**[Cite as *Reid v. Daniel,* 2015-Ohio-2423.]**

**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**MONTGOMERY COUNTY**

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| WORRELL A. REID, et al. | : | |
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| *Plaintiffs-Appellees* | : | Appellate Case No. 26494 |
| | : | |
| v. | : | Trial Court Case No. 2014-MSC-196 |
| | : | |
| GAYLE DANIEL, et al. | : | (Appeal from Probate Court) |
| | : | |
| *Defendants-Appellants* | : | |
| | : | |

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O P I N I O N

Rendered on the 19th day of June, 2015.

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WELBAUM, J.

**{¶ 1}** In this case, Defendant-Appellant, Gayle Daniel, appeals from a partial summary judgment granted in favor of Plaintiffs-Appellees, Worrell A. Reid, Administrator of the Estate of Qulo Daniel, Misti Scales, and Derrick Daniel, Sr.[1] In support of her appeal, Gayle contends that the trial court erred in granting partial summary judgment to Appellees because proper service was not achieved, and because Appellees should be estopped from claiming that a prenuptial agreement between Gayle and Qulo is binding on Gayle.

**{¶ 2}** We conclude that the trial court did not err in finding that the certified mail service was proper. In addition, the trial court did not err in refusing to apply equitable estoppel, because the record is devoid of any misrepresentation made by the administrator of the decedent's estate. Finally, Gayle provided evidence only of potential fraud in the inducement of the prenuptial agreement, which does not provide a basis for avoiding the effect of the limitations period contained in R.C. 2106.22. Because Gayle failed to file an action challenging the prenuptial agreement within the time period outlined in R.C. 2106.22, she is bound by the terms of the agreement. Accordingly, the judgment of the trial court will be affirmed.

## I. Facts and Course of Proceedings

**{¶ 3}** Most of the facts set forth below were undisputed. However, if facts were disputed and are relevant, we will so indicate; otherwise, the facts that we will recite were

[1] Because two of the parties, as well as the decedent, have the same last name, we will refer to these individuals by their first names. We will also refer to the Plaintiffs-Appellees, collectively, as "Appellees."

not disputed in the trial court.

**{¶ 4}** According to the evidence below, Gayle and Qulo were married on February 9, 2001. At the time, Qulo had two children from a prior marriage. On February 8, 2001, Gayle and Qulo signed a prenuptial agreement in consideration of their contemplated marriage. Among other terms, the agreement contained the following provisions:

> 9. DEATH. Each party agrees that if he or she survives the death of the other, such party will make no claim to any part of the real or personal estate or property of the other. In consideration of such promise and in consideration of the contemplated marriage, each party knowingly, intentionally, and voluntarily waives and relinquishes any right of dower, curtesy, homestead, inheritance, descent, distributive share or other statutory or legal right, now or subsequently created, to share in the distribution of the estate of the other party as surviving spouse. The parties agree that it is their intention that neither one shall have or acquire any right, title, or claim in and to the real or personal estate or property of the other by virtue of such marriage. The estate of each in the property now owned by either of them, or acquired after the date of marriage by either of them, shall descend to or vest in his or her heirs at law, legatees or devisees, as may be prescribed by his or her Last Will and Testament or by the law of the State where the decedent lives at the time of death, as if no marriage had taken place between them.
>
> 10. REVOCATION. If the parties decide to revoke this Agreement, they shall do so in a written agreement, signed by both parties in the presence of

> a notary public or other official authorized to take oaths. Such revocation shall be ineffective until recorded with the recorder in the county where the parties maintain their primary residence or both counties if the parties are maintaining separate residence in separate counties.

Exhibit B attached to Complaint for Declaratory Judgment, p. 5.[2]

**{¶ 5}** Qulo died intestate on May 15, 2013. The prenuptial agreement was never revoked before his death by the filing of a written agreement with the recorder of Montgomery County, where the parties lived until Qulo's death. On December 21, 2013, Worrell Reid was appointed administrator of Qulo's estate, and a citation to surviving spouse to exercise elective rights was sent to Gayle by certified mail, at the address where she and Qulo lived, i.e., 2800 Oxford Avenue, Dayton, Ohio. Gayle's adult daughter, LaToya Hindsman, signed for the certified mail, but did not give the mail to Gayle.

