with Kroger in 2002 and later a land lease with Wendy's in 2003, both of whom constructed their own stores.

{¶41} On September 17, 2002, Gender Road LP and T&R Gender executed a $5.6 million promissory note payable to Fifth Third Bank; defendant personally guaranteed the note. As defendant explained, "Gender Road Limited Partnership was able to leverage the income flow from those land leases to borrow the money to do specific improvements that were required by Kroger * * * and then also build some [auxiliary] store fronts." (Tr. Vol. IV, 800.) In 2007, T&R Gender purchased the land it was leasing from the adjacent landowner "because the cost of purchasing the land was less than the cost of the lease payments." (Tr. Vol. IV, 793.) To do so, Gender Road LP and T&R Gender borrowed $1.4 million from Fifth Third Bank; the bank added the new debt onto the preexisting and outstanding loan from 2002.

{¶42} The trial court concluded T&R Gender was defendant's separate property under the terms of the premarital agreement. Plaintiff contends that "while there may have been a small non-marital component to the asset, it was inappropriate [for the court] to assign the entire asset" as defendant's separate property because defendant created the entity after the parties marriage through "borrowed funds and paid for by rents then coming from the buildings that were built." (Appellant's brief, 18.)

{¶43} The evidence demonstrated that T&R Gender simply substituted for T&R Properties as the general partner in Gender Road LP. Defendant owned T&R Properties and its interest in Gender Road LP prior to the marriage, making T&R Gender defendant's

separate property under §1.1(B) of the premarital agreement. Defendant's entering into land leases with other companies was entirely consistent with the premarital agreement which permitted defendant to "manage, direct, enjoy, use, and dispose" of his separate property. (Premarital Agreement, §1.1.) The fact that T&R Gender, collectively with Gender Road LP, leveraged the land the partnership owned prior to the marriage to secure financing, build buildings, and later to acquire additional land does not change the separate property nature of T&R Gender. See *Radcliff*; *Fox*; Premarital Agreement, §1.3.

4. Tiffany Lakes, Inc.

{¶44} Tiffany Lakes, Inc., incorporated October 2, 1998, owned Tiffany Lake Apartments at the time of trial. Tiffany Lake Apartments was "a 202-unit apartment project that was constructed in 1996 and consists of one and two-bedroom units" located off of Cooper Road in Columbus, Ohio. (Defendant's Exhibit F, Tab 40.) The parties stipulated that Tiffany Lakes, Inc. had a fair market value of $4,018,357 at the time of trial.

{¶45} T&R Communities, Inc., incorporated in 1995, owned Tiffany Lakes, Inc.; T&R Holding Co., an entity listed on defendant's premarital property schedules, owned T&R Communities. T&R Communities received Cooper Road land from T&R Properties, and T&R Communities, as relevant to Tiffany Lakes, Inc., consisted of office buildings built on land "from our original Cooper Road land." (Tr. Vol. V, 1051; Vol. VIII, 1717.)

{¶46} T&R Communities built the Tiffany Lakes Apartment complex on the Cooper Road land through a September 28, 1995 loan from Provident Bank of $10,552,250. Defendant explained that T&R Communities had its own assets, "so it borrowed the money, * * * built the community, and then deeded it out to Tiffany Lakes, Inc." (Tr. Vol. VI, 1064.) Defendant presented the general warranty deed demonstrating

that T&R Communities transferred land off of Cooper Road to Tiffany Lakes, Inc. on January 15, 1999. At the time of trial, Tiffany Lakes, Inc. owned the apartment complex and operated the community. As a stand-alone corporation, Tiffany Lakes, Inc. was able to secure a permanent mortgage, and the rental income coming from the apartment complex paid the mortgage attached to the property.

{¶47} Lavelle admitted that, based on the Cooper Road land transfer, "there was separate property transferred into" Tiffany Lakes, Inc., but he also testified that "[t]here was $10 million worth of buildings built on that * * * through marital efforts." (Tr. Vol. X, 2015.) The trial court noted Lavelle's testimony and concluded defendant proffered sufficient tracing evidence to classify Tiffany Lakes as defendant's separate property pursuant to the premarital agreement. The evidence supports the trial court's determination.

{¶48} T&R Communities built the Tiffany Lakes Apartment complex on Cooper Road land by leveraging defendant's separate property assets consisting of land and buildings off of Cooper Road, property the parties stipulated was defendant's separate property. T&R Communities then transferred the apartment complex to Tiffany Lakes, Inc. The trial court properly classified Tiffany Lakes as defendant's separate property pursuant to the premarital agreement. Premarital Agreement, §1.1(B); *Radcliff*; *Fox*. Moreover, no evidence indicated defendant either used the funds from his "deemed salary" to finance the construction of Tiffany Lakes, Inc. or placed Tiffany Lakes, Inc. in some form of joint ownership with plaintiff. See Premarital Agreement, §1.4, 1.7.

5. Scioto Crossing Development, LLC and Residences at Scioto Crossing, LLC

{¶49} At the time of trial, Residences at Scioto Crossing, LLC was "an existing apartment community here in central Ohio that [was] part of a development that was started five or six years ago by Scioto Crossing Development, LLC." (Tr. Vol. V, 980-81.) The Residences at Scioto Crossing, which defendant owned, was incorporated on October 12, 2004 for the purpose of developing the Residences at Scioto Crossing Apartments. The parties stipulated the Residences at Scioto Crossing had a fair market value of $2,276,189 at the time of trial.

