

ORIGINAL

IN THE SUPREME COURT OF OHIO

BARBARA A. VANDERBILT

Appellant

v.

SHANE W. VANDERBILT

Appellee

14-1764

ON APPEAL FROM THE MEDINA
COUNTY COURT OF APPEALS,
NINTH APPELLANT DISTRICT

COURT OF APPEALS
CASE NO: 13CA0084-M

**MEMORANDUM IN SUPPORT OF
JURISDICTION OF APPELLANT BARBARA A. VANDERBILT**

JAMES R. McILVAINE (0014363)
Palecek, McIlvaine, Hoffmann & Morse Co., LPA
273 Main Street, Suite 200
Wadsworth, OH 44281
Telephone: 330-334-1536
Fax: 330-334-7005
Email: jmcilvaine@pmhmlaw.com

COUNSEL FOR APPELLANT

STEVE C. BAILEY (0042706)
The Bailey Law Firm
60 Public Square, Suite 202
Medina, OH 44256
Telephone: 330-723-4140
Fax: 330-723-4610
Email: sbailey@sbaileylaw.com

COUNSEL FOR APPELLEE

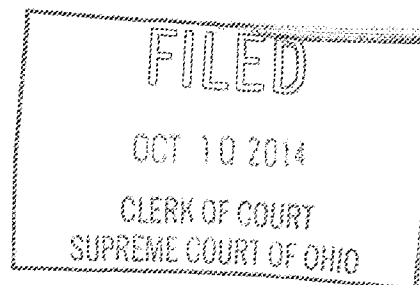


TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT INTEREST	1
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	6
<u>Proposition of Law No. 1:</u> The unconscionability of a prenuptial waiver of Spousal support is measured at the time of divorce in a full factual review of the impact of the enforcement on the economically less advantaged spouse under the factors of R.C. 3105.18(C)(11) and the prenuptial but without a rule that only the differences in the disadvantage of spouses income and station in life is relevant to the change of lifestyle test.....	6
CONCLUSION.....	9
CERTIFICATE OF SERVICE.....	10
APPENDIX	<u>Appx. Page</u>
Decision and Journal Entry of the Medina County Court of Appeals (August 26, 2014).....	A-1
Judgment Entry of the Medina County Domestic Relations Court (October 11, 2013).....	A-10

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Gross v. Gross</i> , 11 Ohio St.3d 99, 464 N.E.2d 500 (1984).....	1, 4, 6, 7
<i>Newcomer v. Newcomer</i> , 6th Dist. Lucas No. L-11-1183, 2013-Ohio-5627.....	3, 7
<i>Saari v. Saari</i> , 9th Dist. Lorain No. 08CA009507, 2009-Ohio-4940.....	1, 6
<i>Vanderbilt v. Vanderbilt</i> , 9th Dist. Medina No. 11CA0103-M, 2013-Ohio-1222.....	4, 6
Code Sections:	
R.C. §3105.18.....	4, 6, 7, 9
Other Authorities:	
Merriam Webster Online, http://www.merriam-webster.com (accessed February 16, 2012).....	3

**EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents a critical issue of importance to all persons in Ohio contemplating or entering into or in a prenuptial agreement that governs spousal support upon termination of marriage. The single issue in this case of critical importance is whether or not a court, as a matter of law, may allow for modification of waivers of spousal support even if determined to be unconscionable at the time of the divorce by the trier of fact in a manner consistent with the mandate of the seminal case of *Gross v. Gross*, 11 Ohio St.3d 99, 464 N.E.2d 500 (1984). In the instant case, the trial court made specific factual determinations from the trial and from the prenuptial agreement which was enforced that due to a change of circumstances in the lifestyle of the parties it would be unconscionable to enforce the spousal support waiver. The trial court examined the factors required in R.C. 3105.18(C)(1) in conjunction with the language contained in the prenuptial agreement which is in compliance with the standard of *Gross* and *Saari v. Saari*, 9th Dist. Lorain No. 08CA009507, 2009-Ohio-4940.