**{¶ 6}** On December 21, 2013, Reid sent an email to an attorney, Paul Courtney, informing him that he had been appointed administrator for Qulo's estate, At the time, it appeared that Courtney and another attorney, Jeff Slyman, would be representing Gayle in connection with the estate. However, by December 31, 2013, Reid had been notified that neither Courtney nor Slyman would be representing Gayle. Gayle subsequently called Reid and indicated that she would be representing herself.

**{¶ 7}** On or about February 22, 2014, Reid sent a proposed settlement agreement to Gayle, Misti, and Derrick. The agreement indicated that the estate took the position

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[2] There is no dispute that Exhibit B is an accurate copy of the prenuptial agreement that Gayle delivered to Appellees pursuant to a subpoena. It is also undisputed that the original document has not been found.

that the prenuptial agreement between Gayle and Qulo was valid. Reid also told all parties that they could, and should, consult with their own attorneys. As soon as Gayle discovered that Reid was "going to use the premarital agreement against" her, she retained counsel. Affidavit of Gayle Hindsman Daniel, ¶ 22, attached to Defendant's Response to Plaintiff's Motion for Summary Judgment.

**{¶ 8}** On May 21, 2014, Gayle filed a "Notice of Intent to Contest Premarital Agreement" in the probate court action. Subsequently, Appellees filed a complaint for declaratory judgment in the probate court against the following individuals or companies: Gayle; Metropolitan Life Insurance Company (which had allegedly distributed the proceeds of a life insurance policy to Gayle); Latoya Hindsman (who, along with Gayle, was allegedly living in the premises at 2800 Oxford Avenue); and Gregory Brush, Clerk of Courts (who had allegedly improperly transferred title to a 1998 Dodge Ram pickup truck to Gayle).

**{¶ 9}** The case was originally removed to federal court by Metropolitan Life, but was then remanded to state court after Metropolitan Life was dismissed from the action. A default judgment was also rendered in the state court proceedings against LaToya. In late August 2014, Appellees filed a motion for partial summary judgment against Gayle, contending that she had failed to timely file an action to contest the validity of the prenuptial agreement, and had not timely filed a motion for an extension of time to do so. On October 28, 2014, the trial court filed a Civ.R. 54(B) judgment, granting Appellees' motion for partial summary judgment, and declaring that the prenuptial agreement was valid. This appeal followed.

II. Did the Trial Court Err in Granting Summary Judgment to Appellees?

**{¶ 10}** Gayle's sole assignment of error states that:

The Trial Court Erred in Granting Partial Summary Judgment.

**{¶ 11}** Under this assignment of error, Gayle makes three primary points: (1) she was never properly served with, and never received, the citation to surviving spouse to exercise elective rights; (2) the administrator of the estate should be estopped from challenging the timing of the notice of intent to contest the prenuptial agreement, because the administrator induced Gayle to try and reach a settlement without advising her that her time to contest the prenuptial agreement was expiring; and (3) the prenuptial agreement was invalid because a full disclosure of assets and liabilities was not made. We will address these arguments separately.

A. Service of the Citation

**{¶ 12}** R.C. Chapter 2106 outlines the rights of surviving spouses. In this regard, R.C. 2106.25 states that:

> Unless otherwise specified by a provision of the Revised Code or this section, a surviving spouse shall exercise all rights under Chapter 2106. of the Revised Code within five months of the initial appointment of an executor or administrator of the estate. It is conclusively presumed that a surviving spouse has waived any right not exercised within that five-month period or within any longer period of time allowed by the court pursuant to this section. Upon the filing of a motion to extend the time for exercising a right under Chapter 2106. of the Revised Code and for good cause shown,

> the court may allow further time for exercising the right that is the subject of the motion.