{¶50} Defendant incorporated Scioto Crossing Development, LLC on July 19, 2004 and at the time of trial owned the entity. Defendant asserted Scioto Crossing Development was worth negative $5,866,639, while plaintiff asserted the asset was worth $0. Defendant explained that Scioto Crossing Development "was created to acquire land here in Central Ohio off of Sawmill Road." (Tr. Vol. V, 982.)

{¶51} Scioto Crossing Development purchased land located off Sawmill Road on August 13, 2004 for $6.3 million. In February 2001, T&R Properties placed $100,000 in escrow to reserve the right to purchase the property from Sawmill Partners Investment Company. On August 13, 2004, T&R Holding Co. advanced $407,141.83 to Hummel Title Agency to finance the purchase of the property. Defendant financed the remainder of the purchase price with a commercial loan from US Bank "collateralized by separate property of all of Scioto Crossing Development and eventually The Residence at Scioto Crossing." (Tr. Vol. V, 990.)

{¶52} After purchasing the land, defendant requested and received rezoning in order to construct apartments, condominiums, patio houses, and detached homes. Defendant then conveyed a portion of the land from Scioto Crossing Development to the Residences at Scioto Crossing. After the transfer, defendant built apartments on the land belonging to the Residences at Scioto Crossing, financing the cost of construction with a construction loan. By 2006, the Residences at Scioto Crossing had rolled the construction loan into a permanent mortgage. The rents derived from the apartment units pay the mortgage on the property.

{¶53} US Bank eventually released the land belonging to the Residences at Scioto Crossing, mortgaged originally as collateral for the Scioto Crossing Development 2004 loan. The land Scioto Crossing Development then held consisted of "unsold condominiums and land to build future condominiums on." (Tr. Vol. VI, 1307.) The bank reappraised the remaining property of Scioto Crossing Development and required additional collateral to secure the loan. Accordingly, the loan on the land Scioto Crossing Development held was cross-collateralized with four of defendant's other business entities.

{¶54} The trial court noted in the divorce decree that "[a]llocating the Residence at Scioto Crossing and Scioto Crossing Development LLC are particularly vexing to the Court as they represent that hybrid situation in which Defendant leveraged premarital assets to secure a totally new entity after the date the parties were married." (Decree, 42.) The court observed that §1.1 of the premarital agreement "clearly delineates * * * exchanges/cash proceeds as Defendant's separate property while §1.7 sets the 'marital floor' above which everything else is Defendant's separate property." (Decree, 44.) The

court concluded defendant proffered sufficient tracing evidence for the Residences at Scioto Crossing and Scioto Crossing Development and awarded defendant the entities as his separate property pursuant to the premarital agreement.

{¶55} Plaintiff contends the trial court, in relying on defendant's "deemed wages" under the premarital agreement, "simply disregarded the fact that the cost of the construction was not paid for by Appellee with income that was described in the prenuptial agreement (in excess of deemed wages), but from rents received from the new construction after the project was completed." (Appellant's brief, 20.)

{¶56} The initial funds to acquire the land off of Sawmill Road came from T&R Properties and T&R Holding Co., two of defendant's premarital properties. As a result, defendant's using the funds of those separate properties to acquire new property rendered the new property defendant's separate property under the terms of §1.1(B) and 1.3 of the premarital agreement. Scioto Crossing Development then leveraged the land to obtain a loan to finance the remainder of the purchase price. Because the initial cash exchanged to acquire the property came from defendant's premarital assets, the resulting loan money and property remained defendant's separate property as well. *Radcliff*; *Fox*; Premarital Agreement, §1.1(B); 1.3.

{¶57} Similarly, when Scioto Crossing Development transferred a portion of the land to the Residences at Scioto Crossing, which then obtained a construction loan to construct the apartment complex, that also remained defendant's separate property under §1.3 of the Premarital Agreement. Nor did defendant's practice of using the rents from the apartment complex to pay the mortgage change the nature of the property, as the rents were derived from defendant's separate property. Cf. *Steinke* at ¶20-24. Lastly, defendant

did not place either entity in a joint ownership with plaintiff, and the record contains no evidence to indicate defendant used any of his "deemed wages" to finance the acquisition or construction of either of these entities. See Premarital Agreement, §1.4, 1.7. The trial court did not err in allocating the Residences at Scioto Crossing or Scioto Crossing Development as defendant's separate property.

{¶58} Competent, credible evidence supports the trial court's finding the entities at issue were defendant's separate properties.

D. *Tracing*

{¶59} Plaintiff asserts "[t]he trial court failed to properly mandate that the burden was upon [defendant] to provide appropriate tracing to demonstrate certain assets or components thereof were separate property." (Appellant's brief, 14.) Plaintiff further contends the trial court disregarded certain assets, specifically the value of notes receivable listed on Defendant's Exhibit Z and Joint Exhibit A. As to the latter, the trial court stated in its decree that the notes receivable and bank accounts "associated with business entities which the Court has deemed separate to Defendant shall also be deemed [defendant's] separate property." (Decree, 81.)