The Appellant Court in the instant case has created a new standard that so narrowly restricts this court's decision in *Gross* as to undermine the public purpose of allowing the trial court to make determinations based on the facts as shown at the time of a divorce on a waiver of spousal support which is the single factor in any prenuptial which is the most uncertain and unpredictable at the time of execution. In *Gross* the Supreme Court recognized this fact by carving out the exception of unconscionability. In the matter of supreme public interest in this case is that the Appellate Court has stated essentially that if the economic less independent spouse has the same job he/she had when married and the same or similar assets that he or she had when married and the economically advantaged spouse has accumulated extremely more

wealth and assets and has created a lavish lifestyle for the couple, that it is not significant what has happened in the lifestyle of the economically dependent spouse on the simplified assertion that spouse should have foreseen that the economically advantaged spouse would continue to prosper and that the court can only consider the changes in the circumstances of the economically disadvantaged spouse when determining whether or not it would be unconscionable to enforce the prenuptial agreement. This matter should be of even greater public interest because the Appellate Court set forth this new test while discarding the specific findings of the trier of fact as to all of the changes in the circumstances of the lifestyle of these parties at the time of the divorce. The Appellate Court basically stated that to rule otherwise would be to open all premarital agreements because they are inherently entered into between a party with far more economic assets and abilities than the other, and that should be of public concern.

In reaching that unjust conclusion, the Appellate Court ignored the specific findings of the trier of fact that the accumulated wealth of the economically advantaged spouse was greatly benefited by the wife's business contacts and efforts, and who expended all of her funds in the development of their mutual success and this lavish lifestyle as described by the court.

The decision of this Appellate Court will take away the last remaining vestige of hope for an economically disadvantaged spouse by even denying the possibility of recovery of sustenance or rehabilitative support when divorced from an economically advantaged spouse. The policy is more like a caste system because under the simple standard set forth here, the circumstances cannot change if the less advantaged has close to what he or she had when married when exiting the marriage. Under the rationale of this Appellate Court, if you are a minimum wage clerk in a fast food restaurant, marry a wealthy person and enter into a prenuptial agreement waving spousal support, you can count on returning to the food line if the marriage ends regardless of the

lifestyle you enjoyed and participated in during the length of the marriage or your contribution to that marriage. So long as you have what you had when you married, then this Court would say the law says you cannot expect anything more. This is a severely harsh public policy issue that should be reviewed.

The second issue of public importance in this case is that the Appellate Court summarily ignored and dismissed all of the specific findings of the trial court setting forth the trial court's examination of the factors of R.C. 3105.18(C)(1) and conscionability of the waiver of spousal support in the instant case. This court granted no deference to the findings of fact of the trial judge and applied the very narrow and strict interpretation to the definition of unconscionability.

A far better definition was found in *Newcomer v. Newcomer*, 6th Dist. Lucas No. L-11-1183, 2013-Ohio-5627, that said that unconscionability as determined in a prenuptial case is a matter within the sound discretion of the trial court and will not be disturbed in the absence an abuse of that discretion. Unconscionable in that case was recognized to mean "unfair and inequitable" as defined by Merriam-Webster Dictionary. In this case public policy supports that decision being made by the trier of fact upon all of the facts. When examining the statement of facts alone of what this trial judge found, it is clear that there were many facts which impacted his assessment of the factors of spousal support and the unconscionability or unfairness of enforcing that in this particular case. For all of the above reasons, it is respectfully submitted that there is a matter of great public concern in the determination of this matter.

STATEMENT OF CASE AND FACTS

Barbara and Shane Vanderbilt married in 1999. Immediately in the days before they married, the couple executed a prenuptial agreement that governed the division of their property and included a mutual waiver of spousal support in the event of divorce. Wife filed a Complaint for Divorce in 2009. The issues were bifurcated by the trial court and the issues of the implementation of the terms of the prenuptial agreement were tried first and the trial court determined that it was valid and enforceable. Both parties appealed from that decision and the 9th District Court of Appeals concluded that the trial court erred by awarding spousal support without determining whether application of the prenuptial agreement at the time of the divorce was unconscionable. *Vanderbilt v. Vanderbilt*, 9th Dist. Medina No. 11CA0103-M, 2013-Ohio-1222. On remand the trial court awarded spousal support to Barbara Vanderbilt in the amount of \$3,500 per month for 49 months.

