

ORIGINAL

IN THE SUPREME COURT OF OHIO

JAMES P. KUHN
APPELLANT,

Case No. 2014-0601

v.

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

KELLY L. KUHN NKA COTTLE,
APPELLEE

Court of Appeals
Case No. 13-CA-24

REPLY BRIEF OF APPELLANT, JAMES P. KUHN

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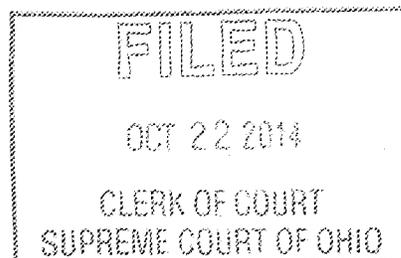


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STATEMENT OF FACTS

Appellant, James P. Kuhn, restates the Statement of Facts as set forth within his Merit Brief previously filed.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Pursuant to Ohio Revised Code Sections 3105.171(A)(4) and 3105.171(A)(6)(a)(iii) passive appreciation and income generated from one spouse's separate, non-marital property is not marital property subject to division between the parties.

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

In her Merit Brief submitted to this Court, Appellee has basically set forth an argument through which she is trying to get the "best of both worlds". First, Appellee wanted (and received) her "pre-marital" contribution towards the real estate recognized and reimbursed. However, despite being able to trace those pre-marital contributions, and the pre-marital contributions of Appellant, Appellee also wants to benefit from the establishment of a marital interest in said real estate. Unfortunately for Appellee, she can't have it both ways. Specifically, if pre-marital contributions are traceable to the extent that they are able to be reimbursed to the spouse making those contributions, then any argument that the property was mutated from Appellant's separate property to a jointly owned marital asset is

defeated. Clearly here the contributions could be and were traced and were fully reimbursed to Appellee. Following that no argument remains that any marital interest was created in the property.

Further, Appellee cites to the case of *Patrella v. Patrella*, 5th Dist. Licking Cty., No. 08CA0073, 2008-Ohio-6714 for support of her arguments. However, the *Patrella* decision better supports the position of Appellant. In *Patrella*, in denying the husband's separate property claim, the 5th District Court of Appeals found, "Whatever separate property claim existed at the beginning of the marriage has been clouded and diluted by the use of marital funds...." There, the parties had mortgaged the property together, made payment together and were unable to specify or identify what contributions had been made by each party. That is not the case here. Instead here, the parties were able to identify and stipulate to the pre-marital contributions of each party. The parties were further able to agree and stipulate to full reimbursement to Appellee for those contributions. Thus, unlike in *Patrella*, the separate property claims of the parties were not clouded or diluted by the use of marital funds.

Appellee further argues that the trial court ignored the stipulations reached by the parties. That is not the case. However, through those stipulations the tracing of the parties' pre-marital contributions could easily be accomplished. Once that tracing was done, any claim of marital interest in the property was defeated. Clearly the property was purchased before the marriage and, given the agreement of the parties and the testimony and evidence received at trial, the

contributions of each party were recognized and Appellant was reimbursed for her contributions. Therefore the property was not marital.

It is important to note that the Fifth District Court of Appeals agreed with the trial court's determination that the Haught Road property was not marital. In fact, the majority of the court did not agree with Appellee's proposition that the real estate was a marital asset and, as such, refused to award Appellant any of the potential royalty interest under the oil and gas lease. Instead, the court held, "We specifically find the agreed settlement amount for appellant's contribution 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." *Kuhn v. Kuhn*, 5th Dist.

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Appellee did not appeal that finding of the appellate court.

In the Fifth District decision and determination of this matter the issue came down to one of income. The Court, having found the Haught Road property to be the separate property of Appellant, thereafter found that the lease signing bonus was income. The Court went on to hold that said income was like any other income received during the marriage and therefore was subject to division between the parties.

In making that determination, the appellate court ignored Ohio Revised Code Sections 3105.171(A)(6)(a)(iii) and 3105.171(A)(3)(a)(iii) and failed to

address the issue of whether the income generated from the oil and gas lease was active or passive.

