

[Cite as *Maloof-Wolf v. Wolf*, 2011-Ohio-701.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94114

FAYE J. MALOOF-WOLF

PLAINTIFF-APPELLEE

vs.

ROBERT O. WOLF, ET AL.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART; REVERSED
AND REMANDED IN PART**

Civil Appeal from
Domestic Relations Division of
Cuyahoga County Common Pleas Court
Case No. D-299737

BEFORE: Blackmon, P.J., Boyle, J., and Jones, J.

RELEASED AND JOURNALIZED: February 17, 2011
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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} This appeal by Robert O. Wolf (“Robert”) and cross-appeal by Faye J. Maloof-Wolf (“Faye”) claims errors by the trial court concerning the parties’ antenuptial agreement as it relates to the appropriate amount of

spousal and child support, the property division, the correct termination date of the parties' marriage, and the award of attorney fees.¹

{¶ 2} Robert argues the trial court failed to enforce the antenuptial agreement regarding the award of spousal support, property division, and the award of attorney fees. Additionally, he contends the calculation of temporary child support was erroneous, as was the court's failure to use a de facto termination of marriage date.

{¶ 3} Faye argues she was entitled to all of the proceeds from the Proctor & Gamble settlement, and that the trial court erred in calculating the amount of child and spousal support, and attorney fees.

{¶ 4} Having reviewed the record and relevant law, we affirm the trial court's decision in part and reverse and remand in part to the trial court for recalculation of Robert's temporary child support arrearage and to modify the property division to reflect the proceeds from Proctor & Gamble constitute Robert's separate property. The apposite facts follow.

Facts

{¶ 5} Robert and Faye were married on February 9, 1991, and two children were born of the marriage (Mary, DOB 4-14-1992 and Robert, DOB 3-23-1995). Prior to the marriage, Faye's attorney drafted an antenuptial agreement, which contained a provision that the parties separate property

¹See appendix for assigned errors.

brought into the marriage would remain separate and property obtained by the parties after the marriage would remain separate. The agreement also contained a provision waiving spousal support.

{¶ 6} Faye filed for divorce on July 7, 2004. At the time of the divorce, Robert was a 55 year-old dentist with a dental practice, earning \$90,536 per year. He also had an ownership interest in a corporation called Perfect Smile that marketed and developed teeth whitening products.

{¶ 7} At the time of the divorce, Faye was a 53 year-old attorney. However, throughout the 18 years marriage, her responsibility was caring for the couple's two children; the trial court found that she had not engaged in substantial employment during the marriage. The trial court concluded if she were to reenter the legal profession, her salary would be that of a new attorney and imputed a \$30,000 salary to her.

{¶ 8} The original judge assigned to the case determined that the antenuptial agreement was valid when it was entered by the parties. However, the trial judge held that the provision waiving spousal support was void based on public policy and because it would be unconscionable to allow the waiver. The court went on to hold that Faye was entitled to spousal support; that Robert committed financial misconduct, fraud, and deceit as to the settlement he received from Proctor & Gamble, and that Faye was entitled to share in the settlement.

{¶ 9} After issuing his opinion, the original judge recused himself and a new judge was assigned. Basing his decision on the transcript of the proceedings held before the original judge, the judge issued a judgment entry in which Robert was ordered to pay Faye \$2,000 per month plus a 2% processing fee for spousal support for a period of two years. He was also ordered to pay \$104.66 per month plus a 2% processing fee for his son's child support. The parties agreed to a shared parenting plan, with the son living with Faye and the daughter living with Robert.

{¶ 10} The parties had stipulated that the value of Robert's dental practice was \$265,000. The court determined the practice was marital property due to financial contributions by Faye and her parents to the practice; therefore, the value of the practice was divided equally. The court also concluded Robert received \$770,385 of the three million dollar Proctor & Gamble settlement and ordered the amount be paid to Faye.² Faye was allowed to keep the marital home as her separate property due to the fact her parents provided the down payment and also saved the home from foreclosure. Robert was directed to pay the liens existing on the home.

