

ORIGINAL

IN THE SUPREME COURT OF OHIO

JAMES P. KUHN)	Supreme Court Case No. 2014-0601
)	
Appellant)	On Appeal from the Guernsey County
)	Court of Appeals
v.)	Fifth Appellate District
)	
KELLY L. KUHN nka COTTLE)	Court of Appeals No. CA 24532
)	
Appellee)	

MERIT BRIEF OF APPELLEE KELLY L. KUHN NKA COTTLE

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FILED
 OCT 06 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

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STATEMENT OF FACTS

Appellant's Brief compels Appellee to submit her own Statement of Facts. While much of Appellant's Statement of Facts is true, critical pieces are misrepresented or omitted.

The Appellant, James P. Kuhn, and the Appellee, Kelly L. Cottle, were married on May 12, 2007. (Tr. 17.) Appellee and her two (2) children from a prior marriage immediately moved into the residence where Appellant had been residing located at 64720 Haught Road, Cambridge, Ohio (hereinafter *Marital Residence*). (Tr. 18.)

Appellant was deeded the Marital Residence on April 26, 2001. (Tr. 27; Joint Exhibit 1) 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 \$6,000.00 down payment on the purchase price. (Tr. 62, 113.) The balance was secured with a first mortgage from First Federal Savings Bank of Eastern Ohio in the amount of \$24,000.00. (*Id.*; Joint Exhibit 4)

On March 13, 2002, Appellant executed a mortgage in the amount of \$136,600.00 with the Caldwell Savings and Loan Co. (Tr. 63; Joint Exhibit 5) The purpose was to commence the construction of a single family dwelling on the property. (Tr. 53, 63.) The testimony indicated that the original mortgage with First Federal was rolled into this latter mortgage. (Tr. 64; Joint Exhibit 6) Appellant's premarital interest in the property at this time was \$6,000.00. (Tr. 62.)

On June 3, 2006, Appellant executed a home equity line of credit with the Wright-Patt Credit Union in the amount of \$25,000.00. (Tr. 65; Joint Exhibit 7) The Wright-Patt financing document was secured by the Marital Residence. *Id.*

In anticipation of marriage, Appellee paid the balance due on the home equity line of credit of \$18,644.38, thus providing her with a premarital interest in the Marital Residence in this amount. (Tr. 66, 69; Joint Exhibit 7) This was accomplished in consultation with Appellant. (Tr. 67.) She further paid \$80,000.00 toward the Caldwell Savings and Loan mortgage. (Tr. 70-71, 106; Joint Exhibit 8) Appellee obtained these funds by redeeming a premarital Certificate of Deposit in this amount. (Tr. 120-121.) This, too, was done by agreement of the parties. (Tr. 72.)

Appellee's investment brought her premarital interest in the Marital Residence to \$98,644.38, all prior to the marriage utilizing premarital assets. (Tr. 29, 32.)

The parties acknowledged in their testimony a premarital interest belonging to Appellant through his pay-down of the mortgage with Caldwell Savings and Loan in the amount of \$9,100.00. (Tr. 78, 106-107.) The parties further testified to Appellant's premarital payments made toward the home equity line of credit with Wright-Patt Credit Union in the amount of \$6,355.62. (Tr. 70.)

Prior to Trial, the parties stipulated that at the time of marriage the fair market value of the Marital Residence was \$165,000.00. (Tr. 23.)

After Appellee invested the \$98,644.38, the parties refinanced the \$47,500.00 remaining due on the Caldwell Savings and Loan mortgage. (Tr. 29, 74; Joint Exhibit 9) The refinance was done through the Summit Federal Credit Union, utilizing the credit status of Appellee to obtain such financing. *Id.* Appellant testified that the Summit Federal Credit Union 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 resulting in the Marital Residence being unencumbered by any debt at that point in time. (Tr. 78; Joint Exhibit 10)

During the marriage, the parties contributed to improvements made to the Marital Residence, including but not limited to installing cement flooring in the two car garage and landscaping throughout the property. (Tr. 39-40.) Soon after the marriage, 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" with an Open-End Mortgage through Huntington National Bank using the Marital residence as collateral (though the Orchard was deeded solely in Appellant's name) (Tr. 108; Joint Exhibit 14) prior to executing the Open-End Mortgage, there was no debt associated with the Marital Residence. The parties agreed to sell this property upon divorce and equally divide the proceeds. (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.) The parties further testified that in the spring of 2011, the "frenzy" of interest in oil and gas rights in Eastern and Southeastern Ohio had entered their area. (Tr. 37, 55, 82.) The testimony of both parties revealed that commencing in the spring of 2011, the parties jointly participated in multiple meetings with lawyers and oil companies advertising for, and negotiating rights to, oil and gas interests in the area. (Tr. 42-43, 89-90.)

The parties originally signed a lease with an oil company unrelated to the Lease that is the subject of this litigation; however, it was not notarized. (Tr. 42, 84, 88.) After conferring with family -- and in particular Appellee's father -- the parties jointly agreed

to delay the signing of another lease and continue to receive other offers relative to their oil and gas interests. (Tr. 42.)

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 solo trips – at the direction of Appellant -- to research title and related documentation at the Guernsey County Recorder's Office relative 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.) The parties acknowledged 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.)

Appellant condescendingly testified that Appellee's efforts were nothing more than her acting the part of the dutiful wife. (Tr. 56, 100.)

It was common through the several months comprising the spring and summer of 2011 for Appellant and Appellee to seek the advice of Appellee's father, who had conducted extensive research relative to the oil and gas issues in the area. (Tr. 42, 93, 128-129.) The parties further jointly spoke with neighbors relative to the oil and gas issues gaining momentum in the area. (Tr. 130.)

The expense of this significant effort by both parties, and particularly by Appellee, culminated in the execution of a Memorandum of Oil and Gas Lease (hereinafter *Memorandum*) on October 22, 2011. (Tr. 92-95; Joint Exhibit 12) Both parties were specifically referred to as Lessors ("collectively called 'Lessor'" per the Memorandum) with the Gulfport Energy Corporation (hereinafter *Gulfport*) being the Lessees. (Tr. 95.)

The same day, an Option to Lease Agreement (hereinafter *Option*) was executed by both parties with Gulfport, the parties listed as, “Grantor’ (whether one or more).” (Tr. 96; Joint Exhibit 12)

Finally, and on the same date, the parties executed the Lease with Gulfport that is the subject of this Appeal. (Tr. 30, 97; Joint Exhibit 13) The signature lines on the Lease indicate that the parties signed as “Lessor(s). The Memorandum, Option and Lease all involved the Marital Residence. All documents were signed by both Appellant and Appellee.

Each of the documents were required to be signed before a notary.

