ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0601

JAMES P. KUHN
APPELLANT,

v.

KELLY L. KUHN NKA COTTLE,
APPELLEE

On Appeal from the Guernsey County Court of Appeals, Fifth Appellate District

Court of Appeals
Case No. 13-CA-24

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, JAMES P. KUHN

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

This matter is one of public or great general interest as it is a matter of first impression concerning the impact and effect that oil and gas exploration, leasing of mineral rights and the accompanied unprecedented signing bonuses that has barraged Eastern and South-Eastern Ohio over the last several years has had on matters previously unrelated to mineral rights and/or real estate. This recent explosion of activity in the Eastern part of Ohio has made it apparent that the impact of this exploration and production of oil and gas reaches far beyond the now common place dormant mineral act questions and quiet title actions and impacts many facets of the law including, as is the case here, domestic relations matters. With the recent flurry of activity, issues of separate property ownership in divorce and the impact of such upon leases, lease signing bonuses and royalties has become an increasingly important issue.

In this matter, not only is the decision of the appellate court contrary to specific statutory authority, but it also flies in the face of well-established real property law. Essentially, in this matter, an oil and gas leasing company required the non-owner spouse to sign an oil and gas lease related to the separated property real estate owned by the other spouse for purposes of recognizing and/or waiving any dower interest she may have therein. Following execution of this lease a signing bonus was paid to the parties by check. That check was written in the name

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of both parties yet the 1099 later received was issued only in the name and social security number of Appellant. The parties negotiated the check.

Based upon the issuance of the check jointly to the parties, the appellate court found that the signing bonus was income earned during the marriage despite the fact that they determined the real estate to be the separate property of the husband. In rendering this decision, the appellate court failed to consider Ohio Revised Code Sections 3105.171(A)(4) and 3105.171(A)(6)(a)(iii). However, more importantly, this decision has permitted a third-party (the oil and gas leasing company) to create an interest in the non-owner spouse in the real estate or the proceeds derived therefrom simply by requiring that spouse's signature. Where a deed would previously have been required in order to transfer an interest in real estate now mere signature on a lease solely for the purpose of dower recognition has created some right, title or interest in or to the real estate – even where that was not the intention of the parties.

The implications of this decision extend beyond the current matter and affect the practice of not only domestic relations law, but also real estate and probate practice concerning the transfer of real estate, including the preparation of deeds, leases and any other documents previously utilized to transfer real estate. In recent years thousands of leases have been signed in Ohio encumbering hundreds of thousands of acres of real estate and stretching throughout many counties in eastern and southern Ohio. Given this, the long term consequences of the construction of these agreements are just becoming known.

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STATEMENT OF THE CASE AND FACTS

On April 19, 2001, Appellant, James P. Kuhn, purchased 24.257 acres more or less, located at 64720 Haught Road, Cambridge, Guernsey County, Ohio for $30,000.00. Appellant was unmarried at that time. Appellant paid $6,000.00 down on that real estate and financed the remaining amount due with First Federal Savings Bank of Eastern Ohio. The general warranty deed for the real estate was held solely in Appellant's name.

On March 13, 2002, Appellant refinanced the existing mortgage and borrowed additional monies from the Caldwell Savings and Loan Co in order to construct a home on the property. Following this refinance, Appellant mortgage liability was $136,000.00.

On June 3, 2006, Appellant executed a home equity line of credit with Wright-Patt Credit Union in the amount of $25,000.00 in order to consolidate credit card debt.

None of the above actions were done in anticipation of marriage and, in fact, much of this occurred prior to the parties meeting one another.

On February 5, 2007, Appellee, Kelly L. Kuhn nka Cottle, paid, from her separate monies, the balance due on the home equity line of credit in the amount of $18,644.38. Subsequently, on February 17, 2007, Appellee paid $80,000.00 towards the Caldwell Savings and Loan Co. mortgage, again from her separate monies.

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On March 30, 2007, the parties jointly refinanced the property with Summit Federal Credit Union in the amount of $47,500.00 which was the amount then remaining on the Caldwell Savings and Loan Co. mortgage.

On May 12, 2007, the parties were married. The parties paid the remainder of the mortgage during the period of the marriage and, as such, at the time of final divorce hearing in this matter, the real estate was unencumbered. During the parties' marriage no deed transferring the real estate from Appellant to the parties jointly was ever executed.