{¶ 11} The court determined that Robert had an arrearage for temporary support in the amount of \$31,525.37 and ordered him to pay

²Robert's 2005 tax return actually lists the amount as \$770,486.

\$80,000 of Faye's attorney fees after concluding his misconduct during discovery and trial resulted in unnecessary litigation.

Enforcement of the Antenuptial Agreement

{¶ 12} In his first assigned error, Robert argues the trial court erred by ordering spousal support, division of his separate property, and ordering him to pay Faye's attorney fees. He claims the court's order violated the antenuptial agreement.

{¶ 13} The Ohio Supreme Court has defined an antenuptial agreement as "a contract entered into between a man and a woman in contemplation, and in consideration, of their future marriage whereby the property rights and economic interests of either the prospective wife or husband, or both, are determined and set forth in such instrument." *Gross v. Gross* (1984), 11 Ohio St.3d 99, 102, 464 N.E.2d 500.

{¶ 14} The determination of the validity of the antenuptial implicates questions of fact; therefore, the trial court's determination will not be reversed absent an abuse of discretion. See *Bisker v. Bisker* (1994), 69 Ohio St.3d 608, 609-10, 635 N.E.2d 308. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying the abuse of discretion standard, this court may not substitute its judgment for that of the trial court. *Id.*

(1) Division of Property

{¶ 15} When a court considers the division of property pursuant to a prenuptial agreement, “the applicable standards must relate back to the time of the execution of the contract and not to the time of the divorce. * * * [If the prenuptial agreement is considered enforceable,] a court should not substitute its judgment and amend the contract.” The Supreme Court of Ohio has recognized that “[s]uch agreements are valid and enforceable (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse’s property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce.” *Gross*, at paragraph two of the syllabus.

{¶ 16} The trial court concluded the antenuptial agreement was valid when it was entered into because it was Faye who brought substantial assets to the marriage and it was she who requested her attorney to draft the agreement; documentation throughout the marriage also indicated the parties were acting in accordance with the antenuptial agreement. Because the court concluded the agreement was valid when entered into, the court had to adhere to the antenuptial agreement in dividing the property. It is well-settled the existence of a valid prenuptial agreement “negates the statutorily defined presumptive rights of a spouse to an equitable distribution

of marital assets upon divorce.” *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 467, 628 N.E.2d 1343, citing R.C. 3105.171. See, also, *Langer v. Langer* (1997), 123 Ohio App.3d 348, 704 N.E.2d 275 (Because a valid prenuptial agreement is, by nature, a contract, a domestic relations court is bound to enforce the parties’ contractual rights under the prenuptial agreement, and is not free to adjust enforcement of those rights to suit any equities involved.)

{¶ 17} In the present case, the parties entered into a prenuptial agreement that clearly expressed the purpose of the agreement was “that each of the parties hereto shall have and enjoy full powers of ownership, control, and disposition of every kind and character of his or her respective properties, now owned or hereafter acquired, including income, to the same extent as if each of them had remained unmarried.” Antenuptial Agreement, at 4.

{¶ 18} The agreement, in pertinent part, explained that Robert Wolf’s separate assets included:

“(a) All of Wolf’s property owned as the date hereof * * *;

“(b) Any additional property, whether tangible or intangible, real, personal, or mixed, acquired by Wolf subsequent to the execution of this agreement;

“* * *

“(d) Any earnings from any employment, office, profession, business or other activity, together with the savings,

accumulations, issues and profits thereof.” Antenuptial Agreement, at 4-5.

{¶ 19} Robert maintains the dental practice and the Proctor & Gamble settlement proceeds were his separate property.

{¶ 20} We agree with the trial court that the dental practice was funded by Faye and her parents. As the court stated, Robert’s claim that the dental practice was his separate property, “ignores the constant flow of cash from the Plaintiff and her parents to finance the Defendant’s business ventures.” Although Robert had a dental practice when he entered the marriage; he, thereafter declared bankruptcy and became financially dependent on his wife and her family. We are aware of his claim that he used some of the proceeds he received from a personal injury suit in 2002 to form the dental practice, but the record is unclear whether only those monies were used as Faye testified to loaning him money to meet payroll.