The Lease mandated the payment of \$5,000.00 per acre to the parties for the right to enter into the Lease (hereinafter *Signing Bonus*). (Tr. 97-98; Joint Exhibit 13 at §1) The Marital Residence consists of 24.257 acres. (Joint Exhibit 13 at §2) The Lease provides for the payment of twenty (20) percent royalties on the production of oil and gas. (Joint Exhibit at §9) 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 made payable to Appellant and Appellee in the amount of \$121,285.00 for the Signing Bonus. (Tr. 50-51, 98; Joint Exhibit 2) That check was deposited into a joint marital account and subject to the Trial Court’s authority during the pendency of the case. (Tr. 52, 98.)

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. (Appx. A at 1) The parties entered into an understanding that Appellee would vacate the marital residence on or before August 1, 2012. *Id.*

In order to facilitate Appellant's request for exclusive possession of the Marital Residence, the parties agreed that \$70,000 of joint marital account would be transferred to Appellee for the purchase of a separate residence. (*Id.* at 2) Appellant received the balance of the proceeds pending further order. (*Id.*) Of particular import to this Appeal is the following language of the Magistrate Order:

4. That by the division of the above referenced joint bank account, *neither of the parties shall be prejudiced as to their claims thereto* and the hereinabove division of said account proceeds shall be accounted for in the final property division orders of this court.

(*Id.*) (emphasis supplied) Appellant omits this critical order in his Statement of the Facts because the basic premise of his appeal relies on the hope that the Supreme Court of Ohio ignores this reservation.

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. (Appellant's A-6) The parties testified in order to establish the 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 stipulated on the record to excluding from the partial settlement the Signing Bonus and oil and gas royalty issues, along with the tax ramifications thereof,

reserving consideration of same for Trial. (Tr. 8) “(W)e would litigate those issues and there would be no prejudice to either parties(sic) position simply because we have come to an understanding on the other property issues.” (Tr. 10) Again, Appellant hopes the Supreme Court of Ohio ignores such stipulation.

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. (Appx. B)

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. (Appx. C) Appellant filed Applications for *En Banc* Consideration and Reconsideration. On March 10, 2014, both Applications were denied. (Appellant’s A-4,A-5)

This appeal followed.

ARGUMENTS IN OPPOSITION TO PROPOSITIONS 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.

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.

Appx. C at ¶26.

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

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 titled to 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 the debt owed to Summit Federal Credit Union. The marital funds came from a joint account in which all income of the parties was deposited. This fact alone warrants the receipt by Appellee of her share of the Signing Bonus.

In *Petrella v. Petrella*, 5th Dist. Licking No. 08CA0073, 2008-Ohio-6714 (Appx. E), the Fifth District Court of Appeals confronted a similar issue. The trial court in *Petrella* made the following finding:

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. On appeal, the Fifth District Court of Appeals agreed with this finding, holding

. . . 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 paying off the debt with marital assets, the (real) property has become marital property.

Id. at ¶15. The facts in *Petrella* closely mimic the facts of the case *sub judice*.

There is no question the Marital Residence was titled in Appellant's name prior to

and during the marriage. However, it is equally clear – and was stipulated prior to Trial -- that at the time of marriage *Appellee had invested more than three (3) times the amount of separate assets toward the Marital Residence than invested by Appellee.* This is the very reason that Ohio recognizes that title to property is not determinative of ownership in property division matters. During the marriage, the parties used marital funds to pay down on the Summit Federal Credit Union mortgage. Finally, the parties utilized the Marital Residence, with no debt associated with it at the time, as collateral for a second mortgage used to purchase of the Orchard property. Both parties were listed on the Mortgage.

Interestingly, *Petrella* also discussed the issue of pretrial stipulations, which were seemingly ignored by the Trial Court in this case. The stipulations herein involved pretrial agreements relative to the division of significant personal and real property interests. However, those agreements would not have been reached had there not also been the stipulation that the settlements would have no impact or prejudice to the facts and arguments presented at Trial relative to the Signing Bonus and royalty issues.

The Trial Court's decision (and the dissent in the Fifth District Court of Appeals) appears to ignore the stipulations as the Trial Court's decision seemed to focus on the fact that the separate property interest were reimbursed. Had Appellee thought the Trial Court would have ignored the stipulations, she would have engaged in a two and a half (2½) days of litigation to protect her rights. Fortunately, the majority of the Fifth District Court of Appeals protected a share of the Signing Bonus for her.

Kotch v. Kotch, 178 Ohio App. 3d 358, 2008-Ohio-5084, 897 N.E.2d 1191 (5th Dist.) utilized a similar rationale as that in *Petrella*. The husband in *Kotch* 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, 897 N.E.2d 1191, 1195.

This Court may also determine the Signing Bonus is active income.

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 jointly deciding to terminate discussions relative to the initial lease agreement with another oil and gas company. Appellee alone 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.

Along this argument, *Middendorf v. Middendorf* (1998), 82 Ohio St. 3d 397, 696 N.E.2d 575, cited by Appellant, affords him no relief. In *Middendorf*, the Supreme Court

was confronted with a situation where the husband owned distinctly separate property, i.e., a stockyard owned prior to the marriage. The wife in *Middendorf* was an interior decorator who had no financial connection to the business prior to the marriage. After the marriage, the wife quit her job in order to care for the household duties. She additionally assisted in some minor tasks on behalf of the business, including organizing office parties and occasionally taking business messages at the home.

The Court placed a value on the business at the time of marriage at \$201,389.00. At the time of the divorce, the trial court determined the value of the business had grown to \$309,939.00.

In granting wife one-half (1/2) of the post-marriage increase in the business's value, the Supreme Court of Ohio stated

Passive forces such as market conditions may influence the profitability of the business; however, it is the employees and their labor input that make a company productive...these individuals are the persons responsible for making pivotal decisions that result in the success or failure of the company. There is no reason that these factors should not likewise be relevant in determining a spouse's input into the success of a business.

Id. at 402, 696 N.E.2d 575, 579. The Supreme Court of Ohio further noted that "the trial court and court of appeals found that these efforts directly contributed to the appreciation of the company's assets." *Id.* Can anything less be said of the cultivation by the parties herein of the Signing Bonus and Lease rights?

The difference between this case and *Middendorf* is that unlike the latter, Appellee invested in and actively participated in generating the assets that the Appellant suggests are not marital.

Assuming without conceding Appellant's argument relative to passive appreciation, *Middendorf* supports Appellee's contention she should receive greater than

fifty percent (50%) of the Signing Bonus. Appellee possessed a premarital interest in the Marital Residence of \$98,644.38 (\$80,000.00 pay down on Caldwell mortgage and \$18,644.38 pay down on Wright-Patt home equity line) or approximately sixty percent (60%) of the fair market value of the Marital Property at the time of divorce.

Appellant was attributed a premarital interest of \$21,455.62 (\$6,000.00 downpayment on land, \$9,100.00 pay down on Caldwell mortgage, and \$6,355.62 pay down on Wright-Patt home equity line) or approximately thirteen percent (13%) of the value of the Marital Residence at the time of divorce.