On October 22, 2011, the parties entered into an oil and gas lease with Gulfport Energy Corporation for oil and gas rights to the subject real estate. The lease referred to the parties as "James P. Kuhn and Kelly L. Kuhn, his wife...(hereinafter called the "Lessor")". The Memorandum of Oil and Gas Lease referred to the parties as "James P. Kuhn and Kelly L. Kuhn, his wife...hereinafter collectively called "Lessor".

The Gulfport lease provided for a signing bonus that totaled $121,285.00 and twenty percent royalty interest in the event that oil and gas are produced from the property. The signing bonus check was executed on February 16, 2012 with the parties placing the proceeds therefrom in an account pending separation of the parties.

Approximately one month later, on March 19, 2012, Appellant filed a complaint for divorce in the Guernsey County Common Pleas Court. The parties entered in to various agreements regarding the division of property between the

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parties. By order filed June 12, 2012, the parties agreed that Appellant would pay to Appellee $70,000.00 as repayment for much of what she had paid towards the Caldwell Savings and Loan Co. mortgage on the subject real estate. Thereafter, a final hearing was held before the Magistrate on March 1, 2013. At that time, the parties entered in to further agreement and disposed of all issues except for the disposition and/or division of the $121,285.00 signing bonus and the rights to any future royalties paid under the oil and gas lease. By that agreement, Appellant agreed to repay Appellee an additional $10,000.00 to fully compensate her for the monies Appellee had previously paid towards the mortgage.

By decision dated March 26, 2013, the Magistrate determined that the subject real estate was Appellant's separate property. Further, the trial court found that no transmutation of separate property had occurred. Therefore, the full signing bonus and any rights to future royalties were determined to be the sole, separate property of Appellant.

Appellee filed a timely notice of appeal to the Fifth District Court of Appeals. Pursuant to a decision dated January 13, 2014, the Fifth District Court of Appeals affirmed in part and reversed in part the decision of the trial court. The appellate court determined that Appellee had been fully reimbursed for her investments in the real estate by agreement of the parties, that no "transmutation" of the property had occurred and, therefore, that Appellee did not acquire a separate property interest in and to the subject real estate property. As such, the appellate

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court determined that any future royalty rights belonged exclusively to the property owner, Appellant, James P. Kuhn.

However, the appellate court found that the signing bonus of $121,285.00 was "income" received during the marriage. The appellate court found that the oil and gas signing bonus was "just as any other income generated during a marriage" and therefore was subject to division between the parties.

Appellant filed an Application for En Banc Consideration and Reconsideration in the Fifth District Court of Appeals on February 4, 2014 urging the appellate court to reconsider its decision as it had failed to consider the application of Ohio Revised Code Section 3105.171(A)(4) and 3105.171(A)(6)(a)(iii) regarding active vs. passive appreciation when rendering its decision.

Pursuant to judgment entries filed March 10, 2014, the appellate court denied both requests. It is from the decision of the appellate court that Appellant now seeks appeal to this Court.

The court of appeals erred in ruling that the income derived from the oil and gas lease executed regarding the Haught Road real estate to be income subject to division between the parties as the income created from that real estate and lease was passive income from Appellant's separate property interest and therefore said income was also Appellant's separate property.

In support of its position on these issues, Appellant presents the following argument:

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ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: ***Pursuant to Ohio Revised Code Sections 3105.171(A)(4) and 3105.171(A)(6)(a)(iii) passive appreciation and income is not marital property subject to division by the parties.***

Proposition of Law No.2: ***Where one spouse owns real property in an area experiencing a high volume of oil and gas exploration and leasing, the acquisition and execution of a lease by the property owner is not the result of contribution of labor, money or in-kind contribution such that any income generated from said lease could be considered "active income" pursuant to Ohio Revised Code Section 3105.171 but is instead "passive income" generated from the separate property and therefore is not subject to division between the spouses in an action for divorce.***

In *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, this Court considered the issue of determination of "passive" vs. "active" income. There, this Court held that ORC Section 3105.171 unambiguously mandates that when either spouse makes a contribution of labor, money, or and in-kind contribution that *causes* an increase in the value of separate property that increase must be considered marital. (emphasis added)

In *Middendorf*, it was determined that the husband's efforts in operating and expanding his stockyard business were what had caused and created the increase in the value thereof. Thus, this Court determined that the increase in value of that business was the result of one party's active participation in the business rather than passive growth and, as such, the additional value created was considered a marital asset that was subject to division between the parties.

