ORIGINAL

IN THE SUPREME COURT OF OHIO

JAMES P. KUHN	)	On Appeal from
	)	the Guernsey County
Appellant	)	Court of Appeals
	)	Fifth Appellate District
v.	)	Appellate Case No. 13 CA 24
	)	
KELLY L. KUHN nka COTTLE	)	Supreme Court Case No. 2014-0601
	)	
Appellee	)	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE KELLY L. KUHN NKA COTTLE

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RECEIVED
MAY 16 2014
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SUPREME COURT OF OHIO

FILED
MAY 16 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENTS AGAINST APPELLANT'S PROPOSITIONS OF LAW 7

Proposition of Law No. 1: Pursuant to Ohio Revised Code §§3107.171(A)(4) and 3105.171(A)(6)(a)(iii) passive appreciation and income is not marital property subject to division by the parties..... 7

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 §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..... 7

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 any proceeds and/or benefits obtained from said real estate..... 11

CONCLUSION 13

CERTIFICATE OF SERVICE 14

APPENDIX

Opinion of the Fifth District Court of Appeals (January 13, 2014) ..... A

Petrella v. Petrella, 5th Dist. Licking No. 08CA0073, 2008-Ohio-6714..... B

EXPLANATION OF APPELLEE AS TO WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

This Court should not accept jurisdiction in this case because the issues raised herein do not involve public or great general interest. This matter only involves the allocation of property rights during divorce litigation. There is nothing novel or unique about this matter.

The Appellant, James P. Kuhn, does not allege a conflict amongst the Courts of Appeal or a substantial constitutional question. This Court has held that

> Whether the question or questions argued are in fact ones of public or great general interest rests within the discretion of the court.

Williamson v. Rubich (1960), 171 Ohio St. 253. When the question presented is of "interest primarily to the parties", this Court should deny acceptance thereof. *Id.*

This case involves the allocation of property rights attained before and during the marriage of Appellant and Appellee, Kelly L. Cottle. Approximately five (5) years after the parties married they received a significant check (hereinafter *Signing Bonus*) from an oil company in exchange for the right to enter into an oil and gas lease on the marital residence. Approximately three (3) months prior thereto, the parties executed a Memorandum of Oil and Gas Lease, an Option to Lease Agreement and, subsequently, the Lease for the oil and gas rights.

The Fifth District Court of Appeals reversed the Trial Court's refusal to grant Appellee any of the Signing Bonus, rightly providing her with one-half (1/2) interest in the Signing Bonus. The decisions of both the Trial Court and the Fifth District Court of Appeals involve merely property issues in divorce litigation and contract interpretation.

Though the heightened interest in oil and gas issues in Ohio may have a titillating effect upon this case, it does not change the basic nature of the litigation in the lower

courts: personal and real property division. Even Appellant acknowledges this case involves "issues of separate property ownership in divorce and the impact upon such leases, lease signing bonuses and royalties." Appellant's Memorandum at 3. Further, Appellant suggests that the Fifth District's Opinion disregarded statutory authority and "flies in the face of well-established real property law." Appellant's Memorandum at 3. Yet, Appellant fails to provide any significant case law buttressing this rather broad rebuke of the Court of Appeals (excluding *Middendorf v. Middendorf* (1998), 82 Ohio St. 3d 397 which actually supports Appellee's position).

In short, Appellant simply disagrees with the property division relative to the Signing Bonus. There is no issue of public or great general interest.

STATEMENT OF THE CASE AND FACTS

On March 19, 2012, Appellant filed a Complaint for Divorce against Appellee. On March 28, 2012, Appellee filed an Answer and Counterclaim.

On May 22, 2012, the parties appeared before the Trial Court as a result of a Motion filed by Appellant for exclusive occupancy of the real property known as 64720 Haught Road, Cambridge, Ohio. The parties entered into an understanding that Appellee would vacate the marital residence on or before August 1, 2012.

