

ORIGINAL

In the  
Supreme Court of Ohio

Steven L. Rardin,

Appellant,

v.

Estate of Diana Lynn Bain,

Appellee.

Case No. **09-1468**

MEMORANDUM IN SUPPORT OF JURISDICTION

ON APPEAL FROM THE  
OHIO COURT OF APPEALS  
SEVENTH APPELLATE JUDICIAL DISTRICT

CASE NO. 08-CA-0853

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## EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Life in Ohio, as across the United States, has evolved to the point where adults live in a variety of household arrangements. Same-sex unions have swelled the numbers of households occupied by unmarried partners. Where once the “unmarried partner” household consisted almost exclusively of one male and one female adult living together outside of wedlock, ever-changing concepts of “family” have increased the incidence of joint ownership of real estate in Ohio among unmarried partners. Indeed, as the “Baby Boomers” reach the end of their lives and their real estate holdings begin to pass to their children, siblings will become joint owners of their parents’ homesteads, whether as “willing” co-tenants or not.

The most recent United States Census Bureau figures confirm that the number of Ohio households occupied by “unmarried partners” is on the rise. In 2000, census data revealed that a total of 216,024 households in Ohio were occupied by “unmarried partners,” whether male and female or both male or both female.<sup>1</sup> Since owner-occupied housing accounts for 3,152,182, or roughly 70%, of the 4,500,621 total households estimated by the Census Bureau in projections published in 2008,<sup>2</sup> it is reasonable to assume that the total number of owner-occupied households in Ohio that are occupied by “unmarried partners,” whether one male and one female or both male or both female, is on the rise.

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<sup>1</sup> [http://factfinder.census.gov/servlet/QTable?\\_bm=y&qr\\_name=DEC\\_2000\\_SF3\\_U\\_QTP18&-geo\\_id=04000US39&-ds\\_name=DEC\\_2000\\_SF3\\_U&-redoLog=false](http://factfinder.census.gov/servlet/QTable?_bm=y&qr_name=DEC_2000_SF3_U_QTP18&-geo_id=04000US39&-ds_name=DEC_2000_SF3_U&-redoLog=false).

<sup>2</sup> [http://factfinder.census.gov/servlet/STTable?\\_bm=y&-state=st&-context=st&-qr\\_name=ACS\\_2007\\_3YR\\_G00\\_S2501&-ds\\_name=ACS\\_2007\\_3YR\\_G00\\_&-tree\\_id=3307&-redoLog=false&-\\_caller=geoselect&-geo\\_id=04000US39&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/STTable?_bm=y&-state=st&-context=st&-qr_name=ACS_2007_3YR_G00_S2501&-ds_name=ACS_2007_3YR_G00_&-tree_id=3307&-redoLog=false&-_caller=geoselect&-geo_id=04000US39&-format=&-_lang=en). The margin of error for this estimate is +/- 10,923 households, meaning that the Census Bureau projections carry a confidence level of 99.65%.

Chapter 5307 of the Ohio Revised Code recognizes the equitable right of co-tenants in real estate interests to seek partition of those interests where those co-tenants reach an impasse respecting use, maintenance, improvement, and/or disposition of the jointly owned realty.

This Court has not tackled issues pertaining to partition actions in Ohio in quite some time. For the next generation of Ohioans living in a quarter million households, therefore, one of the challenges they will face is likely to involve the process by which disputes between and among co-tenants in fee can be resolved in a civil fashion according to clearly articulated standards of review. Respectfully, the decision of the Seventh Appellate Judicial District in this case sets back the limited progress made in this area of the law since this Court last took on the issue of partition in a serious fashion.

In the absence of Supreme Court guidance in this area down the years, the various appellate judicial districts have weighed in to fill in the gaps on such questions as the burden of proof (resting with the party seeking to defeat the partition petition), the standard of proof (clear and convincing evidence), and the presumption of equal and undivided legal and equitable interests attending evidence of a co-tenant's name in the chain of title to a jointly-owned property.

In its decision in the case now before this Court, the court below acknowledged another important principle announced in yet one more of those intermediate appellate authorities, *Spector v. Giunta*, 62 Ohio App.2d 137, 405 N.E.2d 327 (1978), but then turned its attention *away* from that case after claiming that *Spector* "does not offer much guidance because it does not indicate what the nature and circumstances must show" for a co-tenant in fee to prevail on his partition action. The court in *Spector* acknowledged, first, that Ohio law

affords any co-tenant in fee a *presumption* that he or she shares an un-divided fractional interest in jointly owned real estate.<sup>3</sup> But *Spector* **also** went on to hold that a trial court must account for all “contributions” made by *each* of the co-tenants of jointly owned real estate to *both* the purchase price *and* the “expenses, repair or improvement of the property” when determining the relative equitable interests of those co-tenants while fashioning a remedy in a partition action.<sup>4</sup> The Seventh Appellate Judicial District in this case declined to follow *Spector*, instead panning this authority for the little “guidance” it supposedly offers in helping to resolve the question of how one co-tenant’s in-kind “contributions” to the maintenance, repair, and improvement of real property is to be factored when apportioning the respective proportionate equitable interests each co-tenant enjoys in the jointly-owned parcel.

The Supreme Court today is called upon to provide that guidance to the lower courts on this issue of great concern to many Ohioans both now and in the foreseeable future. In this case, for example, the evidence was *uncontroverted* with respect to both the *source* of the repairs and improvements made to the parcels at issue herein and the *value* of those repairs and improvements. Yet, the trial court *ignored* those improvements and simply concluded that the evidence supported a finding that the *presumption* of a fractional *equitable* interest had been overcome without taking *any* of those in-kind “contributions” into account.

Unmarried heterosexual couples, those living in same-sex unions, and siblings struggling to get along with each other following the death of their last surviving parent

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<sup>3</sup> *Spector v. Giunta, supra*, 62 Ohio App.2d at 141, 405 N.E.2d at 330.

<sup>4</sup> *Spector v. Giunta, supra*, 62 Ohio App.2d at 142, 405 N.E.2d at 330-31 (the value of improvements and repairs qualify as contribution to the purchase price and other equities or conflicting claims”).

should not be forced to endure the additional insult or pain that will come with not being recognized for the *value* of the repairs, improvements, and maintenance services provided for the benefit of *all* co-tenants in fee to jointly-owned real estate. The rule announced in *Spector* should **not** be ignored, as the Seventh Appellate Judicial District did in this case. Otherwise the more prosperous of two unmarried partners would be free to *exploit* the partner having fewer resources by accepting the *value* of labor and materials furnished in the course of maintaining, repairing, and improving real estate that is jointly owned without fear of ever having to share in the benefits thus conferred. While it is true that when it comes to jointly-owned real estate, it is always better if unmarried partners were to take the time to reduce the terms and conditions of any understanding they may have between them to written form, it remains that the public policy should **not** be that the rich can exploit the poor when a love affair turns to heartache.

In the case before this Court, a wealthy woman managed to realize substantial benefits to several parcels of property as a result of significant in-kind “contributions” made by her highly skilled and talented unmarried partner who virtually maintained, repaired, and improved those parcels single-handedly. Case law conferred on that unmarried partner a *presumption* of co-equal ownership of both the legal *and* equitable interests in the two parcels at issue. The question for this Court, therefore, will be whether public policy in this state will permit the wealthy unmarried female partner to retain over \$124,000.00 worth of materials and services, at fair market value, and retain *all* of the net proceeds following the sale of the parcels at issue in this case without being forced, in a partition action, to share the benefits of joint ownership . . . all because there was no written agreement confirming the

reasons for her adding her less-well-off unmarried male partner's name to the chain of title to the two parcels at issue in this case.

The eyes of unmarried couples and same-sex partners in joint ownership of real estate in this state surely should be focused on the outcome of this case. And with this case as a vehicle for confirming public policy in this state, the Supreme Court can announce once and for all that the *Spector* rule has viability and that no court in an equitable partition proceeding *ever* should be allowed to *ignore* the total value of all forms of "contributions" made to the maintenance, repair, and improvement of jointly-owned real estate and should order an equitable apportionment of the proceeds of a court-ordered liquidation of such real estate in accordance with the relative value of those "contributions," even in the absence of evidence demonstrating that the partner responsible for *purchasing* the real estate may have harbored some personal motive or unstated reason for voluntarily including his or her partner's name in the chain of title of that property.

#### STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant Stephen L. Rardin ("Rardin") commenced this action on May 25, 2004, upon filing a complaint seeking equitable relief in partition and associated injunctive relief. Following an extended period of pre-trial motion practice, including proceedings respecting disqualification of the trial judge<sup>5</sup> the death of the original defendant in this action, Diana Lynn Bain ("Bain"), and the substitution of the Estate of Diana Lynn Bain ("the Estate") as the real party in interest, the case proceeded to trial on February 15, 2007. In due

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<sup>5</sup> *In re Disqualification of William J. Martin*, Case No. 06-AP-23.

course, judgment was entered against Rardin on April 30, 2007, on his partition claim, a judgment that later was amended to stay the practical effect of the court's order since the visiting judge predicted that the outcome would be "appealed by one or both parties." Eventually, the parties entered into a stipulation whereby the balance of Rardin's claims and the Estate's counterclaims were dismissed and a final judgment was entered.

On appeal, the Seventh Appellate Judicial District affirmed the decision of the visiting judge on June 29, 2009. An application for reconsideration was overruled on August 5, 2009.

Rardin was a self-employed landscaper and general contractor when he met Diana Lynn Bain in 1994. At the time, Bain was the wife of another man, although the testimony indicated that Bain's marriage was in trouble by the time she met Rardin. A social relationship between Rardin and Bain did not begin until 1995, by which time Bain was already involved in divorce proceedings with her husband. That relationship progressed to the point where Bain eventually invited Rardin to move into her marital residence in the City of Hudson, Ohio, after Bain's husband had moved out.

Rardin not only was a landscaper, but also was a highly skilled construction worker and an experienced excavator. The uncontroverted testimony established that when Bain asked Rardin to move in with her, she also asked him to give up his landscaping business and devote his full time and attention to her property.

During the course of their relationship, Bain informed Rardin that it had been her life-long dream to own a home on a lake. Once her divorce settlement was final, Bain realized sufficient net assets from her divorce to make the purchase of the lakefront property possible and both Rardin and Bain set about the task of locating such a parcel.

The testimony adduced before the visiting judge diverged as to what happened next. Rardin testified that when he and Bain found the lakefront resort property, Bain decided to include Rardin's name in the chain of title to the lakefront property with the understanding that Rardin would contribute his skills as a landscaper, general contractor, and excavator to make improvements to that parcel and thereby "make it right" by Rardin for the value of all of the services he had "contributed" to her other property and the significant maintenance, repair, and improvement work he would do on the lakefront property to be acquired.