The precedent of this Court in *Middendorf* is consistent with and in accordance with Ohio Revised ORC 3105.171(A)(4) which defines "Passive

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Income" as *"income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse"* and ORC 3105.171(A)(6)(a)(iii) which further identifies "separate property" as *"Passive income and appreciation acquired from separate property by one spouse during the marriage"*.

Here, one of the primary issues for this Court's review is the determination of whether the lease signing bonus of $121,285.00 is to be considered marital property and therefore subject to division between the parties. In reviewing this matter, the Fifth District Court of Appeals correctly determined that the Haught Road real estate was the separate property of the Appellant. Appellant purchased the real estate more than six (6) years prior to his marriage to Appellee. During the period of the marriage, the deed was never revised or amended in any way. Appellant never executed any deed or other document transferring any of his interest in the real estate to Appellee. Further, pursuant to the terms of the parties' settlement agreement, Appellee was fully reimbursed for the monetary contributions she had made to the real estate mortgages. As the parties were able to identify the contributions made by Appellee and fully reimburse her for those contributions there was no transmutation of the property from Appellant's separate, pre-marital asset in to one in which both parties owned an interest.

Based upon all of these factors, the trial court and appellate courts correctly determined that Appellee was not entitled to any interest under the lease or to any royalties that may be paid thereon.

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As such, the Appellate Court was then required, and it is essential for this Court to consider whether the lease signing bonus - being income derived from the separate property interest of Appellant – was the result of passive growth or appreciation or was the result of some active contribution of one or both of the parties. If the lease signing bonus is passive income then, pursuant to ORC 3105.171(A)(4) and 3105.171(A)(6)(a)(iii) it, like the separate property real estate interest of Appellant, would be a separate property asset of Appellant.

Here, the trial court determined that the signing bonus was passive income as the parties did nothing to generate the income that was derived in the form of the $121,285.00 signing bonus. That signing bonus was obtained solely because of exploration and development of the Utica Shale formation. All of the actions described by Appellee which she alleged created or generated the interest in the property and the opportunity for this lease, such as going to meetings and obtaining a copy of a recorded document did not *cause* the income…ownership of land within the area being developed did. The location of this land within the Utica Shale development determined it's marketability to Gulfport not any action undertaken by either of these parties.

In fact, the very terms of the lease reflect payment based upon a per acre basis which suggests a passive income based solely upon the amount of land owned by Appellant. There is no evidence within the record or presented to the trial court proved, or even suggested, that the terms of the lease and/or the per acre payment were increased due to the work of Appellee or Appellant. No evidence was

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presented to show that either of the parties *caused* the Gulfport Lease to come to fruition or that their actions led to the lease signing. Instead the evidence clearly established that the lease and therefore the signing bonus were based upon the location of the land and the current oil and gas exploration and nothing more. While the parties took actions to take advantage of the current market conditions (i.e. oil and gas exploration), those actions did not *cause* the signing of the lease.

Quite simply, it was Appellant's mere ownership of the land within the current hot bed of oil and gas exploration that led to Gulfport's interest and the lease that was signed. Had Appellant not owned land in that area, (or if the mineral rights had been reserved by a prior owner, if Appellant had previously executed a lease, etc.) Appellee could have performed all the same actions and recognized no benefit by way of oil and gas lease.

Proposition of Law No. 3: ***The signature of a spouse upon a document regarding real estate, which signature is procured solely for the purpose of acknowledging the spouse's dower interest does not create in the non-owner spouse an ownership interest in the subject real estate or in any proceeds and/or benefits obtained from said real estate***

From all evidence presented in this matter, it is clear that Appellee signed the Gulfport lease only as the spouse of Appellant. Under Ohio law, particularly ORC 2103.02, Appellee's signature on the lease was required in order to recognize her dower interest in the real estate.

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Ohio Revised Code Section 2103.02 states:

> *A spouse who has not relinquished or been barred from it shall be endowed of an estate for life in one third of the real property of which the consort was seized as an estate of inheritance at any time during the marriage. Such dower interest shall terminate upon the death of the consort except:*
>
> > *(A) To the extent that any such real property was conveyed by the deceased consort during the marriage, the surviving spouse not having relinquished or been barred from dower therein;...*

Joint trial exhibit 11 as presented by the parties indicated that counsel preparing the lease documents requested Appellee's presence at the lease signing and, ultimately her signature upon the lease, solely in recognition of her dower interest in said property.

