

ORIGINAL

IN THE SUPREME COURT OF OHIO

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Case No. 2010-0070

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ROBERT F. DIETL, et al.

Appellees/Plaintiff

v.

CATHERINE A. SIPKA

Appellant/Defendants

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**ON APPEAL FROM ELEVENTH DISTRICT CASE NO. 2009 TR 00025**

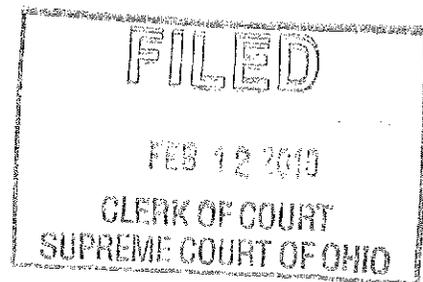
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**MEMORANDUM OF ROBERT F. DIETL AND ANGELA A. DIETL IN  
RESPONSE TO THE MEMORANDUM SUPPORTING JURISDICTION OF  
CATHERINE F. SIPKA**

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Amelia A. Bower (No. 0013474)  
David Van Slyke (No. 0077721)  
Counsel of Record  
Plunkett Cooney  
300 East Broad Street, Suite 590  
Columbus, Ohio 43215  
Phone: (614) 629-3004  
Fax: (614) 629-3019  
Attorneys for Appellees Robert F. Dietl and  
Angela A. Dietl

Randil J. Rudloff (No. 0005590)  
John M. Rossi (No. 0079875)  
Guarnieri & Secrest, P.L.L.  
151 East Market Street  
Box 4270  
Warren, Ohio 44481  
Phone: (614) 629-3004  
Fax: (614) 629-3019  
Counsel for Appellant



**EXPLANATION OF WHY THIS DOES NOT PRESENT ISSUES OF PUBLIC OR GREAT GENERAL IMPORTANCE**

The issue presented by Appellant is already well settled in Ohio. The question is not whether a divorcing spouse can retain an equity interest in marital property through a recorded Quit Claim Deed but whether a spouse, having a judgment rendered in a divorce, must reduce her judgment to a Certificate of Judgment pursuant to R.C. § 2329.02 in order to preserve her claim. Ohio Court's have unanimously enforced that requirement. Appellant's contention that divorcing parties routinely use the vehicle of a Quit Claim Deed to preserve a claim on the equity in marital property is incorrect. While some parties may choose that method, it is not the norm, nor is it proper.

This is an issue that should be addressed to the Ohio legislature, if at all.

## ARGUMENT

### **PROPOSITION OF LAW NO. 1: A VALID AND ENFORCEABLE INTEREST IN REAL PROPERTY MAY BE CREATED BY RESERVING SUCH IN THE DEED CONVEYING THE PROPERTY WHEN THE DEED IS PROPERTY RECORDED WITH THE COUNTY RECORDER.**

Appellant wants to use deeds to create liens on real property. Her theory for changing Ohio law is that reservations for life estates, oil and mineral rights and easements are no longer viable as a result of the Appellate Courts decision. Without a reasonable explanation for doing so, Appellant spins the failure to reduce her judgment to a lien (or to get a mortgage from her former husband) as invalidating the creation and transfer of actual interests in real estate. The problem lies, not in the Appellate Court's misunderstanding of the word "lien", but in Appellant's misreading of the law.

For hundreds of years, citizens of Ohio have created life estates by deed. A life estate is one of the freehold estates. Restatement of Property, No. 46 at 151 (1936). Dower is a form of a legal life estate. *Howell v. Howell* (1930), 122 Ohio St. 543. Other types of freehold estates are (a) estate in fee simple absolute; (b) estate in fee tail; and (c) estate in fee simple defeasible. McDermott, Ohio Real Property Law and Practice § 11-11A (4<sup>th</sup> ed. 1988). A fee simple absolute is the highest degree of ownership of real estate. Restatement of Property, No. 14 at 41 (1936). Because a life estate is an interest in real estate, it must be created by grant or devise. Thus, Appellants view that the sky is falling is misplaced.

Oil and mineral rights are also interests in real estate. *Moore v. Indian Camp Cast. Co.* (1907) 75 Ohio St. 493; *Pure Oil Co. v. Kindall* (1927), 116 Ohio St. 188. Again,

forecasting doom in the transfer of these interests only magnifies the point that Appellant does not understand the difference between interests in real estate and liens on real estate.