The trial court on remand relied upon *Gross*, 11 Ohio St.3d at 109-110, 464 N.E.2d 500, in finding that “unconscionability of a provision for maintenance and sustenance contained in an antenuptial agreement may be found in a number of circumstances, examples of which might be...changed circumstances of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse.” The court considered all factors set forth in R.C. 3105.18 relative to the issue of conscionability of the provisions of the parties prenuptial agreement and made specific findings that over the 12 years of marriage the parties’ circumstances had significantly changed since the execution of the prenuptial agreement. The court found that the wife had sold her separate, premarital home and continued her employment but utilized the funds from that employment for family purposes including purchase of the food, insurance for the parties and for his children by a prior marriage. She assisted the

husband in the promotion of his business through significant business contacts of her own hosting parties and assisting in his rental properties. The Appellant's annual income was clear as a W2 employee and set forth by the finder of trial court. The trial court specifically found that it could not be determined what the income of the Appellee was because he took the Fifth Amendment in this civil matter against self-incrimination and refused to answer or disclose assets or income from his car business. The court found that the parties lived a lavish upscale lifestyle consistent with his own records which reflected expenses of \$9,000 per month and records which clearly supported income in excess of \$200,000 per year.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The unconscionability of a prenuptial waiver of Spousal support is measured at the time of divorce in a full factual review of the impact of the enforcement on the economically less advantaged spouse under the factors of R.C. 3105.18(C)(11) and the prenuptial but without a rule that only the differences in the disadvantage of spouses income and station in life is relevant to the change of lifestyle test

The sole issue in this appeal is whether or not a prenuptial agreement which contains a provision waiving spousal support is basically uncontestable despite the finding of this court in *Gross*, 11 Ohio St.3d at 109, 464 N.E.2d 500. In *Gross* the court held that the determination of whether a written contract is unconscionable is an issue of law which the court reviews de novo. When a trial court makes factual findings, however, supporting its determination of the 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. *Id.* at ¶ 11. The Ninth District Court of Appeal went on to severely limit *Gross* as to its application to prenuptial agreements in *Saari v. Saari*, 9th Dist. Lorain No. 08CA009507, 2009-Ohio-4940. In *Vanderbilt v. Vanderbilt*, decided March 27, 2013, in the 9th Dist. Medina No. 11CA0103, the Court further narrowed the definition of unconscionability and standards for fraud, duress and lack of disclosure. Now in *Vanderbilt v. Vanderbilt* in the appeal decision filed August 26, 2014, in 13CA0084, this court reversed the trial court finding of unconscionability based on change of circumstances which would be unconscionable by further narrowing the decision to say it does not matter whether it would be a change of circumstances for the economically disadvantaged spouse that it would be a hardship to leave the lifestyle that they have grown to enjoy during the marriage when the husband's income went to very high levels [although the exact amount could not be determined because he refused to answer questions concerning his income] and instead

said that the lifestyle of the economically disadvantaged spouse would basically be what it was when she got married and therefore is no substantial change.

This Court could find that the instant decision is in conflict with the decision of the Sixth District Court of Appeals, Lucas County, in *Newcomer v. Newcomer*, 2013-Ohio-5627, decided December 20, 2013. In that case the court applied a less rigid interpretation of the trial court's findings as to unconscionability of a spousal support award contrary to a prenuptial agreement. In *Newcomer*, the court found that the antenuptial agreement was valid and enforceable but based upon *Gross*, stated that provisions of the agreement regarding spousal support are subject to additional scrutiny.

Change of circumstances may render such provisions unconscionable when examined at the time of the divorce. This Court in *Gross* said that in determining whether an antenuptial spousal support provision is conscionable and reasonable at the time of the divorce, the trial court is directed to use the same factors that govern an award of spousal support found in R.C. 3105.18. *Id.* at 109-110. In *Newcomer*, the trial court did exactly what Judge Ramsey did in the underlying case and examined all of the factors and the change in the lifestyle and concluded that it would be unconscionable and unfair to enforce the prenuptial. The Appellate Court applied its own standard without any regard to the facts and substituted their judgment for the trial court.

It is respectfully submitted that in *Newcomer* the same issue arose in which the economically superior party argued that unfair and inequitable are not unconscionable whereas the *Newcomer* Appellate Court said actually "unconscionable" does mean "unfair." The Court went on to say there is nothing in the cases to suggest there are necessarily specific words which must be used to nullify a spousal support provision in an antenuptial agreement and went on to say that the court will not disturb the trial court's decision on the basis of its language use.

