[Cite as *Church v. Church*, 2003-Ohio-3281.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

KIMBERLY CHURCH,	)	
	)	CASE NO. 302
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JAMES CHURCH,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Domestic Relations Division, Case No. 201-0101.

JUDGMENT: Affirmed in part; Reversed in part and Remanded.

APPEARANCES:

For Plaintiff-Appellee: Attorney Michael Buell
322 Third Street
Marietta, Ohio 45750

For Defendant-Appellant: Attorney Marc Dann
127 Churchill-Hubbard Road, Suite D
Youngstown, Ohio 44505

JUDGES:

Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 19, 2003

VUKOVICH, J.

{¶1} Defendant-appellant James Church appeals the decision of the Noble County Common Pleas Court, Domestic Relations Division, entered in the divorce action between himself and plaintiff-appellee Kimberly Church. The first issue concerns whether the court's decision to grant custody to Ms. Church was in the children's best interests. The second issue deals with the court's interpretation of a prenuptial agreement which covered the residence and surrounding land purchased by Mr. Church prior to marriage. For the following reasons, the custody order is affirmed. However, the court's interpretation of the prenuptial agreement is reversed and remanded.

STATEMENT OF FACTS

{¶2} In October 1989, Mr. Church purchased at public auction 232 acres including a residence on Marietta Road in Noble County, all for $62,000. He put 10 percent or $6,200 down and took out a mortgage on the remainder. The parties met in the spring of 1990 and were engaged in November of that year. Before getting married, Mr. Church remodeled the downstairs by ripping out the plaster and hiring someone to install drywall. Some painting and wallpapering was also complete prior to marriage.

{¶3} Mr. Church testified that at the time of the engagement, he asked her to sign a prenuptial agreement regarding his farm because he witnessed too many friends lose their premarital farms after a divorce. Ms. Church admitted that he asked and that she agreed to sign sometime while she was making wedding plans, specifically at a time when she was looking for a reception hall. She also concedes that Mr. Church never met the lawyer before he called him on the phone to have him draw up the agreement and only met him in person on April 19, 1991, the day before the wedding when they both went in to sign the agreement. This prenuptial agreement provides in pertinent part as follows:

{¶4} "Whereas, James is now seized and possessed of real property in his own right, and each party has full knowledge of the nature, extent, and probable value of all aforesaid property presently owned by the other; and

{¶5} "Whereas, Kimberly does desire and intend to, and does, waive, renounce, and relinquish any and all rights she may be entitled to, under the law, as a spouse in the real property and residence of James located and situated at 54091 Marietta Road, Pleasant City, Ohio by virtue of entering into aforesaid proposed marriage.

{¶6} "Now, therefore, in consideration of the proposed marriage and forgoing premises, and mutual promises, the parties agree as follows:

{¶7} "1. The parties agree that in the event that a decree of divorce or dissolution be entered in a proceeding between them that James may have an obligation under such decree to pay reasonable alimony or support to Kimberly. In the event that a decree so provides, it is hereby agreed that Kimberly shall not be entitled to receive alimony, either property division or sustenance, or support, from the real estate previously described, and she hereby waives any and all rights to the same.

{¶8} "2. Kimberly acknowledges that James has fully disclosed his ownership in the above described farm, said value being approximately $75,000.00 at the time of the marriage with an outstanding mortgage obligation of approximately $60,000.00."

{¶9} The Churches had two children, one in 1993 and one in 1994. In September 1994, the five year balloon on the original mortgage was due; so Mr. Church refinanced the realty for $57,900. During the marriage, Mr. Church tore down an old barn and excavated a new driveway by borrowing his friend's bulldozer and buying $700 worth of slag. He also spent $1,200 on replacing fences. A second

mortgage was obtained for $17,900 in order to refurbish the roof, basement, front porch, and landscaping.

{¶10} On October 24, 2001, Ms. Church filed a complaint for divorce. In the complaint, she sought custody of the children and alleged that the prenuptial agreement was invalid because she was not represented by an attorney. Mr. Church answered and counterclaimed seeking custody of the children and arguing that he fully disclosed his ownership of the farm. In her reply to the counterclaim, Ms. Church repeated that she was without counsel and added that the prenuptial agreement was signed without full disclosure. A hearing proceeded before the court on March 27, 2002. An appraisal was admitted establishing that Mr. Church's realty was now worth $209,000. Both parties filed proposed findings of fact and conclusions of law.

{¶11} On August 12, 2002, the court released its judgment granting custody to Ms. Church. The court found the prenuptial agreement to be valid. However, the court interpreted the agreement's language in such a way that Ms. Church received half of the equity in the land minus the $6,200 down payment originally paid by Mr. Church. Thus, she was awarded over $70,000 from the sale of the land if Mr. Church could not otherwise raise the money. The court found: "The Agreement, by its express terms only speaks to spousal support, not property division. There is no language indicating that, in the event of a divorce, the wife is not entitled to an equitable distribution of the property accumulated during the marriage, including the marital portion of the real estate." The court concluded that the waiver was ambiguous and that the ambiguity must be resolved against Mr. Church, stating: "The language here is not clear that she would given up her right to an equitable division of marital property. The language only states that spousal support cannot be satisfied from such asset."