{¶ 21} We disagree, however, with the trial court awarding Faye \$770,385 of the Proctor & Gamble settlement. In determining who owned the trademark that was the subject of the settlement, the convoluted history regarding how Robert and his fellow shareholders of Perfect Smile became the owners of the trademark must be considered.

{¶ 22} The Proctor & Gamble settlement, which was obtained in 2005, resulted from Proctor & Gamble infringing on the trademark, ProHealth,

which at the time of the infringement was owned by the corporation Perfect Smile. The settlement required Proctor & Gamble to purchase the trademark from Perfect Smile for \$3 million.

{¶ 23} In 1997, Wolf International was established by Faye's parents loaning Faye \$100,000. Eventually, Faye, her family, and Robert all became shareholders of the corporation, with Faye as the majority shareholder. Robert was able to become a shareholder by cashing in his \$30,000 Keogh account he had from a his prior corporation, SilverWolf. Wolf International was in the business of creating and marketing denture adhesives and tooth whiteners. After the company was established, Faye's parents gave the corporation \$369,000 to secure a line of credit with the bank for \$1.4 million dollars. The bank also obtained a security interest in the corporation's assets in extending the line of credit.

{¶ 24} The corporation was eventually unable to pay its debts and defaulted on the line of credit. As a result, on April 12, 2000, the bank seized the assets of Wolf International, consisting of patents, trademarks, and inventory. Robert was able to negotiate a forbearance agreement with the bank in order to provide Wolf International additional time to pay off the debt; however, due to nonpayment, the bank foreclosed on the assets in November of 2001. At this point, Faye and Robert were no longer living together.

{¶ 25} Faye and her parents were ultimately able to reach an agreement with the bank to buy themselves out of liability for the debt and claimed their losses on their tax returns. This left Robert responsible for the entire amount of the remaining \$1 million debt. Robert negotiated an agreement with the bank that allowed him to purchase the assets. Robert had to pay the bank \$200,000 by July of 2005, or he would be personally liable for the entire amount remaining on the \$1 million debt. Thus, he was personally guaranteeing payment.

{¶ 26} Robert assembled multiple investors to pay off the federal liens on the assets so that the bank had clear title to the assets to sell them. As a result, in February of 2002, Perfect Smile was formed out of Wolf International's assets that were purchased from the bank. One of the assets was the trademark, ProHealth. However, at the time it was purchased, the trademark did not have value beyond \$10,000, because at that time, Proctor & Gamble had not violated the trademark and there is no evidence Robert had the foreknowledge in 2002 that Proctor & Gamble would infringe on the trademark in 2005. Thus, pursuant to the antenuptial agreement, because Faye no longer owned the assets when Robert purchased the trademark from the bank, the trademark was his separate property. The antenuptial agreement explicitly provided that Robert's assets included "any additional

property, whether tangible or intangible, real, personal, or mixed, acquired by Wolf subsequent to the execution of this agreement.”

{¶ 27} While it seems unfair that Robert should receive such a windfall compared to the loss Faye and her parents suffered by investing in Wolf International,³ Robert put himself at risk financially in order to purchase the assets, which Wolf International no longer owned. If he had not purchased the assets, the trademark would have been deemed abandoned and Proctor & Gamble would have been free to use the trademark without liability.

{¶ 28} Although the original judge thought Wolf’s purchase of the assets involved financial misconduct, the second judge conceded that “While it may be tempting to find that Defendant and his partners were engaged in an elaborate and fraudulent scheme to divest the plaintiff of her rightful claim to a portion of these proceeds, there is no proof of such action.” Judgment Entry, Sept. 18, 2009. Accordingly, the trial court abused its discretion by awarding Faye the \$770,385⁴ from the settlement proceeds because it violated the clear, unambiguous terms of the antenuptial agreement.

³The domestic relations court cannot consider the parents’ loss in their investment in Wolf International, as they do not have standing in the domestic relations court, but must bring their own claim in the civil division for any alleged wrongdoing.

