[Cite as *Saari v. Saari*, 2009-Ohio-4940.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

PATRICIA A. SAARI	C.A. No. 08CA009507
Appellee/Cross-Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
SCOTT L. SAARI	
Appellant/Cross-Appellee	CASE No. 07 DR 068346

DECISION AND JOURNAL ENTRY

Dated: September 21, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Scott Saari ("Husband") appeals from the judgment of the Lorain County Court of Common Pleas, Domestic Relations Division, entering the terms of his divorce from Plaintiff-Appellee, Patricia Saari ("Wife"). This Court affirms in part and reverses in part.

I

{¶2} Husband and Wife were married in June 2004. Both parties had been married once before and had children with their former spouses; Wife's two minor children resided with her half of the time and Husband's two adult children lived independently. Husband and Wife did not have any children together during their marriage. At the time of the marriage, both parties were employed in the banking industry. Wife worked as a manager at Key Bank and Husband was a Senior Vice President over commercial lending at National City Bank. Wife lost her job with Key Bank in May 2004, shortly before the parties were married in June.

Approximately three weeks before their wedding, Husband presented Wife with a prenuptial agreement, requesting she sign it before their June 19 wedding. The agreement sought to identify separate property each party was bringing into the marriage; to state the joint property held by the parties and each party's interests in that property; and to eliminate either party's right to spousal support. Both parties were represented by independent counsel when they executed the agreement two days before their wedding.

{¶3} Throughout the marriage, the parties enjoyed what they referred to as a "comfortable" and "upper class" style of living, free of financial worries. Wife did some operational consulting work for a friend's start-up company and then worked in an accounting position at a jewelry store for the first two years of the marriage. She then took a full-time position as a financial manager/analyst with National City Bank in the summer of 2007. In December 2006, Husband's nineteen-year-old son moved into the marital residence, but the son left approximately six months later, after he and Wife had a dispute over belongings found in his room.

{¶4} The parties' relationship deteriorated from that point on and in September 2007, Wife filed a complaint for divorce, seeking spousal support and attorney fees. She also filed a motion for mutual temporary restraining orders, which was granted the day after her motion was filed. Husband answered and counterclaimed, seeking to enforce the parties' prenuptial agreement. Upon Wife's motion, the trial court issued a temporary support order requiring Wife to pay 26% of the mortgage and household expenses and Husband to pay the remaining 74%. Husband also filed a motion for attorney fees as well as several discovery requests. Wife filed a domestic violence complaint which the court dismissed after a hearing. Husband filed a motion for summary judgment on the validity of the prenuptial agreement, which the trial court denied.

A hearing was held in May 2008 on the validity of the prenuptial agreement, and the trial court found that the agreement was valid, but held that the waiver of spousal support was unconscionable "based upon the parties' relative earning capacities."

{¶5} Once Husband had vacated the marital residence, he filed a motion to modify the temporary support order. The court held a further hearing on the terms of the parties' divorce in September 2008. On October 31, 2008, the trial court granted the parties' divorce on the basis of incompatibility and ordered, inter alia, that: Husband shall pay Wife $4,000 in spousal support for 12 months; Wife was entitled to 60% of the proceeds from the sale of the marital home; Husband was entitled to 40% of the proceeds from the sale of the marital home; Husband and Wife were each responsible for payment of half of: the $5,960.00 withdrawn from a checking account; the $1,109.10 owed to counsel who represented Wife in the execution of the prenuptial agreement; and the $3,406.31 balance on the parties' National City Equity Line of Credit ("equity line"); and that each party bear their own attorney fees for the divorce proceedings.

{¶6} Husband filed a timely appeal to the court's entry of divorce and Wife filed a cross-appeal, which she later dismissed. Husband asserts seven assignments of error, some of which we have combined for ease of analysis.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED IN FINDING THAT THE PRENUPTIAL AGREEMENT IS UNCONSCIONABLE AS TO SPOUSAL SUPPORT."

{¶7} In his first assignment of error, Husband asserts that the trial court erred in finding that the prenuptial agreement was unconscionable, based on the short duration of the parties' marriage, the absence of any children borne from the marriage, and the lack of any significant change in circumstances or lifestyle of either party throughout the marriage. We agree.