By the same entry – and agreement of the parties – Appellee was granted $70,000.00 of the marital funds toward monies owed to her by Appellant in exchange for her agreement to give Appellant the marital residence. The balance of $51,419.48 was disbursed to Appellee. The funds that comprised this division came from a check paid to both parties by Gulfport Energy Corporation (hereinafter *Gulfport*) as and for the Signing Bonus, a per acre fee paid in order to induce the parties into entering into the

Memorandum of Oil and Gas Lease, Option to Lease Agreement, and Oil and Gas Lease (hereinafter *Lease*) for the rights relative to the marital residence. The Order specifically indicated that such disbursement did not prejudice the rights of the parties to argue for their appropriate share of the Signing Bonus at a later date.

By Agreed Entry dated January 22, 2013 the Trial was scheduled for February 22, March 4, and March 6, 2013. The Trial was finally held on March 1, 2013. The parties resolved all outstanding issues between them, save for the issue pertaining to distribution of the Signing Bonus and royalties pursuant to the Lease. The parties testified in order to establish all legal requirements for the issuance of a Decree of Divorce based on incompatibility of the parties with no reasonable likelihood of reconciliation, along with their partial settlement. The parties specifically excluded from the settlement the Signing Bonus and oil and gas royalty issues, along with the tax ramifications thereof, reserving consideration of same for Trial. (Tr. 8, 10.)

On March 26, 2013, the Magistrate issued a Decision refusing to grant to Appellee any of the Signing Bonus or Lease rights pursuant to the Oil and Gas Lease. On April 9, 2013, Appellee filed timely Objections to Magistrate's Decision. Appellant filed a response thereto on May 30, 2013. On June 7, 2013, the Court issued a Final Appealable Order overruling Appellee's Objections to Magistrate's Decision.

Appellee timely appealed to the Fifth District Court of Appeals the property division determined by the Trial Court. On January 13, 2014, the Fifth District Court of Appeals reversed the Trial Court, granting Appellee one half (1/2) of the Signing Bonus. Appellant filed Applications for *En Banc* Consideration and Reconsideration. On March 10, 2014, both Applications were denied.

The factual posture of this case is somewhat convoluted but of significant importance. Some detail is necessary to fully explain the nature of the Fifth District's ruling on property division.

Appellant and Appellee were married on May 12, 2007. Appellee and her two (2) children immediately moved into the marital residence. (Tr. 18.) Appellant was deeded the marital residence on April 26, 2001. (Tr. 27.). Originally, the property contained an uninhabitable building and otherwise vacant land. (Tr. 62.) The purchase price was $30,000.00. (Tr. 48.) Appellant made a modest $6,000.00 down payment on the purchase price, securing the balance with a first mortgage from First Federal Savings Bank of Eastern Ohio in the amount of $24,000.00. (Tr. 67, 113.)

On March 13, 2002, Appellant executed a mortgage in the amount of $136,600.00 with the Caldwell Savings and Loan Co. in order to commence the construction of a single family dwelling on the property. (Tr. 53, 63.) The original mortgage with First Federal was rolled into this latter mortgage. (Tr. 64.) Appellant's premarital interest in the property at this time was $6,000.00. (Tr. 62.) Appellant executed a home equity line of credit with Wright-Patt Credit Union in the amount of $25,000.00, secured by the marital residence. (Tr. 65.)

In anticipation of marriage, Appellee paid the balance due on the home equity line of credit of $18,644.38, providing her with a premarital interest in the marital residence in this amount. (Tr. 66, 69.) She further paid $80,000.00 toward the Caldwell Savings and Loan mortgage by redeeming a premarital Certificate of Deposit in this amount. (Tr. 120-121.) This brought Appellee's premarital interest in the marital residence to $98,644.38.

The parties stipulated that at the time of marriage the Appellant had a premarital interest of $9,100.00 through his partial pay-down of the mortgage with Caldwell Savings and Loan. (Tr.78, 106-107.) Appellant also made partial premarital payments toward the home equity line of credit with Wright-Patt Credit Union in the amount of $6,355.62. (Tr. 70.)

The parties stipulated that at the time of the marriage the fair market value of the marital residence was $165,000.00. (Tr. 23.)

Subsequent to Appellee's investment of $98,644.38 in the marital residence, the parties jointly refinanced the $47,500.00 remaining due on the Caldwell Savings and Loan mortgage with the Summit Federal Credit Union. (Tr. 29, 74.) Appellant testified that the Summit Federal Credit Union, Appellee's banking establishment, provided the best interest rate for the refinance. (Tr. 75.)