⁴We note that the \$770,385 represented capital gain that was unrealized; thus, Robert did not actually have this amount of cash in hand. The investors chose to keep most of the proceeds in the corporation to pay off corporate debts and

(2) Temporary and Permanent Spousal Support

{¶ 29} Robert also contends the trial court's award of temporary and permanent spousal support violated the terms of the antenuptial agreement, which specifically contained a waiver clause regarding support.

{¶ 30} The trial court properly awarded temporary spousal support because the parties had entered into a separate agreement regarding the temporary support. Although Robert contended he was not aware of the waiver provision in the antenuptial agreement prior to signing the temporary support agreement, the record shows his attorney discussed the antenuptial agreement in a brief filed five months prior to the parties' signing the temporary support agreement. Robert cannot now contend the temporary support awarded pursuant to an agreement signed by him, was invalid. Moreover, a trial court may award temporary support during the pendency of a divorce action pursuant to R.C. 3105.18 despite the existence of an antenuptial agreement to the contrary. *Cangemi v. Cangemi*, Cuyahoga App. No. 86670, 2006-Ohio-2879; *Mulvey v. Mulvey* (Dec. 4, 1996), 9th Dist. No. 17707, citing *Fields v. Fields* (Apr. 8, 1992), 9th Dist. No. 15235.

{¶ 31} We also conclude the trial court properly awarded permanent spousal support. An antenuptial agreement that addresses spousal support,

to invest in further research and development. However, later that year he did receive a distribution from Perfect Smile in the amount of \$403,000 as a result of the sale of the trademark to Proctor & Gamble.

unlike property division, “must meet the additional test of conscionability at the time of the divorce or separation.” *Gross*, paragraph four of the syllabus.

The *Gross* court explained:

“We believe that the underlying state interest in the welfare of the divorced spouse, when measured against the rights of the parties to freely contract, weighs in favor of the court’s jurisdiction to review, at the time of the subsequent divorce, the terms in an antenuptial agreement providing sustenance alimony for one of the parties. There is strong public policy rationale for not strictly enforcing such a provision which, even though entered in good faith and reasonable at the time of execution, may have become unreasonable or unconscionable as to its application to the spouse upon divorce. It is a valid interest of the state to mitigate potential harm, hardship, or disadvantage to a spouse which would be occasioned by the break-up of the marriage, and a strict literal interpretation of the provisions for maintenance of the spouse to be found in these agreements.” *Id.* at 109.

{¶ 32} The *Gross* court also stated the trial court must look to the factors governing the allowance of spousal support in R.C. 3105.18 when determining the issue of conscionability as it relates to provisions in the antenuptial agreement regarding spousal support. *Id.* Those factors include: (1) income of the parties; (2) relative earning abilities of the parties; (3) ages and the physical, mental, and emotional conditions of the parties; (4) retirement benefits of the parties; (5) duration of the marriage; (6) 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; (7)

standard of living of the parties established during the marriage; (8) relative extent of education of the parties; (9) relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties; (10) contribution of each party to the education, training, or earning ability of the other party; (11) 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; (12) tax consequences, for each party, of an award of spousal support; (13) lost income production capacity of either party that resulted from that party's marital responsibilities; (14) any other factor that the court expressly finds to be relevant and equitable." R.C. 3105.18(C)(1).

{¶ 33} Here, the evidence supports the trial court's determination that the enforcement of the waiver of spousal support clause would be unconscionable. The court concluded:

"Not only do the [provisions waiving spousal support] completely favor the Defendant and encourage profiteering by divorce, but also permit the Defendant to avoid an appropriate and equitable spousal support award to Faye J. Maloof-Wolf."

{¶ 34} It appears the court was referring to the large amount of money Faye and her family invested in Wolf's business ventures. Additionally, the factors in R.C. 3105.18 support the trial court's award of spousal support.

The court found that Faye had relied upon Robert for financial support throughout the marriage, and that although Faye is an attorney, she did not work but raised the children instead. The court also noted that during the marriage, Faye and Robert “enjoyed a significant and substantial lifestyle.”