{¶60} The majority of the parties' 24-day trial consisted of testimony from defendant and his experts tracing defendant's many business holdings back to premarital assets. Nothing suggests the trial court did not hold defendant to his burden to adequately trace his business holdings. Indeed, although the court determined defendant presented sufficient tracing evidence as to the majority of his business holdings, the court found defendant failed to offer sufficient tracing evidence as to two assets and classified them

as marital property. Plaintiff's contention that the trial court failed to place the burden on defendant to trace his separate property assets lacks merit.

{¶61} Based on the foregoing, plaintiff's first, second, and third assignments of error are overruled.

IV. Defendant's Cross-Assignment of Error – Marital Residence

{¶62} Defendant's sole assignment of error on cross-appeal asserts the trial court erred in awarding the parties' marital residence to plaintiff as her separate property. The parties stipulated that the value of the marital residence was $800,000 at the time of trial.

{¶63} On September 26, 1996, defendant purchased the marital residence for slightly under $600,000, financing the purchase with funds which were separate and apart from the monies he would transfer into plaintiff's account every year as his "deemed salary." Defendant paid the contract price in full, so a mortgage never attached to the property. When defendant purchased the property, he purposely titled the residence in both his and plaintiff's name, making the property marital under §1.4(A) of the premarital agreement. Plaintiff explained that, when the couple initially looked at the property, defendant "did not particularly like the house." (Tr. Vol. X, 2103.) Defendant eventually purchased the house and told plaintiff, "I bought you your house and you got your backyard, which was kind of a joke because [the backyard] was a mess." (Tr. Vol. X, 2104.) Plaintiff explained she believed the house was her separate property because defendant said "he bought [her] the house." (Tr. Vol. X, 2103.)

{¶64} On November 28, 1997, defendant transferred his half interest in the marital residence to plaintiff by means of a general warranty deed, leaving plaintiff the sole titled owner of the residence, a transfer that was tax exempt. Defendant transferred his interest

in the property to plaintiff because he did not want to pledge the marital residence or subject it to possible attachment as a result of his numerous real estate deals. He stated he nonetheless intended to maintain the home as a marital asset and did not intend for the house to be a gift to plaintiff. On subsequent business loan applications, defendant did not list the marital residence as an asset in which he had any interest.

{¶65} Plaintiff argued that, since defendant transferred the land to her "and because such gifts are permitted under the terms of the pre-marital agreement, the Court should award Plaintiff the" marital residence. (Decree, 12.) The trial court found the marital residence to be plaintiff's separate property. The court noted defendant transferred his entire interest in the marital residence to plaintiff, presented the court with "no documentation evidencing his retention of any rights/legal interests to that property" and admitted "that on numerous subsequent loan applications, [he] did not assert any interest or control in the real estate." (Decree, 12.) The court quoted §1.4(A) of the premarital agreement and decided that "given this specific statement of intent set forth in the parties' Premarital Agreement, it is difficult for the Court to rule in any other manner with respect to the marital residence, *except* as Plaintiff suggests." (Emphasis sic.) (Decree, 13.)

{¶66} The mere "holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." R.C. 3105.171(H). The effect of R.C. 3105.171(H) "is to negate the presumption of a gift, but not to preclude such a finding upon an appropriate factual context." *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 161. Thus, "title can be some evidence of the parties' intent as to the nature of the asset being marital or

separate." *Gallo v. Gallo*, 11th Dist. No. 2000-L-208, 2002-Ohio-2815, ¶25. R.C. 3105.171(H) "essentially embraces a flexible totality-of-the-circumstances test to determine whether transmutation of the separate property has occurred." *Hippley v. Hippley*, 7th Dist. No. 01 CO 14, 2002-Ohio-3015, ¶18, citing *Barkley* at 161; *Anderson v. Anderson* (July 7, 1992), 4th Dist. No. 91CA1.

{¶67} "It is well-settled that a spouse can change the nature of property, and its designation as separate or marital property, through conduct performed during the marriage." *Rank v. Rank*, 10th Dist. No. 10AP-273, 2010-Ohio-5717, ¶11, quoting *Smith v. Smith,* 10th Dist. No. 07AP-717, 2008-Ohio-799, ¶14, citing *Moore v. Moore* (1992), 83 Ohio App.3d 75, 77. The most commonly recognized method for changing the nature of property is through an inter vivos gift of the property from the donor spouse to the donee spouse. *Bell v. Bell*, 2d Dist. No. 2002 CA 13, 2002-Ohio-5542, ¶15. The essential elements of an inter vivos gift are (1) the intent of the donor to make an immediate gift; (2) delivery of the property to the donee; and (3) acceptance of the gift by the donee. *Barkley* at 161, n.2, citing *Bolles v. Toledo Trust Co.* (1936), 132 Ohio St. 21.

{¶68} The key issue in determining the nature of the property "is typically whether the donor spouse had the requisite donative intent to transfer an interest to the donee spouse at the time of the transfer." *Rank* at ¶11, citing *Neighbarger v. Neighbarger*, 10th Dist. No. 05AP-651, 2006-Ohio-796, ¶26, citing *Hippley*. "Donative intent is established if a transferor intends to transfer a present possessory interest in an asset." *Brate v. Hurt*, 174 Ohio App.3d 101, 2007-Ohio-6571, ¶21. The donee spouse has the burden of proving by clear and convincing evidence that the donor

spouse made an inter vivos gift. R.C. 3105.171(A)(6)(a)(vii); *Bell* at ¶15; *Bolles* at paragraph two of the syllabus.