The balance of the debt on the Marital Residence -- \$47,500.00 -- was refinanced jointly and satisfied by marital funds during the marriage. If one subtracts the premarital interests of the parties from the stipulated fair market value of the Marital Residence at the time of marriage, the marital equity remaining is \$44,900.00, very close to the amount refinanced prior to the real estate market crash of October, 2007. The parties should equally share the balance of credit toward the Signing Bonus and royalties due to this marital contribution.

Under this scenario Appellee should receive \$89,243.32 of the Signing Bonus and seventy-three and one-half percent (73.5%) of the Lease rights; Appellant would receive the balance.

Appellant argues that he “never executed any deed or other document transferring any of his interest in the real estate to Appellee.” Appellant’s Brief at 12. 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). In the domestic relations context, it is very common to have title to a house in one party’s name even though both

parties live in the residence upon marriage. In many instances one party may be a homemaker while the titleholder provides the income that pays down on the residential debt. Ohio law still protects the homemaker in such circumstances from losing their share of the residence simply because of his or her decision to take care of the home.

Appellant's argument is also misguided as it relates to the Lease related documents. He had every right to negotiate the Memorandum, Option and Lease. He and Appellee decided against executing a previous lease they negotiated but subsequently determined not be in their best interests. 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 Fifth District Court of Appeals

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.

Appx. C at ¶35. (For additional support to this argument see Proposition of Law No. 3 discussing notary clauses).

Appellant further argues that "Appellee was fully reimbursed for the monetary contributions she had made to the real estate mortgages." Appellant's Merit Brief at 12.

This argument is duplicitous and misleading.

The parties specifically agreed at the Temporary Orders Hearing that the payment of some of the proceeds from the Signing Bonus to Appellee in order to vacate the Marital Residence would not prejudice the rights of the parties to argue for their appropriate share of the Signing Bonus at a later date. Both parties understood that Appellee needed an initial outlay of cash in order to secure a new home for herself and

the children if they were to agree that she would leave the Marital Residence. Both parties stipulated and the Magistrate ordered that “neither party shall be prejudiced as to their claims thereto. . .” This left for Trial the determination as to what to do with the Signing Bonus and royalties.

Additionally -- and the sole reason the Trial was limited to approximately four (4) hours instead of two and a half (2 ½) days as scheduled -- the parties stipulated that the issues pertaining to the Signing Bonus and royalties would be litigated, irrespective of the separate property interests accounted for prior to Trial.

It is difficult to imagine the full impact of the chilling effect a decision ratifying Appellants’ deceitful argument would have on future pretrial stipulations.

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 it for herself. If she did not so agree there would have been two (2) other options.

First, the Marital Residence could have been sold. The proceeds would then be divided in consideration of their separate contributions and joint marital mortgage pay down.

Second, minimal reimbursements could have been made to Appellant had Appellee been the party who retained the Marital Residence. As mentioned above, Appellee’s premarital investment dwarfed that of Appellant.

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 Brief at 13-14. There is substantial evidence of Appellant’s participation in the research and negotiation that led to the signing of the Lease in question. The parties jointly participated in the negotiation of a prior lease, which was abandoned by joint decision. Appellee (not Appellant) researched title issues at the Guernsey County Recorder. The parties jointly negotiated the Lease in question. At all points in the process the parties worked in tandem.

Given all these factors it is clear Appellee is entitled to one-half (1/2) of the Signing Bonus, if not more.

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.

The argument posited here by Appellant lacks legal support and is inapposite to the language of the Memorandum, Option, and Lease.

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." Appx. C at ¶26. The Appellate Court further considered the timing of the payment, "during the marriage," and its characterization as income for tax purposes. *Id.*

Omitted from the specific determination of the Fifth District Court of Appeals but clearly implicated in its discussion was the absence of any qualifying language regarding Appellee's participant as a party on the Lease and related documents.

Appellant argues that despite all the care and effort expended by the parties (1) educating themselves about the oil and gas issues, (2) Appellee researching documents at the Guernsey County Recorder's Office, and (3) negotiating another lease only to reject its contents for a better deal, he haphazardly and without intent executed three (3) separate documents naming Appellant as the "'Grantor' whether one or more" (Option) and "Lessor" (Lease and Memorandum).

Appellant suggests that the use of the singular term "Lessor" on the Lease indicates intent to refer only to Appellant. That construction is unsustainable. Frequently contracts refer to the parties in the singular when they intend the plural. Many generically indicate that gender may refer to the male but also applies to the female (although used less these days).

The specific language of the Lease itself refers to the conjunctive “and” in addressing Appellant and Appellee as “Lessor.”

The Lease, Memorandum and Option are devoid of any wording which excludes or limits Appellee’s rights. The Lease is *thirty-two (32) pages containing 60 separate clauses*, none of which even infer the meaning of “Lessor” suggested by Appellant.

The signature lines on the documents offer Appellant no relief. The Option has no defining language by the signatures of the parties. The Memorandum describes the parties as “Lessor.” The Lease describes the signing parties as “Lessor(s).” None of the signature lines contain descriptions such as “his wife” or “as to dower only” (the latter clause or similar phrasing often being used on mortgages where only one party to a married couple is being bound by the document).

Damning to Appellant’s argument are the notary clauses affixed to each of the documents. For instance, the Lease notary clause indicates that “he/she signed the foregoing instrument for the purpose contained therein of his/her own free act and deed.” Thus, the obligations and rights conferred therein are shared by the parties, Appellant entering same with the object of furthering the purpose of the Lease, freely and intentionally. The Option and Memorandum contain similar clauses.

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 related documents, he believes that Appellee’s participation therein -- and signatures thereon -- mean nothing. He further wishes to ignore that the Signing Bonus check lists both parties, without limitation, as payees.

Proposition of Law No. 4: Where no abuse of discretion is shown, a reviewing court may not modify or reverse a trial court's decision regarding property division.

Appellant's proposition here is clearly a long-shot effort that contains no substance.

Initially, it should be noted that Appellant did not assert this position in the Appellate Court in his Motion for Reconsideration, which was denied. Further, Appellant neglected to include this proposition in his initial Memorandum in Support of Jurisdiction filed with the Supreme Court of Ohio.

The Fifth District Court of Appeals held that

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 property award. . .upon review, we find the trial court erred in granting the full proceeds of the signing bonus to (Appellant). . .The \$121,285.00 is to be divided equally between the parties. . .

Appx. C at ¶26. In the concurring opinion, Judge Wise indicated his agreement with the majority decision in granting Appellee one-half (1/2) of the Signing Bonus. He wrote further to indicate he found "some evidence of transmutation of the future revenues stream" of royalties by Appellant entering into the Lease with Appellee. Appx. C at ¶35.

However, Judge Wise was "not inclined" to overturn the decision regarding royalties "unless there is a showing of an abuse of discretion." *Id.* Thus, in reversing the Trial Court's decision regarding the Signing Bonus, the majority clearly determined there to be an abuse of discretion.