This latter refinancing, along with Appellee's $80,000.00 payment, satisfied the Caldwell Savings and Loan mortgage. (Tr. 76.) The Summit Federal Credit Union mortgage was satisfied during the marriage by the joint contributions of the parties; thus the marital residence was unencumbered by any debt. (Tr.78.)

During the marriage, the parties contributed to improvements made to the marital residence, including but not limited to installing cement flooring in the two (2) car garage and landscaping throughout the property. (Tr. 39-40.) The parties opened and utilized a joint account to pay all debt and expenses incurred by them. (Tr. 79-82, 113.) The parties deposited both of their paychecks into this account during the marriage. (Tr. 79.)

In the fall of 2011, the parties jointly purchased farmland which they referred to as "The Orchard" using the marital residence as collateral (though it was deeded solely in

Appellant's name) (Tr. 108.) The parties agreed to sell this property upon divorce. (Tr. 7-8.)

It is uncontroverted that prior to the marriage, the oil and gas rights had not been negotiated nor had any offers been made to Appellant. (Tr. 37, 84, 121.) Commencing in the spring of 2011, the parties jointly agreed to delay the signing of another oil and gas lease and continue to negotiate other offers relative to their oil and gas interests. (Tr. 42.)

Further, Appellee expended money and time in performing several functions in furtherance of preparing for, and negotiating, the oil and gas rights on the marital residence. (Tr. 40.) Her efforts included multiple visits to the Guernsey County Recorder's Office to research title and related documentation concerning to the marital residence. (Tr. 43, 86-87, 124-125.) She and Appellant engaged in meetings and negotiations with various oil and gas entities relative to the marital property. (Tr. 41-42, 127.) Appellant testified Appellee's efforts were nothing more than her acting the part of the dutiful wife. (Tr. 56, 100.) The parties acknowledge that marital funds were used to pay for legal advice relating to oil and gas issues during this period of time. (Tr. 43, 92-93.)

The expense of this significant effort by both parties, and particularly Appellee, culminated in the execution of a Memorandum of Oil and Gas Lease on October 22, 2011. (Tr. 92-95) Both parties were specifically referred to as Lessors ("collectively called 'Lessor'" per the Memorandum) with the Gulfport being the Lessees. (Tr. at 95.) The same day, an Option to Lease Agreement was executed by both parties with Gulfport, the parties listed as " ' Grantor' (whether one or more)." (Tr. 96.)

Finally, and on the same date, the parties executed the Lease with Gulfport that is the subject of this Appeal. (Tr. 30, 97.) The Memorandum, Option and Lease all involved the marital residence. All documents were signed by both parties.

The Lease provided for the payment of $5,000.00 per acre (the Signing Bonus) to the parties for the right to enter into the Lease. (Tr. 97-98.) The marital residence consists of 24.257 acres. The Lease granted the parties twenty (20) percent royalties on the production of oil and gas. At the time of entering into the Lease through the date of Trial, no effort had yet been made to break ground on a well or make any other improvements to the property relative to oil and gas exploration or production. (Tr. 45.)

On February 16, 2012, Gulfport issued a check for the Signing Bonus made payable to both Appellant and Appellee in the amount of $121,285.00. (Tr. 50-51, 98.) That check was deposited into the joint checking account of the parties and was subject to the Trial Court's authority during the pendency of the case. (Tr. 52, 98.)

ARGUMENTS IN OPPOSTION TO PROPOSTIONS OF LAW

Proposition of Law No. 1: *Pursuant to Ohio Revised Code §§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.*

On initial review of Appellant's Propositions of Law Nos. 1 and 2, it is readily apparent that this matter is not of public or of great general interest. The arguments are

simply Appellant's regurgitated pleas at the Court of Appeals, again unsupported by any case law applicable to his circumstance.

Marital property in Ohio is defined as follows:

> (i) All real and personal property that is currently owned by either or both of the spouses...and that was acquired by either or both of the spouses during the marriage...;
> (ii) All interests that either or both of the spouses currently has in any real or personal property...and that was acquired by either or both of the spouses during the marriage;
> (iii) ...all income and appreciation on separate property, due to the labor, monetary or in-kind contribution by either or both of the spouses during the marriage...