{¶69} Defendant initially asserts the trial court improperly placed the burden on him to prove that he did not gift the marital residence to plaintiff. See *Howcroft v. Howcroft,* 192 Ohio App.3d 307, 2010-Ohio-6410, ¶67-83, 88-89 (concluding wife failed to present any evidence that the husband's transfer to her of a half interest in the subject property was an inter vivos gift, thereby failing to carry her evidentiary burden). Defendant cites to a portion of the decree where the court stated it had "no evidence supporting Defendant's contention that he never intended to gift the marital residence to Plaintiff" to support his contention. (Decree, 13.)

{¶70} The court's statement that defendant lacked evidence came after the court cited evidence favorable to plaintiff, including defendant's testimony indicating defendant had gifted his interest in the residence to plaintiff. Defendant agrees with plaintiff that no case law or evidentiary rule prohibits a party from meeting his or her evidentiary burden through the testimony of the opposing party. See *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, paragraph two of the syllabus. The trial court did not improperly place the evidentiary burden on defendant; rather, the court found that plaintiff had met her burden and defendant had not presented the court with evidence to the contrary.

{¶71} Defendant also contends the essential elements of a valid inter vivos gift are lacking. The issue resolves to whether competent, credible evidence in the record supports the trial court's conclusion that defendant acted with the requisite donative intent in transferring his half interest in the property to plaintiff.

{¶72} The cases defendant cites in that regard are not persuasive. They either are cases where the party claiming gift failed to present evidence of a donative intent or cases where one spouse transferred property into joint ownership with the other to obtain financing or a mortgage based on the subject property, causing the courts to conclude the requisite donative intent was lacking. See, e.g., *Smith v. Emery-Smith*, 190 Ohio App.3d 335, 2010-Ohio-5302, ¶9, 39 (finding no donative intent where bank required wife to re-title property in joint ownership with husband in order to obtain mortgage loan proceeds).

{¶73} By contrast, defendant's specific objective in transferring the property from joint ownership with plaintiff to plaintiff alone was to avoid having the marital residence "subject to creditors [sic] attachment because of [his] real estate deals." (Tr. Vol. IV, 807.) Courts have held that when "a transferor transfers his interest in real property for a specific purpose other than ownership, the transferor has demonstrated donative intent." *Dever v. Dever* (Apr. 12, 1999), 12th Dist. No. CA98-07-050 (concluding husband's transfer of property held in joint ownership with wife to wife's name alone "made to protect his assets from creditors," demonstrated his intent to transfer to his wife a present possessory interest "in the property and establish[ed] donative intent as a matter of law"); *Strausburg v. Strausburg*, 3d Dist. No. 2-10-12, 2010-Ohio-3672, appeal not allowed, 127 Ohio St.3d 1546, 2011-Ohio-647 (determining husband who transferred inherited farmland into his wife's name solely "because he was concerned about the risk that he would be sued" acted with donative intent); cf. *Howcroft* at ¶66-88 (deciding donative intent was lacking because husband testified his only intent in transferring the property into joint ownership with his wife was to ensure the house would

go to her if he died, indicating an intent that the wife "would have a future expectancy interest in the property, as opposed to a present possessory interest").

{¶74} Defendant further contends the trial court erred in relying on §1.4(A) of the premarital agreement. Although §1.4(A) concerns the transmutation of separate property into marital property, the premarital agreement is silent on the method by which the parties may change marital property into separate property. The premarital agreement, however, provides that "[a]ll gifts * * * received by either party during the marriage including gifts from the other party" shall constitute that party's separate property. (Premarital Agreement, §1.1(C).) The agreement further provides that "each party may make such disposition of his or her property by sale, gift, * * * or otherwise, during his or her lifetime, as he or she may desire." (Premarital Agreement, §6.2.) Although defendant suggests plaintiff should have produced "other evidence" of defendant's intent to gift the real estate to her, "such as a card memorializing the gift or statements made by" defendant, the premarital agreement pertaining to gifts does not require written evidence memorializing a gift between the spouses. (Cross-appellant's brief, 15.)

{¶75} While we agree with plaintiff that title is a factor relevant for determining separate property, the trial court here relied heavily on §1.4(A) of the premarital agreement. Because the agreement does not address a transfer of marital property to separate, we sustain defendant's sole assignment of error on cross-appeal to the extent that the issue is remanded to the trial court to determine whether defendant made a gift of his half of the marital home to plaintiff.

V. Plaintiff's Fourth Assignment of Error – Shared Parenting Plan

{¶76} Plaintiff's fourth assignment of error asserts the trial court erred both in failing to conduct an evidentiary hearing regarding the parties' respective shared parenting plans and in adopting defendant's proposed plan. On September 23, 2009, prior to the first day of trial, the parties filed a Joint Shared Parenting Plan, including a provision that the parenting time schedule contained therein would come before the court for review on January 21, 2010 at 9:30 a.m. The trial court approved the September 23 plan through an Agreed Interim Order.