In her deposition testimony, by contrast, Bain claimed that although she directed the title company to include Rardin's name in the chain of title at the closing on her acquisition of the lakefront property, she did so only because the property was located in a gated community that supposedly would have precluded Rardin from gaining access to the lake and the other amenities offered by the gated community because Rardin was not her husband. However, the testimony *also* showed that the rules of the gated community provided an *alternative* method for allowing an unmarried live-in partner to gain such unrestricted access by way of a series of annual passes for which Bain could have applied, thereby sparing her the need of *either* having to add Rardin's name to the title of the lakefront parcel *or* having to marry Rardin. Bain *admitted* in her testimony that she simply never bothered to read the rules of the homeowners' association and therefore was not aware of the annual pass option.

In due course, Bain purchased a parcel adjacent to the lakefront parcel referenced above and eventually added Rardin's name to the chain of title of that parcel and consolidated the same with the first parcel purchased under the terms of a "tie-in covenant."

Bain explained that she did this to avoid having to pay "double dues" to the homeowners' association. The uncontroverted evidence showed that the second parcel was in a raw and virtually untouched natural state and did not even have an access to the main roads serving the gated community. The evidence further showed that Rardin, *himself*, constructed an access road to open that additional parcel to possible development, built a beach next to the part of the lakefront bordering the parcels, constructed a dock, built a gazebo, constructed a staircase to access all of these improvements from the main house, installed hundreds of square feet of flower beds and other landscaping features, added a cascading waterfall from the main house to the lower areas near the beach, installed lighting, repaired or replaced sections of the roof on the main house, installed drains, graded and cleared the entire site, reclaimed a shed area, trenched and installed a power line, and made a number of other improvements and repairs to the two parcels, *for which Bain did not compensate Rardin one penny.*

The plain language incorporated into the deeds to each of the two lakefront parcels specify that Bain and Rardin enjoyed undivided one-half interests in the real estate described in those deeds. Exhibits admitted into evidence, without contradiction, established that Rardin contributed more than \$124,000.00 in services and materials in improving and maintaining both of the parcels purchased in the gated community. The evidence *also* showed that Bain owned a number of *other* expensive homes, the deeds to which *never* included Rardin's name. And yet, the evidence *further* showed that Rardin maintained and made improvements to those parcels that carried a fair market value of over \$100,000.00, *for which he was not compensated one penny.* Just as importantly, the evidence showed that Bain, herself, was *spared* all of the expenses she otherwise would have incurred but for

his name to the title of the lakefront property would be the manner in which Bain would “make it right” by him for all the work and other in-kind contributions he had made for Bain’s benefit.

The lakefront property was purchased for \$384,500.00 in the aggregate and recently sold for \$440,000.00. The Estate has retained *all* of the net proceeds of that sale in reliance on the visiting judge decision that the evidence established that the Estate had overcome the *presumption* running in favor of Rardin under Ohio law of co-equal ownership of an undivided one-half interest in those parcels.

Rardin and Bain never married. The services Rardin provided for Bain’s properties went far beyond the mere routine weekend home maintenance duties of mowing lawns and trimming bushes performed by millions of husbands in family homes across this country. Rardin’s “contributions” to the lakefront property at issue in this case were substantial and have conferred a substantial benefit on the Estate. In the absence of relief in the form of an order of partition, the Estate will be able to retain all of those benefits without having to compensate Rardin or even reimburse him for his expenses.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

##### *Proposition of Law No. 1*

In determining the relative equitable interests of co-tenants in fee to a parcel of real estate, the court in a partition action shall take into account the fair market value of all “contributions” made by each co-tenant to the acquisition, maintenance, repair, and improvement of such real estate. *Spector v. Giunta*, 62 Ohio App.2d 137, 405 N.E.2d 327 (1978), approved and applied.

By operation of O.R.C. §§ 5307.01 and 5307.04, Rardin’s standing as a tenant in common with Bain entitled him to equitable relief in partition upon demonstrating a “legal

right to any part of the estate.” In such an action, Ohio law afforded Rardin a *presumption* that he shared with Bain an undivided one-half interest in the parcels of real estate at issue in this case.<sup>6</sup> The burden of proof in overcoming this presumption; therefore, rested with the Estate, as the party seeking to challenge Rardin’s undivided one-half interest.

Ohio law presumes that the language the parties employ in a document identifying the owners of real estate in fact expresses the intent of the parties in respect of the legal and equitable interests of such real estate, and courts are to deviate from this principle *only* if the deed language is unclear or ambiguous.<sup>7</sup> Moreover, in discerning the intent of the parties with respect to deeds, courts are **not** to discern what the parties *meant* to express, but rather what is the meaning of what they *actually* expressed in the written terms of the deeds for those parcels.<sup>8</sup> Likewise, a grantor of an interest in real property in Ohio is presumed – by virtue of his or her execution of a deed – to *know* the contents of the instrument and to be bound by the intention expressed therein.<sup>9</sup> Accordingly, a deed containing apt words conveying a fee simple estate *must* be held to have that effect and the use of words such as “give, grant, and/or convey” usually will be sufficient to evidence a transfer of a fee interest in realty for such language represents a clear expression of a complete transfer of an interest in

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<sup>6</sup> *Huls v. Huls*, 98 Ohio App. at 509, 510-11, 130 N.E.2d 412, 413 (1954).

<sup>7</sup> *Sedlak v. City of Solon*, 104 Ohio App.3d 170, 176, 661 N.E.2d 265, 269 (1995); *37 Robinwood Assoc. v. Health Ind., Inc.*, 47 Ohio App.3d 156, 157, 547 N.E.2d 1019, 1021 (1988); *Siferd v. Stambor*, 5 Ohio App.2d 79, 86, 214 N.E.2d 106, 100 (1966).

<sup>8</sup> *See, e.g., Augenstein v. Augenstein*, 107 Ohio Misc.2d 44, 737 N.E.2d 613 (2000).

<sup>9</sup> *37 Robinwood Assoc. v. Health Ind., Inc., supra.*

alty for such language represents a clear expression of a complete transfer of an interest in real estate.<sup>10</sup> For these reasons, then, when a warranty deed is given, *both legal and equitable* estates are conveyed in the absence of specific limitations, reservations, or exceptions recited in the instrument of conveyance.

All of this means that with respect to the deeds at issue in this case, Rardin was entitled to the *presumption* that those deeds were *valid and conclusive* as to the facts stated therein with respect to the intention of the grantor and Bain to create a co-tenancy in *each* parcel with Rardin.<sup>11</sup>

The visiting judge's opinion is peppered with *speculation* that Rardin *may* have contrived his position in this case so as to "take advantage" of a woman "incapacitated" by her inability to control alcohol, the abuse of which ultimately led to her death in the course of this litigation. But if the visiting judge and the appellate court were required to apply the rule articulated in *Spector*, they would have been powerless to turn a blind eye to the *uncontroverted* evidence respecting Rardin's substantial and otherwise uncompensated "contributions" to the property at issue in this case respecting "expenses, repair or improvement of the property," *regardless of whether or not Rardin actually exploited Bain's purported incapacity*. *Spector* required the visiting judge to hear such evidence *and to give due credit for the value of those "contributions"* because they mattered *just as much* as the amount of the purchase price tendered by Bain and all taxes, insurance premiums, and debt service pay-

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<sup>10</sup> See generally *Russell v. Russell*, Case No. 92-J-31, 1993 WL 204988, *slip op.* at 1 (7th App.Jud.Dist., June 10, 1993) (unreported); *Kampf v. Kampf*, Case No. 90-A-1503, 1991 WL 70785, *slip op.* at 3-4 (11th App.Jud.Dist., May 3, 1991) (unreported).

<sup>11</sup> See also O.R.C. § 5302.19.

ments made by her during the relevant period of time in this case. Rardin's in-kind "contributions" either conferred benefits on Bain and her other properties or spared Bain expenses that she otherwise would have incurred. And while the visiting judge strained to speculate that expensive gifts or other "toys" (as the judge called them) were purchased by Bain for Rardin's exclusive use and benefit, and therefore might be considered a form of recognition for the thousands of dollars of work Rardin had performed to maintain and improve the lakefront parcels and Bain's other properties, it remains that *no evidence* tied Bain's purchase of these "toys" to any efforts by Rardin to take advantage of Bain . . . and just as importantly, *none* of the evidence established that Bain was acting under the influence of alcohol or under the undue influence of Rardin when she *voluntarily* directed the title company to add Rardin's name to the chain of title of each of the parcels at issue in this case.<sup>12</sup>

The centerpiece of the visiting judge's decision was the testimony relating to the purported *reason* Bain added Rardin's name to the chain of title to the first of two parcels purchased in the gated community. The visiting judge concluded that Bain's explanation could be believed, *viz.*, that she added Rardin's name only to provide her unmarried partner with unrestricted access to the "amenities" of the gated community. However, *Spector* makes Bain's perceived reason largely irrelevant, for Bain not only *accepted* all of Rardin's "contributions" of materials and services for the repair, maintenance, and improvement of *both* of the lakefront parcels at issue, but also *encouraged* Rardin to make those "contribu-

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<sup>12</sup> Indeed, the evidence showed that Bain was represented at all relevant times by two of Summit County's foremost attorneys, one in connection with her divorce proceedings and another on general matters. In short, Rardin was in no position to "take advantage" of any "wealthy woman" – whether incapacitated or not – when her every move was scrutinized and overseen by experienced counsel.

tions” by purchasing some of the materials herself and paying for casual labor hired by Rardin from time to time to assist him with the major construction projects. Thus, it is not as if Bain can claim that Rardin’s “contributions” were made without her knowledge or consent or over her objections. And yet, those would seem to be the only reasons why a court in an equitable action in partition should fail to apply the *Spector* rule to disgorge a benefit that the wealthier tenant in fee might try to realize at the expense of the other co-tenant. A court sitting in *equity*, after all, should take into account *all* of the equities” so as to avoid any disadvantage to the party making in-kind contributions to the maintenance, repair and improvement of jointly-owned real estate.

*Proposition of Law No. 2*

The defense of “purchase money resulting trust” can defeat a co-tenant’s claim for relief in a partition action only if all elements of such a trust are established upon clear and convincing proof manifesting an intention not to confer any interest in such co-tenant in a parcel of real estate at the time another co-tenant advanced the consideration given to acquire such parcel.