**{¶ 13}** One of the rights granted to surviving spouses under R.C. Chapter 2106 is the right to challenge the validity of antenuptial or separation agreements. See R.C. 2106.22. However, R.C. 2106.22 provides for a shorter limitations period than R.C. 2106.25. In this regard, R.C. 2106.22 states that:

> Any antenuptial or separation agreement to which a decedent was a party is valid unless an action to set it aside is commenced within four months after the appointment of the executor or administrator of the estate of the decedent, or unless, within the four-month period, the validity of the agreement otherwise is attacked.

**{¶ 14}** Thus, in this case, Gayle would have been required to file an action to set aside the prenuptial agreement within four months after Reid was appointed administrator of the estate, or by April 21, 2014. However, Gayle failed to do so. As was noted, Gayle's excuse is that she was not properly served with notice of her rights under R.C. Chapter 2106.

**{¶ 15}** With respect to elections by a surviving spouse, R.C. 2106.01 provides, in pertinent part, that:

> (A) After the initial appointment of an administrator or executor of the estate, the probate court shall issue a citation to the surviving spouse, if any is living at the time of the issuance of the citation, to elect whether to exercise the surviving spouse's rights under Chapter 2106. of the Revised Code, including, after the probate of a will, the right to elect to take under the

will or under section 2105.06 of the Revised Code.

A surviving spouse may waive the service of the citation required under this division by filing in the probate court a written waiver of the citation. The waiver shall include an acknowledgment of receipt of the description of the general rights of the surviving spouse required by division (B) of section 2106.02 of the Revised Code.

* * *

(E) The election of a surviving spouse to take under a will or under section 2105.06 of the Revised Code may be made at any time after the death of the decedent, but the surviving spouse shall not make the election later than five months from the date of the initial appointment of an administrator or executor of the estate. On a motion filed before the expiration of the five-month period, and for good cause shown, the court may allow further time for the making of the election. If no action is taken by the surviving spouse before the expiration of the five-month period, it is conclusively presumed that the surviving spouse elects to take under the will. The election shall be entered on the journal of the court.

**{¶ 16}** R.C. 2106.02(A) provides that "[t]he citation to make the election referred to in section 2106.01 of the Revised Code shall be served on the surviving spouse pursuant to Civil Rule 73." Under Civ.R. 73(E), service of notices may be made by various methods, including certified mail "addressed to the person to be served at the person's usual place of residence * * *." Civ.R. 73(E)(3).

**{¶ 17}** In addition, R.C. 2106.02(B) states that:

> The citation shall be accompanied by a general description of the effect of the election to take under the will or under section 2105.06 of the Revised Code and the general rights of the surviving spouse under Chapter 2106. of the Revised Code.

**{¶ 18}** In the case before us, service of the citation was made by certified mail addressed to Gayle at her usual place of residence, i.e., 2800 Oxford Avenue, Dayton, Ohio. It also stated Gayle's rights under Chapter 2106, including the right to file an action to set aside the prenuptial agreement.

**{¶ 19}** Gayle does not contest this; instead, her challenge is based on the fact that her adult daughter, LaToya, signed for the certified mail and did not give it to her. However, this is not an excuse for failing to timely file an election. *See In re Estate of Riley*, 165 Ohio App.3d 471, 2006-Ohio-956, 847 N.E.2d 22, ¶ 19-25 (4th Dist.) (finding that a surviving spouse had waived her right to make an election where her son had signed for certified mail service and had failed to give her the documents. Despite this fact, the surviving spouse's untimely election was not honored, and the spouse was conclusively presumed to elect to take pursuant to the will.)