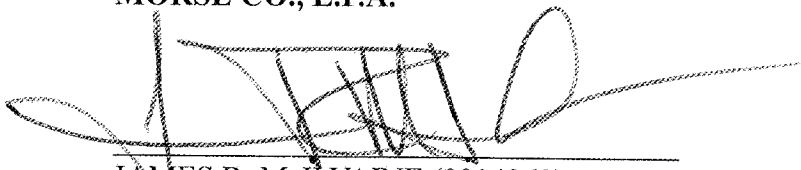
In the instant case, the Court of Appeals did in fact go beyond that review, granted no deference to the trier of fact and have defined a new litmus test that basically provides that change of lifestyle is no longer a relevant consideration in the equation.

CONCLUSION

The court should accept this Appeal to examine the public policy of the extremely narrow restriction on the court's ability to allow spousal support in spite of a waiver in a prenuptial where the implementation of said waiver at the time of divorce is unconscionable under all of the factors of R.C. 3105.18 and change in life style of the parties in the examination of all facts existing at the time of divorce and not to just deny the economically disadvantaged spouse because she still has her "original" job and income therefrom and to grant deference to the trial court on conclusions of fact as to unconscionability rather than apply a red line exception under this guise of "de novo" review.

Respectfully submitted,

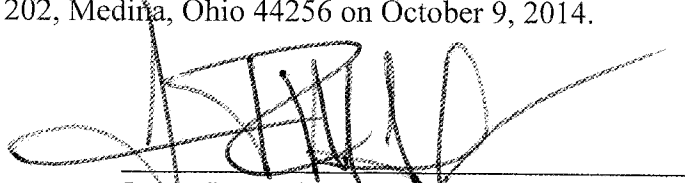
**PALECEK, McILVAINE, HOFFMANN &
MORSE CO., L.P.A.**

A handwritten signature in black ink, appearing to read 'J. McILVAINE', is written over a horizontal line.

JAMES R. McILVAINE (0014363)
Attorney for Appellee, Barbara A. Vanderbilt
273 Main Street, Suite 200
Wadsworth, OH 44281
(330) 334-1536
(330) 723-1580
FAX (330) 334-7005
E-MAIL: jmcilvaine@pmhmlaw.com

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction of Appellant Barbara A. Vanderbilt was sent by ordinary U.S. Mail to counsel for Appellee, Steve C. Bailey, The Bailey Law Firm, 60 Public Square, Suite 202, Medina, Ohio 44256 on October 9, 2014.



James R. McIlvaine (0014363)
Attorney for Appellant

STATE OF OHIO)

COUNTY OF MEDINA)

BARBARA A. VANDERBILT

Appellee

v.

SHANE W. VANDERBILT

Appellant

COURT OF APPEALS
14 AUG 26 AM 10:40

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

Case No. 13CA0084-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 09 DR 0086

DECISION AND JOURNAL ENTRY

Dated: August 25, 2014

HENSAL, Presiding Judge.

{¶1} Appellant, Shane Vanderbilt, appeals the order of the Medina County Court of Common Pleas, Domestic Relations Division, that ordered him to pay spousal support. This Court reverses.

I.

{¶2} Barbara and Shane Vanderbilt married in 1999 after a long relationship. Immediately before they married, the couple executed a prenuptial agreement that governed the division of their property and included a mutual waiver of spousal support in the event of divorce. In anticipation of marriage, the couple also designed their dream home, which they built and furnished to their specifications early in the marriage. Throughout their relationship, Wife worked full-time for a county agency and owned a modest home that she shared with Husband. Wife maintained this employment before and throughout the marriage, and her job provided a steady level of income, no-cost health benefits for her, and a public employee

pension. During the marriage, Wife used her earnings to fund the couple's living expenses. She supplemented her stream of income with approximately \$60,000 that resulted from the sale of her premarital home, from which she paid for a portion of her children's college education, an extra automobile, and various living expenses.

{¶3} Wife filed a complaint for divorce in 2009. During the divorce proceedings, Husband moved the trial court to implement the terms of the prenuptial agreement. The trial court determined that the agreement was valid, but that it did not control with respect to spousal support. Husband appealed, and this Court concluded that the trial court erred by awarding spousal support without determining whether application of the prenuptial agreement at the time of the divorce was unconscionable. *Vanderbilt v. Vanderbilt*, 9th Dist. Medina No. 11CA0103-M, 11CA0104-M, 2013-Ohio-1222, ¶ 39-41. On remand, the trial court awarded spousal support to Wife in the amount of \$3,500 per month for 49 months. The trial court based its determination in large measure on the conclusion that because "[t]hrough the marriage the [W]ife's lifestyle dramatically changed. * * * Enforcement of said provisions would return the [W]ife to her prior standard of living, which would be a hardship on her." Husband filed this appeal.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN DETERMINING THE SPOUSAL SUPPORT PROVISION OF THE PARTIES' PRENUPTIAL AGREEMENT TO BE UNCONSCIONABLE.