The appellate court sustained the visiting judge’s decision on the alternate grounds that the manner in which Bain acquired the lakefront parcels with Bain supposedly created a “purchase money resulting trust” that barred Rardin’s claim for relief in the form of partition. A “purchase money resulting trust” is a legal fiction whereby a court declares that the beneficial interest in an estate is not to be enjoyed by the holder of legal title principally because another party paid the purchase price for the property.<sup>13</sup> Such an intent must be

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<sup>13</sup> *Gabel v. Richley*, 101 Ohio App.3d 356, 363-64, 655 N.E.2d 773 (1995). Such a “trust” has been generally described in the following terms: “[W]hen A furnishes B with money to be invested in land, which is so invested, B, taking title in himself, the title thus acquired is held in trust for A.” *Lewis v. Akerberg*, 100 Ohio App. 209, 214-15, 136 N.E.2d 372, 377 (1954).

demonstrated by clear and convincing proof and such evidence must be coupled with a showing that the consideration given for the parcel was tendered *at the time the “trust” was created*.<sup>14</sup>

The transactions for the two parcels at issue in this case did not qualify for application of the “purchase money resulting trust” theory because they do not remotely satisfy the standards laid out above and at in the margin, Footnotes 13 and 14. An important element to this defense – the *timing* of Bain’s payments for the two parcels – *precluded* the visiting judge from recognizing such a “trust” for one of the two lakefront parcels and the evidence on the “intent” of Bain at the time of the purchase of the other parcel is based on what she did *more than a year later* when acquiring that other parcel.<sup>15</sup>

This Court has not addressed the “purchase money resulting trust” theory in the context of an effort by a co-tenant in fee to avoid a partition action initiated under Chapter 5307 of the Ohio Revised Code. To this end, therefore, the novel defense theory on which the courts below relied presents an issue of first impression. This Court should take

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<sup>14</sup> Such a showing is “indispensable to the creation of the trust.” *Fleming v. Donahoe*, 5 Ohio 255, 257, 1831 WL 85 (1831). “After all, [t]he trust must attach, if at all at the time of the conveyance, for it is the money that has gone to the vendor as the inducement of the title which he part, that creates the equity in favor of him who advances it.” *Watson v. Erb*, 33 Ohio St.35, 46, 1877 WL 1861 (1877). *See also University Hospitals of Cleveland, Inc. v. Lynch*, 96 Ohio St.3d 118, 129, 772 N.E.2d 105, 116, 2002-Ohio-3748, ¶ 55 (the standard of proof is clear and convincing evidence).

<sup>15</sup> Specifically, the evidence demonstrates that Bain paid for the *second* parcel a year *before* Rardin received any deed for that parcel and further shows that Bain executed and delivered a quit claim deed for the *other* parcel, naming Rardin therein as a co-tenant long *after* paying for that parcel. Indeed, the evidence showed that even though the contract for the purchase of that *first* parcel provided that title should be placed in Bain’s name alone, she later directed the title company at the closing to record a deed that reflected that Rardin was to be a tenant-in-common with her in that parcel and later executed the quit claim deed to reconfirm that intent.

this case for the purpose of making it clear that the “purchase money resulting trust” theory is *limited* to the specific types of situations for which it was created, namely, to spare a co-tenant who advances the purchase price for real estate the risk of any loss that otherwise might be suffered on account of the fraudulent efforts of the other co-tenant to claim an interest to which he or she is not entitled by virtue of his or her failure to make *any* contribution to the purchase, maintenance, repair, or improvement of that property. Rardin is **not** such a co-tenant. He is **not** in the position of the individual who arranged to take title in property for himself only by leveraging funds received from the third party for whose benefit title was to transfer. This Court should exercise jurisdiction over this appeal to make that rule of law plain and to avoid the temptation any other court in a partition action might have to rely on such a legal fiction to defeat rights expressly conferred on co-tenants under Chapter 5307 of the Ohio Revised Code.

#### CONCLUSION

This case presents two issues of great general interest affecting public policy in this state, one of which appears to be an issue of first impression in this Court. Rardin requests that this Court exercise jurisdiction over his appeal.



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**CERTIFICATE OF SERVICE**

I hereby certify that on August 12, 2009, a copy of the foregoing was served on counsel for Appellee Estate of Diana Lynn Bain by ordinary U.S. Mail, first class postage prepaid, addressed to the attention of Jeffrey N. James Esq., Counsel for Appellee, Lombardi & James, 137 Main Street, Suite 206, Akron, Ohio 44308.

  
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**Appendix 1**

Opinion and Judgment Entry of the Seventh Appellate Judicial District

*Steven L. Rardin v. Estate of Diana Lynn Bain*

June 29, 2009



**FILED**

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

JUN 29 2009

SEVENTH DISTRICT

COURT OF APPEALS  
CARROLL COUNTY, OHIO

STEVEN RARDIN, )  
 )  
 PLAINTIFF-APPELLANT, )  
 )  
 - VS. - )  
 )  
 ESTATE OF DIANA LYNN BAIN, )  
 et al., )  
 )  
 DEFENDANTS-APPELLEES. )

CASE NO. 08 CA 853

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court,  
Case No. 04CVH23889.

JUDGMENT:

Affirmed.

APPEARANCES:

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For Defendants-Appellees:

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JUDGES:

Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: June 29, 2009

VUKOVICH, P.J.

¶(1) Plaintiff-appellant Steven Rardin appeals the decision of the Carroll County Common Pleas Court denying his complaint for partition of two parcels of property in Carroll County, Ohio, in which he and decedent Diana Bain were jointly deeded the properties. The issue in this appeal is whether the trial court correctly determined that while Rardin had legal title to the property, he had no equitable interest in the property and thus was not entitled to partition. For the reasons expressed below, the judgment of the trial court is affirmed.

STATEMENT OF FACTS AND CASE

¶(2) In 1994 Rardin, an approximately 30 year old self-employed landscaper, and Bain, a 36 year old married woman with three children, met. A romantic relationship between the two began in 1996 during which time Bain was going through a divorce. Sometime in late 1996 or early 1997 Rardin moved in with Bain. During their relationship, which lasted approximately six years, Rardin lived with Bain at three different primary residences: first at 2895 Blaikley Drive, Hudson, Ohio; then at 6401 Rotherby Circle, Hudson, Ohio; and finally at 1920 East Hines Hill Road, Hudson, Ohio. The Blaikley residence was Bain's marital home; she then sold that home and bought the Rotherby Circle residence; she later sold that residence and bought the East Hines Hill Road residence. At all of these residences Rardin performed landscaping, maintenance, and some construction projects on the homes. He also drove Bain's three minor children to various different places and detailed Bain's vehicles.

¶(3) In 1998, around the time Bain purchased the Rotherby Circle residence, she began looking for a vacation home on a lake. She eventually found a home in the gated community of Lake Mohawk in Carroll County, Ohio. She bought lot 323, which had a home on it, for approximately \$292,000; she paid cash for this property. The purchase agreement was between Bain and Sally Critean and it indicated that Bain would be the owner of the property. 03/28/98 Purchase Agreement. On June 5, 1998, a warranty deed was recorded that showed that both "Diana Lynn Bain and Steven Rardin" were co-owners of lot 323. Rardin did landscaping and maintenance on this

property. Membership dues to the Lake Mohawk Property Owners' Association were assessed to the individual owners of the lot; Bain paid for both her and Rardin.

¶{4} In 1999, to prevent the lot beside her, lot 322, from being developed, Bain purchased it for approximately \$92,000. Bain financed the purchase of the lot. Rardin was not named on the loan document, and he provided no monetary contribution to the purchase of the lot. The purchase agreement was signed June 30, 1999, and a warranty deed was recorded on July 20, 1999. This deed only listed "Diana L. Bain" as the owner. Rardin did landscaping and helped with construction projects on lot 322, such as building a dock, working on a gazebo, leveling the land and building a wall by the lake.

¶{5} In 2000, lots 323 and 322 were bound together by a restrictive tie together covenant, which indicated that the properties could only be sold as one unit. In order to bind the properties, allegedly the properties had to belong to the same owners. Thus, Bain quit claim deeded lot 323 to "Diana Lynn Bain and Steve L. Rardin" on March 8, 2000. While that property was already deeded to both of them, the quit claim deed added Rardin's middle initial. She then quit claim deeded lot 322 to "Diana L. Bain and Steven L. Rardin" on June 21, 2000. The restrictive tie together covenant was then signed on July 10, 2000.

¶{6} The parties' relationship deteriorated in 2002 and resulted in their break up. Rardin wanted Bain to buy out his interest in lots 323 and 322; Bain refused and that resulted in Rardin bringing a partition action against her in 2004. That complaint also sought damages for conversion, for interference with right and access to real property, and alleged actual malice and sought attorney fees. Bain answered and counterclaimed for quiet title and for damages for conversion of personal property. Thereafter, Rardin filed a motion for partial summary judgment on the issue of title and ownership. Bain responded and among other arguments contended that Rardin had no equitable interest in the property and that a purchase-money resulting trust was created by Bain's purchase of the real estate with her own money and placing Rardin's name on the deeds.

¶{7} The court found no merit with Bain's argument regarding a purchase-money resulting trust because the deeds did not list Rardin's name when Bain first

purchased the property and because Rardin was the "natural object of Bain's bounty." It further stated the following:

¶(8) "The court finds and concludes that Rardin, by virtue of the deeds in evidence, has a 'legal' tenancy in common interest with Bain in both Lots 322 and 323. He therefore has acquired 'standing' to bring partition as a 'co-owner' (R.C. 5307.01; 5307.04)." 09/28/05 J.E.<sup>1</sup>

¶(9) However, the trial court added that Rardin had no equitable interest in the property and thus could not receive any proceeds from the sale of the property. 09/28/05 J.E.

¶(10) In 2006, during the proceedings of the partition action, Bain died and her estate, defendant-appellee Estate of Diana Lynn Bain (the estate), was substituted in her stead. Rardin amended his complaint in December 2006: count one sought partition; count two alleged conversion of personal property; count three sought injunctive relief; count four alleged negligence; count five alleged promissory estoppel; count six alleged quantum meruit; count seven alleged unjust enrichment/quasi contract; count eight alleged accord and satisfaction; and count nine sought declaratory judgment. The estate filed an answer and counterclaim that was substantially similar to the one previously filed.

¶(11) The parties then agreed that the trial would be bifurcated: the partition action would go forward first and then at a later date the remaining claims would be decided. Thus, the partition action was tried on February 15, 2007.

¶(12) At trial, Rardin asserted that shortly after he moved in with Bain, she asked him to give up his landscaping business and take care of her property/properties. He contended that Bain promised she would "make it right" if he did that. According to him, adding his name to the deed on lot 323 was living up to Bain's promise that she would "make it right"; naming him as a co-tenant was compensating him for all his work on the other properties and the work that he would do on that property. Furthermore, adding his name to the deed on lot 322 was also

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<sup>1</sup>This judgment was rendered by Judge Martin, however, sometime after that decision he recused himself and the case was assigned to Judge Bruzzese of the Jefferson County Common Pleas Court (sitting by assignment).

compensation and "making it right" for the work on lot 323 and for the work he had done and was doing on lot 322.

¶{13} He offered exhibits that estimated he did \$239,533 worth of work at the Blaikley Drive residence, Rotherby Circle residence, East Hines Hill Road residence, Lake Mohawk property and detailing Bain's vehicles.