{¶77} Although both parties admit the January meeting occurred, no transcript of the meeting is in the record. Following the January meeting, each party presented the court with their respective proposed shared parenting plan. The court issued an Amended Judgment Entry Shared Parenting Decree on April 22, 2010, determined defendant's proposed plan was an appropriate allocation of parental rights and responsibilities, and adopted it. Due to a filing error, the court refiled the Amended Judgment Entry Shared Parenting Decree on July 22, 2010 and attached defendant's plan to the entry. In neither entry did the court reference a hearing on the two proposed shared parenting plans.

{¶78} Although a trial court's discretion in custody proceedings is broad, it is not absolute, and the trial court must follow the procedure described in R.C. 3109.04 when it decides custody issues. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. We generally review the trial court's decision to adopt a shared parenting plan for an abuse of discretion. *Haas v. Bauer*, 156 Ohio App.3d 26, 2004-Ohio-437, ¶20, citing *Saylor v. Hessling* (Aug. 5, 1996), 12th Dist. No. CA 95-12-223.

{¶79} "Shared parenting" means that the parents share, in the manner set forth in the plan the court approves, all or some of the aspects of the physical and legal care of their children. R.C. 3109.04(K). In any divorce, and in any proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child, the court must "allocate the parental rights and responsibilities for the care of the minor children of the marriage." R.C. 3109.04(A). "Pursuant to R.C. 3109.04(A), the trial court is to conduct a hearing at which the testimony of at least one of the parents is submitted before making any allocation of parental rights." *Kelm v. Kelm*, 10th Dist. No. 03AP-472, 2004-Ohio-1004, ¶15. "[W]hen the allocation of parental rights and responsibilities is contested, a hearing *must be granted*." *Snouffer v. Snouffer* (1993), 87 Ohio App.3d 89, 92. (Emphasis sic.)

{¶80} If each parent requesting shared parenting files a separate proposed plan for shared parenting, "the court shall review each plan filed to determine if either is in the best interest of the children. If the court determines that one of the filed plans is in the best interest of the children, the court may approve the plan." R.C. 3109.04(D)(1)(a)(ii). If the court determines that neither plan is in the best interest of the children, the court may order each parent, or select one of the plans and order each parent, to submit changes to the plan. R.C. 3109.04(D)(1)(a)(ii). A court may not approve a plan under R.C. 3109.04(D)(1)(a)(ii) "unless it determines that the plan is in the best interest of the children." R.C. 3109.04(D)(1)(b). See R.C. 3109.04(F)(1) and (2) (presenting a non-exhaustive list of factors the trial court must consider in determining the best interest of the child).

{¶81} Plaintiff contends the "trial court's failure to hold a hearing and accept sworn testimony about the terms of a shared parenting plan was not only an abuse of discretion; it was contrary to law." (Appellant's brief, 24.) Defendant asserts plaintiff waived any argument regarding the trial court's failure to hold an evidentiary hearing, pursuant to R.C. 3109.04, because she failed to request such a hearing in the trial court. Typically, "a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal." *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, ¶74, citing *Estate of Hood v. Rose*, 153 Ohio App.3d 199, 2003-Ohio-3268, ¶10.

{¶82} Under the circumstances here, plaintiff's failure to request a hearing did not waive the trial court's obligation to hold an evidentiary hearing regarding the contested shared parenting plan. The requirement in R.C. 3109.04(D)(1)(b) that a trial court determine whether a shared parenting plan is in the best interests of the child "is for the benefit of the children, not the parties, and it can not be waived by the parties." *In re Docie* (Mar. 24, 1998), 4th Dist. No. 97CA19. Although hearings regarding child custody issues pursuant to a shared parenting plan " 'can be informal, * * * where the custody of the child is disputed, evidence must be taken and if testimony is taken it must be sworn.' " Id., quoting *In re Breslin Logan; White v. Thomas* (Dec. 11, 1997), 8th Dist. No. 72514, citing *In re Fleming* (July 22, 1993), 8th Dist. No. 63911. Cf. *Drescher v. Nuttall*, 8th Dist. No. 88774, 2007-Ohio-537, ¶13 (determining that when the parties file "an agreed joint shared parenting plan, evincing that the allocation of parental rights and responsibilities [are] not in controversy" a hearing is "not mandatory").

{¶83} Although the parties initially filed a joint shared parenting plan, each party submitted different proposed shared parenting plans after the joint plan was scheduled for review in January. The proposed shared parenting plans reflect the parties disagreement on the terms of the shared parenting plan going forward, including defendant's proposal that involved one extra overnight per week not present in plaintiff's plan. Because the "parties were unable to reach an agreement on shared parenting, the trial court was required to conduct a hearing at which time appellee and appellant could present testimony as to the contested matters." *Kelm* at ¶18, citing *Snouffer*. See also *Stroud v. Lyons*, 11th Dist. No. 2002-A-0050, 2003-Ohio-6773, ¶36 (deciding that when the parties contested the allocation of parental rights, "based on *Docie*, the trial court was required to determine which plan was in the best interest of the child and such a hearing cannot be waived").

{¶84} In light of the conflicting proposed shared parenting plans, a hearing was necessary to determine which plan was in the best interests of the parties' child. *Docie*. Other factors present in the case only support the need for a hearing. For example, although the guardian ad litem ("GAL") signed the court's April 22, 2010 amended judgment entry, refiled on July 22, 2010, the GAL noted the "terms are consistent with Judge's recommendation, but not as desired by the child or recommended by the GAL." (R. 539, 552.) Nonetheless, the court's decree states that "on July 27, 2010, the Court, in full agreement with the recommendation of the Guardian *ad Litem*, declined to further modify the existing allocation of parenting time." (Decree, 84.) Given those notations, the parties' inability to agree on a shared parenting plan, and the lack of a record on which we

can determine whether the court abused its discretion in adopting defendant's shared parenting plan, the court's failure to conduct a hearing cannot be deemed harmless.