R.C. §3105.171 (A)(3)(a)(i-iii). Ohio law presumes that each party to a marriage contributes equally to the acquisition of marital property. R.C. §3105.171 (C)(2). All marital property is required to be divided equally between the parties. R.C. §3105.171 (C)(1).

In pertinent part, the Fifth District Court of Appeals found as follows:

> (the Signing Bonus) was "income" received during the marriage and was reportable to the IRS for tax purposes. The 1099 for Gulfport Energy Corporation identified both parties as the recipients of the Signing Bonus...Based on the nature of the payment, we find the $121,285.00 to be marital property just as any other income generated during the marriage. We find it is divisible as a separate award, half to each party.

Kuhn v. Kuhn (Fifth District: January 13, 2014), 214-Ohio-126, Guernsey App. No. 13 CA 24, unreported, at 9.

There are many reasons why the Fifth District Court of Appeals made such a holding.

Obviously, there is no question that the income generated by the Signing Bonus was received during the marriage. In fact, it was received five (5) years after the parties had married. This Signing Bonus emanated from real property nominally purchased by

Appellant prior to the marriage, but invested in heavily on the eve of marriage by Appellee. Perhaps of greater weight is the fact that during the marriage, the parties refinanced the outstanding debt on the Marital Residence using joint marital funds for the purpose of paying off this debt owed to Summit Federal Credit Union. This fact alone warrants the receipt by Appellee of her share of the Signing Bonus.

Further, R.C. §3105.171 specifically identifies "active income" as that which results from the labor, money, or in-kind contributions of either party that increases the value of separate property. The record is replete with factual references to the participation of both parties, and in particular Appellee, toward the cultivation, and negotiation of the lease-related transactions which resulted in the Signing Bonus (and, quite frankly, the royalties). In this case, the parties actively gathered information relative to the oil and gas situation in the area. They attended multiple meetings together. They jointly negotiated the terms of the final Lease Agreement after deciding, jointly, to terminate discussions relative to the initial lease agreement with another oil and gas company. Appellee singularly researched title and other issues specifically related to the Marital Residence at the Guernsey County Recorder's Office.

In short, the parties provided – during the marriage – labor, finances and/or in-kind contributions toward obtaining the Signing Bonus and lease royalties.

In *Petrella v. Petrella,* 5th Dist. Licking No. 08CA0073, 2008-Ohio-6714, this Court confronted a similar issue, holding

> This Court specifically denies (husband's) separate property claim. Whatever separate property claim existed at the beginning of the marriage has been clouded and diluted by the use of marital funds for the obligation of the payment, multiple refinancing by the parties, and the use of a second mortgage on the property.

Id. at ¶11

A similar rationale was utilized in *Kotch v. Kotch,* 178 Ohio App.3d 358, 2008-Ohio-5084, 897 N.E.2d 1191 (5th Dist.). The husband in that case purchased a home three (3) years prior to the marriage; thereafter, the parties moved in. Both spouses contributed to the household expenses and finances. Marital funds were used to pay down on the mortgage. The parties added wife to a note after a refinance of the debt on the home. The Court determined such activity by the parties made the marital residence joint property, subject to husband's premarital separate investment. *See Kotch* at 363.

Appellant argues that he "never executed any deed or other document transferring any of his interest in the real estate to Appellee." Appellant's Memorandum at 10. This wholly ignores Ohio Law which rejects title as the dispositive means of determining marital property. "The holding of title to property individually...does not determine whether the property is marital or separate property." R.C. §3105.171 (H). Further, Appellant's argument is significantly untrue. He had every right to negotiate the Memorandum of Oil and Gas Lease, Option to Lease Agreement, and Lease. Not one clause in any of these agreements limits Appellee's rights. Those issues could have very well been negotiated by and between Gulfport and the parties. They were not. As pointed out in the concurring opinion in the decision below,

> even though appellant was awarded the subject real estate as his separate property, he agreed in writing in the lease to effectively make (Appellee) a co-lessor. I find this provides at least some evidence of transmutation of the future revenue stream into marital property.