Appellant also suggests that the dissenting opinion "recognized" that "there was no finding by the Appellate Court that the trial court had committed any abuse of discretion." Appellant's Merit Brief at 18. No such language is contained in the dissent.

Appellant's reliance on *Cherry v. Cherry* (1982), 66 Ohio St. 2d 348, 421 N.E.2d 1293 is inapplicable for a few reasons. As noted in his Merit Brief, *Cherry* has been overruled on other grounds.

The specific issue in *Cherry* is not what Appellant suggests. As this Court stated

The issue these cases present, therefore, is whether the "partnership" language in [*Wolfe v. Wolfe* (1976), 46 Ohio St. 2d 399] mandates a substantially equal property division. We hold that *Wolfe* does not mandate an equal property division, and that the mere fact that a property division is unequal, does not, standing alone, amount to an abuse of discretion.

Cherry, 66 Ohio St.2d 348, 352, 421 N.E.2d 1293, 1297.

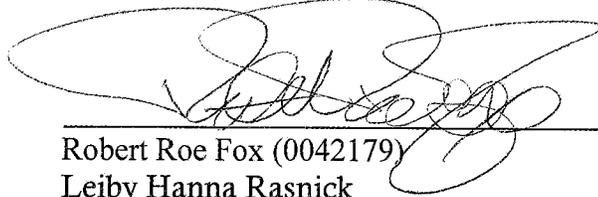
Therefore, Appellant's reliance on *Cherry* does not comport with the issue and holding therein.

CONCLUSION

It is clear that Appellee deserves at least one-half (1/2) of the Signing Bonus, if not more. This matter is of heightened interest only because the assets litigated involve oil and gas interests in Southeast Ohio. In essence, the Supreme Court of Ohio is charged with the task of dividing property upon divorce, a division which Appellee believes the Fifth District Court of Appeals made properly.

Appellee respectfully requests that the decision of the Fifth District Court of Appeals be affirmed.

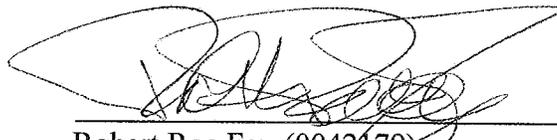
Respectfully submitted,



Robert Roe Fox (0042179)
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Akron, OH 44311
(330) 253-2227
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rfox@neolaw.biz
Counsel for Appellee Kelly L. Cottle

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 2ⁿ day of October, 2014, via regular U.S. mail.



Robert Roe Fox (0042179)
Counsel for Appellee Kelly L. Cottle

FILED
COMMON PLEAS COURT
JUN 12 2012
GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, CAMBRIDGE, OHIO

JAMES P. KUHN) CASE NO. 12-DR-140
Plaintiff) MAGISTRATE HOLLINS
-vs-)
KELLY L. (COTTLE/FATHEREE) KUHN) MAGISTRATE ORDER
Defendant) TEMPORARY ORDER

This matter came on for scheduled hearing on the 22nd day of May, 2012 before the Magistrate, upon the motion of the Plaintiff, herein, James P. Kuhn, for an order granting him exclusive occupancy of the 64720 Haught Road, Cambridge, Ohio 43725 residence premises together with an order for the Defendant, Kelly L. (Cottle/Fatheree) Kuhn, to vacate the 64720 Haught Road residence.

The court, being fully advised in these premises, find that the Plaintiff, herein, James P. Kuhn and that the Defendant herein, Kelly L. (Cottle/Fatheree) Kuhn, personally appeared together with their respective counsel. The court further finds that the parties hereto have entered into an agreement to resolve the matter of said pending motion and for further temporary orders. Both Plaintiff and Defendant, in the presence of their respective counsel, were placed under oath and confirmed the agreement on the record for further temporary orders herein. The court finds that the agreement of the parties is set forth as follows, to-wit:

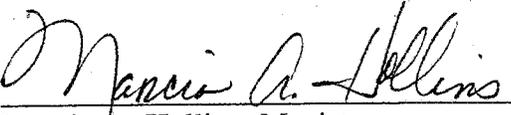
1. That the Plaintiff, James P. Kuhn, shall be granted the exclusive right to occupy and reside in the residence premises located at 64720 Haught Road, Cambridge, Ohio 43725, ~~said residence premises owned by the Plaintiff prior to the date of this marriage~~, during the pendency of this action and until further order of this court, effective the 1st of August, 2012, and that the Defendant, Kelly L. (Cottle/Fatheree) Kuhn, shall vacate the said 64720 Haught Road, Cambridge, Ohio 43725 residence premises on or before August 1, 2012, together with her daughters from her former marriage; and

2. That the temporary orders and magistrate order issued April 3, 2012 relating to the terms for the sharing of and dual occupancy of the Haught Road residence premises by the parties, until August 1, 2012 or until the Defendant earlier vacates the said residence premises, shall remain in full force and effect; and
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); and
4. That by the division of the above referenced joint bank account, neither of the parties shall be prejudiced as to their claims thereto and the hereinabove division of said account proceeds shall be accounted for in the final property division orders of this court.

The court, being fully advised in these premises finds that the agreement of the parties heretofore set forth as and for temporary orders is reasonable that the same should be granted and maintained in effect during the pendency of this action and/or until further order of this court.

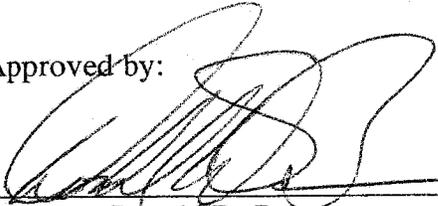
The court further coming on to consider Plaintiff's Motion to Compel, finds that counsel for the Defendant presented to Counsel for Plaintiff, at the scheduled hearing on May 22, 2012, the Defendant's answers to interrogations and her responses to the request for production of documents. The court further therefore finds that there are no further orders needed at this time and said motion therefore is MOOT.

IT IS THEREFORE THE ORDER OF THE COURT that the foregoing agreement of the parties, heretofore found by the court to be fair and reasonable, is approved and the same is hereby adopted as the temporary orders of this court. Both Plaintiff and Defendant are hereby ordered to abide by and comply with the terms and conditions of their agreement, now the order of the court.



Marcia A. Hollins, Magistrate

Approved by:



Attorney Donald D. Brown
Counsel for Plaintiff

Submitted but not approved.

Attorney Miles D. Fries
Counsel for Defendant

FILED
COMMON PLEAS COURT
MAR 26 2013

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

JAMES P. KUHN,

CASE NO. 12DR140

PLAINTIFF,

VS.

KELLY L. KUHN,

MAGISTRATE'S DECISION

DEFENDANT.

This case came before Magistrate Marcia A. Hollins for evidentiary hearing on March 1, 2013, on Plaintiff's Complaint in Divorce and Defendant's Counterclaim. Plaintiff, hereinafter referred to as Husband, appeared with counsel, Attorney Donald D. Brown. Defendant, hereinafter referred to as Wife, appeared with counsel, Attorney Robert Roe Fox.

