

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
WASHINGTON COUNTY

CHRISTOPHER BARTH,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA53
	:	
vs.	:	<b>Released: February 4, 2010</b>
	:	
JACKIE BARTH,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

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APPEARANCES:

Norman L. Folwell, Marietta, Ohio, for Defendant-Appellant.

James Addison, Addison & Funk, Marietta, Ohio, for Plaintiff-Appellee.

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McFarland, P. J.:

{¶1} Defendant-Appellant, Jackie Barth, appeals the decision of the Washington County Court of Common Pleas awarding her husband, Plaintiff-Appellee, Christopher Barth, certain real property in their divorce action. Appellant states the trial court erred in 1) finding the parties had entered into a valid, binding premarital agreement; and 2) finding the funds for building a home, and thus the home itself, were the separate property of Appellee. Because the validity of the premarital agreement was primarily an issue of fact best determined by the trier of fact, we can not say the court below abused it's discretion in determining the premarital agreement was

valid. Further, because the record before us does not contain the exhibits necessary for a meaningful review of the trial court's decision to classify the home as separate property, we overrule Appellant's second assignment of error. Accordingly, we overrule both of Appellant's assignments of error and affirm the decision of the court below.

### I. Facts

{¶2} Appellant, Jackie Barth, and Appellee, Christopher Barth, were married on November 24, 2001. Two days before the marriage took place, Appellant signed a premarital agreement which had been prepared by Appellee's father, Melvin Barth. The enforceability of that document is the core of this appeal.

{¶3} The premarital agreement concerned real property and a residence that was to be built following the marriage. The real property in question was transferred to Appellee by family members in 1999, more than two years before the marriage took place. Melvin Barth testified that he drafted the premarital agreement in order to protect Appellee's interest in the real property and the money for the proposed residence, which was to be provided by Melvin's relatives.

{¶4} After Appellant and Appellee were married, Melvin Barth coordinated a series of transfers of money from his wife's mother, Mary

Niceswanger, and aunt, Alice Lauer, to pay for the construction of the home. In multiple transactions between October 1999 and October 2002, Lauer contributed a total of \$120,000. In two transactions occurring in the latter part of 2002, Niceswanger contributed \$50,000.

{¶5} In November 2007, Appellee filed for divorce. Through mediation, the parties resolved all issues concerning personal property and Appellee was ordered to pay Appellant approximately \$15,000 to equalize the personal property division. The only remaining issue was the disposition of the real estate mentioned above, including the residence. After a full hearing, the magistrate issued a decision finding that the prenuptial agreement was valid. The decision also stated that all of the monetary transfers from Appellee's relatives used to construct the home were gifts to Appellee alone, except for three \$10,000 payments the court construed as gifts to Appellant. The decision further ordered Appellee to pay Appellant \$30,000 and found the real estate to be the separate property of Appellee. After review, the trial court adopted the magistrate's decision. Following the trial court's judgment entry, Appellant timely filed the current appeal.

## II. Assignments of Error

- I. THE TRIAL COURT ERRED IN FINDING THAT THE PREMARITAL AGREEMENT WAS ENTERED INTO FREELY WITHOUT FRAUD, DURESS, COERCION OR OVERREACHING, WITH FULL DISCLOSURE OR FULL KNOWLEDGE OF THE NATURE, VALUE, AND THE EXTENT OF THE PROSPECTIVE SPOUSE'S PROPERTY AND THAT IT WAS THEREFORE VALID AND BINDING.
- II. IT WAS REVERSIBLE ERROR FOR THE COURT TO FIND THAT THE FUNDS PROVIDED TO THE JOINT ACCOUNT OF THE APPELLEE AND THE APPELLANT WERE THE SEPARATE PROPERTY OF THE APPELLEE AS SUCH A FINDING WAS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE IN THE RECORD. AS IT WAS ERROR TO FIND THAT THE FUNDS WERE SEPARATE, IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO DIVIDE THE VALUE OF THE MARITAL RESIDENCE.

