[Cite as *Price v. Price*, 2002-Ohio-299.]

**COURT OF APPEALS**

**ELEVENTH DISTRICT**

**GEAUGA COUNTY, OHIO**

J U D G E S

KARENANN JONES PRICE,

Plaintiff-Appellee,

– vs –

PHILIP MATHER PRICE,

Defendant-Appellant.

HON. DONALD R. FORD, P.J.,
HON. JUDITH A. CHRISTLEY, J.,
HON. DIANE V. GRENDELL, J.

CASE NO. 2000-G-2320

**O P I N I O N**

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No.98 DC 00060

JUDGMENT: Affirmed in part, reversed in part, and remanded.

ATTY. JOYCE E. BARRETT
ATTY. JAMES P. REDDY, JR.
800 Standard Building
1370 Ontario Street
Cleveland, OH 44113

(For Plaintiff-Appellee)

ATTY. JOHN W. SHRYOCK
JOHN SHRYOCK CO., L.P.A.
38118 Second Street
P.O. Box 1293
Willoughby, OH 44096-1293

(For Defendant-Appellant)

GRENDELL, J.

**{¶1}** Defendant-appellant, Philip Mather Price ("appellant"), appeals from the divorce decree entered by the Geauga County Court of Common Pleas, Domestic Relations Division. Appellant only disputes the trial court's determination that several assets were marital and not his separate property.

**{¶2}** Appellant and Karenann Jones Price ("appellee") married on August 16, 1980. Two children were born as issue of the marriage. On September 22, 1981, fifty-five (55) acres of property in Chardon was purchased. Appellant testified that the entire purchase price was funded by monies received from his family following the sale of certain property in Florida and from disbursements from his trust funds. The property was titled in both parties' names in joint and survivorship form. A portion of the land was sold in 1988. The sale proceeds were placed in a joint account and not treated as appellant's separate property.

**{¶3}** In 1982, the parties purchased a home in Wickliffe for sixty-five thousand dollars ($65,000). Appellant testified he provided the thirty-five thousand dollar ($35,000) down payment from trust funds while the remainder of the property was funded by a joint mortgage. The title of the property was in both parties as husband and wife.

**{¶4}** In 1985, the parties purchased the East Willow Pet Hospital and the real estate upon which it was located in Eastlake. The total purchase price was one hundred thousand dollars ($100,000). The down payment of twenty-four thousand dollars

($24,000) was made from appellant's trust. Appellant testified he provided another twenty-five thousand dollars ($25,000) for improvements, but did not specify what improvements were made.

**{¶5}** In 1991, the parties decided to build a residence on the Chardon property. They obtained two construction loans for the property, one being a bridge loan using the Wickliffe property as collateral. A signature loan also was obtained. These loans totaled four hundred thousand dollars ($400,000). Over seven hundred fifty thousand dollars ($750,000) was spent constructing the Chardon home. It later was appraised for five hundred thousand dollars ($500,000). Appellant testified he provided funds from his trusts to partially pay for the building costs. Both parties were responsible for the mortgages.

**{¶6}** On January 20, 1998, appellee filed for divorce. Trial was held on October 20 and 21, 1999. On September 27, 2000, the trial court issued its judgment entry granting the parties a divorce. The trial court determined that the above-mentioned assets were marital property. Appellant has appealed from this ruling.

Appellant assigns the following error for review:

**{¶7}** "The trial court erred as a matter of law to the prejudice of the Appellant and abused its discretion by distributing property without following the statutory mandates of R.C. 3105.171."

**{¶8}** The adjudication of this appeal requires a brief preliminary discussion of several property division rules in divorce cases. These rules include transmutation (the conversion of separate property into marital property through the actions of the property's

owner), gifts (the intentional voluntary conveyance of a property right to another) and traceability (the tracing of separate property back from a potential marital asset to its root).

**{¶9}** There was a time when transmutation was the predominate principle under Ohio law. See, *e.g.*, *Black v. Black* (Nov. 4, 1996), Stark App. No. 1996CA00052, unreported, 1996 Ohio App. Lexis 6008. However, the Ohio Legislature changed the law, effective January 1, 1991, through the enactment of R.C. 3105.171.