The 1099 received reflecting this income also indicates this as, while both names appear thereon, the social security number under which said income was reported to the IRS was only that of Appellant indicating that this was income received by Appellant as his separate property.

The lease itself also makes this clear as the lease never refers to the parties as *"lessors"*. The term "lessors", as a plural term, would suggest that both Appellant and Appellee were in equal positions and both were vested with authority and ownership interest sufficient to allow them enter in to the lease regarding the real estate. Instead, the lease consistently refers to the parties as "James P. Kuhn and Kelly L. Kuhn, his wife,...(hereinafter called ***the "Lessor.*** This *singular* designation of "Lessor" as opposed to use of the plural term "Lessors" clearly indicates that Appellee was not in a position to lease anything.

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This was Appellant's lease. Appellee was to, and ultimately did, sign merely as his spouse.

Where, as here, real estate is owned by one spouse independent of the other spouse, leasing companies will require signature of the non-owning spouse in recognition of the right of dower he or she may possess.

By construing the revenue generated from Appellant's separate property real estate to be marital income subject to division between the parties, the appellate court has essentially created in Appellee an interest in the subject real estate that she did not have prior to her signature being affixed upon the lease. While not vesting an ownership interest in Appellee, the Fifth District's decision in this matter certainly created an interest in the subject real estate that Appellee did not previously own as Appellee's only prior interest in the real estate was the right of dower which would not be recognized until the death of Appellant.

Thus, the fifth district's decision in this matter is not only contrary to well settled property law but also against public policy as it has permitted a third party, being the leasing company, to create an interest in property to someone who previously had no such interest.

In order to execute the lease and obtain the signing bonus, Appellant was required to obtain the signature of his spouse (Appellee) on the leasing documents. Should this decision stand and the leasing companies continue to require non-owner spouses to sign the leasing documents, owners of real estate may continue to

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inadvertently, and involuntarily, transfer interests in his/her separate property to his/her spouse when such is not the intention.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that Court determined that this matter involves an issue of great general or public interest and therefore accept the appeal in this matter and enter judgment summarily finding that the income derived from the separate property of Appellant, while income generated during the marriage, was the result of passive appreciate of the property and is therefore Appellant's separate property, not marital property subject to division and determining that Appellee's signature upon the lease documents did not create in her any interest in the real estate, lease and/or proceeds derived from that lease. In the alternative, Appellant respectfully requests that the appeal in this matter be accepted and the Court order the case be briefed.

Respectfully submitted,

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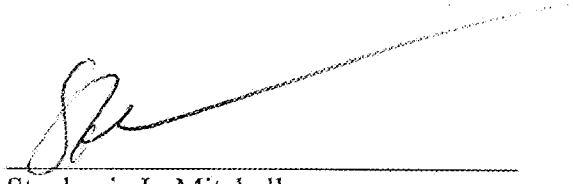
ATTORNEY FOR APPELLANT,
JAMES P. KUHN

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION upon Counsel for Defendant-Appellant, Attorney Robert Roe Fox, 388 South Main Street, Suite 402, Akron, Ohio 44311 by regular U.S. Mail, postage prepaid this 15th day of April 2014.



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Appendix

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IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
JAN 13 2014
GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

JAMES P. KUHN	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KELLY L. KUHN NKA COTTLE	:	
Defendant-Appellant	:	CASE NO. 13 CA 24

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio is affirmed in part and denied in part. Costs to be divided equally between the parties.

Hon. Sheila G. Farmer

Hon. W. Scott Gwin

Hon. John W. Wise

FILED
COURT OF APPEALS
JAN 13 2014
GUERNSEY COUNTY, OHIO
Teresa A. Bankovic, Clerk of Court

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES P. KUHN	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
KELLY L. KUHN NKA COTTLE	:	Case No. 13 CA 24
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 12-DR-140

JUDGMENT: Affirmed/Reversed in Part

DATE OF JUDGMENT:

APPEARANCES:

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Farmer, J.

{¶1} On April 19, 2001, appellee, James Kuhn, purchased a property for $30,000.00. He put $6,000.00 down and financed the remaining amount with First Federal Savings Bank of Eastern Ohio. The property was deeded in his name only.