{¶8} "It is well settled in Ohio that public policy allows the enforcement of prenuptial agreements." *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 466. The Supreme Court has held that "[s]uch agreements are valid and enforceable[:] (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce." *Gross v. Gross* (1984), 11 Ohio St.3d 99, paragraph two of the syllabus.

{¶9} A prenuptial agreement that is freely and voluntarily entered into after full disclosure of a spouse's property will not be invalidated because it makes a disproportionate distribution. *Fletcher*, 68 Ohio St.3d at 466. "[V]irtually every prenuptial agreement provides for the disproportionate distribution of assets in favor of the spouse who brings those assets to the marriage *** [given that] the very purpose of a prenuptial agreement is to avoid by contract the equitable distribution of property mandated by statute." *Millstein v. Millstein*, 8th Dist. Nos. 79617, 79754, 80184, 80185, 80186, 80187, 80188, & 80963, 2002-Ohio-4783, at ¶87. See, also, *Fletcher*, 68 Ohio St.3d at 467.

{¶10} Though generally governed by principles of contract law, a strict application of the law of contracts is not appropriate given the specialized nature of prenuptial agreements. *Gross*, 11 Ohio St.3d at 107. When reviewing the provisions of prenuptial agreement relative to spousal support, the court must apply "a further standard of review [beyond the three elements required for enforceability] *** – one of conscionability of the provisions at the time of the divorce[.]" *Gross*, 11 Ohio St.3d at 109. Because the provisions related to spousal support have the ability to become invalid based on a change in circumstances of one of the parties to the

marriage, a court must review the circumstances of the parties as they exist at the time of the divorce to determine if they remain conscionable. Id.

{¶11} A determination of whether a written contract is unconscionable is an issue of law which a court reviews de novo. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, at ¶37; *Brunke v. Ohio State Home Services, Inc.*, 9th Dist. No. 08CA009320, 2008-Ohio-5394, at ¶8. "When a trial court makes factual findings, however, supporting its determination that a contract is or is not unconscionable, such as any findings regarding the circumstances surrounding the making of the contract, those factual findings should be reviewed with great deference." *Taylor Bldg. Corp. of Am. v. Benfield* at ¶38.

{¶12} "The trial court, in the determination of the issue of conscionability and reasonableness of the provisions for sustenance or maintenance of a spouse at the time of the divorce, shall utilize the same factors that govern the allowance of alimony which are set forth in R.C. 3105.18." *Gross*, 11 Ohio St.3d at 109-10. R.C. 3105.18(C)(1) provides that:

> "In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:
>
> "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;
>
> "(b) The relative earning abilities of the parties;
>
> "(c) The ages and the physical, mental, and emotional conditions of the parties;
>
> "(d) The retirement benefits of the parties;
>
> "(e) The duration of the marriage;
>
> "(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

> "(g) The standard of living of the parties established during the marriage;
>
> "(h) The relative extent of education of the parties;
>
> "(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
>
> "(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
>
> "(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
>
> "(l) The tax consequences, for each party, of an award of spousal support;
>
> "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
>
> "(n) Any other factor that the court expressly finds to be relevant and equitable."

Additionally, the *Gross* Court further opined that unconscionability as to a spousal support provision could be:

> "[F]ound in a number of circumstances, [such as] an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed on the spouse by way of responsibility to children of the parties; marked changes in the cost of providing the necessary maintenance of the spouse; and changed circumstance of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse." *Gross*, 11 Ohio St.3d at fn.11.

Furthermore, the *Gross* Court clarified that the party challenging the conscionability of a spousal support provision "has the burden of showing the unconscionable effect of the provision at the time of [the] divorce[.]" Id. at 109.