Kuhn at 13.

Appellant further argues that "Appellee was fully reimbursed for the monetary contributions she had made to the real estate mortgages." Appellant's Memorandum at 10. This duplicitous argument fails on several levels.

The parties specifically agreed at the Trial Court level that the payment of some of the proceeds from the Signing Bonus to Appellee as a result of her agreeing to vacate the Marital Residence would not prejudice the rights of the parties to argue for the appropriate share of the Signing Bonus at a later date. Additionally – and the sole reason the Trial was limited to approximately four (4) hours – the parties agreed to settle certain necessary reimbursements to Appellee as a result of her agreeing to let Appellant remain in the marital residence, rather than seeking the residence herself.

Regardless of the separate property interests for which Appellee was reimbursed, there remained the significant pay down on the debt from joint marital funds. This alone provides substantial rationale for giving Appellee one half (1/2) of the Signing Bonus.

Appellant further argues that no evidence was 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." Appellant's Memorandum at 11-12. As mentioned above, there is substantial evidence of Appellant's participation in the research and negotiation that led to the signing of the Lease in question, especially considering that another lease had been negotiated which the parties jointly agreed to abandon.

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.*

This Proposition of Law suggested by Appellant fails to provide any basis for this Court accepting jurisdiction of this case. It clearly presents no issue of public or great general interest.

First, the Fifth District Court of Appeals did not base its decision only on Appellee's signature on the Lease. It also considered "the nature of the payment." *Kuhn* at 9. The Appellate Court further considered the timing of the payment "during the marriage" and its characterization as income for tax purposes. See *Id.*

Omitted from the specific determination of the Fifth District Court of Appeals but clearly implicated in its discussion was any reference in any document excluding Appellee from her share of these proceeds.

Appellant's arguments relative to this proposition of law are again duplicitous. In the first instance, Appellant argues that as the sole title holder to the Marital Residence, he is entitled to all of the Signing Bonus and royalties from the Lease. Yet, after all the effort and money expended in negotiating and finalizing the Lease and its related documents, he believes that Appellee's participation therein and signatures thereon mean nothing.

Appellant's suggests that the use of the singular term "Lessor" on the Lease indicates intent to refer only to Appellant. That construction is nonsensical. Frequently contracts refer to the parties in the singular when they intend the plural. The specific language of the Lease itself refers to the conjunctive "and" in addressing Appellant and Appellee as "Lessor."

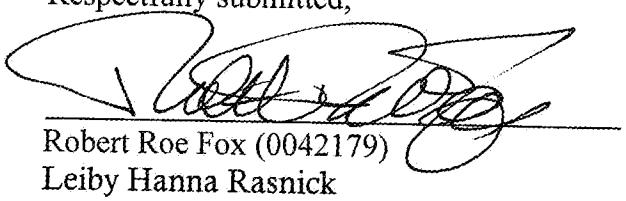
CONCLUSION

This case presents the Court with nothing more than a standard appellate decision relative to property division. The parties themselves limited the issue at Trial to one of property division. There is no issue of public or great general interest that requires this Court's taking further attention to this matter.

The reality is that Appellant does not agree with the decision of the Fifth District Court of Appeals relative to an issue of property division and it is his hope that by arguing the heightened attention to oil and gas issues in the State of Ohio this Court will be misled into accepting jurisdiction of this matter.

WHEREFORE, Appellee requests that the Supreme Court of Ohio decline to accept jurisdiction of this matter.

Respectfully submitted,



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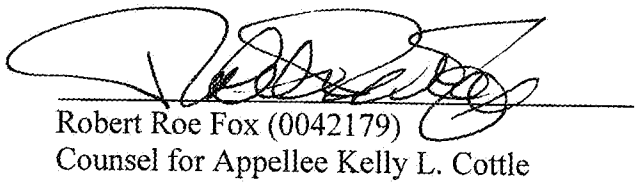
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Ms. Stephanie L. Mitchell, Esq., 139 West Eighth Street, P.O. Box Cambridge, Ohio, 43725-0640 on this 15th day of May, 2014, via regular U.S. mail.



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FILED
COURT OF APPEALS
JAN 13 2014
GUERNSEY COUNTY, OHIO
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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:

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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."