{¶2} On March 13, 2002, the mortgage was rolled into a mortgage with Caldwell Savings and Loan Co. in the amount of $136,600.00 in order to construct a home on the property.

{¶3} On June 3, 2006, appellee executed a home equity line of credit with Wright-Patt Credit Union in the amount of $25,000.00.

{¶4} On February 5, 2007, appellant, Kelly (Fatheree) Kuhn nka Cottle, paid the balance due on the home equity line of credit in the amount of $18,644.38. On February 17, 2007, appellant paid $80,000.00 toward the Caldwell mortgage.

{¶5} On March 30, 2007, appellee, together with appellant, refinanced the property with Summit Federal Credit Union in the amount of $47,500.00, the amount remaining on the Caldwell mortgage.

{¶6} On May 12, 2007, appellee and appellant were married. The subject property and home became the marital residence. During the course of the marriage, the mortgage was satisfied and the marital residence property was unencumbered by any debt.

{¶7} On October 22, 2011, the parties executed an oil and gas lease with Gulfport Energy Corporation for oil and gas rights to the marital residence property. Both parties were identified as the "lessors." The lease provided for a signing bonus of

$121,285.00, and twenty percent royalties in the event oil and gas are produced from the property. The signing bonus check was executed on February 16, 2012.

{¶8} On March 19, 2012, appellee filed a complaint for divorce. The parties entered into various agreements and temporary orders. By order filed June 12, 2012, the parties agreed that appellee would pay appellant $70,000.00.

{¶9} A final hearing before a magistrate was held on March 1, 2013. The parties entered into an agreement on all issues except for the disposition of the oil and gas lease signing bonus check and the rights to any future royalties. By decision filed March 26, 2013, the magistrate determined the marital residence property was appellee's separate property and therefore the signing bonus and the rights to any future royalties under the oil and gas lease were the sole property of appellee. The magistrate noted appellant received $70,000.00 and appellee agreed to pay appellant an additional $10,000.00. The trial court adopted the magistrate's decision on same date. Appellant filed objections. By entry filed June 7, 2013, the trial court denied the objections.

{¶10} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶11} "THE TRIAL COURT'S DECISION TO GRANT PLAINTIFF-APPELLEE THE FULL PROCEEDS FROM THE SIGNING BONUS CHECK AND LEASE ROYALTIES WAS NOT SUPPORTED BY CREDIBLE OR SUFFICIENT EVIDENCE AS DEFENDANT-APPELLANT INVESTED SUBSTANTIAL PREMARITAL FUNDS WHICH PROVIDED HER A SEPARATE PROPERTY INTEREST IN SAME."

Worthington v. W (1986) 21 Ohio St. 3d 73 increase in value = marital where the increase is value is the result to the couples' expenditure of a substantial sum of marital funds labor.

Middendorf 82 Ohio St. 3d 397 3105.71 unamb mandate that when either spouse makes a labor money or in-kind contrib. that causes an increase in the value of the property, the increase

II

{¶12} "THE TRIAL COURT'S DECISION TO GRANT PLAINTIFF-APPELLEE THE FULL PROCEEDS FROM THE SIGNING BONUS CHECK AND LEASE ROYALTIES WAS NOT SUPPORTED BY CREDIBLE OR SUFFICIENT EVIDENCE AS THESE ASSETS REPRESENT MARITAL PROPERTY ACQUIRED DURING THE MARRIAGE."

I, II

{¶13} Appellant claims the trial court's decision to grant appellee the full proceeds from the signing bonus check and the rights to any future royalties under the oil and gas lease was against the manifest weight and sufficiency of the evidence. Appellant claims she had invested premarital funds in the subject property thereby providing her a separate property interest, and the signing bonus check and the rights to any future royalties constitute marital property acquired during the marriage. We agree in part.

{¶14} R.C. 3105.171(A)(3)(a) defines "marital property" as follows in pertinent part:

> (i) All real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;
>
> (ii) All interest that either or both of the spouses currently has in any real or personal property, including, but not limited to, the

retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;

(iii) Except as otherwise provided in this section, all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage;

{¶15} R.C. 3105.171(A)(6)(a)(ii) defines "separate property" and includes the following: "Any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage."