{¶13} The trial court made eight findings of fact in its decision on the validity of the prenuptial agreement. None of the eight findings, however, bear on the factors set forth in R.C. 3105.18 or the circumstances proposed by the *Gross* Court. Instead, the findings made by the

trial court deal exclusively with the three-prong test for the validity of the prenuptial agreement. The only basis for the trial court's conclusion as to the unconscionability of the spousal support provision is found in one sentence, where it stated that "[t]his Court finds that [the spousal support] provision does not relate to the parties' premarital assets and liabilities and that it would be unconscionable and grossly unfair to enforce such a provision based upon the parties' relative earning capacities." Our review of the transcript from the hearing fails to evince any support for this conclusion or demonstrate that Wife met her burden of proof as to this issue. Instead, the evidence adduced at the hearing focused primarily upon the completeness and accuracy of the financial disclosures made by Husband when entering into the prenuptial agreement; whether Wife had received the aid of independent counsel when she signed the agreement; and the events that led up to the execution of the agreement and the parties' wedding.

{¶14} Aside from the near absence of any testimony as to the statutory or other considerations a court should factor into its decision on the conscionability of such a provision, what little evidence of this nature that was presented favors a finding of conscionability under the Supreme Court's directive in *Gross*. Here, the record reveals that it was a second marriage for both parties that produced no children and lasted only three years. Before the marriage, Wife was employed in a full-time management position at a bank, and while being terminated from that position approximately a month before their wedding, she continued to work part-time throughout the beginning of the marriage, first as a business consultant with a start up company, then as an accountant with a jewelry store, only to later return to a full-time position as a financial analyst in the banking industry. Wife admits that before the marriage, she lived in the same house and sent her two children to the same private school as she did at the end of the marriage. She admits that the parties did not travel extensively or belong to any country clubs

while she was married to Husband. Furthermore, there is no testimony that she suffered from any health conditions, incurred any additional burdens for the care of any children, or had a marked change in her standard of living or cost of necessary maintenance expenses, as alluded to in *Gross*. In short, there was no significant change in circumstances between the time she signed the prenuptial agreement, which the court found to be valid, and the time she sought a divorce.

{¶15} The prenuptial agreement reflects a disparity of income between the parties, with Wife earning approximately $68,000 and Husband earning nearly $140,000 (plus bonus and stock options) at the time of the marriage. Though there was limited information introduced at the hearing as to Husband's increase in net worth and annual salary, the prenuptial agreement evidences that the disparity in net worth and annual income pre-dated the parties' marriage, which is typically the reason why parties contract to avoid an equitable distribution of assets should their marriage end in divorce. *Millstein* at ¶87; *Fletcher*, 68 Ohio St.3d at 467. Moreover, the finding of unconscionability based upon this record is inconsistent with the nature in which it was defined in *Gross*. In *Gross*, the parties were married for over fourteen years and had a child together, though they both had children from their first marriages. At the time of their divorce, husband's net worth had increase some twelve- to fourteen-fold over what it was when the couple was married, and while husband's gross income for that year was approximately $250,000, the prenuptial provided his wife receive a maximum spousal support award of only $200 per month for a period of 10 years. The Court reasoned that "[t]o require the wife to return from this opulent standard of living *** could well occasion a hardship or be significantly difficult for the former wife." *Gross*, 11 Ohio St.3d at 110. The record in this case does not reflect facts or circumstances remotely similar to those which led to a finding of unconscionability in *Gross*. Accordingly, we conclude that the trial court erred in concluding

that the spousal support provision of the parties' prenuptial agreement was unconscionable. Husband's first assignment of error is sustained.

Assignment of Error Number Two

> "ASSUMING ARGUENDO THAT THE PRENUPTIAL AGREEMENT IS UNCONSCIONABLE AS TO SPOUSAL SUPPORT, THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING PATRICIA SAARI SPOUSAL SUPPORT IN THE AMOUNT OF $4000 PER MONTH FOR A PERIOD OF ONE YEAR AS WELL AS AN ORDER FOR SCOTT TO PAY 50% OF THE MORTGAGE, TAXES AND INSURANCE ON THE MARITAL REAL ESTATE."

{¶16} In his second assignment of error, Husband argues in the alternative that, if the prenuptial agreement is unconscionable as to spousal support, the trial court abused its discretion when it awarded Wife $4,000 per month in spousal support over the next 12 months and ordered him to pay 50% of the mortgage and household expenses until the marital residence was sold, while Wife was awarded sole possession of the property. Having concluded that the trial court erred in finding the parties' spousal support provision unconscionable, Husband's second assignment of error is moot. App.R. 12(A)(1)(c).