**{¶10}** It is clear that the Legislature enacted R.C. 3105.171 to clarify that the form of ownership was not the determinative factor. Further, the law of Ohio is that traceability of an asset is the major means for determining whether an asset is separate or marital property. *Okos v. Okos* (2000), 137 Ohio App.3d 563; *Zeefe v. Zeefe* (1998), 125 Ohio App.3d 600; *Modon v. Modon* (1996), 115 Ohio App.3d 810; *Peck v. Peck* (1994), 96 Ohio App.3d 731; *Seybert v. Seybert* (Dec. 14, 2001), Trumbull App. No. 99-T-0119, unreported, 2001 Ohio App. LEXIS 5646; *Lewis v. Lewis* (Nov. 5, 2001), Clermont App. Nos. CA2001-01-002, CA2001-01-005, unreported, 2001 Ohio App. LEXIS 4930; *Mays v. Mays* (Oct. 12, 2001), Miami App. No. 2000-CA-54, unreported, 2001 Ohio App. LEXIS 4599; *Leady v. Leady* (Aug. 31, 2001), Fulton App. No. F-00-027, unreported, 2001 Ohio App. LEXIS 3882; *Doane v. Doane* (May 2, 2001), Guernsey App. No. 00CA21, unreported, 2001 Ohio App. LEXIS 2029.

**{¶11}** Of course, traceability is not applied in a vacuum. In the process of tracing ownership of a particular asset, the court must evaluate such factors as each party's basis for his or her claim of an ownership interest (*e.g.*, by contract, by gift, etc.). The party

attempting to prove that the asset is traceable separate property must establish such tracing by a preponderance of the evidence. *Matic v. Matic* (July 27, 2001), Geauga App. No. 2000-G-2266, unreported, 2001 Ohio App. Lexis 3360, at 6. The party seeking to prove that he or she has a property interest by contract or gift has the burden of proving such claimed property interest. However, in the case of a "gift," the party asserting a gifted interest must prove such interest by clear and convincing evidence. R.C. 3105.171(A)(6)(a)(vii); *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 168.

**{¶12}** In this case, appellee does *not* claim that she acquired an interest in any of the parties' real property at issue by contract. Such assertion of a contract right by appellee appears nowhere in the record or appellee's brief. Appellee did raise the issue of a gift below but the trial court did not make any finding of such and appellee did not appeal this ruling. Therefore, the issue of whether appellant gifted appellee with an interest in the property is not now before this court.[1]

**{¶13}** The trial court makes no finding that appellee acquired any interest in the parties' real property by contract. Moreover, there is no legal authority in Ohio that supports the proposition that one spouse's willingness to co-sign for a mortgage debt on a parcel of real property, without more, becomes "consideration" that converts the other spouse's traceable separate property down payment into a contractually converted marital asset. Indeed, such a proposition would be misplaced and would contravene the case law

1. We note that clear and convincing evidence of any alleged gift of a real property interest from appellant to appellee is lacking in the record.

of Ohio and the Legislature's traceability concept in every case involving third party financing. Under this misplaced proposition, a benevolent co-signing spouse would obtain a "contractual" interest in real property held solely in the other spouse's name, despite the parties' intention that the property remain the sole asset of the titleholding spouse.

**{¶14}** In the present case, the trial court also makes no finding that any gift had been intended or made by appellant to appellee. While the trial court made detailed findings, the word "gift" appears nowhere in those findings.

**{¶15}** Therefore, the issues of a contract or gift claim by appellee are not before this court in this appeal. It would be inappropriate and improper for this court to address issues on appeal that were not addressed by the court below.

**{¶16}** Additionally, the issue as to the constitutionality or retroactivity of R.C. 3105.171 was *not* raised by appellee or addressed by the trial court in the lower court proceedings. We are mindful of the principle promulgated by the Supreme Court of Ohio that "'[c]onstitutional questions will not be decided until the necessity for a decision arises on the record before the court.'" *Christensen v. Bd. of Commrs. on Grievances and Discipline* (1991), 61 Ohio St.3d 534, 535, quoting *State ex rel. Herbert v. Ferguson* (1944), 142 Ohio St. 496, paragraph two of the syllabus. We will not violate that principle by pursuing an unnecessary analysis of those issues in this case. We note, however, that the Supreme Court of Ohio has unequivocally addressed the retroactivity issue in *Schulte v. Schulte* (1994), 71 Ohio St.3d 41, 45, holding that "R.C. 3105.171

applies prospectively only *to* those *divorce cases filed after its effective date, January 1, 1991*." (Emphasis added.) We are mindful that the divorce case before us was filed *after* January 1, 1991.[2]