Exhibit A, attached hereto and incorporated herein by reference as if fully rewritten, is the stipulated agreement of the parties related to the division of assets and liabilities of the marriage, excluding any interest in the oil and gas at the Haught Road property, which was the only issue remaining for the court to decide. Parties were sworn and testimony and evidence was presented.

FINDINGS OF FACT:

1. The court has jurisdiction in this matter as the parties lived the requisite time in the State of Ohio and Guernsey County prior to the filing of the complaint in divorce.
2. Parties were married on May 12, 2007.
3. Parties have no children together and Wife is not pregnant.
4. Parties agree that they are incompatible and request that the court end and terminate the marriage.
5. Parties acknowledged and approved the division of assets and debts which has been reduced to writing and attached as Exhibit A.
6. Excepted from the agreement are the ownership of the oil and gas lease rights, royalties, and Signing Bonus.

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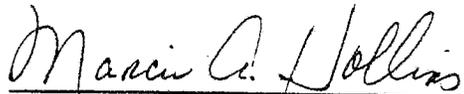
7. The question before the Magistrate is whether the payment of money by Wife on loans secured by the Haught Road property gave Wife any interest in the real property and by extension to the oil and gas lease and royalties or that she is just entitled to her money back.
8. R.C. 3105.171(A)(6)(b) reads: "The 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."
9. The Fifth District Court of Appeals "held in *Black v. Black* (Nov. 4, 1996), Stark App.No. 1996CA00052, a trial court must ... determine whether transmutation has occurred under the factors set forth in *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245; i.e., "(1) the expressed intent of the parties, insofar as it can be reliably ascertained; (2) the source of the funds, if any, used to acquire the property; (3) the circumstances surrounding the acquisition of the property; (4) the dates of the marriage, the acquisition of the property, the claimed transmutation, and the breakup of the marriage; (5) the inducement for and/or purpose of the transaction which gave rise to the claimed transmutation; and (6) the value of the property and its significance to the parties." *Hildebrand v. Hildebrand*, 5th Dist. No. CA954, 2003-Ohio-3654
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.
12. It is important to note that the parties had not met and none of the above was done in anticipation of marriage. Parties were married 6 years after Husband acquired the real estate and the divorce was filed 5 years later. Husband testified that Wife asked for a divorce just after the signing bonus for the oil and gas was received. Wife said the marriage had not been good for years.
13. Husband had an additional consolidation of debt through a home equity line of credit at Wright-Patterson Credit Union (6/3/2006) for \$25,000 for credit card debt. Wife paid-off the remaining balance of \$18,644.38 by check dated 2/5/2007, prior to the marriage. However, the Magistrate finds that Husband's testimony that Wife paid the amount off because her daughters by another marriage were also coming to live in the home is credible.
14. Wife further paid \$80,000 on the remaining mortgage on the Haught Road property at Community Savings by check dated 2/17/2007, again prior to the marriage.
15. Husband agrees that Wife is entitled to repayment of the \$80,000; however, Wife believes the payment gives her interest in the real property and by extension to the oil and gas rights. The Magistrate finds no donative intent on Husband's part to give Wife an interest in the real estate and no donative intent on Wife's part to give the Husband \$80,000.

16. The remainder of the mortgage of \$47,802.86 was refinanced at Summit Federal Credit Union with both parties signing as borrowers. This money then paid off the remainder of the mortgage at Community Savings.
17. The Magistrate finds that there are no documents giving Wife interest in the Haught Road property. There was no testimony by either party that Husband ever promised Wife an interest in the property and no testimony that the parties' ever discussed Wife's payment as an investment.
18. There was no transfer of interest to Wife by deed when she paid money on the mortgage prior to marriage; there was no transfer of interest to Wife by deed at the time of marriage and there was no transfer of interest to Wife by deed when the money was borrowed at Summit Federal Credit Union.
19. The Magistrate notes that this is the Wife's third marriage and she cannot nor did she claim ignorance of the process.
20. The fact that the parties can clearly trace all of the money is evidence that the commingling of the Wife's \$80,000 and Husband's real estate did not destroy the identity of the separate property as separate property.
21. Pursuant to the above and the instructions of the 5th District Court of Appeals in *Hildebrand*, the Magistrate finds that there was no transmutation and that Wife's claim to interest in the real property fails.
22. As mineral rights, including oil and gas, also pass by deed, Wife's claim for interest in the oil and gas lease and royalties and signing bonus also fails.
23. Wife further argues that she is entitled to an interest in the oil and gas lease/royalties/bonus because she "actively" participated in obtaining the lease.
24. The Magistrate finds that Wife went to meetings with Husband, discussed it with various individuals and went to the map department for a map of the property and got a copy of the deed. It should be noted that in our community, the recorder's office and the map department are on the same floor of the County Administration Building.
25. Wife further argued that she somehow initiated the oil and gas interest for the Haught Road property because the man who first approached them at the residence had passed her several times on the road while she was jogging.
26. The Magistrate finds that due to the high volume of news coverage and community meetings in this area for over a year, no one can take credit for initiating interest in an oil and gas lease. The marketing of leases has been done by oil companies not the landowners. There is no testimony that Wife organized a group of landowners to consolidate to secure a lease they would not otherwise have profited from.

27. The Magistrate further finds that no marital funds were expended in securing the oil and gas lease on the Haught Road property. All legal fees were paid by the lessee.
28. The Magistrate finds that the lease and subsequently the signing bonus and the royalties are a passive appreciation of the mineral rights owned by Husband prior to the marriage.
29. Wife's third argument for her interest in the oil and gas lease/royalties/bonus is that her name was on the lease and she was required to sign the same. The oil and gas lease (Jt. Ex. 13) refers to the lessors as James P. Kuhn and Kelly L. Kuhn, his wife.
30. Black's Law Dictionary, Fifth Edition, defines a mineral lease as a "Lease in which the lessee acquires the right to work a mine of oil and gas, etc."
31. The lease cannot be used as a substitute for a deed to transfer ownership of the minerals to Wife.

CONCLUSIONS OF LAW:

1. Parties are **GRANTED** a divorce and the obligations of the marriage which heretofore existed are terminated.
2. The division of assets and liabilities attached hereto as Exhibit A was entered into freely and voluntarily and is fair and equitable and hereby **APPROVED** and made the order of the court.
3. The Haught Road property, including the mineral rights (oil and gas) is the premarital and separate property of Husband and no transmutation has occurred giving Wife any interest in the property (land or oil/gas). Subsequently the signing bonus and royalties are the sole property of the Husband.
4. Wife received payment of \$70,000 at the time of temporary orders by agreement of the parties. The remaining \$10,000 and any reduction of mortgage payments have been provided for in the attached agreement of the parties.
5. Wife is restored to her former name of Kelly L. Cottle.
6. Costs are to be taken equally from the deposits and any remaining costs are assessed equally to the parties.