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.

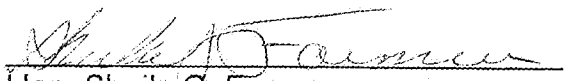
{¶28} Assignment of Error I is denied. Assignment of Error II is granted as to the signing bonus and denied as to any future royalties under the oil and gas lease.

{¶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.

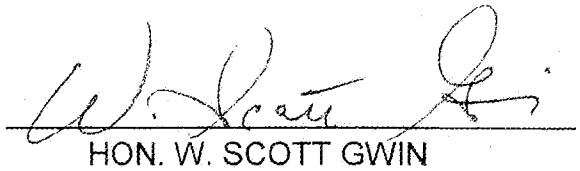
{¶31} The trial court recognized that the marital residence property was appellee's separate property. The trial court further recognized that the royalties from the oil and gas lease are exclusively appellee's separate property because appellant never acquired any interest in the marital residence property.

{¶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.

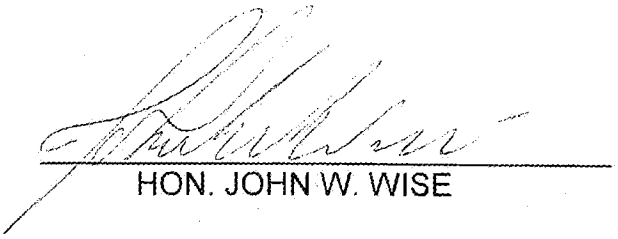
{¶34} Accordingly, I dissent from that portion of the majority opinion that characterizes the $121,285.00 signing bonus as marital property to be divided equally between the parties. I would overrule both of appellant's assignments of error and affirm the Court of Common Pleas of Guernsey County decision.



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

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

Petrella v. Petrella

Court of Appeals of Ohio, Fifth Appellate District, Licking County
December 19, 2008, Date of Judgment Entry
Case No. 08CA0073

Reporter: 2008-Ohio-6714; 2008 Ohio App. LEXIS 5607

MICHELLE J. PETRELLA, Plaintiff-Appellee -vs- CHARLES A. PETRELLA, Defendant-Appellant

Prior History: [**1] CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 06DR00695.

Disposition: Affirmed/Reversed in Part & Remanded.

Counsel: For Plaintiff-Appellee: WILLIAM M. SCHUMANN, Westerville, OH.

For Defendant-Appellant: PHILIP M. COLLINS, EHREN W. SLAGLE, Columbus, OH.

Judges: Hon. W. Scott Gwin, P.J., Hon. Sheila G. Farmer, J., Hon. Patricia A. Delaney, J.

Opinion by: Sheila G. Farmer

Opinion

Farmer, J.

[*P1] On July 23, 1994, appellant, Charles Petrella, and appellee, Michelle Petrella, were married. On April 21, 2006, appellee filed a complaint for divorce.

[*P2] Hearings were held on August 15 and 16, 2007. During the hearings, the parties filed numerous stipulations on various issues including parental rights, child support, spousal support, and division of property and debt.

[*P3] On October 10, 2007, the parties filed revised Joint Exhibit 2 which journalized their stipulations. By judgment entry decree of divorce filed May 6, 2008, the trial court granted the parties a divorce and divided the parties' remaining property and debt.

[*P4] Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

[*P5] "THE TRIAL COURT ERRED IN ITS FINDINGS WITH REGARD TO MARITAL [**2] VERSUS SEPARATE PROPERTY AND DEBT."

II

[*P6] "THE TRIAL COURT ERRED BY FINDING THAT THE PARTIES ENTERED INTO A STIPULATION WHEN NO SUCH STIPULATION WAS MADE."

III

[*P7] "THE TRIAL COURT ERRED IN NOT HONORING THE PARTIES' STIPULATIONS AFTER ACCEPTING THE STIPULATIONS DURING TRIAL."

I

[*P8] Appellant claims the trial court erred in determining the Appleton Road property was marital property and the Chase, Kohl's, and Citibank credit card debt was marital debt.

[*P9] A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 1993 Ohio 9, 614 N.E.2d 742.