**{¶17}** We also are *not* aware of any judicial or legislative support for the notion that there is a "vesting" exception to the Ohio Supreme Court's "divorce cases filed" after the "January 1, 1991" ruling in *Schulte* that exempts property rights that "vested" before that date. Indeed, any such exception would effectively render the Ohio Supreme Court's ruling in *Schulte* a nullity in pre-1991 marriages since every spouse named prior to January 1, 1991, would merely assert a pre-January 1, 1991 "vested property right," to avoid R.C. 3105.171. The Supreme Court of Ohio has not adjudicated any such vesting exception and we are aware of no legal authority that allows this court to do so. Furthermore, the creation of "vesting" exceptions to Ohio legislative divorce laws by the courts would open a pandora's box in divorce actions. By law, divorce courts make equitable distributions or re-distributions of property rights without regard to "vesting" claims. The interjection of a "vesting" concept into divorce cases would create a nightmarish patchwork of legislative enactments that would have to be applied in different ways depending not on the effective date of statutes or the Ohio Supreme Court's determinations, but rather solely on the so-called "vesting" date. This would allow individuals to alter legislative effective dates by private conduct. We are not aware of any legal authority that makes legislative enactments and the public policy embodied in those

2. The underlying divorce case was filed on January 20, 1998.

statutes subservient to private contracts or private conduct.

**{¶18}** Since contracts, gifts, and constitutional retroactivity issues are not before this court, we will focus on the issue at hand: Did the trial court err by failing to recognize the traceability of any of appellant's separate property in this case? The answer to this question is not dependent on appellant's or appellee's testimony, the competency or credibility of the evidence, or any disagreement with any of the trial court's factual findings. Rather, the erroneous nature of a portion of the trial court's ruling is self-evident from the trial court's findings.

**{¶19}** In paragraphs 27 and 28 of the trial court's findings, the trial court makes two separate determinations that appellant used money from "his trust funds" towards the purchase of property held by the parties during the marriage. The record contains other unrebutted evidence that funds used for the purchase of certain acreage in Chardon came through appellant from his family and his trust funds. The trial court's findings and rulings fail to trace these funds adequately. The trial court's ruling that all of the real property involved was marital ignores the traceability of those funds. Under current Ohio law, such tracing is required.

**{¶20}** In addressing traceability in this case, the initial focus is whether appellant's act of placing separate property into a joint account and subsequently using the funds to purchase property titled in both parties' names resulted in the separate monies being untraceable. The trial court determined that the money was not traceable and, therefore, became marital property.

**{¶21}** In divorce proceedings, a trial court must first determine what constitutes marital property and what constitutes separate property. R.C. 3105.171(B). Once the trial court has determined the status of the parties' property, the trial court generally must disburse a spouse's separate property to that spouse and equitably distribute the marital estate. R.C. 3105.171(B) and (C). An increase in the value of separate property caused by the contribution of either spouse, whether by monetary, labor, or in-kind means, is deemed to be marital property. *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397. Appreciation, resulting from an increase in the fair market value of property, is considered passive income and remains the separate property of the spouse. *Munroe v. Munroe* (1997), 119 Ohio App.3d 530, 536.

**{¶22}** An appellate court applies a manifest weight of the evidence standard of review to a trial court's designation of property as either marital or separate. *Barkley, supra*, 119 Ohio App.3d at 159. Therefore, the judgment of the trial court will not be disturbed upon appeal if supported by competent, credible evidence. *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 468.

**{¶23}** Spouses can change the nature of the property through their conduct during the marriage. *Moore v. Moore* (1992), 83 Ohio App.3d 75, 77. However, the commingling of separate property with marital property will not destroy the identity of the separate property if that property remains traceable. R.C. 3105.171(A)(6)(b); *Peck, supra.* "[T]raceability has become the focus when determining whether separate property has lost its separate character after being commingled with marital property." *Id.* at 734. As

stated previously, the party seeking to have a certain asset characterized as separate property bears the burden of proof by a preponderance of the evidence standard. *Boyles v. Boyles* (Oct. 5, 2001), Portage App. No. 2000-P-0072, unreported, 2001 Ohio App. LEXIS 4520; *Matic v. Matic* (July 27, 2001), Geauga App. No. 2000-G-2266, unreported, 2001 Ohio App. LEXIS 3360; *O'Brikis v. O'Brikis* (Oct. 6, 2000), Portage App. No. 99-P-0045, unreported, 2000 Ohio App. LEXIS 4663; *Polakoff v. Polakoff* (Aug. 4, 2000), Trumbull App. No. 98-T-0163, unreported, 2000 Ohio App. LEXIS 3542; *Letson v. Letson* (Sept. 30, 1997), Trumbull App. No. 95-T-5356, unreported, 1997 Ohio App. LEXIS 4445. Although this court is sensitive to the intent of the parties, the present law in Ohio focuses instead upon traceability.