Assignment of Error Number Three

> "THE TRIAL COURT ABUSED ITS DISCRETION IN DEVIATING FROM THE TERMS OF THE IN DETERMINING THE PARTIES' SEPARATE INTERESTS IN THE MARITAL REAL ESTATE." (Sic.)

Assignment of Error Number Four

> "THE TRIAL COURT ABUSED ITS DISCRETION IN DIVIDING THE MARITAL EQUITY IN THE REAL ESTATE UNEQUALLY."

{¶17} In his third assignment of error, Husband alleges that the trial court abused its discretion when it deviated from the prenuptial agreement's calculations establishing the separate interests of each party in the marital residence, after having previously concluded that the prenuptial agreement was valid as to all provisions other than spousal support. Along those same

lines, in his fourth assignment of error, Husband argues that the trial court failed to make any findings of fact that the marital property had been divided equitably when it awarded him only 40% of the equity in the marital residence. Husband argues that the trial court failed to make findings of fact as required by R.C. 3105.171(C)(1) to support its determination that the marital property had been divided equitably. He asserts that he contributed greater sums to the payment of the mortgage throughout the marriage and pursuant to the court's temporary orders. In addition, he maintains he paid approximately $8,400 for the storage shed which he was unable to claim as separate property in the divorce. Thus he asserts the trial court abused its discretion in awarding him only 40% of the proceeds from the sale of the marital residence. We agree.

{¶18} 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." *Gross*, 11 Ohio St.3d at 108-09; *Avent v. Avent*, 6th Dist. No. L-05-1140, 2006-Ohio-1861, at ¶17. We will uphold the trial court's findings under the terms of a parties' prenuptial agreement when the record contains some competent evidence to sustain the trial court's conclusions. *Fletcher*, 68 Ohio St.3d at 468.

{¶19} With respect to the parties' separate interest in the marital residence, the prenuptial agreement states, in relevant part, that "[t]he ownership rights of the [p]arties in the [marital] residence shall be in direct proportion to the amount of equity in the residence[,] which shall be determined to be $66,500 for [H]usband and $78,100 for [W]ife at [the] date of marriage[.]" Despite the express calculation of each party's separate interest in the marital property, the trial court awarded Husband only $51,900 of the equity in the property, while awarding Wife $78,100. Further, it appears that the trial court then derived the percentage of

interest either party would have in the proceeds from the sale of the marital residence based on a combined equity in the marital residence of $130,000. That is, Wife was awarded a 60% interest in any sale proceeds, and Husband was awarded a 40% interest, based on their respective contributions to the $130,000 in equity in the marital residence.

{¶20} It is evident from the record that the parties' refinanced the property weeks before getting married, at which point Husband paid $51,900 of the proceeds from the sale of his separately owned home into the outstanding mortgage on Wife's home, thereby taking an equity interest in the marital residence. Husband testified that the difference between the $51,900 he contributed to the property during refinancing and the $66,500 stated as his equity in the residence under the terms of the prenuptial agreement was based on the nearly $15,000 in investments that Husband had made or had planned for the home. These investments included the installation of a 500 square foot storage shed, significant improvements to the basement and landscaping, and repairs to the roof. Husband introduced receipts and payments for such improvement into evidence to support the parties' agreement that he had contributed $66,500 in equity to the marital residence. Having previously concluded that the prenuptial agreement was valid and enforceable in all respects, it was error for the trial court to substitute its judgment and amend the terms of the contract by awarding Husband a different interest in the marital property than the amount the parties had agreed to under its terms. *Gross*, 11 Ohio St.3d at 108-09.

{¶21} Having derived each parties' percentage interest in the sale proceeds of the home based on the erroneous application of figures other than those stated in the prenuptial agreement, the trial court similarly erred in awarding Wife 60% of the sale proceeds and in awarding Husband 40%. Based on the terms of the prenuptial agreement each parties' "ownership rights *** in the [marital] residence shall be in direct proportion to the amount of the [parties'] equity

in the residence[.]" Thus, the trial court should have calculated each party's share of the proceeds in direct proportion to their equity in the residence under the prenuptial agreement, crediting Wife with $78,100 in equity and Husband with $66,500, which equates to Wife having a 54% interest and Husband a 46% interest in any sale proceeds from the property. To do otherwise would violate the provision of the prenuptial agreement which the court had previously concluded was valid and enforceable - a decision which Wife has not appealed.