{¶4} Husband argues that the trial court erred by determining that the parties' lifestyle during the marriage rendered the prenuptial agreement unconscionable as of the time of the divorce. We agree.

{¶5} Prenuptial agreements may contain provisions related to spousal support, but “a party may challenge the spousal support provisions contained therein by demonstrating that the terms related to spousal support are unconscionable at the time of the divorce.” *Vanderbilt* at ¶ 39, citing *Gross v. Gross*, 11 Ohio St.3d 99, 109 (1984). This determination does not go to the validity of the prenuptial agreement itself, but to the question of whether spousal support provisions may be enforced at the time of the divorce. *See Gross* at 100.

{¶6} The statutory considerations that govern an award of spousal support under R.C. 3105.18(C)(1) guide this conscionability analysis. *Vanderbilt*, 2013-Ohio-1222, at ¶ 39. Consequently, the trial court must consider the income, assets, and liabilities of the parties; their relative earning capacities, educational attainments, and retirement benefits; the ages and health of the parties; the duration of the marriage and the parties’ standard of living; the contribution of one spouse to the education or training of the other and, conversely, the resources necessary for one spouse to obtain appropriate employment; and whether either party lost employment capacity as a result of marital responsibilities. R.C. 3105.18(C)(1). This list of factors is nonexclusive. *See* R.C. 3105.18(C)(1)(n).

{¶7} The critical factor in this determination, however, is whether there are “*changed circumstances* which render the provisions unconscionable as to one or the other at the time of the divorce[.]” (Emphasis added.) *Gross* at 109. In this respect, the Ohio Supreme Court has explained:

Unconscionability of a provision for maintenance and sustenance contained in an antenuptial agreement may be found in a number of circumstances, examples of which might be an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed upon a 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.

Id. at 109, fn.11. Put simply, the conscionability analysis considers whether a couple's circumstances have changed during the marriage to such a degree that the spouse seeking spousal support should be relieved of the agreement he or she made regarding spousal support. Because a valid prenuptial agreement is one that the parties enter into freely and with full disclosure, *see Vanderbilt* at ¶ 7, this analysis presumes that the changed circumstances would not have been contemplated at the time of the agreement. When a trial court declines to apply a spousal support provision without first determining that such changed circumstances exist, it errs as a matter of law, and our review is de novo. *See Saari v. Saari*, 9th Dist. Lorain No. 08CA009507, 2009-Ohio-4940, ¶ 11.

{¶8} Two cases illustrate the importance of a true change in circumstances to our analysis. In *Gross*, the Ohio Supreme Court considered the validity of prenuptial agreements under Ohio law for the first time. In that case, the Husband enjoyed a substantial income from a number of beverage franchises. *Gross*, 11 Ohio St.3d at 100. Before they married, the Wife was employed by the Husband's company as a secretary. *Id.* Both had been married before, and they executed a prenuptial agreement in anticipation of marriage. The agreement provided that in the event of divorce, the Wife would be entitled to \$200 per month in spousal support for ten years. *Id.* at 101. During the couple's fourteen-year marriage, the Husband's assets increased in value from approximately \$550,000 to \$8 million. *Id.* at 101-102. Although the Court upheld the prenuptial agreement, it concluded that changed circumstances over the course of the marriage rendered application of the spousal support provisions unconscionable. *Id.* at 111. Specifically, the Court noted that magnitude of the Husband's increase in assets and the "opulent" nature of the couple's lifestyle when compared to the \$200 per month to which the Wife would be entitled under the prenuptial agreement "could well occasion a hardship or be significantly difficult for

the former [W]ife.” *Id.* at 110. In other words, the Court recognized that an increase in the assets of one party coupled with a dramatic change in lifestyle during the course of a marriage could, in comparison to the amount of spousal support permitted under a prenuptial agreement, render the support provisions unconscionable at the time of the divorce.