**{¶24}** The first issue raised by appellant with regard to the classification of property is the acreage purchased in Chardon in 1981. The following analysis will focus on the forty (40) acre parcel of land that remains vacant. The parties built a home on the remaining ten (10) acres. Appellant testified he funded the purchase from monies received from the sale of land in Florida by his family. Appellant received over one hundred fifty thousand dollars ($150,000) following the sale of the Florida property. He combined that money with an interest payment from one of his trusts to buy the Chardon land. Appellee admitted that the funding for the Chardon land purchase came from appellant's separate property, but felt the land was joint property because the tax liability incurred from that sale was paid from marital funds. Appellee also points out that title to the land was joint and survivorship. Further, the monies were all placed in the parties'

joint account before the property was purchased.

**{¶25}** Determining whether property involved in a divorce proceedings is marital or separate is often difficult, especially when the property is commingled or the object of a gift.

**{¶26}** A trial court is to assume that any property acquired during the marriage is marital, unless evidence is offered to rebut the presumption. *Barkley, supra,* 119 Ohio App.3d at 160. A spouse's pre-marital property remains separate property as long as it is traceable, regardless of whether it has been commingled with other property. *Id*.

**{¶27}** Appellant asserts that the Chardon property is his separate property because he funded the purchase with monies received from his family's sale of land in Florida. The trial court ruled that the Chardon parcel was marital property because title was held by the parties joint and survivorship and because appellant "treated" it as marital property and acknowledged that the proceeds were deposited in a joint account. Absent from the trial court's ruling is any discussion or finding concerning traceability or gift. The trial court's apparent reliance on the deed and subsequent joint account raises a serious question as to the basis of the court's ruling with respect to the Chardon property. However, the holding of title to real property by both spouses is not determinative of whether the property is marital or separate. R.C. 3105.171(H). Separate funds placed in a joint checking account and used to purchase property held in joint title is insufficient to demonstrate a gift, absent evidence of donative intent. *Angles v. Angles* (Sept. 15, 2000), Fairfield App. No. 00CA1, unreported, 2000 Ohio App. Lexis 4281. Commingling does

not destroy the separate nature of the property if the property remains traceable. *Frederick v. Frederick* (Mar. 31, 2000), Portage App. No. 98-P-0071, unreported, 2000 Ohio App. Lexis 1458. Therefore, to the extent the trial court's decision that the Chardon property was marital is predicated on the deed form and joint account, it is incorrect as a matter of law. This, however, does not resolve the status of the Chardon property. The primary focus when determining whether separate property has become marital is traceability.

**{¶28}** Appellant testified he titled the property in appellee's name with the understanding that she would have title upon his death. Appellee claimed that the property was to benefit both parties as she also would be paying taxes on the land.

**{¶29}** The trial court made no specific finding (i) that appellant "gifted" an interest in the Chardon property to appellee, (ii) with respect to the tracing of appellant's separate property, or (iii) concerning transmutation of his separate property.

**{¶30}** When allocating property between the parties, a trial court must make written findings of fact that support a property determination with sufficient detail to enable a reviewing court to determine that the decision is fair, equitable and in accordance with the law. R.C. 3105.171(G); *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, paragraph two of the syllabus.

**{¶31}** In the instant matter, the trial court's ruling fails to address the issues of traceability *or gift*. Rather, the lower court concentrated on the form of the deed and the use of a joint account. As a result, we determine that appellant's assignment of error as to

the forty (40) acres of the Chardon property has merit. On remand, the trial court is instructed to issue specific written findings of fact with respect to the tracing of appellant's separate property; whether a gift, if any, was involved; and determining whether the Chardon parcel was separate or marital property.

**{¶32}** Appellant next asserts that the trial court erred by not determining what portion of the parties' first marital home in Wickliffe was his separate property and what was marital. The Wickliffe home was purchased in 1982 and titled in both parties' names. A down payment of thirty-five thousand dollars ($35,000) was made for the residence with the remaining thirty thousand dollars ($30,000) being financed through a mortgage. Appellee acknowledged that at least some of the down payment was funded with a disbursement from appellant's trust. Appellant testified the entire down payment of thirty-five thousand dollars came directly from his trust fund. Appellant provided a statement at trial showing a disbursement from his trust fund for thirty-one thousand dollars ($31,000). Appellant averred two other cash disbursements were made on April 14, 1982. The Wickliffe residence was purchased a few days later.

**{¶33}** Appellant presented ample evidence demonstrating he *provided* the down payment for the Wickliffe marital residence from his separate property. Appellant still was required to trace that separate property. Appellant testified the proceeds from the sale of the Wickliffe home were applied to the bridge loan used for the construction of the Chardon residence. Appellant stated only a small amount was left over. He did not testify as to exactly how much of the proceeds was not used for the Chardon home or

what happened to that money. Any money not used for the Chardon residence will be deemed to be marital as appellant provided no evidence tracing the amount or its use. Also, the burden was appellant's to demonstrate that his separate property remained traceable once it was used for the Chardon residence. The traceability of appellant's separate property with regard to the Chardon residence will be discussed below.