{¶ 35} Additionally, the support order is not indefinite. The court limited Robert’s spousal support obligation to two years to allow Faye the opportunity to become employed. Given the substantial financial help Robert had received from Faye and her parents during the marriage, we conclude the \$2,000 per month was both equitable and reasonable.

(3) Attorney Fees

{¶ 36} Lastly, Robert contends the court’s award of attorney fees to Faye violated the antenuptial agreement. The antenuptial agreement provides that if either party challenges the validity of the agreement or attempts to set aside any portion of said agreement, then:

“The prevailing party shall be entitled to recover from the other party all reasonable costs and expenses incurred in such action or defending against said action, including, but not limited to, reasonable attorney fees.”

{¶ 37} Although Faye did contest the validity of the agreement, she successfully persuaded the court that the enforcement of the spousal support provision was unconscionable. Therefore, we cannot conclude that

Robert is entitled to recovery of fees due to Faye's challenge of the agreement when she prevailed as to the support.

{¶ 38} Moreover, the trial court concluded that the \$80,000 in fees awarded to Faye was based on the unnecessary litigation created by the husband. The court found that "the conduct of the Defendant in this matter necessitated extensive litigation and trial preparation. In light of such conduct it would be inappropriate to burden the plaintiff with an obligation for all of the attorney fees incurred on her behalf." Judgment Entry, Sept. 22, 2009 at 4. Thus, because the fees were incurred as a result of the husband's attempts to hide from Faye the proceeds he received from the Proctor & Gamble settlement, the attorney fee award was proper.⁵ Accordingly, Robert's first assigned error is overruled.

Temporary Child Support

{¶ 39} In his second assigned error, Robert argues the trial court erred in determining his temporary support arrearage was \$31,525.37.

{¶ 40} On June 6, 2008, the trial court determined on the record that Robert's temporary support arrearage was \$34,478. This amount took into account the fact that the daughter was living with Robert as of November 28, 2007. The court determined that the new monthly payment for spousal and

⁵In spite of Robert's statement to the contrary, Faye's attorney submitted an itemized statement regarding his fees.

child support, after subtracting the daughter's child support, totaled \$2,015 per month. The original amount was \$2,630.30 per month. The court on the record ordered the \$34,478 to be paid in two equal lump sums. \$17,239 was due on July 15, 2008, while the second half was due on August 17, 2008.

{¶ 41} Unfortunately, none of the court's pronouncements regarding the temporary support were reduced to a journal entry. Although we realize that it is axiomatic that a trial court speaks through its journal entry, a review of the transcript from the June 8, 2008 hearing indicates the court intended for a journal entry to be entered. The court ordered the wife's attorney to draft and submit the journal entry, but it appears it was never done. It would be inequitable to require Robert to continue to pay support for a child that is undisputably living with him. This is especially true because the trial court's intent to modify Robert's child support is shown in the transcript of the proceedings. Therefore, this matter is remanded for the trial court to enter a journal entry that reflects the court's pronouncements at the June 8, 2008 hearing.

{¶ 42} The court is also ordered to recalculate the arrearage using the new monthly amount. The CSEA records show that Robert paid the two lump sums of \$17,239 as payment of the \$34,478 arrearage. It is difficult to determine from CSEA's records how much CSEA is seeking to collect from Robert, the modified \$2,015 amount or the prior amount of \$2,630.30. Thus,

along with entering a journal entry, the trial court is directed to recalculate the arrearage.

{¶ 43} Although Robert contends the trial court failed to consider the fact that he had to support two other children from a prior marriage, the record indicates otherwise. At the hearing conducted on May 9, 2008, Robert admitted that his two children were emancipated and that he has paid their support in full. Although he claimed he helps the two children from the prior marriage with college expenses, he admitted that it was not pursuant to a court order. Therefore, the trial court did not err in not including the support due to the children from the first marriage in its calculation of child support.