{¶85} Moreover, where each party submits a proposed shared parenting plan and the court approves one of the plans, the court must enter "in the record of the case findings of fact and conclusions of law as to the reasons for the approval." R.C. 3109.04(D)(1)(a)(ii). The requirement "does not mean that the trial court must provide a detailed analysis. Instead, the court may substantially comply with the statute if its reasons for approval or denial of the shared parenting plan are apparent from the record." *Swain v. Swain*, 4th Dist. No. 04CA726, 2005-Ohio-65, ¶18. Here, we are unable to discern the reasons underlying the court's decision to adopt defendant's shared parenting plan, as the court offered no factual findings or conclusions of law. Moreover, because the record contains nothing concerning the informal meetings the parties had with the court, the court's reasons for approving defendant's plan are not apparent. The court's assertion in the amended judgment entry that defendant's shared parenting plan is in the best interest of the child, without more, is insufficient to satisfy the requirement that the court present findings of fact and conclusions of law. *Swain* at ¶19.

{¶86} Based on the foregoing, plaintiff's fourth assignment of error is sustained.

VI. Plaintiff's Fifth Assignment of Error – Child Support

{¶87} Plaintiff's fifth assignment of error asserts the trial court erred in calculating child support when it failed to properly calculate defendant's gross income pursuant to R.C. 3119.01(C)(7). A trial court generally has considerable discretion related to the calculation of child support, and, absent an abuse of discretion, an appellate court will not disturb a child support order. *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, 390.

{¶88} At the time a trial court orders child support, the court must complete a child support guideline worksheet and make it part of the trial court's record. *Marker v. Grimm* (1992), 65 Ohio St.3d 139, paragraph one of the syllabus; R.C. 3119.022 (providing the worksheet the trial court must complete to determine the child support obligation if the case involves a sole residential parent or shared parenting). The guideline amount is rebuttably presumed to be the correct amount of child support to be awarded, but the court, with supporting factual findings, may deviate from the guideline worksheet. See *Marker*; R.C. 3119.03; 3119.022. Despite the discretion a trial court has in child support matters, the court must literally and technically follow the statutory requirements in all material respects. Id. at paragraph two of the syllabus.

{¶89} Both parties prepared a child support worksheet, but the court declined to accept either. Rather, the court determined plaintiff had an annual income of $60,000 per year and defendant had an annual income of $144,789 per year. (Decree, 87.) Based on those figures, the trial court completed the R.C. 3119.022 worksheet for parents operating under a shared parenting order, finding that the parties had a combined annual income of $140,667. Pursuant to the schedule in R.C. 3119.021, the court determined the parties' combined yearly child support obligation was $14,523.47 and set defendant's monthly child support obligation at $670.72. (Decree, 98.)

{¶90} For purposes of child support, the "income" of a parent employed to full capacity is "the gross income of the parent." R.C. 3119.01(C)(5). A parent's "gross income" is "the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, * * * [and] commissions; royalties; tips; rents; dividends; * * * interest; trust income;

annuities; social security benefits, * * * spousal support actually received; and all other sources of income." R.C. 3119.01(C)(7). "Gross income" also includes "self-generated income; and potential cash flow from any source." R.C. 3119.01(C)(7).

{¶91} Gross income does not include "[n]onrecurring or unsustainable income or cash flow items," meaning "an income or cash flow item the parent receives in any year or for any number of years not to exceed three years that the parent does not expect to continue to receive on a regular basis." R.C. 3119.01(C)(7)(e) and (8). In adopting the above definition of "gross income," the General Assembly intended for an expansive definition of gross income for child support purposes. See *Howell v. Howell*, 167 Ohio App.3d 431, 2006-Ohio-3038, ¶50; *McQuinn v. McQuinn* (1996), 110 Ohio App.3d 296, 300-01.

{¶92} Plaintiff contends the trial court simply averaged defendant's gross wages for the three years prior to the decree and failed to include all of the applicable R.C. 3119.01(C)(7) items in defendant's gross income. Precisely how the trial court arrived at the figure for defendant's gross income is difficult to determine. The trial court set defendant's income at $144,789 per year, explaining the figure represented a "3-year average of Defendant's income according to Ms. Congrove: $163,580 for 2007, $166,000 for 2008, and $104,787 for 2009. DEF EX Y." In 2007, defendant's W-2 wages were $163,580, corresponding to the figure the trial court used; in 2008, defendant's W-2 wages were $166,557, $557 greater than the figure the trial court used; and in 2009 defendant's W-2 wages were $184,658, some $80,000 greater than the trial court used. The figure the trial court used for defendant's 2009 annual income corresponds to the amount of defendant's 2009 "deemed salary" under §1.7 of the premarital agreement.