MAGISTRATE MARCIA A. HOLLINS

NOTICE TO THE PARTIES:

A PARTY MAY FILE WRITTEN OBJECTIONS TO A MAGISTRATE'S DECISION WITHIN FOURTEEN DAYS OF THE FILING OF THE DECISION, REGARDLESS OF WHETHER THE COURT HAS ADOPTED THE DECISION PURSUANT TO CIV. R. 53(E)(4)(c). A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FINDING OF FACT OR CONCLUSION OF LAW IN THAT DECISION UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FINDING OR CONCLUSION AS REQUIRED BY CIV. R. 53(E)(3).

cc: Plaintiff, Atty. Donald D. Brown, Counsel for Plaintiff, Defendant , and Atty. Ronald Roe Fox, Counsel for Defendant

EXHIBIT "A"

The following stipulated agreement terms were entered into the record on Friday, March 1, 2013, by counsel for both Plaintiff and Defendant and confirmed on the record, under oath, by both Plaintiff and Defendant as their agreement and settlement terms, to-wit:

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 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.

2. New Concord: The real estate and residence premise located at 111 Eastview Drive, New Concord, Muskingum County, Ohio, presently titled in the sole name of the Defendant, consisting of lot and residence of the Defendant, having been acquired by the Defendant during the period of this marriage, after the parties separated and agreed by the parties to be Defendant's separate property, shall be and remain the sole property of the Defendant, free and clear of all claims of the Plaintiff. Any and all mortgage or loan indebtedness owed on said premises, whether secured by the said real estate or not, shall be assumed and paid by the Defendant and the Defendant shall save the Plaintiff harmless therefrom.

3. Orchard Property: The real estate property identified as the Orchard property/acreage, located on Bloomfield Road, New Concord, Highland Township, Muskingum County, Ohio, acquired by the parties during the period of the marriage, titled only in the name of the Husband, shall be deemed a marital asset and each party shall be entitled to an undivided one-half interest therein. The parties have agreed that the same shall be sold, at the best price attainable, by auction, utilizing the services of Kaufman Auctions (Jason Miller). The parties shall cooperate fully with the auction company to coordinate the matter of the sale by auction, as soon as possible, in order to obtain the best price obtainable for said premises. All obligations due on the Orchard property, including \$142,525 still due on the line of credit against the Plaintiff's Haught Road property, as well as the \$15,000 note still due to Plaintiff's mother, together with all costs of sale, including but not limited to insurance, real estate taxes, monthly mortgage/financing charges from and after March 1, 2013, any and all sales commissions, auction fees, surveys, and advertising, and any and all other costs and/or expenses associated with preparing the property for sale, shall be paid by the parties equally when due and from the proceeds of sale.

Further, the parties agree that after payment and satisfaction of all sale expenses, costs, expenses and debts associated with the Orchard property sale, as above required, that the Defendant shall receive the first \$23,450 from the adjusted net sale proceeds, with the remaining adjusted net proceeds of sale to be divided equally. Each party shall be responsible for and shall save the other party fully harmless from his or her individual 50% obligation for the federal, state and local income taxes due resulting from the sale of the Orchard property. The parties shall execute and deliver any and all documents necessary to implement their settlement agreement for the equal division of sale proceeds and equal division/payment of his/her individual obligation for the personal income tax obligations.

B. Motor Vehicles/Motorized Equipment:

1. The 2010 GMC Truck motor vehicle, titled in the joint names of the parties, was acquired during the term of the marriage but the same shall be set off and awarded to the Plaintiff, free and clear of all claims of the Defendant. The Defendant shall execute and deliver all title and other related documents to effectuate such transfer. All outstanding debt and obligation associated with the truck motor vehicle, including its financing included in the line of credit debt against the above-referenced Haught Road premises of the Plaintiff, shall be the responsibility of the Plaintiff and the Plaintiff shall save the Defendant harmless therefrom. All costs of operation, maintenance, licensing and insurance on said motor vehicle shall be the responsibility of the Plaintiff, who shall save the Defendant harmless therefrom.

2. The 2002 Toyota Camry motor vehicle, presently titled in the name of the Plaintiff, acquired by the Plaintiff, during the period of the separation of the parties, is separate property, by the temporary orders and the agreement of the parties, and shall be and remain the sole property of the Plaintiff, free and clear of all claims of the Defendant. Any and all outstanding debt and obligation associated with the said motor vehicle shall be the responsibility of the Plaintiff and the Plaintiff shall save the Defendant harmless therefrom. All costs of operation, maintenance, licensing and insurance on said motor vehicle shall be the responsibility of the Plaintiff, who shall save the Defendant harmless therefrom.

3. The 2006 Toyota Corolla motor vehicle, titled in the name of the Defendant, acquired by the Defendant before the marriage, shall be and remain the property of the Defendant, free and clear of all claims of the Plaintiff. Any and all outstanding debt and obligation associated with the said motor vehicle, if any, shall be the responsibility of the Defendant and the Defendant shall save the Plaintiff harmless therefrom. All costs of operation, maintenance, licensing and insurance on said motor vehicle shall be the responsibility of the Defendant, who shall save the Plaintiff harmless therefrom.

4. The Kubota Tractor and implements shall be set off and awarded to the Plaintiff, free and clear of all claims of the Defendant. All equity claims of the Defendant in said tractor and equipment have been satisfied by the overall settlement terms of the property division incorporated and set forth herein.

5. The Stealth (battery powered) ATV shall be set off and awarded to the Defendant, free and clear of all claims of the Plaintiff. All equity claims of the Plaintiff in said vehicle/equipment have been satisfied by the overall settlement terms of the property division incorporated and set forth herein.

C. Household Goods and Furnishings/Personal Property:

All household goods and furnishings, personal belongings, tools and equipment located at the Haught Road, Cambridge, Ohio, residence premises of the Plaintiff, shall be set off and awarded to the Plaintiff, free and clear of all claims of the Defendant, except that the sectional and two youth guns, which the parties have identified, shall be returned to the possession of the Defendant, as part of the overall settlement terms of property division herein.

All household goods and furnishings, personal belongings, tools and equipment, located at the Eastview Drive, New Concord, Ohio, residence premises of the Defendant, shall be set off and awarded to the Defendant, free and clear of all claims of the Plaintiff.

D. Pension/Retirement Benefits:

All rights of the Plaintiff in and to his 401K plan and social security benefits are set off and awarded to the plaintiff, free and clear of all claims of the Defendant.

All rights of the Defendant in and to her OPERS retirement, deferred compensation plan and accrued vacation/sick leave benefits are set of and awarded to the Defendant, free and clear of all claims of the Plaintiff.

The parties agree that the equity claim of the Plaintiff in the retirement/pension benefits of the Defendant have been satisfied by the overall terms of property settlement herein as well as all of the equity claims of the Defendant in the personal property and her equity

claims for marital mortgage reduction, have been satisfied by and are incorporated in the overall terms of property settlement herein.