**{¶34}** Appellant claims the trial court erred by not determining how much of the marital home constructed on the Chardon property remained his separate property. The parties stipulated that the value of the home and land was six hundred twenty-five thousand dollars ($625,000) at the time of separation.

**{¶35}** The construction of the residence was financed by a series of loans and mortgages. The parties used a bridge loan of fifty thousand dollars ($50,000) with the Wickliffe home as collateral. Following the sale of the Wickliffe home, the proceeds were applied to the costs of the Chardon home. Appellant testified to other loans for three hundred fifty thousand dollars ($350,000). The remainder of the money spent to build the home came from disbursements from appellant's various trusts. Appellant testified to several disbursements being made from his account, which were used to finance construction costs. Trust statements as well as banking records reflect that several trust disbursements were made shortly before appellant paid a contractor involved in building the home.

**{¶36}** The parties agree that far more funds were expended in constructing the Chardon home than are reflected in its appraised value. In essence, the home was vastly

overbuilt. The appraised value of the home itself was stipulated as being five hundred thousand dollars ($500,000), with the ten (10) acres of land being appraised at one hundred twenty-five thousand dollars ($125,000). Appellant testified to spending anywhere from seven hundred twenty-five thousand dollars ($725,000) to eight hundred thousand dollars ($800,000) to build the home. Given the disparity in the construction costs and the appraised value of the home, it is impossible to distinguish which part of the appraised value of the home is attributable to appellant's separate property and what is the marital property. Appellant's trust funds as well as the proceeds from the Wickliffe home are not traceable and became marital property. The trial court was correct in determining that appellant's separate property in the Chardon residence and the ten (10) acre parcel was not traceable.

**{¶37}** Appellant next disputes the trial court's finding that real estate located on Vine Street in Eastlake was marital property. This is the land where appellant's veterinary practice was located. Appellant also argues that the practice itself remains his separate property. Appellant testified he purchased both the land and the practice for one hundred thousand dollars ($100,000). Appellant used twenty-four thousand dollars ($24,000) from his trust funds for the down payment. Appellee does not dispute this amount or the source. Another trust disbursement of twenty-five thousand dollars ($25,000) was used for improvements to the business. The loan for the remainder of the purchase price was retired in two years using earnings from the business.

**{¶38}** Again, aside from title, there is no evidence the down payment money was

not traceable. The trial court erred by determining the entire Vine Street property and the veterinary practice was marital because the down payment remained traceable. Even so, there is no evidence that the appreciation on the property was passive in nature. Given that appellant testified he made improvements, it is unlikely the appreciation was solely passive, if at all. Appellant bore the burden of demonstrating the appreciation was passive. *Bugos v. Bugos* (Oct. 15, 1999), Trumbull App. No. 98-T-0141, unreported, 1999 Ohio App. LEXIS 4875. Appellant provided no evidence to show the appreciation was passive. Only the money used for the down payment remained appellant's separate property. The appreciation of the real estate and practice was marital property.

**{¶39}** The trial court was correct in determining appellant provided no evidence as to how the twenty-five thousand dollars ($25,000) used for improvements added to the value of the asset. Appellant did not testify as to what improvements were made or how the improvements increased the property's value. The trial court did not err by failing to award this amount to appellant as his separate property in the Eastlake property.

**{¶40}** Appellant's assignment of error has merit in part and is overruled in part. The twenty-four thousand dollars ($24,000) used by appellant for the down payment for the Eastlake property is his separate property. This matter is affirmed in part, reversed and remanded in part to the trial court for further proceedings with respect to the Chardon property consistent with this opinion.

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JUDGE DIANE V. GRENDELL

FORD, P.J., concurs,

CHRISTLEY, J., dissents with Dissenting Opinion.

CHRISTLEY, J., dissenting.

**{¶41}** I respectfully dissent from that portion of the majority opinion concerning its tracing analysis. While the majority initially acknowledges that tracing can be offset by evidence of donative intent, its ultimate conclusion was that "[t]he primary focus when determining whether separate property has become marital is traceability." With all due respect, I believe this to be an overly broad statement of the law.

**{¶42}** The central point of the majority's conclusion is that if commingled assets can be traced, such tracing overrides the ability of a spouse to gift or contract away non-marital property to a spouse. This "all or nothing" interpretation is incompatible with the other relevant statutes and completely ignores the ability of a husband and wife to contract with or gift each other during the marriage. See R.C. 3103.05 and 3105.171(A)(6)(a)(vii).