{¶93} Defendant contends that due to the "unpredictability of the real estate business as well as the formula in the parties' Prenup to determine [his] income, it was appropriate for the Court to use the formula to determine [his] deemed income for a three-year period, and then average that income over the 3 year period." (Appellee's brief, 38.) Although the trial court used defendant's deemed salary only for 2009, not for the entire three-year period as defendant indicates, the court's decision to follow the prenuptial formula raises public policy issues.

{¶94} Antenuptial agreements containing provisions for the disposition of property and setting forth amounts to be paid as sustenance alimony upon a subsequent divorce of the parties are not contrary to public policy. *Gross* at paragraph one of the syllabus. Nonetheless, "[t]he duty owed by the courts to children under the doctrine of *parens patriae* cannot be severed by agreement of the parties." *Kelm v. Kelm*, 92 Ohio St.3d 223, 226, 2001-Ohio-168. The applicable law permits parents to agree as to the amount of child support in a separation agreement. See *Gross* at 104, citing R.C. 3105.63. Where, however, the parties, as here, do not agree regarding the amount of child support, the court must strictly follow the child support statute, computing gross income accordingly and supporting deviations as required. *Marker*.

{¶95} Although defendant's expert, Darci Congrove, testified at trial regarding defendant's personal tax returns, R.C. 3119.01(C)(7) requires the trial court to compute defendant's gross income. Defendant's 2009 federal tax return, which defendant filed separately, reflects defendant's income of $184,658 in W-2 wages, $160,369 in taxable interest, $35,809 in ordinary dividends, $0 in taxable refunds, $452,549 in business loss, $1,500 in capital loss, and $666,039 from rental real estate, partnerships, S Corporations,

trusts, and the like. Defendant's 2008 federal income tax return, filed separately, depicts $166,557 in W-2 wages, $151,844 in taxable interest, $64,076 in ordinary dividends, $58,155 in taxable refunds, $203,066 in business income, $1,500 in capital loss, and $603,566 from rental real estate, partnerships, S corporations, trusts, and the like. Defendant's 2007 federal income tax return, filed jointly with plaintiff, indicates $163,580 in W-2 wages, $494,256 in taxable interest, $62,405 in ordinary dividends, $40,150 in taxable refunds, $314,375 in business losses, $1,538,202 in capital gains, and $818,178 of losses from rental real estate, partnerships, S corporations, trusts, and the like.

{¶96} A trial court fails to comply with the statutory mandates of R.C. 3119.01 "by basing the modified child support award on the adjusted gross income of the parties rather than their gross income as required by statute." *Bates v. Bates*, 10th Dist. No. 04AP-137, 2005-Ohio-3374, ¶16, citing *Ohlemacher v. Ohlemacher*, 9th Dist. No. 02CA008108, 2003-Ohio-368. "[G]ross income for child support purposes is not always equivalent to the parent's taxable income." *Scott G.F. v. Nancy W.S.,* 6th Dist. No. H-04-015, 2005-Ohio-2750, ¶35, appeal not allowed, 106 Ohio St.3d 1558, 2005-Ohio-5531, citing *Thomas v. Thomas*, 6th Dist. No. L-03-1267, 2004-Ohio-1034, ¶16; *Foster v. Foster*, 150 Ohio App.3d 298, 2002-Ohio-6390, ¶12. See also *Helfrich v. Helfrich* (Sept. 17, 1996), 10th Dist. No. 95APF12-1599. Thus, "[f]ederal and state tax documents provide a proper starting point to calculate a parent's income, but they are not the sole factor for the trial court to consider." *Foster* at ¶11.

{¶97} On remand, the trial court will need to calculate the gross income of the parties based on the statutory definition and the evidence in the record. In calculating gross income, the court, when appropriate, may average income over a reasonable

period of years. R.C. 3119.05(H). Income averaging is particularly appropriate where income is unpredictable or inconsistent. *Rhoades v. Priddy-Rhoades*, 10th Dist. No. 06AP-740, 2007-Ohio-2243, ¶11, citing *Marquard v. Marquard* (Aug. 9, 2001), 10th Dist. No. 00AP-1345.

{¶98} "If the combined gross income of both parents is greater than one hundred fifty thousand dollars per year," the court must "determine the amount of the obligor's child support obligation on a case-by-case basis and shall consider the needs and the standard of living of the children * * * and of the parents." R.C. 3119.04(B). The child support obligation must be no less than the amount under the applicable worksheet for parents with a combined gross income of $150,000, "unless the court or agency determines that it would be unjust or inappropriate and would not be in the best interest of the child, obligor, or obligee to order that amount." R.C. 3119.04(B). See *Kuper v. Halbach*, 10th Dist. No. 09AP-899, 2010-Ohio-3020, ¶84, citing *Zeitler v. Zeitler*, 9th Dist. No. 04CA008444, 2004-Ohio-5551, ¶8.

{¶99} As part of defendant's child support obligation, the trial court ordered that defendant be solely responsible for the cost of the child's medical insurance and private school tuition. (Decree, 87.) The court, upon remand, may consider those expenses in adjusting the child support order. See *Pearlstein v. Pearlstein*, 11th Dist. No. 2008-G-2837, 2009-Ohio-2191, ¶66-67 (concluding the trial court did not abuse its discretion when, in lieu of an upward deviation from the $150,000 cap on the child support guidelines, the court ordered father to pay 100 percent of the children's uncovered medical expenses, private school tuition, and expenses for the extracurricular activities in addition to the father's child support obligation).