**{¶ 20}** The trial court rejected Gayle's position, by first holding that service of a citation was no longer either "a triggering or a tolling event in the statutory scheme setting forth the limitations periods to exercise elective rights." Entry Denying Motion to Strike; Granting Motion for Partial Summary Judgment; Declaring Validity of Prenuptial Agreement, p. 8. The basis for this conclusion was that service of the citation had been removed as a triggering event from R.C. 2106.01 (formerly R.C. 2107.39), when the statute was amended in 2001. Instead, the "triggering event" became appointment of

the fiduciary. *Id.*

**{¶ 21}** In addition, the trial court went on to conclude that even if a failure of service could toll the limitations period in R.C. 2106.22, there was no failure of service. We agree with the trial court that Gayle was properly served. Since the statute clearly provides that an action challenging the validity of a prenuptial agreement must be filed within four months of the appointment of the fiduciary, and Gayle was given notice by certified mail of her right to do so, we agree with the trial court that Gayle cannot challenge the validity of the prenuptial agreement.

**{¶ 22}** As was noted, R.C. 2106.02(A) allows service of the citation to be made pursuant to Civ.R. 73. Under Civ.R. 73(E):

> In any proceeding where any type of notice other than service of summons is required by law or deemed necessary by the court, and the statute providing for notice neither directs nor authorizes the court to direct the manner of its service, notice shall be given in writing and may be served by or on behalf of any interested party without court intervention by one of the following methods:
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> * * *
>
> (3) By United States certified or express mail return receipt requested, or by a commercial carrier service utilizing any form of delivery requiring a signed receipt, addressed to the person to be served at the person's usual place of residence with instructions to the delivering postal employee or to the carrier to show to whom delivered, date of delivery, and address where delivered, provided that the certified or express mail

> envelope or return of the commercial carrier is not returned showing failure of delivery * * *.

**{¶ 23}** "If a plaintiff follows the Ohio Rules of Civil Procedure that govern service of process, a presumption of proper service arises. * * * A defendant can rebut the presumption of proper service with sufficient evidence that service was not accomplished." *Adams, Babner & Gitlitz, L.L.C. v. Tartan Dev. Co. (West)*, 10th Dist. Franklin No. 12AP-729, 2013-Ohio-1573, ¶ 10, citing *Erin Capital Mgt. LLC v. Fournier*, 10th Dist. Franklin No. 11AP-483, 2012-Ohio-939, ¶ 18-19. In *Tartan Dev. Co*., the court of appeals also noted that:

> Service of process fails if it does not comply with the requirements of due process. *Akron–Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403 (1980), syllabus. Due process requires service to be " 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Id.* at 406, quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Consequently, a defendant may rebut the presumption of proper service by establishing that the plaintiff failed to direct service to an address where it would be "reasonably calculated" to reach a person or entity that may be served under Civ.R. 4.2. *See Fournier* at ¶ 19.

*Id.*

**{¶ 24}** In her brief, Gayle argues that the certified mail service was not proper, because it was accepted by her daughter, who had not lived at her residence for a year.

However, Gayle never stated in her affidavit that her daughter lacked authority to pick up her mail, and this was a distinction found relevant in *Riley*. *See Riley*, 165 Ohio App.3d 471, 2006-Ohio-956, 847 N.E.2d 22, at ¶ 22 and fn. 8. In *Riley*, the court of appeals stressed that "someone other than the person on whom service is to be made may sign the receipt." *Id.* at ¶ 19, citing *Mitchell v. Mitchell*, 64 Ohio St.2d 49, 413 N.E.2d 1182 (1980), paragraph one of the syllabus. (Other citation omitted.) *See also, Rita Ann Distrib. v. Brown Drug Co*., 164 Ohio App.3d 145, 2005-Ohio-5786, 841 N.E.2d 400, ¶ 18 (2d Dist.), and *New v. All Transp. Solution, Inc.*, 177 Ohio App.3d 620, 2008-Ohio-3949, 895 N.E.2d 606, ¶ 11 (10th Dist.) (both noting that delivery need not be restricted to a particular person authorized by law to receive service of process).

**{¶ 25}** In *New,* the Tenth District Court of Appeals stressed that:

> We have never held – and we are not aware of any controlling authority that has held – that certified mail must be delivered to and signed for by the person to whom it is addressed, whether the defendant is an individual, a corporation, or other legal entity.

*Id.*

**{¶ 26}** In view of the undisputed evidence that the certified mail was delivered to the address where Gayle resided, and was signed for by an adult person at the address, the trial court did not err in concluding that the certified mail service on Gayle was proper.