{¶22} Husband's assertion that the trial court was required to make separate findings of fact pursuant to R.C. 3105.171(C)(1) and (G) is misplaced, as the trial court was bound to the ownership terms set forth in the prenuptial agreement, which usurp any statutory requirements. See, e.g., *Graham v. Graham*, 3d Dist. No. 1-06-62, 2007-Ohio-1091, at ¶8 (relying on provisions in the Ohio Revised Code only where terms are not defined or set forth in the parties' prenuptial agreement). Additionally, Husband's arguments that mortgage payments and improvements he made to the marital residence throughout the marriage should alter the respective ownership rights of the parties cannot alter the terms to which the parties assented when they entered into the prenuptial agreement.

{¶23} Having concluded that the trial court erred by not enforcing the prenuptial agreement's provision addressing the parties' separate ownership interests, we similarly conclude that it erred in deriving the parties' proportionate interest in the sale proceeds from the marital residence. Accordingly, Husband's third and fourth assignments of error are sustained.

Assignment of Error Number Five

> "THE TRIAL COURT ERRED IN ORDERING SCOTT TO PAY THE SUM OF $544.55 TO ATTORNEY JOHN KEYSE-WALKER FOR HIS REPRESENTATION OF PATRICIA PRIOR TO THE MARRIAGE."

{¶24} In his fifth assignment of error, Husband argues that the trial court erred when it ordered him to pay half of the remaining balance to the attorney who represented Wife in the execution of their prenuptial agreement. He maintains these charges represent a pre-marital expense, are not considered a "joint obligation" under the prenuptial agreement, and fall outside the scope of the agreement. Consequently, he maintains that Wife should be fully responsible for payment of the attorney services she received prior to the marriage. We agree.

{¶25} Again, we note that "[pre]nuptial agreements are contracts and that the law of contract will generally apply to their application and interpretation. *** [Thus,] [t]he trial court's resolution of a legal issue is reviewed de novo on appeal[.]" *Badger v. Badger* (Feb. 6, 2002), 9th Dist. No. 3197-M, at *1. Moreover, we will affirm a trial court's decision if the record contains competent evidence to support it. *Fletcher*, 68 Ohio St.3d at 468.

{¶26} The prenuptial agreement provision titled "Debts and Liabilities" reads, in pertinent part, as follows:

> "Unless otherwise specified herein, all debts, liabilities, liens or encumbrances *which have been incurred *** by each [p]arty before the contemplated marriage shall be the sole and exclusive responsibility of and paid by the [p]arty who incurred them* and neither the other [p]arty nor his or her property shall in any way be liable or obligated for the payment thereof. ***
>
> "Each [p]arty agrees to indemnify and hold harmless the other [p]arty from any and all debts or liabilities separately incurred by him or her, and each [p]arty agrees that he or she will not seek financial participation for debt reduction or satisfaction, unless otherwise specified herein." (Emphasis added.)

Thus, the parties' prenuptial agreement unambiguously states that Husband and Wife each remain responsible for any debts they may have incurred before they were married. In concluding that the prenuptial agreement was valid, the trial court also found that Wife had the benefit of "independent legal counsel who explained the [p]re-nuptial [a]greement" to her and cautioned her as to some of its provisions. There is no dispute that Wife signed the agreement

two days before the parties' wedding on June 19, 2004. Based on the billing summary Wife introduced into evidence at trial, the attorney fees associated with the prenuptial service were incurred between June 3, 2004 and June 17, 2004. The services were unquestionably incurred by Wife "before the contemplated marriage" which occurred on June 19, 2004. Therefore, under the terms of the prenuptial agreement she signed, the attorney fees were "the sole and exclusive responsibility of and [shall be] paid by [Wife, as she is] the [p]arty who incurred them." Thus, the trial court erred when it ordered Husband to pay 50% of Wife's outstanding debt for attorney fees incurred in the preparation and execution of the parties' prenuptial agreement, as that decision was in contravention of the terms of the parties' prenuptial agreement. Accordingly, Husband's fifth assignment of error is sustained.