¶{14} Since Bain was deceased at the time of trial, her depositions were admitted into evidence. In those depositions, she indicated that she and Rardin never had an agreement where she would "make it right," but rather they had an agreement that she would add Rardin's name to the deed for lot 323 for the sole purpose of providing him with unrestricted access to Lake Mohawk's properties and its amenities (three beaches, a nine hole golf course, 520 acre lake used for skiing and fishing, tennis courts, basketball courts, and a baseball field). Lake Mohawk, being a gated community, only permitted its owners and their immediate family (meaning spouses, children, parents, grandparents and grandchildren) to have unrestricted access to the facilities. Bain had been told that she could get Rardin a guest pass, but that he would not have unrestricted access to the facilities. The current manager of Lake Mohawk corroborated that testimony and explained that Rardin, with a guest pass, would not be permitted to use the amenities unless a member was present with him.

¶{15} Furthermore, Bain explained that adding Rardin's name to the deed of lot 322 was not to compensate him, but was instead a means to tie together lots 322 and 323. Bain testified that she was told that the lots could not be tied together unless the owners on the lots were the same. According to her, the properties were tied together to save on membership dues. Dues were assessed per lot and therefore before the lots were tied together, Bain was paying three membership dues, hers for lot 323, Rardin's for lot 323, and hers for lot 322. After the lots were tied together, she was only paying two dues, one for her and one for Rardin.

¶{16} Testimony at trial also indicated that Rardin did not pay rent for living in any of the residences, he paid no membership dues, he did not pay taxes on the residences or insurance, he paid no utilities, he did not pay for the purchase of food or clothes, and that Bain would give him spending money. In fact, Bain purchased gifts for Rardin and gave him \$20,000 for the purchase of a truck.

¶{17} Also at trial, testimony was offered about the items allegedly converted by Rardin. These included two jet skis, two snowmobiles, a speed boat, a pontoon boat, a boat lift, and a golf cart. Rardin claimed that these items were gifts from Bain. These items were titled in his name, except for the boat lift, which was not titled. Rardin took all of these possessions from the property after the break up and sold most of them. The estate disputed that these were gifts to him and contended they were to be used by the family. The trial court allowed the testimony for the purpose of showing the course of dealings between the parties.

¶{18} Given the evidence, Rardin argued that his contributions to the three residences and to the Lake Mohawk lots 322 and 323 entitled him to an equitable interest in one half of the Lake Mohawk properties. The estate argued that the evidence showed that there was never an agreement that Rardin would have an ownership interest in the real property; placing his name on the deeds was the means to give him, as the live-in-boyfriend, unrestricted access to the amenities and to prevent Bain from having to pay three membership dues instead of two. Further, it once again claimed that a purchase-money resulting trust was formed and Rardin had no beneficial interest in the property.

¶{19} After hearing all the evidence, the trial court thoroughly analyzed the issue and concluded that the inclusion of Rardin's name on the deeds to lots 323 and 322 conveyed no equitable interest to Rardin and created a purchase-money resulting trust in which Rardin had no beneficial interest. 04/30/07 J.E. Thus, the trial court determined that Rardin could not obtain any funds generated through a partition sale. 04/30/07 J.E. That finding rendered moot all issues pertaining to partition. 04/30/07 J.E.

¶{20} Following that decision, Rardin filed a motion for reconsideration, a motion for new trial and motion to disqualify the trial judge. Those motions were subsequently overruled. 07/18/07 J.E. and 07/23/07 Amended J.E.

¶{21} The case did not become final until April 2, 2008. As stated earlier, the trial was bifurcated and only the partition and quiet title portion of the complaint and counterclaim were tried in February 2007; all other issues were to be tried at a later date. However, those issues were not tried because the parties entered a stipulated

dismissal of their respective pending claims with prejudice. An order to that effect was entered on April 2, 2008. Rardin now timely appeals raising six assignments of error. Rardin fails to argue each assignment separately as is required by the appellate rules. However, after dissecting the brief, arguments as to all assignments of error can be found and, as such, each assignment will be addressed.

LAW ON PARTITION

¶{22} The first four assignments of error deal specifically with the law of partition. Rardin argued below and argues on appeal that the deeds to lots 322 and 323 convey one-half interest in equitable title to those lots to him and, as such, he is entitled to partition. Thus, as to the first four assignments of error (and even the sixth) an overview on the law of partition is helpful.

¶{23} R.C. 5307.01 states that tenants in common may compel partition. Case law indicates that when a deed is silent as to the respective interests of each owner, a rebuttable presumption exists that the shares of the parties are equal. *State v. Rebman* (Oct. 19, 1994), 9th Dist. No. 94CA005857; *Spector v. Giunta* (1978), 62 Ohio App.2d 137, 141; *Huls v. Huls* (1954), 98 Ohio App. 509, 511. In this case, only Rardin and Bain are listed on the deeds to lots 322 and 323, and the deeds are silent as to their respective shares. Therefore, Rardin can seek partition and a rebuttable presumption exists that he is entitled to half of the property. That said, Bain can overcome the rebuttable presumption by proving that the intention of the parties at the time of the deed was contrary to the expressed and presumed equality of interest. *Huls*, 98 Ohio App. at 511. See, also, *Spector*, 62 Ohio App.2d at 141-142.

¶{24} The *Spector* Court indicated that when sufficient evidence is provided, the presumption of equality of shares can be rebutted and, if that occurs, the court may order the proceeds of the partition sale to be distributed in accordance with the amounts contributed. *Spector*, 62 Ohio App.2d at 141. Courts are permitted to look beyond the deed to determine equitable interest of each co-tenant in the property. *Rebman*, 9th Dist. No. 94CA005857, citing *Huls*, 98 Ohio App. 509, *Spector*, 62 Ohio App.2d 137, and *Bryan v. Looker* (1994), 94 Ohio App.3d 228. The *Spector* Court indicated that in that case the parties did not argue how the proceeds would be distributed, therefore, it sent the issue back to the trial court. In doing so it stated, "We

find that substantial justice would be served by a retrial in which the parties are given a full right to submit evidence concerning any unequal contribution to the purchase price and other equities or conflicting claim." *Spector*, 62 Ohio App.2d at 142. Thus, a party's contribution to the improvement of the property can be used to determine equitable interest.

¶{25} Under such a scenario in order to be entitled to partition, the party claiming partition must not only have a legal interest, but also must have an equitable interest. The party trying to overcome the rebuttable presumption of equitable interest has the burden of proof. Furthermore, contributions to the property can be considered in determining each party's equitable interest. With those laws in mind, we now turn to the assignments of error dealing with partition.

#### FIRST ASSIGNMENT OF ERROR

¶{26} "THE TRIAL COURT ERRED DREW IMPERMISSIBLE INFERENCES OR OTHERWISE VIOLATED OHIO LAW OR RULES OF EVIDENCE OR PROCEDURE IN ADMITTING CERTAIN EVIDENCE AND ARRIVING AT ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW."

#### THIRD ASSIGNMENT OF ERROR

¶{27} "AFTER ORDERING BIFURCATION OF ALL ISSUES PERTAINING TO DISPUTES OVER PERSONAL PROPERTY AND LIMITING THE FEBRUARY 15, 2007, TRIAL TO THE QUESTION OF WHETHER THE DEFENSE COULD MEET ITS BURDEN OF OVERCOMING THE PRESUMPTION OF EQUAL OWNERSHIP RUNNING IN PLAINTIFF'S FAVOR, THE TRIAL COURT ERRED IN ADMITTING EVIDENCE RESPECTING SUCH PERSONAL PROPERTY DISPUTES TO THE PREJUDICE OF PLAINTIFF AND THEN RELYING ON SUCH EVIDENCE TO DECIDE THE SPECIFIC PARTITION QUESTION JOINED FOR TRIAL."

¶{28} The first and third assignments of error appear to be arguing very similar propositions, thus they are addressed together. These assignments seem to argue that the introduction of certain evidence was improper. There are two distinct arguments being made: first, the admission of certain alleged hearsay statements by Bain were in error; and second, allowing testimony regarding personal property that

was purchased by Bain, titled in Rardin's name and that was allegedly converted by Rardin was also in error.

¶(29) Each argument will be addressed separately, but prior to addressing them the standard of review for the admission of evidence, which applies to both arguments, will be laid out. A trial court is vested with broad discretion in determining the admissibility of evidence: *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271. An appellate court reviewing the trial court's admission or exclusion of evidence must limit its review to whether the trial court abused its discretion. *Id.* citing *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107.

#### BAIN'S TESTIMONY

¶(30) Rardin contends that a portion of Bain's testimony that the trial court permitted to be considered was hearsay. The specific testimony regards why Rardin's name was put on the deed to lot 323.

¶(31) Bain testified that she was told that unless she and Rardin were married or Rardin's name was on the title, he could not have unlimited access to Lake Mohawk's amenities and get stickers to come and go freely from the property. (07/07/03 Bain Depo. 23-24; 11/05/04 Bain Depo. 16). In the first deposition, she could not remember who told her that, but in the second deposition she stated it was Mary Shearer. (07/07/03 Bain Depo. 26; 11/05/04 Bain Depo. 18). Rardin objected to this testimony claiming that her statements were hearsay. (02/28/07 Tr. 5-9). The trial court overruled the objection stating that it was not being offered to prove the truth of the matter asserted, but was rather showing her state of mind that was relevant in determining her intent at the time of the conveyance. (02/28/07 Tr. 5-9).

¶(32) Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Bain's testimony was a statement of what another person told her. However, just as the estate argued and the trial court found, that statement was not being offered to prove that what Bain was told was correct. The issue was Bain's state of mind when deeding the property to Rardin and what type of equitable interest he would have in the property. *Huls*, 98 Ohio App. at 511; *Spector*, 62 Ohio App.2d at 141, 142. The specific questions to Bain dealt with the reasons

why she put his name on the deed and, as such, were about her state of mind. She responded that she did it because she was told by an employee of Lake Mohawk, particularly Mary Shearer, that unless his name was on the deed or unless she was married to him, Rardin would not get unrestricted access to the property and amenities. Whether or not the representation Shearer made to Bain was correct was not the issue. Thus, her statements were not being offered to prove that her reason for putting his name on the deed was correct; they were not being offered to prove the truth of the matter asserted. As such, they did not amount to hearsay and the trial court correctly allowed her testimony.

¶(33) However, even if there was a remote possibility that her testimony was hearsay, we cannot find that the trial court committed any reversible error in admitting the testimony. While Mary Shearer did not testify, Scott Noble, the manager of Lake Mohawk testified; his testimony concerned the Rules and Regulations of Lake Mohawk. Noble indicated that only immediate family members of property owners have access to the property and amenities, and guests could get a pass but it was a restricted pass that did not allow guests to use the amenities without a member or the member's immediate family with them. (Tr. 73, 78). He explained that an extended pass of 30 days was available, but it operated the same way as a one day pass and would not allow unrestricted access. Furthermore, the Rules and Regulations offered as Defendant's Exhibit M indicate that any guest using association owned facilities must be accompanied by the property owner or their immediate family. Article II, Rule 1. It further provides that a pass for 30 days is available. Article II, Rule 6. Also, a special pass for one year in length may be obtained for a person other than those defined as immediate family. Article II, Rule 9. Rardin contends in his brief that this rule gives a guest with a one year pass unrestricted access. Page 30 of Brief, fnt 91. His contention is not supported by that rule; the rule contains no indication that Rule 1's prohibition against guests having unrestricted access was not applicable. As such, it appears guests who obtain a one year pass would not have unrestricted access. Thus, the Rules and Regulations and Noble's testimony supported her stated belief as to why his name had to be put on the deed.