{¶12} Mr. Church filed timely notice of appeal on September 10, 2002. The case was not fully briefed until mid-March 2003. Mr. Church sets forth two assignments of error on appeal.

ASSIGNMENT OF ERROR NUMBER ONE

{¶13} Mr. Church's first assignment of error asks:

{¶14} "WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CUSTODY OF THE PARTIES' TWO MINOR CHILDREN TO APPELLEE."

{¶15} Mr. Church argues that the evidence clearly shows that it would be in the children's best interests to have him appointed the residential parent. In awarding custody, the court is to determine the children's best interests. R.C. 3109.04(B)(1). Best interests are determined by considering relevant factors including, but not limited to: the parents' wishes, the children's wishes if mentioned in an in camera interview, the interaction and interrelationship with parents and others, the adjustment to home, school, and community, their mental and physical health, and whether one parent is more likely to honor visitation rights. R.C. 3109.04(F)(1).

{¶16} In arguing best interests, he claims that Ms. Church has abused alcohol and exposed the children to an unsuitable environment. He then complains about the condition of Ms. Church's parents' house, where the children are now staying in Washington County. He notes that they should live in the house where they grew up in Noble County. Mr. Church alleges that Ms. Church has improperly disciplined the children by threatening them. He then argues that her religious beliefs threaten to mentally injure the children. He relates one example where Ms. Church covered all the windows in black plastic based on a religious belief that a cataclysmic event would occur. Mr. Church concludes that he is more stable.

{¶17} In making its custody determination, the trial court noted that Ms. Church was the primary caretaker throughout the children's lives. The court opined: "Mr. Church's allegations were basically groundless and highly exaggerated. Many accusations were unsubstantiated by any evidence." The court noted that Mr. Church's prior jobs required him to leave the state for days at a time and that he has only been at his current job, which has more regular hours, for less than a year. The court found that Ms. Church has employment only during school hours, whereas Mr. Church leaves before the children leave for school and returns after they get home. With regards to the children's present home, the court pointed out that the Washington County Children Services Board conducted an investigation based upon Mr. Church's complaints and found no problems that called for their intervention. In fact, a caseworker testified as to the bonding between the children and their mother and grandparents. The caseworker also testified that Ms. Church's discipline methods were appropriate.

{¶18} It is well-settled that a trial court has broad discretion in its determination of parental custody rights. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. A custody decision that is supported by some competent and credible evidence will not be reversed absent an abuse of discretion. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23. An abuse of discretion entails a decision that is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Specifically, the Supreme Court has advised that the trial court's discretion in custody matters "should be accorded the utmost respect, given the nature of the proceedings and the impact that court's determination will have on the lives of the parties concerned." *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. As in other cases, the trial court occupies the best position from which to view the credibility of the witnesses. See *Seasons Coal*

Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80. Much is evident in a child custody case from demeanor and attitude which does not translate into the record well. *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418.

{¶19} Here, there existed some competent, credible evidence that would support a best interests determination in favor of Ms. Church. The trial court did not abuse its discretion naming Ms. Church as the residential parent. The trial court made its own credibility determinations and weighed the evidence in favor of Ms. Church. We cannot second-guess this judgment. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶20} Mr. Church's second and final assignment of error queries:

{¶21} "WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW TO THE PREJUDICE OF APPELLANT, BY MISAPPLYING THE RULES GOVERNING THE CONSTRUCTION AND INTERPRETATION OF CONTRACTS."

{¶22} Mr. Church focuses on the introductory paragraphs in the prenuptial agreement, which, as Ms. Church concedes, appear to waive any claim to the farm. Ms. Church, on the other hand, focuses on the paragraph labeled with the number one and argues that the trial court correctly ruled that this paragraph only prohibits her from receiving any part of the farm as spousal support but does not preclude her from receiving half of it in the property division.

{¶23} It is clear that the paragraph labeled with the number one precludes Ms. Church from making *any* claim to the farm, whether as spousal support *or* in a division of property. It appears that the word "alimony" may have thrown the trial court off track. It is well-established that the word alimony, which is no longer used in current domestic relations orders, is comprised of two components. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 95; *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 352.

Alimony entails both: (1) periodic payments for sustenance and support; and (2) a division of marital assets and liabilities. Id. In fact, the court should have realized and discovered this definition of the word alimony when the paragraph in question specifically stated, "shall not be entitled to receive alimony, *either property division or* sustenance, or support from the real estate previously described, and she hereby waives any and all rights to same." (Emphasis added.) Property division is explicitly mentioned.

{¶24} As such, Mr. Church correctly argues that the trial court's interpretation of the prenuptial agreement was erroneous as a matter of law. Thus, this assignment of error has merit. The trial court's decision is reversed and remanded for a new order of property division and spousal support if any. See *Kaechele*, 35 Ohio St.3d at 95 (noting that property division must be properly accomplished prior to making a decision on spousal support); *Young v. Young* (Sept. 21, 2001), 7th Dist. No. 00CO43 (stating that when property division is reversed, the court may need to reevaluate its spousal support order on remand).