E. Restoration to Former Name: Upon request of the Defendant, she shall be restored to her former name of Kelly L. Cottle.

F. Spousal Support: Neither party shall pay spousal support to the other and the Court shall relinquish jurisdiction on all matters relating to spousal support.

G. Marital/Non-Marital Debt: Plaintiff and Defendant each agree that the satisfaction of all marital debt of the parties has been provided for within the terms of their overall settlement agreement herein, and that there are no other joint marital debts. The parties further acknowledge and agree that any individual debts and obligations of the parties, incurred in his/her individual names, shall be the responsibility of the party in whose name the account now stands, and the other party shall be held harmless therefrom.

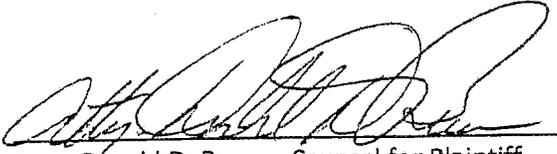
H. Bank Accounts: Plaintiff and Defendant acknowledge that all joint bank accounts of the parties have been closed and each has opened his/her own individual bank account, which each shall keep and maintain as his/her own separate property, free and clear of all claims of the other party.

I. Costs/Attorney Fees: Each party shall be responsible to pay his or her own attorney fees and expenses. The Court costs in these proceedings shall be first paid equally from the filing deposits of the Plaintiff and the Defendant, and otherwise assessed to and paid by the parties equally.

Approved by:



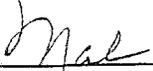
Magistrate Marcia A. Hollins



Atty. Donald D. Brown, Counsel for Plaintiff

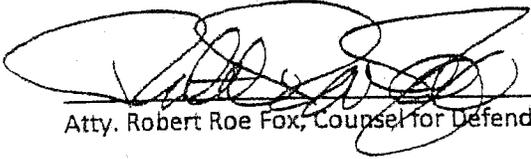
Atty. Robert Roe Fox, Counsel for Defendant

Approved by:



Magistrate Marcia A. Hollins

Atty. Donald D. Brown, Counsel for Plaintiff



Atty. Robert Roe Fox, Counsel for Defendant

Approved by:

Marcia A. Hollins

Magistrate Marcia A. Hollins

Atty. Donald D. Brown, Counsel for Plaintiff

Atty. Robert Roe Fox, Counsel for Defendant

**FILED
COMMON PLEAS COURT**

MAR 26 2013

GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

JAMES P. KUHN,

PLAINTIFF,

VS.

KELLY L. KUHN,

DEFENDANT.

CASE NO. 12-DR-140

**FINAL AND APPEALABLE
DECISION, ORDER AND
ENTRY ADOPTING THE
MAGISTRATE'S DECISION**

* * * * *

Upon careful and independent examination and analysis of the Magistrate's Findings and Decision, the Court finds the Decision of the Magistrate is sufficient for the Court to make an independent analysis of the issues and to apply appropriate rules of law in reaching a judgment. Therefore the Court adopts the Decision, and approves and enters the same as a matter of record. The Court further finds there is no error of law or other defect on the face of the Decision, and incorporates by reference the findings and decision of the Magistrate.

The Court hereby GRANTS a divorce on the grounds of incompatibility; APPROVES the agreement of the parties set forth in Exhibit A as to the division of assets and liabilities; finds the Haught Road property (including mineral rights - oil & gas) is the premarital and separate property of Husband and no transmutation has occurred giving Wife any interest in the property (land or oil/gas), subsequently the signing bonus and royalties are the sole property of the Husband; finds the Wife received payment of \$70,000 at the time of the temporary orders by agreement of the parties and the remaining \$10,000 and any reduction of mortgage payments have been provided for in the attached agreement of the parties; RESTORES Wife to her former name of Kelly L. Cottle.

The decision of the Court constitutes a final and appealable Order. The Clerk of this Court is ORDERED to comply with Civil Rule 58(B), and serve upon all parties notice of judgment and date of entry upon the journal.

Court costs from deposit and any remaining costs are assessed to the parties equally for which judgment plus interest is granted.

IT IS SO ORDERED.

**FINAL APPEALABLE
ORDER**

David A. Ellwood
JUDGE DAVID A. ELLWOOD

Dated: 25th March 2013

cc: James P. Kuhn
Kelly L. Kuhn
Donald D. Brown, Attorney for Plaintiff
Robert Roe Fox, Attorney for Defendant

VOL 493 PG 349

Kuhn v. Kuhn

Court of Appeals of Ohio, Fifth Appellate District, Guernsey County
January 13, 2014, Date of Judgment
Case No. 13 CA 24

Reporter

2014-Ohio-126; 2014 Ohio App. LEXIS 105; 2014 WL 198415

JAMES P. KUHN, Plaintiff-Appellee -vs- KELLY L. KUHN NKA COTTLE, Defendant-Appellant

Subsequent History: Appeal granted by Kuhn v. Kuhn, 2014-Ohio-3012, 2014 Ohio LEXIS 1749 (Ohio, July 9, 2014)

Prior History: [**1] CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 12-DR-140.

Disposition: Affirmed/Reversed in Part.

Counsel: For Plaintiff-Appellee: DONALD D. BROWN, Cambridge, OH.

For Defendant-Appellant: ROBERT ROE FOX, Akron, OH.

Judges: Hon. W. Scott Gwin, P.J., Hon. Sheila G. Farmer, J., Hon. John W. Wise, J. Wise, J. concurs separately and Gwin, P.J. dissents.

Opinion by: Sheila G. Farmer

Opinion

Farmer, J.

[*P1] 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.

[*P2] 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.

[*P3] On June 3, 2006, appellee executed a home equity line of credit with Wright-Patt Credit Union in the amount of \$25,000.00.

[*P4] 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.

[*P5] On March 30, 2007, appellee, together with appellant, refinanced the property with Summit [**2] Federal Credit Union in the amount of \$47,500.00, the amount remaining on the Caldwell mortgage.

[*P6] 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.

[*P7] 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.

[*P8] 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.

[*P9] 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 [**3] 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.

[*P10] Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

[*P11] "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

[*P12] "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

[*P13] Appellant [**4] 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.

[*P14] 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 inkind [**5] contribution of either or both of the spouses that occurred during the marriage;

[*P15] 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."

[*P16] 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.

[**6] The only value given for the Haught Road property was \$165,000, from a drive by appraisal for an equity line of credit.

[*P17] 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.

[*P18] 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.

[*P19] The magistrate's temporary order filed June 12, 2012 stated the following:

3. That [**7] 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.

[*P20] 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 [**8] 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.

[*P21] 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.

[*P22] During the hearing, appellant presented evidence of her premarital investments in the property, despite the parties' agreement to reimburse appellant for her contributions.

[*P23] 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.

[*P24] The gravamen of this case is whether the oil and gas lease signed by both parties is separate or marital property.

[*P25] The lease [**9] 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.*

[*P26] 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.

[*P27] 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.

[*P28] Assignment [**10] 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.