¶{34} Rardin also raises issues with Noble's testimony. Rardin finds fault with the fact that Noble testified instead of Mary Shearer, the employee who allegedly told Bain that Rardin's name needed to be on the deed. This fault is misplaced because Noble clearly was the keeper of the records and testified in that capacity. His testimony was used to admit exhibit M, the Rules and Regulations, exhibits I and J, which were allegedly the sheets filled out by Rardin and Bain at orientation, and to discuss the Rules and Regulations of Lake Mohawk. Exhibits M, I, and J were business records and Noble indicated that all those documents were kept in the office which he oversaw. Thus, he was permitted to testify in that capacity pursuant to Evid.R. 803(6). Furthermore, as the manager of the property he was clearly aware of the Rules and Regulations and could testify as to what they were.

¶{35} Admittedly, because he was not an employee at the time of the transaction, Noble could not testify as to when Bain was told that Rardin's name had to be on the deed. However, he did indicate that typically an orientation program was given before the property was purchased and at the orientation the rules of the association would be discussed, which would include restricted access for guests. He acknowledged that Lake Mohawk's records, Exhibits I and J, could not confirm that the date of orientation occurred prior to the purchase of lot 323. (Tr. 93-94). However, that does not matter because Bain testified that she did attend the orientation prior to the purchase. That portion of her testimony clearly is not hearsay. Thus, whether the orientation occurred prior to the purchase was a credibility question that the trial court was in the best position to determine.

¶{36} In conclusion, we find that Bain's testimony was not hearsay and that even if it was, allowing that testimony did not amount to reversible error because there was other evidence presented that corroborated her testimony. Furthermore, any issue with Noble's testimony is incorrect.

#### PERSONAL PROPERTY

¶{37} The trial was bifurcated and the only issue before the trial court on the February 15, 2007 trial date was partition and all claims related to it; all issues as to personal property disputes were not tried on that date. However, over the objection of Rardin, the trial court allowed the estate to question Rardin on the personal property,

specifically the speed boat, pontoon boat, jet skis, snowmobiles, the golf cart and boat lift – all the property that Rardin removed from the Lake Mohawk property following the breakup. (Tr. 47). Also, Bain, during her deposition, testified about the personal property. (11/05/04 Bain Depo. 28-38). Rardin objected to this testimony being offered at trial, however, the trial court overruled the objection. (02/28/07 Bain Depo. 31-35). The trial court allowed both Rardin's and Bain's testimony as to the personal property for two reasons. First, because it evidenced the entire relationship between the parties and the lifestyle Bain provided for them. And second, the trial court used it in determining credibility.

¶{38} On appeal, Rardin contends that the trial court abused its discretion when it permitted testimony and arguments regarding the alleged converted personal property during the partition portion of the trial. Rardin does not cite any case law or statutes in support of his argument.

¶{39} Rardin is correct that the trial was bifurcated and that the sole issue tried was partition, however, the trial court's decision to allow testimony regarding personal property for the purposes of looking at their entire relationship and credibility was not an abuse of discretion for three reasons.

¶{40} First, as the trial court explained to the parties, while the personal property was being discussed at trial, it was not being litigated:

¶{41} "Mr. Worhatch [counsel for Rardin]: -- they're irrelevant to the partition claim, Your Honor. This is not a question of whether or not the issues were -- the questions were posed by the Plaintiff's counsel or not.

¶{42} "The Court: Okay.

¶{43} "Mr. Worhatch: I -- by stipulation of the parties and order of this Court all issues other than the partition issue were irrelevant to the proceeding.

¶{44} "The Court: I don't know that that's true.

¶{45} "Mr. James [counsel for the estate]: If I may, they were simply not to be litigated.

¶{46} "The Court: That's how I see it.

¶{47} "Mr. James: There's a difference between the two.

¶{48} "The Court: A huge one. So, one of them is like res gestae. It's – it's – it's the surrounding circumstances, how these people were dealing with each other. Like I said, if this was a commercial litigation case we would be talking about course of dealings. That's what we would call it. That would be the name we would put on it but this is the same kind of evidence as that. So – so, yeah, it's – it's relevant to what everybody's state of mind was which is what this case is about.

¶{49} "Mr. Worhatch: So, what you're saying, Your Honor, is I can argue from the evidence that because she put a name on the boat, because she put his name on the truck, because she gave him the ski dos and all that she clearly wanted to give him things, including half of the interest in the property.

¶{50} " \* \* \*

¶{51} "The Court: Absolutely you get to. I think when you – I think he will – I think you get a presumption that you're right. Remember how we had the Defendant start this case because he had the burden of proof because he wants to – I mean, excuse me, we had the Plaintiff – hold on here.

¶{52} "Mr. James: The Defendant.

¶{53} "The Court: Defense. Okay. We had the Defendant go first which is kind of unusual but the reason we did it and we discussed why we did it is because the Defendant has the burden of proof here. So, in my mind, and somebody can correct me if I'm wrong, if – if the deed's in his name, then there's a presumption that he has an interest. If the – if the boat's in his name, there is a presumption that he has an interest. That's what I think and that if somebody wants to claim different than that, they have the burden of proof which is why the Defendant went first and we discussed all that before we ever started any of the hearings.

¶{54} "Mr. Worhatch: My – my point, Your Honor, was simply that all the issues relating to the personal property were not litigated in the partition action.

¶{55} "The Court: And they're not being – but they're not being litigated in the sense that they're not going to be determined but they are most certainly relevant." (02/28/07 Tr. 34-36).

¶{56} Second, testimony as to Bain paying for the speed boat, pontoon boat, two snowmobiles, two jet skis and the golf cart and those being titled in Rardin's name

shows the parties course of dealings and shows Bain's state of mind. This evidence could lead to two different conclusions. It could be used to show that since Rardin's name was on the titles to the personal property, this evidences Bain's desire to give those items to him and likewise, shows she wanted to give him a half interest in the Lake Mohawk properties. Or, on the other hand, it could be concluded that it was the normal course of dealing for these parties to put things in Rardin's name and that even though they were in his name, he did not own them; rather, they were purchased and owned by Bain for the use of the whole family. They were not intended as gifts or compensation for him.

¶{57} After considering the evidence, the trial court found that the second conclusion was more logical. We have no basis to disagree with that determination. Testimony established that the pontoon boat, speed boat and golf cart were all used by Rardin, Bain and her three children; the boats for recreation on the lake and the golf cart as a means to get around Lake Mohawk. As the trial court found, it was highly unlikely that Bain intended these to be gifts only to Rardin. Moreover, as to the two jet skis and two snowmobiles, even though they were titled in Rardin's name only, it is logical to conclude that these were his and her gifts, meaning one for Bain and one for Rardin. It is unlikely that Bain would have purchased two jet skis and two snowmobiles for Rardin alone. Thus, the evidence tended to show that items were deeded in Rardin's name, but were not intended to be solely owned by him.

¶{58} And finally, the third reason why the testimony in regards to the personal property was permitted was to determine credibility. In addition to showing the course of dealings, the above also goes to Rardin's credibility; the trial court found Rardin's testimony that the above items were gifts to him to be incredible. That fact sheds light on the he said/she said aspect of the case that there was some agreement between Bain and Rardin that she would "make it right" to him for all the work he did on her properties; Rardin claimed that there was an agreement to that effect while Bain claimed that there was not.

¶{59} In all, the trial court did not abuse its discretion in allowing the testimony as to the personal property to be admitted. Any argument to the contrary lacks merit. These assignments of error are meritless.

SECOND ASSIGNMENT OF ERROR

¶{60} "ALTHOUGH OHIO LAW REQUIRED INDEPENDENT JUDGMENTS RESPECTING EACH PARCEL IN ARRIVING AT A CONCLUSION RESPECTING THE INTENT OF THE GRANTOR 'AT THE TIME OF THE DELIVERY OF THE DEED,' THE TRIAL COURT ERRONEOUSLY RELIED ON THE PART OF ITS DECISION RESPECTING PLAINTIFF'S PARTITION CLAIM AS TO THE LATER ACQUISITION OF THE TWO PARCELS AT ISSUE IN THIS CASE AS THE BASIS FOR DECIDING PLAINTIFF'S PARTITION CLAIM AS TO THE EARLIER ACQUIRED PARCEL."

¶{61} Under this assignment of error, Rardin contends that the trial court erred when it considered both deeds simultaneously to reach the result that Bain's intent was not to convey an equitable interest to Rardin. According to him, in Ohio the deeds must be looked at separately, the court cannot rely on the deed to one property to conclude what the intent was for the other property. However, he provides no case law to support this position.

¶{62} We begin our analysis with a determination of whether both deeds can be looked at to determine the interests of the parties. As explained above, when determining the interests of the parties and rebutting the presumption of equality of interest, we must look to the intention of the parties at the time of the execution of the deed. *Huls*, 98 Ohio App. at 511. In *Huls*, the evidence was that one party contributed a greater amount to the purchase price of the property than the other. However, the party contributing the greater amount of the purchase price admitted that at the time the property was deeded he never claimed to own more than half of the property. It was not until years later when that party was living on the property, farming it, and repairing it that he claimed to own more than half of the property. The court found that the party claiming to own more than half of the property failed to prove any intention of the parties at the time of delivery of the deed that was contrary to expressed and presumed equality of interest. *Id.* at 512. Thus, it appears from that case that the intention of the parties must be looked at during the time of the deed; anything that happened afterwards is not relevant to the determination of the parties' interest. This

could be deemed to mean that what happened with the deed on lot 322 was not relevant to lot 323.

¶{63} However, the *Spector* case indicates that in addition to the amount each party paid towards the purchase price, evidence of repairs or improvements can be considered to determine each party's interest in the property. *Spector*, 162 Ohio App.2d at 142. That case states at one point in a footnote that the nature and circumstances of the repairs or improvements must be established. However, that statement does not offer much guidance because it does not indicate what the nature and circumstances must show.

¶{64} Neither of those cases are factually similar to the case at hand because neither deal with two parcels of property and whether the deed from the first property can be used to determine the intention of conveying equitable interest for the second property. Thus, they do not provide much guidance.

¶{65} That said, even though there is not much guidance in case law, we find that equity demands that in this situation both deeds and the circumstances surrounding the execution of both deeds should be considered to determine the intention to convey equitable interest for both properties. As explained in the facts, the lots were tied together by a covenant. Thus, they can no longer be sold as two properties but instead must be sold as one. This means that what was occurring with one property was relevant to the other. The trial court's analysis on this issue highlights the circumstances and the intertwined nature of the two properties and evidences the need for considering the deeds simultaneously to determine the intent of the parties.