APPLETON ROAD PROPERTY

[*P10] In its judgment entry filed May 6, 2008, the trial court found the Appleton Road property was marital property:

[*P11] "The Court specifically denies the defendant's separate property claim involving this real property. Whatever separate property claim existed at the beginning of the marriage [**3] has been clouded and diluted by the use of marital funds for the obligation payment, multiple refinancing by the parties, and the use of a second mortgage on the property. The evidence also showed that the parties used cash from the refinancing to pay marital debt.

[*P12] "The financial aspect of this property has been commingled to a degree that it cannot now be equitably separated out. Further, the defendant did not adequately trace the financial aspects of this asset."

[*P13] Appellant argues the commingling of separate property does not destroy its identity if it is traceable. R.C. 3105.171(A)(6)(b) states, "[t]he commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." "Thus, traceability has become the focus when determining whether separate property has lost its separate character after being commingled with marital property." *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734, 645 N.E.2d 1300.

[*P14] The property in questioned belonged to appellant prior to his marriage. T. at 74. Appellant obtained a $ 65,000 open-ended mortgage in 1992, prior to the marriage in 1994. T. at 75-76; [**4] Exhibit 41. In 1998, the parties jointly executed a mortgage in the amount of $ 72,000. T. at 76; Exhibit 33. In 2002, the parties jointly executed another mortgage in the amount of $ 71,900. T. at 77; Exhibit 36. In 2003, the parties executed an open-ended mortgage in the amount of $ 41,900. T. at 77-78; Exhibits 35 and 40. Appellant admitted marital funds were used to pay on the mortgages. T. at 79. In addition, the storage shed on the residence was purchased with marital funds. T. at 108-109.

[*P15] Appellant argues appellee's share should not be one-half of the net value of the property minus one-half of the marital equity in the property because the mortgages were refinanced and paid off through the refinances. We find appellant's actions to be inconsistent with his argument that the property was his separate property. By refinancing and having appellee sign as a mortgagor, as well as by paying off the debt with marital assets, the Appleton Road property has become marital property. We find the trial court's decision to be consistent with and supported by the evidence.

CREDIT CARD DEBT

[*P16] Appellee stated the Chase, Kohl's, and Citibank credit cards were used for ordinary costs associated [**5] with the marriage i.e., gasoline, groceries, purchasing children's clothing, prescriptions, eye doctor, etc. T. at 112, 114. The card with the highest outstanding balance, the Chase card, had a high balance prior to the parties' separation in 2006. T. at 111-112. We find the trial court did not err in concluding the outstanding balances on these credit cards were marital debt.

[*P17] Assignment of Error I is denied.

II, III

[*P18] In these assignments, appellant challenges the trial court's determination relative to the stipulations filed by the parties.

[*P19] In Assignment of Error II, appellant argues the trial court noted in its judgment entry that the U.S. Bank Standard Savings Account, # 23651, was stipulated to be marital property when in fact there was no stipulation regarding this account.

[*P20] In Assignment of Error III, appellant argues the trial court ignored the parties' stipulations as to the value and/or marital ownership of Petrella & Hatch Builders, LLC. In the October 10, 2007 stipulation, the parties stated "[a]ll contested matters have been removed from the attached revised Joint Trial Ex. 2, and instead, the contested issues appear on the parties' respective balance sheets submitted for [**6] consideration***."

[*P21] The parties agree the trial court's determination, predicated on their stipulations as to the savings account and the valuation and ownership of the LLC, is in error. See, Appellee's Brief at 10.

[*P22] In light of the stipulations, the trial court's decision on the U.S. Bank Standard Savings Account is reversed and the issue is remanded for determination of the account as marital or separate property. In addition, the issue of the valuation of the LLC and the parties' proportional shares is remanded for re-determination.

[*P23] Assignments of Error II and III are granted.

[*P24] The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed in part, reversed in part, and remanded.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

/s/ Sheila G. Farmer

/s/ W. Scott Gwin

/s/ Patricia A. Delaney

JUDGES

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio is affirmed in part and reversed in part, and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to be divided equally between the parties.

/s/ Sheila G. Farmer

/s/ W. Scott Gwin JUDGES

/s/ Patricia [**7] A. Delaney