{¶ 44} While the trial court indicated that Robert's temporary support order commenced in 2006, this is clearly a typographical error. The CSEA records, the agreed judgment entry, and the testimony all indicated that Robert's obligation to pay temporary support commenced on July 7, 2004. Accordingly, Robert's assigned error has merit in part.

De facto Termination Date

{¶ 45} In his third assigned error, Robert argues the trial court erred by concluding the termination date of the parties' marriage was July 31, 2009, the date on which the final hearing concluded. He argues that the proper

termination date was either November 2000, when the parties separated, or July 7, 2004, the date Faye filed for divorce.

{¶ 46} In order to achieve an equitable division of marital property, the court must select a beginning and an ending date that defines the “duration of the marriage.” R.C. 3105.171(A)(2) defines “during the marriage” to mean:

“(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation; [or]

“(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, ‘during the marriage’ means the period of time between those dates selected and specified by the court.”

{¶ 47} The decision to use the final hearing date as the valuation date or another alternative date pursuant to R.C. 3105.171(A)(2)(a) and (b) is discretionary and will not be reversed on appeal absent an abuse of discretion.” *Schneider v. Schneider* (1996), 110 Ohio App.3d 487, 493, 674 N.E.2d 769. A trial court may use a de facto termination date when such a

date would be equitable. *Berish v. Berish* (1982), 69 Ohio St.2d 318, 320, 432 N.E.2d 183. Otherwise, it is presumed the date of the final divorce hearing is the appropriate termination date of the marriage. *Id.*; *Glick v. Glick* (1999), 133 Ohio App.3d 821, 828, 729 N.E.2d 1244. We find no reason for the trial court to not adhere to the accepted practice of using the last date of the hearing as the termination date. Accordingly, Robert's third assigned error is overruled.

CROSS-ASSIGNED ERRORS:

Proctor & Gamble Settlement

{¶ 48} In her first cross-assigned error, Faye argues that the trial court erred by not awarding her the entire amount of the \$3 million settlement with Proctor & Gamble. Based on our disposition in Robert's first assigned error, in which we concluded the court erred in awarding Faye proceeds from the settlement, this assigned error is moot. Accordingly Faye's first assigned error is overruled.

Attorney Fees

{¶ 49} In her second cross-assigned error, Faye argues the trial court should have awarded her the entire amount of her attorney fees, totaling \$216,530.28. She claims Robert's conduct of concealing information and documentation and otherwise failure to be forthcoming created an unnecessarily long and protracted litigation of the divorce.

{¶ 50} Although we agree that Robert's conduct added to the aggravation and length of the trial, the trial court considered this in awarding Faye the \$80,000 in fees. Other issues were also argued during the hearing other than Robert's alleged financial misconduct.

{¶ 51} Moreover, it appears that Faye's attorney did not help matters by engaging in repetitive questioning of Dr. Wolf and his partner for several days about the Proctor & Gamble settlement and their purchase of Wolf International's assets. The same questions were asked repeatedly with the same answers given. Although we understand that the trial was not continuous, and some refreshment of what was testified to is understandable, it was incredulous that the court allowed Faye's attorney to continually ask the same questions. Thus, to award Faye the entire amount of fees would not be equitable. Accordingly, Faye's second cross-assigned error is overruled.

Spousal and Child Support

{¶ 52} In her third cross-assigned error, Faye argues the trial court should have awarded her more spousal and child support due to the fact Robert's income exceeds \$539,000 per year.

{¶ 53} An award of spousal support will be reversed on appeal only if an abuse of discretion is shown. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 24, 550 N.E.2d 178. Here, the trial court considered the factors set forth in R.C. 3105.18 prior to ordering the

support. Considering Faye is a licensed attorney who can begin seeking employment, the trial court did not err in limiting Faye's award to \$2,000 per month for two years. Also, the record indicates that Faye indicated her monthly expenses were \$5,000 when seeking temporary support, but for permanent support she alleged her monthly expenses were \$10,000, double the amount she had previously indicated.