Here, the “income” generated, being the oil and gas signing bonus, is clearly passive income. While the parties both undertook activities such as gathering information, attending meetings, and talking to Appellee’s father, none of those actions created the income. Instead it is the minerals that are believed to lie under the ground owned by Appellant prior to the marriage that created the income. Even if the parties had done none of those things identified above or detailed in Appellee’s brief, the oil and gas companies were still interested in leasing land in the area where the Haight Road property lies because of the “frenzy” of oil and gas activity. These parties did not bring this frenzy about. They did not bring interest to their property. No improvements they placed upon the real estate led to the interest. The potential for oil and gas exploration, and that potential alone, led to the signing of this lease and the signing bonus. This is passive income.

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

Shale development determined its marketability to Gulfport, not any action undertaken by either of these parties. It was Appellant's mere ownership of the land within the current hot bed of oil and gas exploration that led to Gulfport's interest and the lease that was signed. Had Appellant not owned land in that area, (or if the mineral rights had been reserved by a prior owner, if Appellant had previously executed a lease, etc.) Appellee could have performed all the same actions and recognized no benefit by way of oil and gas lease.

Finally, as the trial court made a determination that the income generated from this property was passive in nature, the appellate court was required to review that finding under an abuse of discretion standard. It did not do so.

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 arguments contained within Appellee's merit brief epitomize the reason for this appeal and the potential for wide spread ramifications from this decision. Appellee signed the lease document solely as the spouse of Appellant, the titled real estate owner. Joint trial exhibit 11 as presented by the parties indicated that counsel preparing the lease documents requested Appellee's presence at the lease signing and, ultimately her signature upon the lease, solely in recognition of her dower interest in said property. Despite obtaining her signature on the lease, it was not the intent of Appellant to create and/or transfer an interest in the Haught Road property to Appellee. He merely intended to execute a lease to allow for oil and gas exploration and, in order to do so, was required to procure the signature of his spouse in recognition of potential dower interests she may hold therein.

If permitted to stand, the decision of the Fifth District Court of Appeals then has essentially permitted the oil and gas company to create an interest in Appellee for Appellant could not finalize the lease without her signature. Again, with no intention of transferring any interest to her, this decision essentially indicates that Appellant did so by signature of this lease.

Appellee argues that the way the signing bonus check was written also establishes this. However, again, this was out of the control of Appellant. The

signing bonus check was issued by the oil and gas company in fulfillment of the lease contract. Appellant did not and could not dictate how the check was drafted.

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*

First, this proposition of law was not included within the original memorandum in support of jurisdiction simply because it has been the long established precedent of this Court that, absent a showing of abuse of discretion, a reviewing court may not modify or reverse a trial court's property division. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348 (*superseded by statute on other grounds*). In order to find an abuse of that discretion, the court must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. This basic legal principal was ignored by the Fifth District Court of Appeals in this matter.

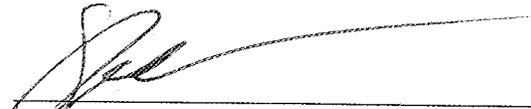
Here, there was quite simply no finding by the Appellate Court that the trial court had committed any abuse of discretion, regardless of Appellee's assertion that this finding was somehow implied by the decision. Before that trial court decision, which included very extensive and detailed findings of fact and conclusions of law, could be overturned, the appellate court was required to make such a finding. It didn't. No language appears within the decision indicating that the trial court

abused its discretion. It was only within the dissent that "abuse of discretion" was even referenced.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this Court determine that the decision of the Fifth District Court of Appeals was in error and the original determination and decision of the trial court be restored. The Haught Road real estate constitutes the separate, non-martial asset of Appellant and, as such, the passive income derived therefrom constitutes the separate, non-marital asset of Appellant as well. Further, the trial court did not abuse its discretion in rendering a decision in this matter consistent with the conclusion set forth herein and, as such, the decision of the trial court should not have been reversed.

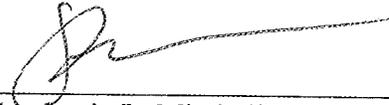
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true copy of the foregoing REPLY BRIEF OF APPELLANT upon Counsel for Defendant-Appellant, Attorney Robert Roe Fox, 388 South Main Street, Suite 402, Akron, Ohio 44311 by regular U.S. Mail, postage prepaid this 22nd day of October 2014.



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