{¶9} This Court considered similar issues, but reached the opposite result, in *Saari*. In that case, the Husband and Wife were both employed in the financial sector prior to their marriage. *Saari* at ¶ 2. They executed a prenuptial agreement that provided, in part, that each party agreed to forgo the right to spousal support. *Id.* Although the Wife lost her job shortly before the wedding, she later obtained work in the same industry. *Id.* at ¶ 2-3. Throughout their marriage, which lasted only three years, the parties “enjoyed what they referred to as a ‘comfortable’ and ‘upper class’ style of living, free of financial worries.” *Id.* at ¶ 3. When they divorced, the trial court concluded that spousal support provision in the prenuptial agreement was unconscionable based on the parties’ respective earning capacities and awarded the Wife \$4,000 per month in spousal support for twelve months. *Id.* at ¶ 5.

{¶10} On appeal, this Court concluded that the trial court erred as a matter of law because it failed to consider the factors set forth in R.C. 3105.18(C) and awarded spousal support when there had not been a change in circumstances over the course of the marriage. *Id.* at ¶ 13, 15. We also determined that when the evidence was examined in light of R.C. 3105.18, it mitigated in favor of enforcing the agreement. *Id.* at ¶ 14. Specifically, this Court noted:

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*.

Id. Because there had been no change in circumstances that would render application of the support provision unconscionable, this Court reversed. *Id.* “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.” *Id.*

{¶11} This case presents a situation more like *Saari* than *Gross*. With respect to Wife’s employment and earning capacity, there has been no change that would warrant deviation from the terms of the prenuptial agreement. Wife was employed full-time at the time the prenuptial agreement was executed and has been continuously employed in the same position since. Although Wife did sell her home before the marriage, the proceeds from that sale appear to have been used, at least in part, to fund the higher education of her adult children – a potential expense that has now been eliminated. Wife did not invest her own financial resources or sacrifice her career to benefit Husband’s business interests, and she has no barriers to continued employment in the same capacity that she enjoyed before and during the marriage. Although Wife maintained in the course of the previous appeal that she made significant indirect contributions to Husband’s success, this Court rejected that position in light of the prenuptial agreement. *Vanderbilt*, 2013-Ohio-1222, at ¶ 32.

{¶12} To the extent that Wife’s standard of living has changed, it is significant that the change occurred over the course of the couple’s lengthy relationship and not merely as a result of the marriage. Due in part to Husband’s higher income, the couple enjoyed a higher standard of living than Wife did on her own, but the record indicates that the higher standard of living was

established before the marriage. In other words, Wife enjoyed a higher standard of living as a result of her relationship with Husband at the time that she executed the prenuptial agreement. It was neither drastic nor unanticipated, but was, instead, part and parcel of the couple's lengthy pre-marital relationship. Even considering a higher standard of living after the marriage, that fact alone would not be the type of change in circumstances that justifies setting aside part of a valid prenuptial agreement. If that were so, it is hard to imagine a situation in which a spousal support limitation in a prenuptial agreement would be valid, especially given that such agreements are often the product of income inequality. *Compare Fletcher v. Fletcher*, 68 Ohio St.3d 464, 467 (1994) (emphasizing that a prenuptial agreement can be valid even when the party challenging the agreement would receive disproportionately less than would result from an equitable distribution).

{¶13} As in *Saari*, therefore, we agree with Husband that the trial court erred in this case by setting aside the spousal support provisions of the prenuptial agreement apart from changed circumstances that rendered their application unconscionable. Husband's first assignment of error is sustained.

ASSIGNMENT OF ERROR II

THE COURT ERRED IN NOT CREDITING [HUSBAND] FOR COSTS PAID DURING THE PENDENCY OF THE CASE.

{¶14} Husband has also argued that, in the event that this Court overrules his first assignment of error, we should conclude the trial court erred by failing to offset his spousal support award by expenses that he paid while the divorce case was pending. This Court has sustained his first assignment of error, so his second assignment of error is moot. *See App.R. 12(A)*.

III.

{¶15} Husband's first assignment of error is sustained. His second assignment of error is moot. The judgment of the Medina County Court of Common Pleas, Domestic Relations Division, is reversed.

Judgment reversed.

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 Medina, 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(C). 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 to Appellee.



JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR.

APPEARANCES:

STEVE C. BAILEY, Attorney at Law, for Appellant.

JAMES MCILVAINE, Attorney at Law, for Appellee.

IN THE COMMON PLEAS COURT OF MEDINA COUNTY, OHIO
DOMESTIC RELATIONS DIVISION

Barbara A. Vanderbilt,
Plaintiff,

Vs.

Shane W. Vanderbilt, *et al.*
Defendants.