B. Estoppel

**{¶ 27}** Gayle's second argument is that Appellees should be estopped from claiming that the prenuptial agreement is valid because the administrator, Reid, induced

her to attempt to reach a settlement without informing her that the time to consent to the agreement's validity was expiring.

**{¶ 28}** In *Hutchinson v. Wenzke*, 131 Ohio App.3d 613, 723 N.E.2d 176 (2d Dist.1999), we observed that:

> Equitable estoppel precludes a party from asserting certain facts where the party, by his conduct, has induced another to change his position in good-faith reliance upon that conduct. *State ex rel. Cities Serv. Oil Co. v. Orteca* (1980), 63 Ohio St.2d 295, 299, 17 O.O.3d 189, 191-192, 409 N.E.2d 1018, 1020-1021. The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145, 555 N.E.2d 630, 633.
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> "A prima facie case for equitable estoppel requires a plaintiff to prove four elements: (1) that the defendant made a factual misrepresentation; (2) that it is misleading; (3) [that it induced] actual reliance which is reasonable and in good faith; and (4) [that the reliance caused] detriment to the relying party." *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369, 379, 607 N.E.2d 492, 498.

*Id.* at 616.

**{¶ 29}** In the case before us, the record is devoid of any factual misrepresentation made by Reid, nor is there evidence that any representation of Reid was misleading. Reid attempted to arrange a settlement among the parties, by sending a proposed settlement agreement to them around February 22, 2014 – which was almost two months

before the limitations period expired. In the proposed settlement, Reid clearly informed Gayle of his position that the prenuptial agreement was valid, and of the fact that all parties should consult an attorney. Gayle's affidavit also states that as soon as she was informed that Reid was asserting the validity of the prenuptial agreement, she consulted an attorney. This would have been prior to the expiration of the limitations period. Accordingly, there is no evidence of any factual misrepresentation that was misleading to Gayle, nor is there any representation upon which Gayle could have even arguably relied.

**{¶ 30}** Furthermore, even before Gayle was represented by an attorney, she was presumed to know the law. "Litigants who choose to proceed pro se are presumed to know the law and correct procedure, and are held to the same standards as other litigants." *Yocum v. Means*, 2d Dist. Darke No. 1576, 2002-Ohio-3803, ¶ 20, citing *Kilroy v. B.H. Lakeshore Co.*, 111 Ohio App.3d 357, 363, 676 N.E.2d 171 (8th Dist.1996). As a result, like any other litigant, Gayle was required to file an action challenging the validity of the prenuptial agreement within four months after the administrator was appointed. Again, she failed to do so.

**{¶ 31}** Accordingly, we conclude that the trial court did not err in refusing to apply equitable estoppel.

C. Validity of Prenuptial Agreement

**{¶ 32}** Gayle's final argument is that the prenuptial agreement is invalid because Qulo failed to make full disclosure of his assets and liabilities when they entered into the agreement. As was previously noted, R.C. 2106.22 provides that:

> Any antenuptial or separation agreement to which a decedent was a party is valid unless an action to set it aside is commenced within four months after the appointment of the executor or administrator of the estate of the decedent, or unless, within the four-month period, the validity of the agreement otherwise is attacked.

**{¶ 33}** As a general rule, "[s]tatutes of limitations seek to prescribe a reasonable period of time in which an injured party may assert a claim, after which the statute forecloses the claim and provides repose for the potential defendant." *Liddell v. SCA Serv. of Ohio, Inc.*, 70 Ohio St.3d 6, 10, 635 N.E.2d 1233 (1994). In *Liddell,* the court stressed that "the rationale underlying these statutes [is] fourfold: 'to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases.' " *Id*., quoting *O'Stricker v. Jim Walter Corp*., 4 Ohio St.3d 84, 88, 447 N.E.2d 727 (1983).