¶{66} The trial court stated in its judgment:

¶{67} "After taking possession of the home on Lot Number 323 Bain bought Lot Number 322 which is adjacent to the lake house. She made this purchase in order to control that lot and prevent it from being developed. The home and the adjacent lot were considered by her to be complementary and to be used together. Unless Bain actually intended that Rardin have an interest in that property there would have been no reason for her to put Rardin's name on that lot at that time because Rardin already had unrestricted access to the premises by virtue of the first lot. The purchase of this

second lot would provide strong corroboration for one party or the other of Bain's actual intention.

¶{68} " \* \* \*

¶{69} "The circumstances of this transfer [referring to the deeding of lot 322 to both Bain and Rardin] into joint names of the second lot also corroborate Bain's position. When the only reason to put Rardin's name on the second lot would have been to actually give him an interest in that lot Bain chose not to do so. When savings were made possible by the transfer she chose to do it, not to give Rardin an interest but to secure the savings." 04/30/07 J.E.

¶{70} Thus, we are of the opinion that the trial court did not err in considering both deeds to determine the parties' intention. Furthermore, when considering the deeds together, we find no error with the trial court's determination that it was not Bain's intention to convey equitable interest in either lot 322 or 323 to Rardin. As to lot 322, it is clear that conveying that lot by quit claim deed to both herself and Rardin nearly one year after purchasing the property and less than a month before executing the tie together covenant, that Bain had no intention of giving Rardin any interest in that property. The testimony established that without the tie together covenant, Bain was paying three membership dues – one for her for lot 323, one for Rardin for lot 323, and one for her for lot 322. After the tie together covenant, she would only be paying two membership dues – one for her and one for Rardin. However, to do the tie together covenant, the parties owning each property must be the same. Thus, Rardin's name, which was already on the deed to lot 323, had to be added to the deed for lot 322.

¶{71} As to her intentions for lot 323, when considering the facts surrounding the conveyance of lot 322 to Rardin and Bain and Noble's testimony, these support the conclusion that there was no intention to convey equitable interest to Rardin. Both Bain and Noble testified that Bain purchased lot 323 prior to purchasing lot 322. They further testified that the only way Rardin, as Bain's live-in-boyfriend, could have unlimited access to Lake Mohawk and its amenities was if he was named on the deed.

¶{72} However, even if the deeds should not have been considered together, the trial court did not solely rely on lot 322 to determine the equitable interest for lot

323. The facts surrounding the decision to deed lot 323 were sufficient to overcome the rebuttal presumption of equality and show that Bain did not intend to convey equitable interest in lot 323 to Rardin. The trial court relied on the fact that the purchase agreements to lot 323 stated that Bain was the buyer, she paid for that lot with her own funds and Rardin made no financial contribution to the purchase. The trial court then discussed Bain's claim that the only reason Rardin's name was added to the deed to Lot 323 was to give Rardin unrestricted access to Lake Mohawk amenities. The trial court discussed Bain's understanding of the rules of Lake Mohawk Owners' Association that the only way Rardin could get unrestricted access to the property was by placing his name on the deed and that Noble's testimony confirmed this understanding. The trial court even discussed the property owners' association handbook and found that Rardin could not have gotten unrestricted access to Lake Mohawk without being on the deed or being married to Bain. Consequently, this assignment of error lacks merit.

#### FOURTH ASSIGNMENT OF ERROR

¶{73} "EVEN THOUGH OHIO LAW REQUIRED CONSIDERATION OF ALL FORMS OF 'CONTRIBUTIONS' MADE BY PLAINTIFF TOWARD ACQUISITION, IMPROVEMENT, MAINTENANCE, AND REPAIR OF THE REAL ESTATE AT ISSUE IN THIS CASE, THE TRIAL COURT ERRONEOUSLY IGNORED OR DISCOUNTED THE VALUE OF THE INKIND 'CONTRIBUTIONS' MADE BY PLAINTIFF IN FORMS OTHER THAN TENDER OF MONETARY CONSIDERATION THAT SUPPORTED PLAINTIFF'S CLAIM OF ENTITLEMENT TO AN UNDIVIDED ONE-HALF EQUITABLE INTEREST IN SUCH REAL ESTATE."

¶{74} In this assignment of error, Rardin contends that the trial court did not account for the contributions he made to the properties and thus, did not follow the law. As stated above, contributions or improvements in the property can be considered as well as the purchase price when determining the equitable interest of the parties to the deed in a partition action. *Spector*, 62 Ohio App.2d 141-142.

¶{75} Rardin testified and offered Exhibit O as evidence of the contributions he made to the Lake Mohawk properties. This exhibit showed that Bain contributed \$451,637 for the purchase price of both lots and the costs of the supplies used to do

landscaping and construction on those lots. It then showed Rardin's contribution of \$124,402 for the cost of labor on the landscaping and construction projects for these lots. He also offered exhibits to show his contribution for work done on the Blaikley Drive, Rotherby Circle, and East Hines Hill residences. Exhibits P, Q, and R. These exhibits also showed Bain's contribution for the cost of the supplies used to perform work at each of these three residences; however, the purchase price of the real estates were not factored into her contribution. Lastly, he submitted Exhibit S for the work he did on her cars for six years of washing and detailing. The total from these exhibits showed Bain's contribution to be \$460,148 and Rardin's contribution to be \$239,533.

¶{76} The trial court found that while Rardin went to great lengths to establish the services that he supplied to Bain, that those services were overblown and overvalued. 04/30/07 J.E. The court explained that in all those figures Rardin failed to consider the lifestyle that Bain provided for Rardin at no cost to him.

¶{77} "Rardin fails to consider that he lived quite well while living with Bain, residing in huge beautiful homes or estates and upon lakefront property and that he was provided with a multitude of toys with which to play all at the sole cost of Bain. The relationship was that of boyfriend/girlfriend admitted by Rardin. The things he did are those things that would be expected of a boyfriend of his capabilities who is being kept by his girlfriend. Although the real value of Rardin's services are irrelevant in light of the other findings of the Court, there appears to be no real discrepancy between the value of what Rardin did for Bain and the value of the manner in which Bain kept Rardin."

¶{78} As this finding shows, the trial court did not fail to consider the "contributions" made by Rardin to the property, but rather disbelieved their worth and held that what was done for Bain was done in Rardin's capacity as a live-in-boyfriend who paid no rent, utilities, taxes, insurance, food or clothing costs and who was given gifts and spending money when he needed it.

¶{79} We agree with the trial court's reasoning and hold that it did not commit error when it found that Rardin's "contributions" did not show that he was entitled to one half interest in lots 322 and 323. The evidence clearly established that Bain and

Rardin were boyfriend/girlfriend who lived together. In their relationship, she paid for everything; she provided them with this extravagant lifestyle, gave him gifts (which in one instance was \$20,000 to buy a truck) and provided him spending money. He did not contribute financially to the lifestyle and did not even pay for his basic needs, such as food and clothing. He did however perform work on the Lake Mohawk property, which was within his ability to provide. The trial court obviously found it unbelievable, as do we, that in addition to Bain providing the entire lifestyle to Rardin without his financial help, she would also agree to compensate him for work on the property, which would mean he contributed in no way to that lifestyle. This assignment of error lacks merit.

#### FIFTH ASSIGNMENT OF ERROR

¶{80} "THE TRIAL COURT ERRED IN CONCLUDING THAT THE ADDITION OF PLAINTIFF'S NAME TO THE DEEDS TO THE REAL ESTATE PARCELS AT ISSUE CREATED A 'PURCHASE MONEY RESULTING TRUST IN WHICH RARDIN HAS NO BENEFICIAL INTEREST.'"

¶{81} In this assignment of error, Rardin argues that the trial court erred in finding that a purchase money resulting trust was formed by Bain. As stated above, Rardin sought partition and the estate's defense was that a purchase money resulting trust was created. An overview of the law on resulting trusts and in particular purchase money resulting trusts is helpful prior to addressing this assignment of error.

¶{82} A resulting trust is based upon the parties intentions and "arises when property is transferred under circumstances that raise an inference that the transferor, or the person who caused the transfer, did not intend the transferee to take a beneficial interest in the property." *Brate v. Hurt*, 174 Ohio App.3d 101, 2007-Ohio-6571, ¶28, citing *Union S. & L. Assn. v. McDonough* (1995), 101 Ohio App.3d 273, 276. By employing its equitable powers in creating a resulting trust, a court seeks to enforce the parties' intentions. *Bilovocki v. Marimberga* (1979), 62 Ohio App.2d 169, 172.

¶{83} "A purchase-money resulting trust occurs when property is transferred to one person, but the entire purchase price is paid by another. *Glick v. Dolin* (1992), 80 Ohio App.3d 592, 597, citing Restatement of the Law 2d, Trusts (1959) 393, Section

440, and 5 Scott on Trusts (4th Ed. 1967), Section 440. In such a case, a resulting trust arises in favor of the person by whom the purchase price is paid. *John Deere Indus. Equip. Co. v. Gentile* (1983), 9 Ohio App.3d 251, 255, citing Restatement of the Law 2d, Trusts (1959), 393, Section 440. Central to the determination of whether a purchase money resulting trust exists are the issues of (1) who paid for the purchase and (2) who was intended to beneficially enjoy the property. *Cayten v. Cayten* (1995), 103 Ohio App.3d 354, 359, citing *Glick v. Dolin* (1992), 80 Ohio App.3d 592, 597." *Rodgers v. Pahoundis*, 5th Dist. No. 07CA07, 2008-Ohio-4468, ¶34.

¶{84} Restatement of the Law 2d, Trusts (1959) 416-417, Section 454, states:

¶{85} "Where a transfer of property is made to one person and a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made in such proportion as the part paid by him bears to the total purchase price, unless he manifests an intention that no resulting trust should arise or that a resulting trust to that extent should not arise."

¶{86} Therefore, "the equitable owner has an interest in such proportion as the amount he paid bears to the total purchase price." *Glick*, 80 Ohio App.3d at 597. The burden of proof to establish a purchase-money resulting trust is clear and convincing evidence. *Ohman v. Ohman*, 5th Dist. No. 2001CA214, 2001-Ohio-7050, citing *Gertz v. Doria* (1989), 63 Ohio App.3d 235, 237.

¶{87} With that law in mind, we now turn to the arguments made under this assignment of error:

¶{88} First, Rardin argues that the trial court, in finding that a purchase money resulting trust was created, improperly reconsidered its prior order that had found that the defense of a purchase money resulting trust would fail. Judge Martin originally found that Bain's defense of a purchase money resulting trust would not work because Rardin was the natural object of her bounty and that Bain at the time of the conveyances of lots 322 and 323 took title in her name only. Those facts, according to the trial court, disallowed a purchase money resulting trust. 09/28/05 J.E. The estate later re-raised the issue to the trial court. Judge Bruzzese found merit with the claim and found that Rardin was not the natural object of Bain's bounty. 04/30/07 J.E.