**{¶43}** Further, the majority holds that even if gifting could prevail over traceability, it would not have reached the same factual conclusion as the trial court in terms of whether there was a gifting. Instead, the majority, primarily, relies on appellant's testimony at trial that he intended to maintain his assets as his separate assets. However, the trial court determined that appellant's self-serving statement was at odds with his behavior, as the trial court found that appellant had treated his infusion of separate assets as marital assets from the beginning of the marriage. Thus, the trial court concluded that a

gift had been intended and made.

**{¶44}** The record demonstrates that there were serious issues of credibility between appellant and appellee. The trial court resolved them in favor of appellee. The possibility that the majority may disagree with the trial court's factual findings is an insufficient reason to reverse on that basis. Great deference is to be accorded the trial court on these factual decisions. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279; *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159.

**{¶45}** A review of the record shows that there was competent, credible evidence to support the trial court's determination that the properties were marital in nature. For example, appellant was admittedly a recipient of a significant trust during most of his adult life. Thus, he would have had a better than average knowledge of how to protect assets. He was admittedly experienced in conducting sophisticated financial transactions, including land purchases. In fact, when questioned at trial, appellant responded that he was aware of the significance of a title held jointly with right of survivorship. Further, it is irrelevant that appellant now claims he did it for probate reasons, as he admitted he was aware that such title gave appellee a *present interest* in the property:

**{¶46}** "Q. [by appellee's attorney on cross-examination] Well, she [appellee] would have a present interest, and then if you died she would get the entire property?

"A. That's right.

"Q. And you understood that, correct?

"A. Yes, that's correct."

**{¶47}** Subsequently, on direct examination, appellant's attorney tried to rehabilitate appellant's testimony with the following exchange:

**{¶48}** "Q. Did you understand at that time what a joint and survivorship deed was?

**{¶49}** "***

**{¶50}** "Q. What was your intent when you took title to the property in whatever form you took it?

**{¶51}** "A. The intent was to allow upon my death the transfer of that particular property free and clear to my wife in the event that I passed away before her. That was the intent of the survivorship. Otherwise, it was to be my personal investment."

**{¶52}** In addressing a similar argument in *Helton v. Helton* (1996), 114 Ohio App.3d 683, the Second Appellate District reaffirmed its holding in an earlier case:

**{¶53}** "'We are mindful of R.C. 3105.171(H), that provides that the holding of title by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital or separate property. Here, however, the evidence [of a joint and several with right of survivorship title] presented more than a mere form of ownership. *It demonstrated a transaction entered into to accomplish a specific object; avoidance of expense that would otherwise accompany the death of either Mr. Wolf or his mother. This benefit could not be achieved without Mr. Wolf and his mother giving the plaintiff Mrs. Wolf an interest in the property.*'" (Emphasis added.) *Helton* at 687, quoting *Wolf v. Wolf* (Sept. 27, 1996), Greene App. No. 96 CA 10, unreported, 1996 WL 563997.

**{¶54}** In the instant case, appellant's claim on redirect examination that he intended his investment in the Chardon property to remain as separate property was negated, among other reasons, by his admission that he understood that this form of title

was required to achieve the probate result he wished. Unless appellee was shown to be in agreement with appellant's "secret" intent, appellant was actually claiming he defrauded appellee. After all, she testified her understanding was that "the land would be for both of [them] ***." I doubt that appellant really understood the implications of his rebuttal testimony.

**{¶55}** Nevertheless, the trial court understood perfectly how inconsistent appellant's testimony was. In light of that, the court chose only to believe appellant's admission that he understood the use and significance of a joint and survivorship title; and, that he could not use such a title without vesting his spouse with a present interest. The fact that appellant may not have wanted to give such an interest to his wife is irrelevant. Any duress which appellant felt could only fall far short of what was needed to invalidate his action in vesting appellee with a one-half interest in marital property.

**{¶56}** Such an analysis is not in conflict with R.C. 3105.171. If title itself is not determinative, then, it is the surrounding circumstances which are now determinative of the significance of the title form. Did the litigant demonstrate his or her awareness of the legal significance of one form of title over another? Did the litigant behave in a manner consistent with the title form chosen? Did the opposing litigant behave in a manner consistent with the title form? The trial court's determination that the evidence supported an intent to exercise joint and several ownership from the beginning is, indeed, supported by the record.

**{¶57}** Another issue that needs to be addressed is the implication of appellee's

testimony that consideration was exchanged between appellant and appellee. Married couples have long had the right to gift or to contract with each other during the marriage as long as the contract did not impact the marriage relationship itself. R.C. 3103.05 states in relevant part:

> **{¶58}** "A husband or wife may enter into any engagement or transaction with the other, *** which either might if unmarried; subject, in transaction between themselves, to the general rules which control the actions of persons occupying confidential relations with each other."