{¶16} As noted by the magistrate in her decision filed March 26, 2013 at Findings of Fact Nos. 10 and 11, it is uncontested that appellee purchased the marital residence property prior to the marriage and constructed a home on the property:

10. The real property located at 64720 Haught Road, Cambridge, Ohio, which consists of approximately 24.257 acres, more or less, and which will hereinafter be referred to as the Haught Road property, was acquired by Husband by general warranty deed dated April 19, 2001, for $30,000. All mineral rights including oil and gas went with the land.

11. Husband paid $6000 down and secured the other $24,000 with a mortgage. In 3/13/2002, Husband using an equity line of credit for $136,000 and with the help of his family and some

> subcontractor's, Husband built a home on the real estate. What was left on the original mortgage was rolled over into the line of credit. The only value given for the Haught Road property was $165,000, from a drive by appraisal for an equity line of credit.

{¶17} Appellant argues she obtained a separate interest in the property when she invested her premarital funds in the property ($18,644.38 toward a home equity line of credit and $80,000.00 toward the mortgage). In addition, the property was refinanced during the course of the marriage and appellant's name was included on the note and mortgage. See, Note, Disclosure, Security Agreement attached to Appellant's Brief as Appendix I.

{¶18} Appellee argues the parties agreed to an $80,000.00 payment to appellant. During the hearing before the magistrate (T. at 5), appellant's attorney explained the following:

> ***Mr. Kuhn had agreed in the Temporary Orders that he would reimburse to Mrs. Kuhn Eighty Thousand Dollars that we agree she paid on the mortgage before they were married. Seventy Thousand ($70,000.00) on it has been paid so he still owes her Ten Thousand Dollars ($10,000.00). That Ten Thousand Dollars ($10,000.00) will be paid as far as a cash award is concerned or a cash payment is concerned.

{¶19} The magistrate's temporary order filed June 12, 2012 stated the following:

> 3. That the oil and gas delayed rental/royalty deposit previously ordered held in a joint account by the parties, shall be closed and the funds held in said account shall be divided $70,000 to the Defendant and the balance in the amount of $51,419.48 to the Plaintiff. The parties are ordered to forthwith meet at Advantage Bank to close and liquidate said account, consistent with this agreement and order (see attached check copies evidencing closure and distribution of account proceeds.

{¶20} The parties' March 1, 2013 agreement, attached to the magistrate's March 26, 2013 decision as Exhibit A, included the following.

> A. Real Estate
>
> 1. Haught Road Residence and Premises: The real estate and residence premises located at 64720 Haught Road, Adams Township, Cambridge, Guernsey County, Ohio, presently titled in the name of the Plaintiff, consisting of the Plaintiff's residence and improvements and 24.257 acres more or less, shall be the sole property of the Plaintiff, free and clear of all claims of the Defendant. Any and all mortgage indebtedness on said premises, in excess of the $142,525 due on the Orchard property financing,

> secured by the Haught Road current line of credit, shall be assumed and paid by the Plaintiff and the Plaintiff shall save the Defendant harmless therefrom. The line of credit indebtedness associated with the indebtedness due on the Orchard property/farm shall be paid in accord with subsequent provisions of this agreement. Further the Plaintiff shall pay unto the Defendant, on or before April 22, 2013, the remaining sum of $10,000.

{¶21} The parties resolved all of their issues regarding the marital residence property save for the issue of the $121,285.00 signing bonus for the oil and gas lease acquired during the course of the marriage, as well any future royalties.

{¶22} During the hearing, appellant presented evidence of her premarital investments in the property, despite the parties' agreement to reimburse appellant for her contributions.

{¶23} We specifically find the agreed settlement amount for appellant's contributions to the financing of the marital residence property fully resolved the issue of appellant's investments. Therefore, we find "transmutation" of the property did not occur, and appellant did not obtain a separate property interest.

{¶24} The gravamen of this case is whether the oil and gas lease signed by both parties is separate or marital property.

{¶25} The lease provided for a signing bonus of $121,285.00 and the right to future royalties in the event oil and/or gas is extracted from the property. The lease specifically identifies the lessors as "James P. Kuhn and Kelly L. Kuhn, his wife." The

consideration for the drilling rights was the out-front payment of $121,285.00 to the lessors. This was "income" received during the marriage and was reportable to the IRS for tax purposes. T. at 52. The 1099 from Gulfport Energy Corporation identified both parties as the recipients of the signing bonus. *Id.*

{¶26} Based on the nature of the payment, we find the $121,285.00 to be marital property just as any other income generated during a marriage. We find it is divisible as a separate award, half to each party. Because no transmutation occurred, we find any future royalty rights belongs exclusively to the property owner, appellee herein.