¶{89} We find no merit with Rardin's argument. Admittedly, the 09/28/05 judgment entry did find that the defense of purchase money resulting trust failed. However, that was not a final order and thus, could be reconsidered by the trial court. *Whetzel v. Starkey*, 7th Dist. No. 99BA42, 2000-Ohio-2621.

¶{90} Next, addressing the merits, Rardin asserts that a purchase money resulting trust does not result for two reasons. First, he contends that Rardin was the natural bounty of Bain's affection and, as such, a purchase money resulting trust could not be formed.

¶{91} It is true that a resulting trust, including a purchase money trust, does not arise if the transferee is "a natural object of bounty" of the person who pays the purchase price. *John Deere Indus. Equipment Co. v. Gentile* (1983), 9 Ohio App.3d 251, 255, citing *Creed v. Lancaster Bank* (1852), 1 Ohio St. 1, 9-10. However, even if the transferee is the "natural object of bounty" a purchase money resulting trust can be formed if it appears from other evidence that the person who paid the purchase price intended to retain a beneficial interest in the property. *John Deere Indus. Equipment Co.*, 9 Ohio App.3d at 255, citing Restatement of the Law, Trusts 2d, at Section 442. "In other words, the law presumes that a conveyance to an individual's own child without fair consideration is a gift, unless this presumption is overcome by other evidence tending to show that the parent conveyed only the bare legal title, and intended to retain her equitable ownership." *John Deere Indus. Equipment Co.*, 9 Ohio App.3d 251, 255, citing *Creed v. Lancaster Bank* (1852), 1 Ohio St. 1, 9-10.

¶{92} The trial court in its 04/30/07 judgment entry found that Rardin was not the "natural object of bounty." It supported this decision with evidence submitted at trial of Bain's last will and testament. That will was drafted in 1998 during Rardin and Bain's relationship and in it Bain left everything to her children and made no mention of Rardin. Her will is strong evidence that Rardin was not the natural object of Bain's bounty. Thus, the trial court's conclusion was justified.

¶{93} However, for the sake of argument, even if the trial court was incorrect and Rardin was the "natural object of bounty," the law clearly indicates that the presumption of a gift can be overcome if other evidence shows that Bain intended to retain beneficial interest in the property. As is discussed above, Bain submitted

evidence that she retained beneficial interest by explaining her reason for putting his name on the deeds was to allow him unrestricted access to Lake Mohawk and its amenities and to save on membership dues. The evidence, clearly believed by the court, supported her indication that she was not conveying equitable interest to Rardin.

¶{94} The next argument made by Rardin is that a purchase money resulting trust was not brought about because Bain did not pay for and convey title to Rardin at the same time. As to lot 323, this argument is factually lacking. Title was conveyed to Rardin and Bain at the time of purchase; a warranty deed from the seller, Critean, conveyed title to Bain and Rardin on June 5, 1998. Admittedly in March 2000, Bain executed a quit claim deed that transferred lot 323 to herself and Rardin; the quit claim deed added Rardin's middle initial. However, as Rardin admits, that was done so that title to lots 323 and 322 could be tied together; they had to have the same legal names in the deeds. Asserting that the purchase and conveyance did not occur at the same time is incorrect; they did. Clearly in 1998 the purchase and the conveyance happened at the same time. Thus, that argument does not defeat a purchase money resulting trust as to lot 323.

¶{95} As to lot 322, the time line clearly shows that the conveyance of the property to Rardin and purchase of the property did not occur at the same time. Rather, Bain purchased the property and one year later executed a quit claim deed that put the property in both her and Rardin's name. Rardin cites to an 1831 case that states that the resulting trust must arise at the same time as the conveyance. *Fleming v. Donahoe* (1831), 5 Ohio 255, 257. He also cites to an 1877 case, *Watson v. Erb* (1877), 33 Ohio St. 35, 47, that he claims states that a trust attaches at the time of the conveyance when the money is paid to the vendor. In *Watson*, the Court stated the following:

¶{96} "Equity will relieve against a fraudulent purchaser, by converting him into a trustee for the person injured, and parol evidence of the facts is admissible to show that he is such fraudulent purchaser. This doctrine rests upon the ground, that where a party has parted with his money or property, and an attempt is made to rob him of the fruits of it, equity will decree a trust in such fruits. If, however, he has made no payment, he can not, as a general rule, be permitted to show by parol, that the

purchase was made for his benefit; nor would a subsequent advance of the money to the purchaser, after the title is vested, alter the case. *Botsford v. Burr*, 2 Johns. Ch. 405; *Hollida v. Shoup*, 4 Md. 465. The trust must attach, if at all, at the time of the conveyance, for it is the money which has gone to the vendor, as the inducement of the title with which he parts, that creates the equity in favor of him who advances it. *White v. Carpenter*, 2 Paige, 238; *Botsford v. Burr*, 2 Johns. Ch. 405; *Walter v. Klock*, 55 Ill. 362." Id.

¶{97} The above case is distinguishable because it is discussing a fraudulent purchaser and when and if a trust would be created in that situation. Here, we are not discussing a fraudulent purchaser. Furthermore, *Watson* does not clearly indicate that a person who has already purchased land and had title in their name cannot later deed that property over to another person with the intention of creating a purchase money resulting trust.

¶{98} In a recent case, the Fifth Appellate District was faced with a fact pattern where land was purchased by A, then years later A transferred that property to B, but A remained on the land. *Rodgers*, 5th Dist. No. 07CA07, 2008-Ohio-4468. A claim that a purchase money resulting trust was created by the transfer to B. B claimed that the transfer of the property was to compensate B for the money he lent A. The case went to trial and it was found that no purchase money resulting trust occurred because the evidence showed that the transfer of the property was for compensation of the loans extended to A from B. That decision was upheld. Id. The appellate court did not discuss the time delay between A's purchase of the property and A's conveyance of the property to B, rather, the court relied on other facts and stated that those facts did not clearly and convincingly show intent for a purchase money resulting trust. Id.

¶{99} The *Rodgers* court's analysis, though not directly on point, shows that any time delay is not the most important factor to determine whether a purchase money resulting trust was created. What is important is who paid the purchase price and who was intended to have a beneficial interest. Regarding these two factors, we find that at the time Rardin's name was added to the deeds, Bain intended to create a purchase money resulting trust. She did not intend to convey any equitable interest in the property to Rardin; her sole reason for putting his name on the deeds was to allow

him, as her live-in-boyfriend, to have unlimited access to Lake Mohawk and its amenities and to save on membership dues. This assignment of error lacks merit.

SIXTH ASSIGNMENT OF ERROR

¶{100} "THE TRIAL COURT'S DECISION THAT THE DEFENSE SUSTAINED ITS BURDEN OF PROOF IN OVERCOMING THE PRESUMPTION IN FAVOR OF PLAINTIFF'S UNDIVIDED ONE-HALF EQUITABLE INTEREST IN THE PARCELS AT ISSUE BY CLEAR AND CONVINCING EVIDENCE IS NOT SUPPORTED BY THE RECORD, OR IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, OR PROCEEDED UPON FINDINGS OF FACT THAT ARE IRRATIONAL, ARBITRARY, CAPRICIOUS, UNREASONABLE, IMPERMISSIBLE, MANIFESTLY UNJUST, OR IN ABJECT DISREGARD OF OTHER RELEVANT AND UNCONTROVERTED EVIDENCE ESTABLISHING JUSTIFICATION FOR THE EQUITABLE INTEREST CONFERRED ON PLAINTIFF."

¶{101} Under this assignment of error Rardin argues that the trial court's decision was against the manifest weight of the evidence. When reviewing this type of argument, we will affirm the judgment if it is supported by "some competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, syllabus. Under this standard we have an obligation to presume that the findings of the trier of fact, which in this case was the trial court, are correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81. This presumption arises because the trial judge had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id.* at 80. We cannot reverse a decision simply because we hold a different opinion concerning the credibility of the witnesses and evidence submitted to the trial court. *Id.* at 81. "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Id.* at 81. This standard affords the trial court with a great amount of deference. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶26.

¶{102} Here, as explained at length above, the trial court found by clear and convincing evidence that Bain rebutted the presumption that she and Rardin were equal owners in lots 322 and 323 at Lake Mohawk. It stated that the inclusion of Rardin's name on lot 323 was to allow Rardin access to Lake Mohawk and its amenities and that the inclusion of his name on lot 322 was for the purpose of saving annual dues.

¶{103} Rardin claims that from all the evidence there are four plausible inferences that can be drawn from the evidence. The first inference contends that Bain intended him to receive an equitable interest in both lots. The next two are similar because they each purport that Bain intended to give an equitable interest in lot 323 to Rardin, but no equitable interest in lot 322. The last inference claims that the difference in the length of time it took to deed each of the properties in both names shows that Bain intended a different result as to the equitable interest conveyed. The purchase contract on lot 323 was signed in March 1998; the warranty deed conveyed from the seller to Bain and Rardin was issued June 1998. The purchase contract on lot 322 was signed in June 1999 and one month later a warranty deed was conveyed from the seller to Bain solely. Eleven months later in June 2000, Bain quit claim deeded that property jointly in her name and Rardin's name. When reading this fourth inference, Rardin is implicitly claiming that due to the timing of the conveyances, Bain intended to convey equitable interest in lot 323 and not in lot 322. He then claims that since these are four viable alternatives, the trial court's finding that Bain had overcome her presumption is against the manifest weight of the evidence.

¶{104} All of the inferences he sets forth and the determination of which is most believable hinge on the credibility of the witnesses. Both Rardin and Bain testified as to what the intent was when each property was conveyed in their joint names. To support the position that no equitable interest was conveyed and that a purchase money resulting trust was created, the estate offered Bain's testimony that for lot 323 Rardin's name was put on the deed to allow him unlimited access to Lake Mohawk and all its amenities; it was not to convey any equitable interest to him. For lot 322, she testified that it was to save on property ownership dues. The estate also offered Noble's testimony to corroborate Bain's stated belief that Rardin could not get

unrestricted access to Lake Mohawk without being married to her or without putting his name on the deed to the property. Furthermore, the owners' association manual was also admitted into evidence and it appears to indicate that there was no other way to get him unrestricted access. Noble also testified that by doing a tie together covenant for lots 322 and 323, Bain would save on membership dues. Lastly, the estate offered evidence of the parties' lifestyle and course of dealings - that Bain paid for it all with no financial help from Rardin and that items were deeded solely in Rardin's name but were used by the entire family.

¶(105) Rardin, on the other hand, testified that conveying the property to him was giving him an equitable interest and was compensating him for all the work he had done on her properties. Rardin supported his position with the deeds that gave him a rebuttal presumption of half equitable ownership and his testimony that Bain and he had an agreement where she would make it right if he worked only on her properties and gave up his landscaping business.