**{¶59}** If believed, appellee's testimony, arguably, sets out the elements of a contract. Specifically, the joint titling took place in exchange for her financial liability exposure; thus, there was a clear exchange of consideration. This was evidenced by appellee's testimony wherein she stated that the reason she insisted that title be taken as joint and several with right of survivorship was because she was to incur financial liability:

> **{¶60}** "Q. And did you discuss this with [appellant] vis-à-vis the land that you were buying?
>
> "A. Yes.
>
> "Q. And what did you discuss?
>
> "A. That the land would be for both of us if I was [sic] paying the taxes on it with him.
>
> "Q. You said, the land would be for both of us, correct?
>
> "A. Yes.
>
> "Q. What did [appellant] respond to that?

"A. That he had no problem with that."

Similarly, in regards to the animal hospital, appellee testified as follows:

"Q. And did [appellant] ever discuss with you [sic] characterization of that asset, the animal hospital and the land upon which it was situated?

"A. I thought it was a mutual holding. I thought it was for both of us.

"Q. And what led you to believe you thought it was for both of you?

"A. I think the [sic] way the deed was when I saw it and helped sign for it, and I supported us for the two years while he paid it off. He didn't have to bring money home from the business. I could pay all the bills ***."

**{¶61}** Appellee further testified that she knew she would help pay the tax liability incurred from appellant's down payment. Later, when the parties decided to build a residence on the Chardon property, appellee was a co-signor on $400,000 of related financing, as well as a co-signor on all the other mortgages secured on the various properties. In exchange for incurring such liability, appellee would retain a one-half interest in the property, thereby making the property marital in nature. Arguably, this was more than a gift; it was an exchange for consideration.

**{¶62}** Given that this specific issue was never precisely raised on appeal, I return to the issue that, minimally, a gifting was intended. Prior to the enactment of R.C. 3105.171, commingling, by itself, was regularly viewed as being sufficient to transmute separate funds into marital funds, without any need to show a gift or contract. In effect,

commingling resulted in transmutation, regardless of any ability to trace the funds. *Black v. Black* (Nov. 4, 1996), Stark App. No. 1996CA00052, unreported, 1996 WL 752885, at 2-3.

**{¶63}** However, the revised attitude expressed towards commingling and traceability in R.C. 3105.171(A)(6)(b) and titling in R.C. 3105.171(H) did not replace section (A)(6)(a)(vii) of R.C. 3105.171 dealing with gifting and R.C. 3103.05 concerning contracts between spouses. Hence, the commingling, tracing and titling sections of R.C. 3105.171 must be read in harmony with the gifting section and the contract statute. In doing so, one must acknowledge that it is still possible, under the appropriate circumstances, to transfer non-marital funds to a spouse through a contract or gift, regardless of traceability. See, *e.g.*, *Letson v. Letson* (Sept. 30, 1997), Trumbull App. No. 95-T-5356, unreported, 1997 WL 663514, at 6 (holding that "[a] review of the relevant case law reveals that the effect of R.C. 3105.171(H) 'is to negate the presumption of a gift, but not to preclude such a finding upon an appropriate factual context.'").

**{¶64}** The majority claims that the trial court never actually held that appellant gifted appellee his non-marital property. I disagree. In paragraph forty of the September 27, 2000 findings of facts and conclusions of law judgment entry, the trial court cited the statute on gifting and then cited a number of relevant cases with similar facts where gifting was found. Immediately thereafter in the same paragraph, the court determined that all of the disputed property was marital in nature.

**{¶65}** I believe that the trial court was on the right track in its reasoning that the

actions of appellant were consistent in that he treated the property as marital property from the beginning. Specifically, the court found that all the properties were titled in joint and several ownership with right of survivorship; that appellee incurred tax liability on the down payment; that appellee was subsequently liable on the numerous loans and mortgages; that appellee contributed in numerous ways to payment and upkeep on these properties; that the proceeds from the sale of a portion of the Chardon property were untraceable and commingled; that the parties' funds were jointly used to pay off these debts; and that appellant never attempted to segregate his assets until the divorce. No one factor by itself might have been enough; however, together they overwhelmingly support the trial court's determination that appellant intended to gift appellee with his separate assets throughout the marriage.

**{¶66}** In summation, the pronouncement of this case should be that, while the holding of title is not dispositive of whether property is separate or marital, neither is the traceability of commingled assets dispositive *if there has been a clear and convincing showing that there has been an exchange for consideration or a gift.* There is simply no other statutory interpretation possible which can allow all of the various code sections to be read harmoniously.