{¶100} Based on the foregoing, plaintiff's fifth assignment of error is sustained.

VII. Plaintiff's Sixth Assignment of Error – Attorney Fees

{¶101} Plaintiff's sixth assignment of error asserts that the trial court erred in denying her November 20, 2009 motion for attorney fees and expenses. Plaintiff contends she has outstanding attorney fees of $150,000 and owes her expert witness $10,000.

{¶102} In an action for divorce, a court may award all or part of reasonable attorney fees and litigation expenses to either party if the court finds the award equitable. R.C. 3105.73(A). In determining whether such an award is equitable, "the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate." R.C. 3105.73(A). An award of attorney fees under R.C. 3105.73 lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Huffer v. Huffer,* 10th Dist. No. 09AP-574, 2010-Ohio-1223, ¶19.

{¶103} Noting R.C. 3105.73, the trial court acknowledged defendant's net worth and earning potential "dwarf that of Plaintiff's." (Decree, 96.) The court examined plaintiff's conduct throughout the case, observing that "shortly after the divorce action was filed, [defendant] offered to pay Plaintiff $100,000 as the first installment of spousal support under the parties' Premarital Agreement;" plaintiff declined to accept the money and the funds sat in escrow, "earning no interest, for an entire year." (Decree, 96.) On April 1, 2009, pursuant to defendant's motion, the court ordered plaintiff to pay defendant $3,647 in attorney fees based on plaintiff's lack of cooperation in the discovery process. Given "the complexity of this action and the incentive for the parties

to engage in further needless litigation," the trial court determined it was fair and equitable to require each party to pay their own attorney fees. (Decree, 97.)

{¶104} Plaintiff contends the court should not have considered her refusal to accept defendant's first $100,000 payment pursuant to the terms of the premarital agreement. She asserts she "was not foregoing a possible source of income for payment of her attorney fees, as the court intimates, but was instead preserving her right to litigate her interpretation of the premarital agreement." (Appellant's brief, 33-34.) Plaintiff further contends the court erred in considering her bad conduct during discovery because "the conduct was previously censured." (Appellant's brief, 34.)

{¶105} The trial court did not err in considering plaintiff's conduct. R.C. 3105.73(A) specifically permits the court to consider the conduct of the parties without limitation. See *Speck v. Speck*, 6th Dist. No. WD-09-005, 2009-Ohio-6684, ¶28, 31 (determining the trial court did not err in considering fact that husband "caused the pending litigation to be protracted by demanding paternity testing," even though husband argued he had "a statutory right, pursuant to R.C. 3111.04, to challenge his paternity" and "the trial court's award punished him, in effect, for exercising that right"); *Farley v. Farley* (Aug. 31, 2000), 10th Dist. No. 99AP-1103 (concluding award of fees to wife appropriate and noting "[t]he trial court was also in a far better position than are we to ascertain the extent to which Mr. Farley's conduct contributed to dragging out the divorce litigation and consequently caused higher fees for Mrs. Farley").

{¶106} Plaintiff nonetheless contends that, since defendant's income is much greater than her own, "requiring [her] to bear the burden of fees which would be no burden upon Appellee is a clear abuse of discretion." (Appellant's brief, 34.) During the

trial, defendant advanced to plaintiff, pursuant to court order, $10,000 for attorney fees and $45,000 in expense money to pay her expert's fees. The court also ordered a distribution on December 8, 2009 of $150,000 to each party from a stipulated marital account to pay attorney fees and trial expenses. Pursuant to the premarital agreement, plaintiff will receive five annual installments of $100,000 and 60 spousal support payments of $5,000 a month. Plaintiff also owns as her separate property, a 25 percent interest in ROLL Development, LLC, valued at $1,775,693, an interest in the JELM Partnership to which the parties had not assigned a value at the time of trial, and the marital residence with a stipulated value of $800,000 and no attached indebtedness.

{¶107} Although plaintiff points to defendant's higher earning potential, that fact did not require the trial court to award plaintiff her requested fees, when plaintiff has income and assets available to her from which to pay her fees. *Meeks v. Meeks*, 10th Dist. No. 05AP-315, 2006-Ohio-642, ¶26 (deciding the trial court did not abuse its discretion in refusing to award wife her attorney fees where the wife's "income and her awarded marital assets would enable her to pay her attorney fees"); *Schultz v. Schultz* (1996), 110 Ohio App.3d 715, 725 (concluding that "[a]lthough there is a substantial income disparity between the parties, appellant has income available to her and it [was] not unreasonable to award almost one half of her attorney fees").

{¶108} The trial court did not abuse its discretion in refusing to award plaintiff her attorney fees and litigation expenses. Plaintiff's sixth assignment of error is overruled.

VIII. Disposition

{¶109} Having overruled plaintiff's first, second, third, and sixth assignments of error, but having sustained plaintiff's fourth and fifth assignments of error and defendant's

assignment of error on cross-appeal to the extent indicated, we affirm in part and reverse in part the judgment of the trial court. We remand the matter to the trial court for it to hold an evidentiary hearing on the parties' shared parenting plan, to recalculate the child support award, and to re-determine whether the marital residence is separate or marital property in accord with this decision.

Judgment affirmed in part and reversed in part; cause remanded with instructions.

BROWN and FRENCH, JJ., concur.

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