2013 OCT 11 PM 1:27
Case No. 09 DR 0086

Judge Donald L. Ramsey
By Assignment
CLERK OF COURT

Judgment Entry

This matter is before the court pursuant to the Decision and Journal Entry, filed March 29, 2013, by the Court of Appeals of Ohio, Ninth Judicial District, Medina County. By said Decision and Journal Entry the appellate court remanded to this court for further consideration the following issues: (a) the division of equity in the parties' marital residence located at 350 Reimer Road, Wadsworth, Ohio, (b) the division of personal property set forth in Defendant's trial Exhibit E valued at \$44,895.11, and (c) spousal support.

A. Division of equity in the parties' marital home located at 350 Reimer Road, Wadsworth, Ohio

In their Prenuptial Agreement the parties clearly and unambiguously set forth their intention concerning their marital home at 350 Reimer Road. After accounting for separate contributions to the marital home from their respective pre-marital funds, the parties agreed that they "specifically intend that their new residence shall be their *joint asset*, which shall continue to be maintained by *marital funds*. (Emphasis added.) Title to their new home was placed in both names.

Incomes earned by the both parties during the marriage are deemed to have been contributed to the general maintenance of the home. Such incomes are deemed to be marital funds, lest no meaning at all be given to the parties' own words of "marital funds."

From the trial this court did not find that the husband had traced by clear and convincing evidence his contributions from separate property, except for \$160,613, in the parties' marital home. Specifically, this court found that "the husband had set up artificial transactions between his corporate entities, his father and his customers for the transfer of large sums of money," which he claimed to have contributed to the home from separate property.

Notwithstanding such findings by this court the court of appeals has deemed the parties' joint marital home to be the property of the husband alone, subject to the remaining terms of the Prenuptial Agreement. Accordingly, this court so orders the same and re-affirms all other provisions of this court's Judgment Entry of September 21, 2011, not inconsistent with those herein, relating to the marital home.

B. Division of personal property set forth in Defendant's trial Exhibit E, valued at \$44,895.11

Per the Decision and Journal Entry of the appellate court, all personal property listed in Defendant's trial Exhibit E is awarded to the husband.

C. Spousal Support

"In the review of provisions in antenuptial agreements regarding *maintenance or sustenance* alimony, a . . . standard of review must be applied – one of conscionability of the provisions at the time of the divorce or separation. Although . . . such provisions in an antenuptial agreement generally may be considered valid, . . . the provisions relating to maintenance or sustenance 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. Accordingly, such provisions may, upon a review of all of the circumstances, be found to have become voidable at the time of the divorce. . . 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*. . . Unconscionability of a provision for maintenance and sustenance contained in an antenuptial agreement may be found in a number of circumstances, examples of which might be . . . changed circumstances of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse." (See, *Gross v. Gross*, 11 Ohio St.3d. 99 (1984) at 109 and 110.)

The court has considered all factors set forth in O.R.C. Section 3105.18 relative to the issue of the conscionability of the provisions of the parties' Prenuptial Agreement in relationship to spousal support. The court finds as follows:

The Court specifically finds that over the twelve years of marriage the parties' circumstances have significantly changed since the time of the Prenuptial Agreement. Specifically, the Court finds that since the time of the parties' Prenuptial Agreement the wife sold her separate, premarital home. After the marriage the wife invested the sale proceeds in the parties' upscale marital lifestyle and in the college education of her own children. The wife continued her own employment and yet actively and purposefully assisted the husband in the promotion of his businesses through supplying significant business contacts, hosting house parties for business clients and assisting the husband in his rental properties. The wife assisted in the final stages of the rearing of the husband's children. The wife further provided and paid for all medical insurance coverage of the husband and the husband's children.

At the time of trial the wife was 58 years of age and reported no major health issues. She has an Associate's Degree and has been employed for 34 years at her present employer or its predecessors. The wife has 34 years of service credit in Ohio Public Employees Retirement System. The husband shall have no claim upon the wife's pension benefits. The wife's current annual income is \$41,000. The wife has a history of modest annual increases in salary commensurate with public employment. The wife also

enjoys medical insurance benefits, vacation and sick leave benefits through her employment.