{¶27} Upon review, we find the trial court erred in granting the full proceeds of the signing bonus to appellee, but was correct in awarding appellee the rights to any future royalties. The $121,285.00 is to be divided equally between the parties, and appellee is entitled to any future royalties under the oil and gas lease. = $60,642.50

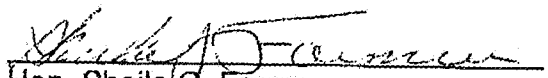
{¶28} Assignment of Error I is denied. Assignment of Error II is granted as to the signing bonus and denied as to any future royalties under the oil and gas lease.

{¶29} The judgment of the Court of Common Pleas of Guernsey County, Ohio is hereby affirmed in part and reversed in part.

By Farmer, J.

Wise, J. concurs separately and

Gwin, P.J. dissents.



Hon. Sheila G. Farmer

Hon. W. Scott Gwin

Hon. John W. Wise

SGF/sg 1210

Gwin, P.J., dissenting

{¶30} I respectfully dissent from the majority's characterization of the $121,285.00 signing bonus as marital property to be divided equally between the parties.

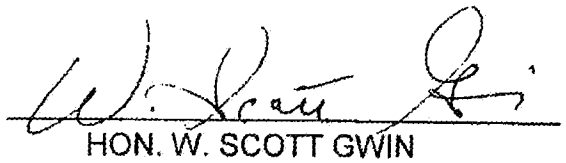
{¶31} The trial court recognized that the marital residence property was appellee's separate property. The trial court further recognized that the royalties from the oil and gas lease are exclusively appellee's separate property because appellant never acquired any interest in the marital residence property.

{¶32} "Marital property" includes all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage. R.C. 3105.171(A)(3)(iii). Thus, when either spouse makes a labor, money or an in-kind contribution that causes an increase in the value of separate property, that increase in value is marital property. Passive income and appreciation acquired from separate property by one spouse during the marriage, however, is separate property. R.C. 3105.171(B)(4). Therefore, because the agreed settlement amount for appellant's contributions to the financing of the marital residence fully resolved the issue of appellant's investments, allocation of the signing bonus can only be characterized as passive income acquired from the separate property of the appellee. Appellant never acquired a "separate property interest." Appellant's signing of the lease agreement could not create a property interest in the marital residence property. She therefore had no interest to convey through the oil and gas lease.

{¶33} The only interest appellant potentially had to convey was a dower interest. R.C. 2103.02. However, a "'[d]ower interest arises when property is purchased during a

marriage and continues unless the interest is specifically released. * * * Such a release must be done in writing and recorded.' *State ex rel. Miller v. Private* Dancer (1992), 83 Ohio App.3d 27, 30, 613 N.E.2d 1066, 1068." *Ogan v. Ogan*, 122 Ohio App.3d 580, 585, 702 N.E.2d 472(12th Dist 1977); *Accord Jewett v. Feldheiser*, 68 Ohio St. 523, 67 N.E. 1072. The oil and gas lease could not, and, as found by the trial court did not create any interest in appellant in the separate marital residence property of appellee. Thus, appellant could never have a dower interest in appellee's separate property that was not purchased during the marriage.

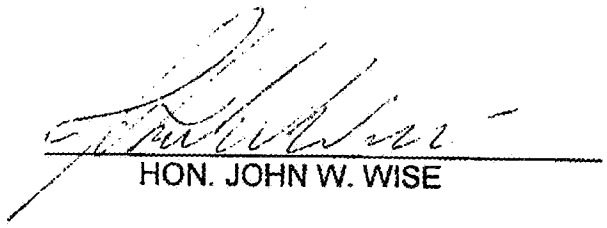
{¶34} Accordingly, I dissent from that portion of the majority opinion that characterizes the $121,285.00 signing bonus as marital property to be divided equally between the parties. I would overrule both of appellant's assignments of error and affirm the Court of Common Pleas of Guernsey County decision.