## III. First Assignment of Error

{¶6} Appellant's first assignment of error states the trial court erred in determining that the premarital agreement was valid and binding. She argues that decision was error both because there was not a full disclosure of the nature, value and content of the prospective spouse's property before the agreement was executed, and because she did not sign the agreement freely, without fraud, duress, coercion or overreaching.

{¶7} It is well settled that prenuptial agreements are enforceable under Ohio law. *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 466. However, such agreements must meet the requirements set forth by the Supreme Court of Ohio in *Gross v. Gross* (1984), 11 Ohio St.3d 99, 464

N.E.2d 500. Under *Gross*, “[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.

{¶8} We review a trial court’s decision regarding the validity of a prenuptial agreement under an abuse of discretion standard. *Bisker v. Bisker*, 69 Ohio St.3d 608, 609-610, 1994-Ohio-307, 635 N.E.2d 308. See, also, *Zawahiri v. Alwattar*, 10th Dist. No. 07AP-925, 2008-Ohio-3473, at ¶21; *In re Estate of Gates v. Gates*, 7th Dist. No. 06 CO 60, 2007-Ohio-5040, at ¶13. An abuse of discretion constitutes more than an error of law or judgment. Rather, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140. Further, determining the validity of a prenuptial agreement “is a question of fact best left to the trial court.” *Bisker* at 610. Thus, the relevant inquiry in the case sub judice is whether the trial court abused its discretion in enforcing the premarital agreement.

{¶9} The document at issue was created by Melvin Barth with a computer program and without consulting an attorney. Under cross-

examination, Appellant agreed that the document states that the intent of the signing parties is that Appellee will retain the residence in the event of separation or death and that “the house will be built with Christopher’s money and will remain in his separate ownership.” She further admitted that the document states that each party acknowledges that he or she has been advised to seek the advice of a separate lawyer and has the opportunity to seek the advice of a separate lawyer. She also testified that she signed the document in three separate locations.

{¶10} Though the provisions of the document itself were not in dispute, the parties' testimony concerning the circumstances surrounding the document's execution was vastly different. Appellee and Melvin Barth testified that: Appellant willingly provided information for the creation of the agreement, namely her debts and assets; she was given a copy of the full agreement for her review prior to the day she signed it; she understood the terms of the agreement, including that it was to protect the money being transferred to Appellee for the construction of the house; she was told that, if she did not sign the agreement, the money to build the house would not be forthcoming, and she had a discussion with Melvin Barth to that effect; and Melvin Barth specifically told her the document was a premarital agreement.

{¶11} Directly contradicting that testimony, Appellant testified that: she had nothing to do with creating the agreement, but she did admit to providing her father-in-law information about her assets; she was not provided a copy of the agreement before she signed it and had never seen any part of it until the day she signed it; the document she signed was not the full, premarital agreement; she never read the agreement and did not know what she was signing; a discussion about the availability of the money to build the house being contingent upon her signing the agreement never took place; she was told the agreement was just insurance to protect her and her children from the potential claims of her previous spouses; the document was never referred to as a premarital agreement; and had she known it was a premarital agreement, she never would have signed it.

{¶12} As the parties do not contest the terms of the agreement itself, but rather the circumstances surrounding its execution, the validity and enforceability of the agreement are issues of fact. The magistrate determined that while the testimony of both parties could be seen as self-serving, Appellant's version of events was less credible than Appellee's. The magistrate found that the agreement contained both detailed information regarding the parties' respective assets and an acknowledgement concerning each party's right to seek the advice of counsel, which was located

immediately above the dated and notarized signatures. Further, the magistrate found the parties had signed not only the primary document but also the exhibits listing the parties assets and liabilities and an acknowledgement that each had received copies of the other parties' exhibits.