**{¶ 34}** In 1954, the Supreme Court of Ohio held that "an action for disaffirmance or rescission by such surviving spouse must be commenced within the period of time prescribed by this statute, or be forever barred." *Burlovic v. Farmer*, 162 Ohio St. 46, 50, 120 N.E.2d 705 (1954), citing G.C. 10512-3 (a predecessor statute to R.C. 2106.22).[3] In *Burlovic*, a surviving spouse attempted to attack the validity of a separation agreement based on the fact that she was a minor when the agreement was signed, and the

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[3] The wording of the statute has remained consistent up to the present time, although the time frames have been somewhat different. For example, in 1954, G.C. 10512-3 allowed actions to be filed within six months after the appointment of the administrator or executor. *Burlovic* at 49. However, the content of the statute has otherwise remained unchanged.

agreement, therefore, would have been voidable. *Id.* The Supreme Court of Ohio rejected this argument, finding nothing in the statute to suggest that the limitations period lacked universal application, even to persons under disability. *Id.* at 51. As a result, the court held that the surviving spouse was bound by the separation agreement she had signed. In addition, the court noted that:

> There is no claim made in the instant case nor does the record support one that any fraud in the executing of the separation agreement as distinguished from fraud in its inducement was practiced upon the surviving spouse. The rule is that such an agreement even though there may be fraud in its inducement may not be set aside unless an action for that purpose is brought within the required statutory period.

*Id.* at 54, citing *Juhasz v. Juhasz*, 134 Ohio St. 257, 16 N.E.2d 117 (1938).

**{¶ 35}** Fraud in the factum (or fraud in the execution of a document) occurs "where an intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement." *Haller v. Borror Corp*., 50 Ohio St.3d 10, 13, 552 N.E.2d 207 (1990). In other words, "the act of signing itself is infected with fraud; for example, by means of the surreptitious substitution of one paper for another, or by misrepresentation of the nature of the paper when the signer has had no opportunity to read and comprehend it." (Citations omitted.) *Hodge v. Drummond*, 1st Dist. Hamilton No. C-780233, 1979 WL 208703, *2 (June 6, 1979). *See, also*, *W.K. v. Farrell*, 167 Ohio App.3d 14, 2006-Ohio-2676, 853 N.E.2d 728, ¶ 20 (2d Dist.), citing *Haller* at 14.

**{¶ 36}** The Eighth District Court of Appeals applied this doctrine to potentially

avoid the limitations period in GC 10512-3, reasoning that fraud in the factum would render the parties' antenuptial agreement "void" and "there would be no basis upon which the six months' statute of limitations could be applied * * *." *Petrich v. Petrich*, 58 Ohio Law Abs. 566, 97 N.E.2d 56, 58 (8th Dist.1950). In contrast, fraud in the inducement of a contract makes the contract voidable only. *Haller* at 14.

**{¶ 37}** In the case before us, Gayle failed to submit evidence of fraud in the factum, or execution of the document. Instead, Gayle's claim was based on Qulo's failure to fully disclose his assets and liabilities. This raises fraud in the inducement, which occurs "when a party is induced to enter into a contract or agreement through fraud or misrepresentation, and the fraud relates not to the nature or purport of the agreement, but to the facts inducing its execution." *Cefaratti v. Cefaratti*, 11th Dist. Lake No. 2004-L-091, 2005-Ohio-6895, ¶ 28, citing *Haller* at 14. Specifically, "[i]n order to prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment." *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 502, 692 N.E.2d 574 (1998), citing *Beer v. Griffith*, 61 Ohio St.2d 119, 399 N.E.2d 1227 (1980).

**{¶ 38}** The fact that the prenuptial agreement may have been voidable, upon proper proof, does not allow Gayle to avoid the bar of the limitations period and to challenge the agreement's validity. Accordingly, the trial court did not err in concluding that Gayle was bound by the terms of the prenuptial agreement.

**{¶ 39}** Based on the preceding discussion, Gayle's sole assignment of error is overruled.

## III. Conclusion

**{¶ 40}** Gayle's sole assignment of error having been overruled, the judgment of the trial court is affirmed.

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DONOVAN, J. and HALL, J., concur.

Copies mailed to:

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