Assignment of Error Number Six

> "THE TRIAL COURT ERRED IN AWARDING PATRICIA FIFTY PERCENT (50%) OF $5,960 WITHDRAWN BY SCOTT FROM NATIONAL CITY BANK CHECKING ACCOUNTS USED BY THE PARTIES FOR MARITAL EXPENSES."

{¶27} In his sixth assignment of error, Husband asserts that the trial court erred in requiring that he reimburse Wife for monies that constituted separate property under the parties' prenuptial agreement or were the result of a duplicate deposit made from his individual account to the parties' joint account.

{¶28} We incorporate the standard of review from Husband's fifth assignment of error and will uphold the trial court's decision if it is supported by competent evidence in the record. *Fletcher*, 68 Ohio St.3d at 468. The provision titled "Living Expenses, Support Obligations" reads, in pertinent part, as follows:

> "The [p]arties agree that *they shall establish a jointly owned checking account* *** for living expenses, and if mutually agreed, for other joint needs. Each of the parties shall make a mutually agreed contribution to that account. The [p]arties

> agree to pay out of this account all their ordinary living expenses, including utilities, groceries and food, entertainment, home maintenance and repair, transportation, routine medical and routine health related expenses ***, other general costs of running and maintaining a household, and other related items as the [p]arties shall agree. *Each of the [p]arties agrees to keep the other [p]arty advised and informed of all checks written on, or withdrawals made from any said joint account.* These common, reasonable living expenses of the [p]arties shall be considered as their joint obligation." (Emphasis added.)

The next provision in the prenuptial agreement is titled "Non-Joint Bank Accounts" which provides, in part, that:

> "[O]ther than the special joint account referred to *** above, and any other such joint cash accounts which the [p]arties establish ***, *all other cash accounts will be maintained as the Separate Property of each [p]arty*. All such Separate Property accounts opened by either [p]arty during the marriage may be designated under the owner [p]arty's name as [separate or sole property of that party]." (Emphasis added.)

At trial, Wife argued that Husband made the following bank transfers from the parties' joint checking account into his separate, non-joint account: a transfer on June 22, 2004, in the amount of $2,000; a transfer on July 19, 2004, in the amount of $2,560; and a transfer on February 17, 2006 in the amount of $1,400. The transfers total $5,960 and the divorce entry ordered Husband to pay 50% "of $5,960 withdrawn by [Husband] from National City Bank Account []143."

{¶29} Wife introduced the monthly statements from the National City Bank accounts ending in 143 and 911 for the months of the transfers. The captions to the June 2004 and July 2004 statements on the account ending in 143 identify the sole account holder as "Scott L. Saari." The February 2006 statement for the same account, however, clearly reflects the account holders as "Scott L. Saari or Patricia Anne Saari." Thus, our review of the record in light of the aforementioned prenuptial provisions reveals that the June 2004 and July 2004 transfers were made from and into an account that was in Husband's name only. The parties had not yet "establish[ed] a jointly owned checking account" pursuant to the prenuptial agreement.

Therefore, under the terms of that agreement, the funds transferred from the account ending in 143 were, in fact, Husband's separate funds at the time. Accordingly, the trial court erred in considering those funds to be joint funds and requiring Husband pay half of those amounts to Wife.

{¶30} With respect to the February 2006 transfer of $1,400, Husband argues that, once the parties established a joint checking account, he routinely transferred funds from his separate account ending in 911 to their joint account ending in 143 to cover monthly household expenses. According to Husband, on February 17, 2006, he made such a transfer, not realizing that he had just done so two days earlier. He reversed the transaction for the duplicate deposit the same day, which was evidenced on the bank statement. Wife, however, testified that she was unaware of the withdrawal and that Husband had not informed her of any duplicate deposit to their joint account. Husband did not testify that he had informed Wife, either. Thus, based on the terms of the parties' prenuptial agreement, we conclude that the trial court did not err in ordering Husband to pay half of the February 2006 transfer, as the funds deposited into their joint account became joint funds, and Husband failed to "inform[] [Wife of the] withdrawal[] made from [their] joint account" pursuant to the terms of their prenuptial agreement.