The third category of rights that Appellant says are imperiled are easements. Easements can be created by deed, prescription or implication. *See, Yeager v. Tuning* (1908), 79 Ohio St. 121. A party seeking the imposition of an easement by prescription or implication through court order, does not obtain a lien upon the real estate. He/she has a judgment that may be enforced, however.

The Court of Appeals appropriately found that Appellant did not reduce her judgment to a lien or obtain a mortgage from her ex-husband, both of which she could have done. At the same time, Appellant transferred her interest in the marital home to her husband so that he could refinance, without taking any steps to make sure that she would be paid. Now, after having lost her opportunity, she comes to this Court seeking a life preserver when she cast off in a leaky boat.

Appellant attempts to distinguish certain cases including *First Federal S & L Ass'n of Lakewood v. Dus* (2003 WL 215451206)(8<sup>th</sup> Ap. Dist. 2003). Contrary to her statement, the Eighth District, there, upheld the rule that a divorce decree granting attorneys fees did not create a judgment lien in favor of the attorney. Appellant also believes that *Campbell v. Campbell* (1992 WL 56794) (4<sup>th</sup> Ap. Dist. Case No. 91 CA 17) is not relevant despite the fact that the Court held that a divorce judgment is not a lien on real property. Like the facts here, Lewis Campbell was supposed to pay his ex-wife money after the divorce. Mrs. Campbell did not obtain a Certificate of Judgment for the amount owed but relied on the court order to collect. The only difference between *Campbell* and our case is that there was no transfer of property in which Mrs. Campbell

attempted to claim a lien. However, Mrs. Campbell, like Appellant, failed to take adequate steps to protect herself.

In *Zalewski v. Chalasta* (1994 WL 449560)(8<sup>th</sup> Ap. Dist.) a judgment lien coming out of a divorce was upheld as valid. This is another example of the steps that Appellant could have taken to preserve her claim to the equity on the marital home but failed to do so.

Appellant does not deal at all with a prior Eleventh District case, *Liddy v. Studio* (1997 WL 184763)(11<sup>th</sup> Ap. Dist.) in her brief. *Liddy* involved a water tap in fee which was not deemed to be an encumbrance on real estate that had been sold after the Liddys received a letter advising them of the cost to tap into a city water main. The Court of Appeals there determined that the fee was not an encumbrance which was defined as “[a]ny right to, or interest in, land which may subsist in another to [the] diminution of its value, but consistent with the passing of the fee by conveyance. . . . including a mortgage, judgment lien . . . ” *Id.*, 3.

Likewise, Appellant has apparently abandoned her interest in *Bank of New York v. Stambaugh* (2003 WL 22844267)(11<sup>th</sup> Ap. Dist.) where the Court held that a divorce judgment, not reduced to a lien, was not an encumbrance.

Appellant’s argument that the practicing bar is at risk because of this appellate decision is also undone by treatises directed to divorce lawyers. In Morganstern and Sowald, Baldwin’s Ohio Domestic Relations Law § 12:25 (2008), a warning is posted:

“It is an often-made assumption that the existence of the judgment entry on the court records creates a lien. Although a title company might call such a judgment into question, if it is missed, the party seeking to establish the lien is unprotected.”

Even though this *caveat* does not include an attempt to lien property by a deed recital, the authors cite to *Vickroy v. Vickroy* (1988), 44 Ohio App. 3d 210 (5<sup>th</sup> Ap. Dist) where the Court found that an unrecorded mortgage between divorcing parties, which was referenced in the divorce judgment, was not a lien. The Court specifically referenced R.C. § 2329.02 as requiring a Certificate of Judgment.

Appellant challenges the Appellate Court's conclusions as a misreading of the concept of liens despite the fact that three other Appellate Districts (Fourth, Fifth and Eighth) have decided this issue in a manner not favorable to her. In fact, there are no appellate districts that have accepted Appellant's view.

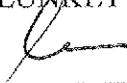
The Court of Appeals decision is well reasoned and above scrutiny. There are no material of issues of fact or genuine issues of law that require further review.

**CONCLUSION**

There are no issues of public or great general importance presented.

Respectfully Submitted,

PLUNKETT COONEY



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Amelia A. Bower (No. 0013474)  
David Van Slyke (No. 007721)

CERTIFICATE OF SERVICE

On this 12th day of February, 2010 the foregoing was served by regular U.S. Mail as follows:

Randil J. Rudloff  
John M. Rossi  
Guarnieri & Secrest, P.L.L.  
151 East Market Street  
Box 4270  
Warren, Ohio 44481



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Amelia A. Bower

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