¶(106) The timeline for conveyance of lot 322 to Bain and then to Bain and Rardin is discussed at length above. That timeline along with the tie together covenant that was signed less than a month after the conveyance from Bain to Bain and Rardin is strong support to overcome the presumption of equitable ownership in lot 322. When that is taken along with Bain's testimony, it is nearly impossible to find that the decision regarding that property was against the manifest weight of the evidence.

¶(107) The deeds and purchase agreement for lot 323 show that the property was immediately conveyed to Rardin and Bain jointly. This deed alone does not help to overcome the rebuttal presumption concerning lot 323. However, if Bain's testimony is believed and is taken in conjunction with the deed to lot 323, it overcomes the rebuttable presumption. On the other hand, if Rardin's testimony is believed and the deed is considered in conjunction with that testimony, the rebuttable presumption cannot be overcome.

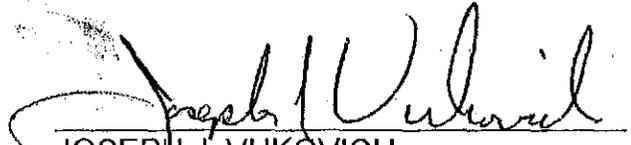
¶(108) As can be seen, this is clearly a credibility question. The trial court did not believe Rardin. As discussed above regarding the personal property which highlighted the parties' course of dealing, the trial court found Rardin's testimony

unbelievable. Specifically, the trial court stated that it was not believable that Bain would purchase two ski dos and two snowmobiles as a gift to only Rardin and similarly that she would purchase a speed boat and pontoon boat that was used by the family and only give it to Rardin. The trial court also did not believe that there was an agreement between Rardin and Bain that she would give him half of the Lake Mohawk properties. This is also discussed at length above; it found that Rardin's work was his contribution to the lifestyle that Bain provided to him. Thus, while there might be two plausible outcomes, the trial court finding Rardin incredible and Bain credible allows her to overcome the presumption. Credibility is a question best left for the trier of fact. Consequently, the decision reached as to lot 323 was also not against the manifest weight of the evidence. Thus, this assignment of error lacks merit.

¶{109} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.  
Waite, J., concurs.

APPROVED:

  
\_\_\_\_\_  
JOSEPH J. VUKOVICH,  
PRESIDING JUDGE

ENTERED

**Appendix 2**

Judgment Entry of the Seventh Appellate Judicial District

*Steven L. Rardin v. Estate of Diana Lynn Bain*

August 5, 2009

STATE OF OHIO )  
CARROLL COUNTY ) SS:

IN THE COURT OF APPEALS OF OHIO  
SEVENTH DISTRICT

STEVEN RARDIN, )  
PLAINTIFF-APPELLANT, )  
VS. )  
ESTATE OF DIANA LYNN BAIN, )  
et al., )  
DEFENDANTS-APPELLEES. )

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CASE NO. 08 CA 853  
**FILED**  
JUDGMENT-ENTRY  
AUG 05 2009  
COURT OF APPEALS  
CARROLL COUNTY, OHIO

On July 9, 2009, plaintiff-appellant Steven Rardin filed a timely App.R. 26(A) motion for reconsideration of our June 29, 2009 opinion, *Rardin v. Estate of Bain*, 7th Dist. No. 08CA853, 2009-Ohio-3332.

Our standard of review of a motion for reconsideration is very limited. "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *In re Estate of Phelps*, 7th Dist. No. 05JE19, 2006-Ohio-1471, ¶3, quoting *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, paragraph one of the syllabus. Reconsideration motions are rarely considered when the movant simply disagrees with the conclusions reached and the logic used by an appellate court. *Victory White Metal Co. v. N.P. Motel Syst.*, 7th Dist. No. 04MA245, 2005-Ohio-3828, ¶2. If the issue is one of clarification or expansion, such can be addressed while still denying the application. *Reighard v. Cleveland Elec. Illuminating*, 7th Dist. No. 05MA120, 2006-Ohio-2814, ¶2.

In the motion for reconsideration, Rardin raises two issues. The first argument concerns the standard employed by this court in reaching its decision. Rardin contends that it appears from the opinion that we have departed from the clear and

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convincing standard that must be shown to overcome the rebuttable presumption that parties have an equal and undivided interest in the deeded property. He cites *Huls v. Huls* (1954), 98 Ohio App. 509, 511 and *Henkle v. Henkle*, 75 Ohio App.3d 732, 736, in support of the clear and convincing standard. He asserts that this court did not declare that it was following the clear and convincing standard and, given the evidence, it is unclear how that standard was met.

In reviewing the arguments made in the direct appeal, it appears that Rardin's argument is that when considering the sixth assignment of error this court did not use a clear and convincing standard.<sup>1</sup> In that assignment of error, Rardin argued that the trial court's decision finding that he was not entitled to partition was against the manifest weight of the evidence. Specifically, he claimed that since there were viable alternatives for what the evidence showed, the trial court's finding that Bain had overcome her presumption was against the manifest weight of the evidence.

In discussing the law of partition in paragraphs 22-25 of the opinion, this court did not use the words "clearly and convincingly." However, we note that *Huls*, the case cited by Rardin as support for the position that the clear and convincing standard is applicable in a partition case, also did not use the words "clearly and convincingly" in its opinion.<sup>2</sup> Rather, it merely stated that it was clear in one instance. Yet, it is still read to invoke a clear and convincing standard. Likewise, we additionally note that as Rardin contends, the clear and convincing standard of proof was not challenged by the estate.

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<sup>1</sup>The other assignments of error do not call for a clear and convincing standard or are not dealing with the law on partition. For instance, the first and third assignments of error argued that the trial court incorrectly admitted certain evidence. As explained in the opinion, we review the trial court's admission of evidence for an abuse of discretion. As to the second assignment of error, Rardin argued that the trial court improperly considered both deeds simultaneously when determining that it was not Bain's intent to convey equitable interest to Rardin. That argument did not encompass whether the trial court's result was correct, although we did somewhat address whether that decision was correct in ruling on that assignment of error. The fourth assignment of error dealt with contributions allegedly made by Rardin that the trial court allegedly did not consider in determining that Rardin was not entitled to one half equitable interest in the property. The fifth assignment of error dealt with a purchase money resulting trust, not partition. In that assignment of error, we clearly indicated that the clear and convincing standard applied.

<sup>2</sup>Rardin also cited *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 736. That case does not deal with partition, but rather with reformation of a deed on the basis of mutual mistake. It does state that in order to reform the deed mutual mistake must be shown by clear and convincing evidence.

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While this court did not use the words "clearly and convincingly," our opinion and reasoning found that Bain showed by clear and convincing evidence that she did not intend to convey equitable interest to Rardin. In summarizing our analysis under the last assignment of error, we found that there was no error in the trial court's determination that the estate, by clear and convincing evidence rebutted the presumption that she and Rardin were equal owners in lots 322 and 323. This is an indication that we applied the same standard used by the trial court. If we had been only using a preponderance of the evidence standard, we would have indicated that the trial court used a higher standard than was required, but the decision could still be affirmed.

Furthermore, in paragraphs 106 and 107 of the opinion, we explained how the rebuttable presumption was overcome. Part of overcoming that presumption was considering both Rardin and Bain's testimony. The trial court clearly indicated it did not find Rardin credible. As explained in the opinion, we give deference to the trial court's credibility findings. However, even if we did not give deference to the trial court, we previously stated in the opinion that considering the other evidence, we did not believe Rardin. *Rardin*, 7th Dist. No. 08CA853, 2009-Ohio-33332, ¶79.

Also, our opinion explained that in considering the parties intent, both deeds could be looked at simultaneously. We stated that it was clear that by conveying lot 322 by quit claim deed to herself and Rardin nearly one year after purchasing the property and less than a month before executing the tie together covenant, that Bain had no intention of giving Rardin any interest in that property. *Id.*, at ¶70. When that was considered in conjunction with Bain's testimony about her intentions on Lot 323, we found that the evidence supported the conclusion that there was no intention to convey equitable interest to Rardin. *Id.*, at ¶71. Consequently, our opinion did consider all the evidence. Just because there were other viable alternatives (if the evidence supporting those alternatives was believed), does not mean that the rebuttable presumption was not overcome by clear and convincing evidence.

It is noted at this point, that Rardin contends that it did not "appear" to him that the trial court applied the clear and convincing standard to both parcels, but rather only applied it to Lot 323. We disagree with his interpretation of the trial court's order.

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When reading the trial court's entire paragraph on burden of proof, the trial court applied a clear and convincing standard to both lots:

Additionally under this argument, Rardin discusses at great length that the special pass, which we acknowledged that Bain could have gotten for Rardin, casts doubt on overcoming the rebuttable presumption. We disagree. As was explained in the opinion, while it is true that Bain could have gotten a special pass for Rardin, we stated that Lake Mohawk's Rules and Regulations did not support Rardin's belief that he would have unrestricted access to Lake Mohawk and its amenities. *Id.*, at ¶33. As such, the special pass does not cast doubt on overcoming the rebuttable presumption, because as the opinion explained Bain's reasoning for adding Rardin to the deed to Lot 323 was so that he could have unrestricted access to Lake Mohawk and its amenities.

Consequently, as to the first argument, the motion for reconsideration is denied. However, it is clarified that we did apply a clear and convincing standard and found, just as the trial court did, that the rebuttable presumption was overcome by clear and convincing evidence.

The second issue raised by Rardin argues that this court overlooked the contributions made by Rardin. His alleged contributions were discussed at length throughout the opinion. They were specifically addressed in paragraphs 73-79 when dealing with the fourth assignment of error which argued that the trial court ignored or did not fully consider Rardin's contributions. We found no merit to his argument and stated that it was unbelievable that in addition to Bain providing an extravagant lifestyle for herself and Rardin (without him providing anything), that she would agree to compensate him for the work on the property. *Id.* at ¶79. Consequently, we did consider contributions. He is disagreeing with our resolution of his alleged contributions.

Also under this argument, Rardin discusses *Spector v. Giunta* (1978), 62 Ohio App.2d 137, and how our court distinguished that case from the facts that were before us. He contends that upon reconsideration we should state that the distinction "is one without any substantial difference" and that we should find that the deeds cannot be considered simultaneously. His argument is merely a disagreement with our holding

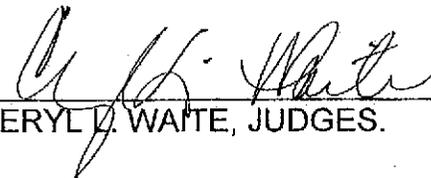
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that *Spector* is distinguishable and finding that the deeds could be looked at simultaneously to determine Bain's intent. As such, we will not entertain it on reconsideration.

In all, the motion for reconsideration is denied.

  
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JOSEPH J. VUKOVICH,

  
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GENE DONOFRIO,

  
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CHERYL L. WAITE, JUDGES.

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