{¶31} Accordingly, Husband's sixth assignment of error is sustained with respect to the June 2004 and July 2004 transfers totaling $4,560, but overruled with respect to the February 2006 transfer of $1,400.

Assignment of Error Number Seven

> "THE TRIAL COURT ERRED IN ORDERING SCOTT TO PAY ONE-HALF OF THE BALANCE ON THE HOME EQUITY LOAN WHICH REPRESENTED DEBT INCURRED BY PATRICIA FOR THE TUITION OF HER CHILDREN."

{¶32} In his seventh assignment of error, Husband asserts that the $3,406.31 balance owed on the parties' equity line represented a balance transferred from the parties' joint Visa account to which Wife had charged her daughter's tuition and other expenses which he asserts were related to her children. Husband argues that under the prenuptial agreement, he has no "financial obligation to support [Wife's] children," and Wife concedes that nearly half of the balance due represents her daughter's private school tuition. Therefore, Husband argues that the trial court erred by ordering him to pay such expenses that were expressly excluded from his responsibilities under the terms of the prenuptial agreement.

{¶33} We review the record for some competent evidence to support the trial court's determination on this matter. *Fletcher*, 68 Ohio St.3d at 468. Again, we note that the prenuptial agreement expressly provided that the parties would use joint funds to pay for "their ordinary living expenses, including utilities, groceries and food, entertainment, home maintenance and repair, transportation, routine medical and routine health related expenses ***, other general costs of running and maintaining a household, and other related items as the [p]arties shall agree." Additionally, the agreement provides that in the event of a divorce, "neither party shall have any financial obligation to support the [p]arty's children."

{¶34} Initially, we note that under the term of the parties' prenuptial agreement, tuition for Wife's daughter would not fall within the contours of "ordinary living expenses" which would have been paid by joint funds. Moreover, Wife does not dispute that $1,500 of the balance transferred to the parties' equity line represented tuition she had charged to the parties' Visa for her daughter's tuition. Instead, she testified and argues on appeal that Husband had instructed her to do so. Husband, however, merely testified that Wife charged the tuition to the Visa, and that he later transferred the Visa balance to a lower interest rate on the parties' equity

line. On cross-examination, when Wife was asked how she afforded her children's tuition expenses throughout the marriage, Wife testified that "she didn't have the money to pay tuition once. And Scott said to ask your mom for it, so I did. She gave it to me." Wife further added that her aunt and her parents had given her money at different points in the marriage to help offset some of her children's expenses. Thus, her own testimony reveals that, during the parties' marriage, her children's tuition was not treated as a joint obligation. Rather, Husband had declined to pay such expenses during the marriage and the provisions of the prenuptial agreement do not require he pay such expenses, during the marriage or in the event of a divorce. Thus, the trial court erred in ordering Husband to pay half of the $1,500 representing tuition for Wife's daughter.

{¶35} With respect to the remaining balance on the equity line of $1,906.31, the parties' dispute the nature of those expenses. Wife testified the balance was for "groceries" and "other household stuff" while Husband testified that it represented "clothing *** for [Wife's children] *** [a]nd clothing for [Wife], as she was getting prepared for her new job assignment." Neither party presented evidence as to any specific charges made as part of the remaining Visa balance of $1,906.31, nor were copies of any Visa statements introduced into evidence. In light of the charges being made to the parties' joint Visa account, then being transferred to the parties' joint equity line, and the parties' differing testimony on the matter, the trial court did not err in ordering Husband and Wife to each pay 50% of the remaining balance of $1,906.31 on their equity line. Accordingly, we sustain Husband's assignment of error with respect to the $1,500 in tuition that was applied to the equity line, but overrule his assignment of error with respect to the remaining balance of $1,906.31, which should be paid equally by the parties pursuant to the trial court's order.

III

{¶36} Husband's first, third, fourth, and fifth assignments of error are sustained. Husband's sixth and seventh assignments of error are sustained in part and overruled in part. Husband's second assignment of error is moot. The judgment of the Lorain County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part and remanded to the trial court for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
CARR, J.
CONCUR

APPEARANCES:

DARLENE A. WILCOX, Attorney at Law, for Appellant/Cross-Appellee.

HANS C. KUENZI, Attorney at Law, for Appellee/Cross-Appellant.