{¶ 54} As to the child support, this court had previously acknowledged that a trial court has significant discretion in calculating child support awards. *Pesek v. Berkopec-Pesek*, Cuyahoga App. No. 87840, 2007-Ohio-2630; *MacFarlane v. MacFarlane*, Cuyahoga App. No. 94758, 2010-Ohio-4900. We will not disturb a child support award absent an abuse of discretion. *Id.*

{¶ 55} While Faye claims Robert's income from his most recent tax return, which was for 2005, shows he has an income of \$539,821, this income included the amount he received for the Proctor & Gamble settlement, which does not constitute recurring income. R.C. 3119.01(C)(7)(e) provides that a parent's gross income does not include "[n]onrecurring or unsustainable income or cash flow items." Such items are defined by R.C. 3119.01(C)(8) to mean "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." See *Dawson v. Dawson*, 3d Dist. Nos. 14-09-08, 14-09-12, 14-09-10, 14-09-11, 2009-Ohio-6029 (money received from

a settlement is nonrecurring income). The evidence indicated that in spite of Robert's investment in Perfect Smile, the corporation has consistently operated at a loss except for the year of the Proctor & Gamble settlement. Thus, the court did not err by only considering Robert's income as a dentist. Accordingly, Faye's third cross-assigned error is overruled.

Judgment affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

It is ordered that appellee and appellant share the costs equally.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

LARRY A. JONES, J., CONCURS;
MARY J. BOYLE, J., CONCURS AND DISSENTS.
(SEE ATTACHED CONCURRING AND DISSENTING
OPINION.)

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 56} I agree with the majority (1) that the Proctor & Gamble settlement proceeds are Robert's separate property; (2) that the trial court erred in calculating the amount of temporary support arrearage that Robert owes; and (3) that the trial court did not err in determining the termination date of the parties' marriage. But I disagree with the majority's conclusion that (1) Robert's dental practice is marital property; (2) that the spousal support provision in the antenuptial agreement is void for public policy reasons; and (3) that Robert should have had to pay Faye's attorney fees. Therefore, I concur in part and dissent in part.

Robert's Dental Practice

{¶ 57} In *Advent v. Advent*, 166 Ohio App.3d 104, 2006-Ohio-1861, 849 N.E.2d 98, ¶15-16, the court explained:

{¶ 58} "In a divorce action, the domestic relations court is required to determine whether property is separate or marital and to divide both marital and separate property equitably. R.C. 3105.171(B). Marital property generally includes all property acquired by either party during the marriage as well as the appreciation of separate property due to the labor, monetary, or in-kind contributions of either party during the marriage. R.C. 3105.171(A)(3)(a)(i) and (iii). Marital property is to be divided equally in general, and each spouse is considered to have contributed equally to the acquisition of marital property. R.C. 3105.171(C)(1) and (2). However,

marital property does not include separate property. R.C. 3105.171(A)(3)(b). Under R.C. 3105.171(A)(6)(a)(v), separate property includes any real or personal property that is excluded by a valid antenuptial agreement. Thus, Ohio law specifically allows for property that would normally be considered marital 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.

{¶ 59} “An antenuptial agreement is a contract entered into between a man and a woman in contemplation, and in consideration, of their future marriage whereby the property rights and economic interests of either the prospective wife or husband are determined and set forth in a written instrument. *Gross v. Gross* (1984), 11 Ohio St.3d 99, 102, 11 OBR 400, 464 N.E.2d 500. The law of contracts applies to the interpretation and application of antenuptial agreements. *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 467, 628 N.E.2d 1343. The interpretation of a contract that is clear and unambiguous is a question of law, and no issue of fact exists to be determined. *State ex rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377; *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 66, 609 N.E.2d 144. On appeal, questions of law are reviewed de novo. *Wiltberger v. Davis* (1996), 110 Ohio App.3d 46, 51-52, 673 N.E.2d 628.”

{¶ 60} The antenuptial agreement here has already been determined to be a valid agreement. The parties voluntarily agreed before they got married that separate property brought into the marriage would remain separate property, as well as property obtained by the parties after they were married.