**{¶67}** Finally, I feel compelled to address another issue which neither party has raised, but which begs to be addressed: Is R.C. 3105.171(A)(6)(b) retroactive? If the majority is correct in its analysis, appellee will be deprived of property interests she acquired, beginning at the time the Chardon deed was signed in 1981, by the retroactive

application of R.C. 3105.171(A)(6)(b).

**{¶68}** With respect to this point, the Supreme Court of Ohio has determined that "there is no language in [R.C. 3105.171] that supports the conclusion that the General Assembly intended [the statute] to apply retroactively." *Schulte v. Schulte* (1994), 71 Ohio St.3d 41, 45. From this, the court concluded that "R.C. 3105.171 applies prospectively only to those divorce cases filed after its effective date, January 1, 1991." *Schulte* at 45.

**{¶69}** At the outset, it appears that R.C. 3105.171 is applicable given that appellee filed a complaint for divorce in 1998. Although I agree with the limited holding in *Schulte*, I believe that it does not address the precise issue in this case, to wit: whether R.C. 3105.171(A)(6)(b) is applicable to situations where property rights were vested prior to its enactment? For the reasons that follow, I believe the majority inappropriately applied R.C. 3105.171(A)(6)(b) and its concept of tracing retroactively to the instant cause. Rather, I posit that the law in effect at the time appellee's property rights vested should be employed.

**{¶70}** As previously mentioned, I contend that an exchange for consideration and/or gifting occurred in this case. In either instance, appellee immediately acquired a vested property right in the Chardon property. "'When a contract is once made, the law then in force defines the duties and rights of the parties under it.'" *Ross v. Farmers Ins. Group of Companies* (1998), 82 Ohio St.3d 281, 287, quoting *Goodale v. Fennell* (1875), 27 Ohio St. 426, 432. The same logic would clearly apply to a completed gift. If a statute

were applied to a contract that was entered into before the effective date of the statute, "'[it] would essentially change the contract which existed prior to the effective date of the statute.'" *Ross* at 288, quoting *Aetna Life Ins. Co. v. Schilling* (1993), 67 Ohio St.3d 164, 167. Again, the same can be said for a gift.

**{¶71}** The above proposition of law is also emulated in Section 28, Article II of the Ohio Constitution, which provides that "[t]he general assembly shall have no power to pass *** laws impairing the obligation of contracts."

**{¶72}** With these concepts in mind, I believe that R.C. 3105.171(A)(6)(b) is not applicable to appellee as her property rights were vested prior to the enactment of this statute. To now apply R.C. 3105.171(A)(b)(6) retroactively would inequitably destroy appellee's vested property rights. See, *e.g., Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 263 (holding that the retroactive application of statutory provisions to land installment contracts that were entered into before the effective date of the statute violated Section 28, Article II of the Ohio Constitution, as applying the statutes would destroy the vested rights of the contracting parties). Rather, the law in effect at the time appellee retained her vested property interest should determine her rights.

**{¶73}** Prior to the enactment of R.C. 3105.171, the concept of transmutation by commingling was alive and well, despite any ability to trace assets. In fact, trial courts were to consider the following factors in determining the transmutation of separate property into marital property: "(1) the expressed intent of the parties insofar as it could 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." *Frederick v. Frederick* (Mar. 31, 2000), Portage App. No. 98-P-0071, unreported, 2000 WL 522170, at 10. See, also, *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245, 246.[3]

**{¶74}** Thus, it was the act of commingling, not tracing, which was determinative in addressing the issue of transmutation. *Black* at 3 (applying the doctrine of transmutation after the enactment of R.C. 3105.171 and holding that "[t]he fact that property can be traced back to [a spouse] is not a factor the trial court should consider in addressing the issue of transmutation.").

**{¶75}** In applying the foregoing to the case at bar, appellant clearly transmuted his separate property into marital property by knowingly and intentionally giving appellee a present interest in the purchase of the Chardon property, as well as the other properties, even if it was only for estate planning purposes. The evidence is consistent that appellant intended the conveyance of these property interests to act either as a gift or as an exchange for consideration. Further, these conveyances occurred irrespective of appellant's ability

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[3.] However, the enactment of R.C. 3105.171 and its concept of traceability, otherwise known as the "source of funds rule", virtually replaced the multi-factor rule of *Kuehn* and the doctrine of transmutation. *Frederick* at 10. See, also, 1 Baldwin's Ohio Practice, Domestic Relations Law (1997), 489, 497, Sections 12.4, 12.10.

to trace his property. *Black, supra*.

**{¶76}** Based on the aforementioned reasons, I respectfully dissent from the majority opinion and would affirm the judgment of the trial court.

JUDGE JUDITH A. CHRISTLEY