{¶13} As previously stated, determining the validity of a prenuptial agreement is primarily an issue for the trier of fact. That deference is particularly appropriate in the present case, where the parties' testimony is factually contradictory on a number of vital issues, including whether Appellant was provided with a copy of the document prior to the day of signing, and whether the document was understood to be a premarital agreement. "The underlying rationale for appellate courts to defer to the trier of fact on matters of evidence weight and witness credibility is that the trier of fact is best positioned to view the witnesses and to observe their demeanor, gestures, and voice inflections and to use those observations to weigh credibility." *Cox Paving, Inc. v. Indell Constr. Corp.*, 4th Dist. No. 08CA11 at ¶11, citing *Myers v. Garson* (1993), 66 Ohio St.3d 610, 615, 614 N.E.2d 742; *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.



{¶14} Here, the magistrate found Appellant's version of events to be less credible than Appellee's version. Under the particular circumstances of the case, we cannot say the trial court, which adopted the magistrate's decision, abused its discretion in determining that Appellant entered into the premarital agreement with full knowledge and without fraud, duress, coercion or overreaching. Accordingly, Appellant's first assignment of error is overruled.

#### IV. Second Assignment of Error

{¶15} In her second assignment of error, Appellant argues the trial court erred in determining the funds used to construct the residence in question were Appellee's separate property. Instead, she states that money, and thus the home itself, should have been classified as marital property.

{¶16} Funding for the construction of the home ultimately came from Appellee's grandmother, Mary Niceswanger, and his great-aunt, Alice Lauer. Melvin Barth testified that he formulated a plan to transfer the funds from Niceswanger and Lauer to Appellee in an attempt to reduce federal gift tax, which is why there were multiple transfers, to multiple parties, in \$10,000 increments. A total of \$190,000 was transferred for the building of the residence. Most of that money was deposited, at some point, in two accounts held jointly by Appellant and Appellee.

{¶17} During the proceedings below, the trial court examined the various deposit slips and transactions in order to determine the intended recipient. The court found that Appellee was the intended recipient of all the funds except for \$30,000. The court found Appellant was the intended recipient of the \$30,000 because of the three \$10,000 transactions in which she was specifically named.

{¶18} The crux of Appellant's argument is that the donators' intent cannot be determined solely from the deposit slips, and because almost all the transfers were made into accounts which were held jointly by Appellant and Appellee, the money was marital property, not separate. However, because the exhibits upon which the trial court based its decision are not in the record before us, we are unable to consider the argument.

{¶19} It is an appellant's responsibility to provide the appellate court with a record of all evidentiary matters which are necessary to support his or her assignments of error. *State v. Kimes*, 4th Dist. No. 02CA11, 2003-Ohio-3752, at ¶17; *Volodkevich v. Volodkevich* (1989), 48 Ohio App.3d 313, 314, 549 N.E.2d 1237, 1238. Because of the absence of the relevant exhibits in the record before us, unlike the trial court, we are unable to review the multiple deposit slips and the various transactions. Accordingly, we are unable to undertake a meaningful review of the trial court's determination

that Appellee was the intended recipients of the majority of the funds and, thus, that the funds were his separate property. Because the missing exhibits are necessary for the resolution of this assignment of error, we must defer to the trial court and presume the validity of the decision below. *State v. Burkhart*, 4th Dist. No. 08CA22, 2009-Ohio-1847, at ¶24; *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. As such, Appellant's second assignment of error is overruled.

#### V. Conclusion

{¶20} For the foregoing reasons, we overrule both of Appellant's assignments of error. Because the validity of the premarital agreement was an issue fact, and because the court below was in a better position to weigh witness testimony and credibility, we cannot conclude the trial court abused its discretion in enforcing the agreement. Further, because the record lacks the exhibits necessary for us to conduct a meaningful review of Appellant's second assignment of error, we must presume the validity of the decision below. Accordingly, the trial court's decision is affirmed.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of the Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Kline, J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY: \_\_\_\_\_  
Judge Matthew W. McFarland  
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**