Robert's dental practice falls within this provision; it is his separate property and should not be subject to division.

{¶ 61} The agreement defined Robert's separate assets to include "(a) all of [Robert's] property owned as of the date hereof; (b) any additional property, whether tangible or intangible, real or personal, or mixed, acquired by [Robert] subsequent to the execution of this agreement; *** (d) any earnings from any employment, office, profession, business, or other activity, together with savings, accumulations, issues and profits thereof."

{¶ 62} I disagree that the fact that Robert filed bankruptcy and started another dental practice with financial assistance from Faye and her family affects the analysis. He was the sole shareholder. Neither Faye nor her family were partners in this business. According to Faye, she and her family "loaned" the money to Robert, which was subject to him repaying the money to her and her family. This did not morph the property into "marital" or "mixed" property.

Spousal Support

{¶ 63} Although I recognize that provisions regarding spousal support in antenuptial agreements “may lose their validity by reason of changed circumstances which render the provisions unconscionable as to one or the other at the time of the divorce of the parties,” I disagree that those circumstances exist in this case. *Gross*, 11 Ohio St.3d at 109.

{¶ 64} It is my view that the finding of unconscionability based upon this record is inconsistent with the nature in which it was defined in *Gross*. In *Gross*, the husband “became a man of considerable greater” wealth during the marriage. As a result, “[t]he wife’s standard of living [had] changed quite dramatically from the time of the execution of the agreement until the time of the divorce.” The Supreme Court found that “[t]o require the wife to return from this opulent standard of living to that which would be required within the limitations of the property and sustenance provisions of this agreement, could well occasion a hardship or be significantly difficult for the former wife.” *Id.* at 110-111.

{¶ 65} The record in this case does not reflect any facts or circumstances remotely similar to those that led to a finding of unconscionability in *Gross*.

{¶ 66} Further, a significant factor in this case is the fact that it was Faye and her family who wanted the antenuptial agreement. Faye, an attorney herself, procured her attorney to draft the antenuptial agreement for her benefit. That is undisputed. She wanted to prevent Robert from

accessing the wealth that *she brought* to the marriage. The record simply does not support the fact that she would suffer any hardship.

{¶ 67} Accordingly, I would find that the trial court erred in concluding that the spousal support provision of the parties' antenuptial agreement was unconscionable.

Attorney Fees

{¶ 68} I would also find that since it was Faye who contested the validity of the antenuptial agreement, and because I would not find the antenuptial agreement to be unconscionable (and therefore Robert would be the prevailing party, not Faye), then I would also find that under the terms of the antenuptial agreement, she is not entitled to any attorney fees.

{¶ 69} It is my opinion that both Robert's and Faye's conduct throughout these proceedings was inappropriate. It is unfair and unreasonable to sanction only Robert. A cursory review of the record shows that both parties contributed to making this a lengthy and expensive process. Indeed, Faye went to great lengths to obtain the Proctor & Gamble settlement, when the antenuptial agreement clearly and unambiguously defined it as separate property.

{¶ 70} Thus, I would find that each party should bear the cost of his and her attorney fees, costs, and expenses.

APPENDIX

Assigned Errors on Appeal:

“I. The trial court erred and abused its discretion in failing to abide by the terms of the valid antenuptial agreement and thus erred in its division of property, award of spousal support, and award of attorney fees.”

“II. The trial court erred and abused its discretion in its rendering a judgment against appellant/cross appellee for \$31,525.37 for arrearages in the temporary support order.”

“III. The trial court erred and abused its discretion in failing to use a de facto termination of the marriage date.”

Assigned Errors on Cross-Appeal:

“I. The trial court erred and abused its discretion in its division of property by failing to award appellee/cross-appellant all of the Proctor & Gamble settlement proceeds.”

“II. The trial court erred and/or abused its discretion in its determination and award of attorney fees to appellee/cross-appellant; and by failing to award appellee/cross-appellant all of her attorney fees and litigation expenses incurred in regard to the divorce matter.”

“III. The trial court erred and/or abused its discretion in its determination and award of spousal support and child support.”