[*P29] 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.

Concur by: John W. Wise

Concur

Wise, J., concurring

[*P35] 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*, 1996 Ohio App. LEXIS 722, 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 [**11] court's ruling as to said future lease royalties.

Dissent by: W. Scott Gwin

Dissent

Gwin, P.J., dissenting

[*P30] 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.

[*P31] 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.

[*P32] "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(A)(4). Therefore, because the agreed settlement amount for appellant's contributions to the financing of the marital [*12] 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.

[*P33] 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, 1 Ohio L. Rep. 509. 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 [*13] was not purchased during the marriage.

[*P34] 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.

ORC Ann. 3105.171

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE 31. DOMESTIC RELATIONS -- CHILDREN > CHAPTER 3105. DIVORCE, ALIMONY, ANNULMENT, DISSOLUTION OF MARRIAGE > SPOUSAL SUPPORT

§ 3105.171. Equitable division of marital and separate property; distributive award

(A) As used in this section:

- (1) "Distributive award" means any payment or payments, in real or personal property, that are payable in a lump sum or over time, in fixed amounts, that are made from separate property or income, and that are not made from marital property and do not constitute payments of spousal support, as defined in section 3105.18 of the Revised Code.
- (2) "During the marriage" means whichever of the following is applicable:
 - (a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;
 - (b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, "during the marriage" means the period of time between those dates selected and specified by the court.
- (3) (a) "Marital property" means, subject to division (A)(3)(b) of this section, all of the following:
 - (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;
 - (iv) A participant account, as defined in section 148.01 of the Revised Code, of either of the spouses, to the extent of the following: the moneys that have been deferred by a continuing member or participating employee, as defined in that section, and that have been transmitted to the Ohio public employees deferred compensation board during the marriage and any income that is derived from the investment of those moneys during the marriage; the moneys that have been deferred by an officer or employee of a municipal corporation and that have been transmitted to the governing board, administrator, depository, or trustee of the deferred compensation program of the municipal corporation during the marriage and any income that is derived from the investment of those moneys during the marriage; or the moneys that have been deferred by an officer or employee of a government unit, as defined in section 148.06 of the Revised Code, and that have been transmitted to the governing board, as defined in that section, during the marriage and any income that is derived from the investment of those moneys during the marriage.
 - (b) "Marital property" does not include any separate property.
- (4) "Passive income" means income acquired other than as a result of the labor, monetary, or in-kind

contribution of either spouse.

- (5) "Personal property" includes both tangible and intangible personal property.
 - (6) (a) "Separate property" means all real and personal property and any interest in real or personal property that is found by the court to be any of the following:
 - (i) An inheritance by one spouse by bequest, devise, or descent during the course of the marriage;
 - (ii) 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;
 - (iii) Passive income and appreciation acquired from separate property by one spouse during the marriage;
 - (iv) Any real or personal property or interest in real or personal property acquired by one spouse after a decree of legal separation issued under section 3105.17 of the Revised Code;
 - (v) Any real or personal property or interest in real or personal property that is excluded by a valid antenuptial agreement;
 - (vi) Compensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets;
 - (vii) Any gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse.
 - (b) The 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.
- (B) In divorce proceedings, the court shall, and in legal separation proceedings upon the request of either spouse, the court may, determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section. For purposes of this section, the court has jurisdiction over all property, excluding the social security benefits of a spouse other than as set forth in division (F)(9) of this section, in which one or both spouses have an interest.
- (C)
- (1) Except as provided in this division or division (E) of this section, the division of marital property shall be equal. If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section.
 - (2) Each spouse shall be considered to have contributed equally to the production and acquisition of marital property.
 - (3) The court shall provide for an equitable division of marital property under this section prior to making any award of spousal support to either spouse under section 3105.18 of the Revised Code and without regard to any spousal support so awarded.
 - (4) If the marital property includes a participant account, as defined in section 148.01 of the Revised Code, the court shall not order the division or disbursement of the moneys and income described in division (A)(3)(a)(iv) of this section to occur in a manner that is inconsistent with the law, rules, or plan governing the deferred compensation program involved or prior to the time that the spouse in whose name the participant account is maintained commences receipt of the moneys and income credited to the account in accordance with that law, rules, and plan.
- (D) Except as otherwise provided in division (E) of this section or by another provision of this section, the court

shall disburse a spouse's separate property to that spouse. If a court does not disburse a spouse's separate property to that spouse, the court shall make written findings of fact that explain the factors that it considered in making its determination that the spouse's separate property should not be disbursed to that spouse.

(E)

- (1) The court may make a distributive award to facilitate, effectuate, or supplement a division of marital property. The court may require any distributive award to be secured by a lien on the payor's specific marital property or separate property.
- (2) The court may make a distributive award in lieu of a division of marital property in order to achieve equity between the spouses, if the court determines that a division of the marital property in kind or in money would be impractical or burdensome.
- (3) The court shall require each spouse to disclose in a full and complete manner all marital property, separate property, and other assets, debts, income, and expenses of the spouse.
- (4) If a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.
- (5) If a spouse has substantially and willfully failed to disclose marital property, separate property, or other assets, debts, income, or expenses as required under division (E)(3) of 14 this section, the court may compensate the offended spouse with a distributive award or with a greater award of marital property not to exceed three times the value of the marital property, separate property, or other assets, debts, income, or expenses that are not disclosed by the other spouse.

(F) In making a division of marital property and in determining whether to make and the amount of any distributive award under this section, the court shall consider all of the following factors:

- (1) The duration of the marriage;
- (2) The assets and liabilities of the spouses;
- (3) The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;
- (4) The liquidity of the property to be distributed;
- (5) The economic desirability of retaining intact an asset or an interest in an asset;
- (6) The tax consequences of the property division upon the respective awards to be made to each spouse;
- (7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;
- (8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;
- (9) Any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension;
- (10) Any other factor that the court expressly finds to be relevant and equitable.

(G) In any order for the division or disbursement of property or a distributive award made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided and shall specify the dates it used in determining the meaning of "during the marriage."

(H) Except as otherwise provided in this section, the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property.

(I) A division or disbursement of property or a distributive award made under this section is not subject to future

modification by the court except upon the express written consent or agreement to the modification by both spouses.

- (J) The court may issue any orders under this section that it determines equitable, including, but not limited to, either of the following types of orders:
- (1) An order granting a spouse the right to use the marital dwelling or any other marital property or separate property for any reasonable period of time;
 - (2) An order requiring the sale or encumbrancing of any real or personal property, with the proceeds from the sale and the funds from any loan secured by the encumbrance to be applied as determined by the court.

History

143 v H 514 (Eff 1-1-91); 144 v S 300 (Eff 11-5-92); 148 v H 628. Eff 9-21-2000; 152 v H 395, § 1, eff. 4-7-09; 153 v H 238, § 1, eff. 9-8-10.

Page's Ohio Revised Code Annotated:

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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

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

JUDGES