HON. W. SCOTT GWIN

Wise, J., concurring

{¶35} I concur with Judge Farmer's decision to affirm in part and reverse in part. I add my observation, regarding the issue of future royalties on the oil and gas lease, that even though appellee was awarded the subject real estate as his separate property, he agreed in writing in the lease to effectively make appellant a co-lessor. I find this provides at least some evidence of transmutation of the future revenue stream into marital property. However, a trial court's decision on the classification of separate and marital property is generally not reversed unless there is a showing of an abuse of discretion. *See, e.g., Valentine v. Valentine,* (Jan. 10, 1996), Ashland App.No. 95COA01120, citing *Peck v. Peck* (1994) 96 Ohio App.3d 731, 734, 645 N.E.2d 1300. I am therefore not inclined under the circumstances presented to disturb the trial court's ruling as to said future lease royalties.



HON. JOHN W. WISE

Mitchell

FILED
COURT OF APPEALS
MAR 10 2014
GUERNSEY COUNTY, OHIO
Teresa A. Bankovic, Clerk of Court

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JAMES P. KUHN	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
-vs-	:	
KELLY L. KUHN NKA COTTLE	:	
Defendant-Appellant	:	CASE NO. 13-CA-24

This matter is before this court upon appellee's February 4, 2014 application for reconsideration of this court's decision entered January 13, 2014.

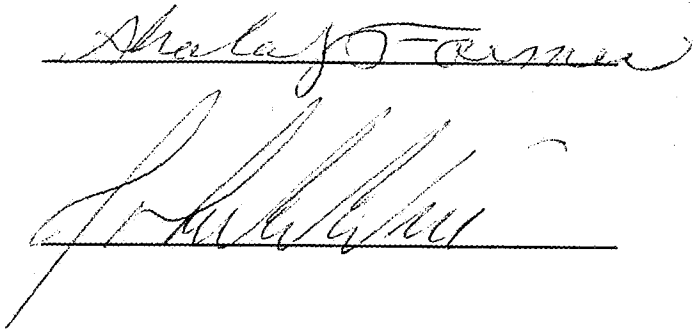
The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *Matthews v. Matthews,* 5 Ohio App.3d 140 (1981).

In his application, appellee argues this court failed to consider three issues: active versus passive income, passive income and separate property, and tax implications.

Upon review, we do not find an obvious error or an issue that was not considered or was not fully considered.

Appellee's application for reconsideration is denied.

SO ORDERED.



JUDGES

Guernsey County, Case No. 13-CA-24

Gwin, P.J., dissents

For the reasons stated in our opinion, I would grant the motion to reconsider.

HON. W. SCOTT GWIN

FILED
COURT OF APPEALS
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GUERNSEY COUNTY, OHIO
Orrie A. Dankovic, Clerk of Court

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JAMES P. KUHN	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
-vs-	:	
KELLY L. KUHN NKA COTTLE	:	
Defendant-Appellant	:	CASE NO. 13-CA-24

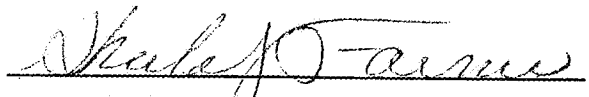
This matter is before this court upon appellee's February 4, 2014 application for en banc consideration in order for this court to secure and maintain uniformity in its decisions.

Under App.R. 26(A)(2)(a), if a majority of the court of appeals judges in an appellate district determine that two or more decisions of the court on which they sit are in conflict, the court "may order that an appeal or other proceeding be considered en banc." Under App.R. 26(A)(2)(b), the applicant "must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why en banc consideration is necessary to secure and maintain uniformity of the court's decisions." According to App.R. 26(A)(2)(a), "[c]onsideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed."

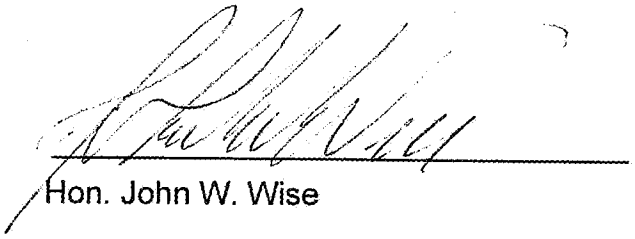
After reviewing the application and the cited cases therein, the application for en banc consideration is denied as no majority in favor of granting the application could be reached.

Appellee's application for reconsideration is denied.

SO ORDERED.



Hon. Sheila G. Farmer



Hon. John W. Wise

Hon. W. Scott Gwin