At the time of trial the husband was 57 years of age and reported no major health issues. The husband has been self-employed in the roofing and construction trades, real estate business and car business. The husband asserted his Fifth Amendment Constitutional right against self-incrimination and refused to disclose the assets or income from his car business. According to the husband his car business is a cash business dealing in the buying and selling of cars and car parts. Because of the husband's unreported dealings in the car business and manipulation of his various corporate enterprises, the husband's true annual income is unable to be determined. However, based upon his reported income, his increase in net wealth and his expenses, the last of which exceed his income and are paid in cash and not with credit, the Court finds that the husband has at a minimum an annual income of \$200,000.

The Court further finds that the parties' term of marriage is from January 2, 1999 (the date of marriage) until May 9, 2011 (the beginning date of the final trial herein.) During the marriage the parties lived an ample, upscale lifestyle. Their marriage was highlighted with a luxurious home valued at \$489,000, cruises, luxury cars, high fashion clothing and jewelry, vacations, concerts and dining out. While the parties did not commingle their finances, the wife outspent her income in maintaining the parties' lifestyle and relied upon the husband's income to provide the balance. In disputing the wife's claim that her monthly living expenses are approximately \$9,500, the husband attested that his living expenses just for himself are approximately \$4,000 per month. The Court concludes that the wife's monthly living expenses are no less than those of the husband.

Prior to the marriage the wife had lived a modest lifestyle, supporting herself and her own children on her own income and living in a home valued at approximately \$155,000. Per the parties' Prenuptial Agreement the wife's net assets prior to the marriage were approximately \$222,200. In contrast the husband had accumulated prior to the parties' marriage net assets in the approximate amount of \$1,629,098, consisting of investments, cash, securities, pensions, real estate holdings, vehicles and other personal property.

Through the marriage the wife's lifestyle dramatically changed. She acquired an upscale lifestyle, contributed to the newly acquired lifestyle and assisted the husband in both family and business endeavors. In so doing, the wife contributed her annual income and consumed the bulk of her premarital assets. The change of circumstances that occurred over the 12+ years of marriage has rendered the spousal support provisions of the parties' Prenuptial Agreement unconscionable as to the wife. Enforcement of said provisions would return the wife to her prior standard of living, which would be a hardship on her.

Accordingly, based on the factors set forth in O.R.C. Section 3105.18 the Court deems that an award of spousal support from the husband to the wife is fair and appropriate following the termination of the marriage. Therefore, the Court orders that the husband shall pay the wife for a period of 49 consecutive months, beginning October 1, 2011, spousal support in the amount of \$3,500 per month. Said monthly amount, plus 2% service fee, shall be paid by wage withholding through Ohio Child Support Payment Central, Columbus, Ohio. The Medina County Child Support Enforcement Agency shall

immediately set up a wage withholding order and notice for the Defendant and his employer to comply with the orders herein.

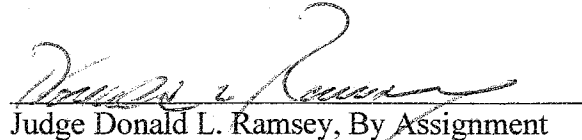
The spousal support awarded herein shall be non-modifiable both as to term and amount. The Court shall not retain jurisdiction over the matter. The spousal support shall be taxable as income to the wife and tax deductible to the husband. The spousal support shall be earlier terminable upon the first happening of any of the following events: death of either the husband or the wife or remarriage of the wife.

D. Miscellaneous

Except to the extent modified by the findings and orders herein, all prior findings and orders set forth in this court's Judgment Entries of March 29, 2010 and September 21, 2011 remain in full force and effect.

It is so ordered.

9-20-13
date


Judge Donald L. Ramsey, By Assignment

cc: Barbara A. Vanderbilt, Plaintiff
James R. McIlvaine, Attorney for Plaintiff
Shane W. Vanderbilt, Defendant
Steve C. Bailey, Attorney for Defendant-Shane W. Vanderbilt
Premier Roof Systems, Inc., Defendant
VM Premier Properties, LLC, Defendant
Premier Construction Services, Inc., Defendant
Americar Auto Specialties, Inc., Defendant
Ronald M. Martin, Attorney for Defendants-Premier Roof, VM Premier, Premier Construction and Americar
William D. Vanderbilt, Defendant
Lawrence J. Courtney, Attorney for Defendant-William Vanderbilt
National City Bank, Defendant
Merrill Lynch, Defendant
Stephen M. Bales, Attorney for Defendant-Merrill Lynch
Profunds, Defendant
Ameritrade, Defendant
Medina County Child Support Enforcement Agency