{¶25} Ms. Church's brief divided her response to this assignment of error into two separate issues. The first issue was addressed above. The second issue revolves around her argument that Mr. Church failed to meet his burden of proving that she entered into the agreement with full disclosure of the value of the property. She states that incomplete disclosure can be inferred because in 1991 he disclosed the value as $75,000, but in 2002, the realty was appraised at $209,400. She also notes that she did not have separate counsel and she signed the agreement the day before the wedding.

{¶26} Ms. Church notes that she raised this issue in her proposed findings of fact and conclusions of law. She attempts to claim that "The trial court did not reach

this issue because it determined that Ms. Church was entitled to half the value of the appreciation of the property. Likewise this issue is moot if this Court finds Ms. Church is entitled to half of the appreciation of the real estate."

{¶27} However, this argument is misguided. The trial court actually and necessarily reached this issue. Firstly, a court cannot interpret the language of the agreement (to find that it did not apply to property division but did apply to spousal support) if the agreement was invalid for any reason. Rather, the court must find the agreement enforceable before it can interpret and enforce the agreement.

{¶28} Second, just before interpreting and applying the prenuptial agreement, the trial court expressly found:

{¶29} "11. On April 9, 1991, the day before the parties' marriage, they entered into a Prenuptial Agreement, the validity of which is herein challenged.

{¶30} "12. Each party was of legal age at the time. Each party was literate and had opportunity to read the agreement before executing it. Each party signed that agreement. The parties are bound by that agreement."

{¶31} As such, the trial court explicitly refused to invalidate the agreement as urged by Ms. Church. Furthermore, contrary to Ms. Church's suggestion that we infer a lack of disclosure due to the large value increase in approximately twelve years, the trial court found that Mr. Church purchased the property at auction in 1989 for $62,000 and concluded "[n]o appraisal was presented as to the value of the property at the time of the marriage, however, the purchase price at public auction would be a good indication." Thus, the trial court disagreed that the property was worth $209,400 when the prenuptial agreement was entered. Mr. Church disclosed the value was $75,000 with a $60,000 mortgage; he based this on his recent purchase for $62,000, which he believed to be true and fairly accurate indication of the value.

{¶32} Additionally, Ms. Church did not file a cross-appeal of this decision. App.R. 3(C) provides:

{¶33} "(1) Cross appeal required. A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order, shall file a notice of cross appeal within the time allowed by App.R. 4.

{¶34} "(2) Cross appeal not required. A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal."

{¶35} Here, Ms. Church may not believe she is trying to change the court's judgment. Yet, the court's judgment was that the prenuptial agreement was valid, and she argues that the agreement was invalid. Just because she *believes* the result (of her receiving $70,000) would be the same under her invalidity argument as it would under the trial court's interpretation the agreement, does not mean that she is not trying to change the judgment.

{¶36} In any event, the result would not be the same because if the prenuptial agreement was invalidated as she desires, then she would still barely receive any equity in the realty because according to her argument, it was worth much more when she married Mr. Church and thus such value was premarital, separate property. Even the increases in value to the house during marriage were mostly financed with a second mortgage which is still owed. Additionally, any passive appreciation during marriage due to an increase in property value is nonmarital. See R.C. 3105.171(A)(3) and (6).

{¶37} Even if she were not required to file a notice of appeal and instead could raise her argument under App.R. 3(C), her argument fails under the analysis set forth above. That is, the trial court found that the agreement was validly entered and that full disclosure of the value was made; yet, Ms. Church does not argue that the trial court erred.

{¶38} In any case, the validity of a prenuptial agreement is a question of fact best left to the trial court. *Bisker v. Bisker* (1994), 69 Ohio St.3d 608, 609. In fact, in her proposed findings of fact and conclusions of law, she specifically stated that the court can come to "one of two reasonable conclusions:" the $75,000 value set forth in the prenuptial agreement is grossly underestimated or that value vastly increased during marriage. As such, she cannot now argue that the second conclusion is not reasonable. Id. (noting that it is paradoxical for the wife to argue that full disclosure of a pension was not made in the agreement but also argue that it was made when it benefits her). Accordingly, Ms. Church's second alternative issue (which she addressed in case we reversed on Mr. Church's second assignment of error) is without merit for all of the foregoing reasons.

{¶39} In conclusion, the trial court found the prenuptial agreement to have been validly entered. This decision is not challenged and shall stand notwithstanding the concerns of this court relative to the timing of its execution and lack of independent counsel. However, the trial court's interpretation of the prenuptial agreement is contrary to the plain language of the agreement because the word "alimony" encompasses both property division and spousal support.

{¶40} For the foregoing reasons, the decision of the trial court regarding custody is hereby affirmed, but the trial court's interpretation of the prenuptial

agreement is reversed and this case is remanded for further proceedings according to law and consistent with this Court's opinion.

Waite, P.J., and DeGenaro, J., concur.