[Cite as *Tochtenhagen v. Tochtenhagen*, 2010-Ohio-4557.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

JOYCE L. TOCHTENHAGEN,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0011**
- vs -	:	
SAMUEL E. TOCHTENHAGEN,	:	
Defendant-Appellant,	:	
T-AND-T LAND COMPANY, INC., et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 06 DR 280.

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

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William P. McGuire, William P. McGuire Co., L.P.A., 106 East Market Street, #705, P.O. Box 1243, Warren, OH 44482-1243, and *Shirley J. Smith*, 1399 East Western Reserve Road, #2, Poland, OH 44514 (For Defendant-Appellee T-And-T Company, Inc.).

MARY JANE TRAPP, P.J.

{¶1} Samuel E. Tochtenhagen appeals from a judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, which granted the parties a

divorce and divided the marital properties. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings consistent with our opinion.

{¶2} Dr. Tochtenhagen, age 78, and Joyce L. Tochtenhagen, age 60, were married on August 2, 1974. They have four children together; all of them are now grown. In 2006, after more than 30 years of marriage, Mrs. Tochtenhagen filed a complaint for divorce. The complaint named Dr. Tochtenhagen, as well as T-and-T Land Company, Inc. ("T&T"), among others, as defendants.

{¶3} Dr. Tochtenhagen is a self-employed physician, who planned to retire soon. His income as a physician was $85,592 in 2004; $78,669 in 2005; and $56,092 in 2006. Mrs. Tochtenhagen has a nursing degree. After the couple married, she worked in Dr. Tochtenhagen's medical practice but has not worked as a nurse for many years. She also worked as a bookkeeper for T&T. During the marriage, she was the primary caregiver of the couple's children. She also helped raise a child of Dr. Tochtenhagen's from a prior relationship, as well as cared for his parents. She has no independent income of her own.

{¶4} **The Marital Homes**

{¶5} The trial court divided their various assets and ordered Dr. Tochtenhagen to pay Mrs. Tochtenhagen $4,000 in monthly spousal support. None of these awards are challenged. The only dispute in the trial court concerned the couple's two marital homes, located in McDonald, Ohio, and Big Pine Key, Florida. The trial court determined the appreciation in value of these two residential properties was marital property. Dr. Tochtenhagen challenges that characterization on the ground that the title to both properties is held in the name of T&T.

{¶6} T&T is a C corporation incorporated in 1966, prior to the couple's marriage. Before the parties were married, T&T owned a building at 512 North State Street, Girard, Ohio, where Dr. Tochtenhagen's medical practice was located.[1] T&T received rents from Dr. Tochtenhagen's medical practice.

{¶7} One of the two marital homes is located in McDonald, Ohio, where Dr. Tochtenhagen currently resides. T&T owned the land prior to the couple's marriage. After the couple married, T&T sold two other parcels of land it owned for $51,250, and used the proceeds to construct the couple's home. The title to the home is held in the name of T&T. The couple used Dr. Tochtenhagen's income to pay rent to T&T; T&T paid the real estate taxes, insurance and utilities for the home.

{¶8} The trial court found during the marriage both Dr. and Mrs. Tochtenhagen contributed to the improvements of the home, funded by the income from Dr. Tochtenhagen's medical practice. These improvements include a pole barn with an efficiency apartment, a greenhouse, and a sauna and hot tub area. The home now has a value of $325,000.

{¶9} The court found the value of the land to be $15,000. Therefore, it found Dr. Tochtenhagen had a separate property interest of $66,250 in the home (= $15,000 + $51,250). The court, however, found the increase in value, i.e., $258,750 (= $325,000 – $66,250), to be marital property, because the improvements to the home were funded with Dr. Tochtenhagen's income, and because Mrs. Tochtenhagen contributed to the

1. Dr. Tochtenhagen presented documents showing that in 1968, he and his father owned shares of T&T's stock. In 1974, when the couple married, Dr. Tochtenhagen was the only shareholder of T&T. In 1995, as part of his estate planning, Dr. Tochtenhagen began to gift his T&T shares to the trusts established for each of his four children. At the time Mrs. Tochtenhagen filed for divorce, Dr. Tochtenhagen owned only a portion of T&T's shares.

improvements. The court ordered the increase in value to be divided equally between the couple.

{¶10} The other marital home is located in Big Pine Key, Florida, where Mrs. Tochtenhagen currently resides. The property was purchased in 2000 for $236,872, and it is also titled in the name of T&T. The funds to purchase this home came from the sale of the medical office building in Girard. As with the McDonald home, the couple paid rent to T&T, and T&T paid the monthly expenses for the home, such as electricity, fuel, and water. Similarly, the trial court found both the husband and wife contributed to the improvement of the property, and that those improvements were funded by the income from the medical practice.

{¶11} The home in Florida now has a value of $615,000. The court found Dr. Tochtenhagen had a separate property interest of $236,872, i.e., the initial purchase price. However, the court found the increase in value of the home since 2000, i.e., $405,677, to be marital property, and ordered the increase in value to be divided equally between the couple.

{¶12} After Mrs. Tochtenhagen filed the divorce complaint, T&T filed a motion asking the court to determine that the real properties titled in T&T's name are not marital property. The court held a hearing on the motion and denied it in its Final Decree of Divorce. [2]

{¶13} Dr. Tochtenhagen now appeals, raising two assignments of error:

2. T&T did not file a notice of appeal from the court's judgment. Furthermore, neither its name nor its signature appears in the notice of appeal filed by Dr. Tochtenhagen. Therefore, it is not a proper party before this court in this appeal. See *Hineman v. Brown*, 11th Dist. No. 2002-T-0006, 2003-Ohio-926, ¶2. We accepted T&T's request to file a brief, but it fails to advance any argument as to why it should be considered a party in this appeal without filing a notice of appeal. We note, however, in its brief T&T does not raise its own assignments of error but merely make arguments supporting Dr. Tochtenhagen's claims.

{¶14} "[1.] The trial court erred and abused its discretion by classifying two parcels of real property owned by T-and-T Land Company, Inc. as 'marital property' and distributing those properties to Husband and Wife.

{¶15} "[2.] The trial court erred as a matter of law by failing to consider the tax consequences of the distribution of the McDonald Property and the Florida Property to Husband and Wife."

{¶16} Under the first assignment of error, Dr. Tochtenhagen challenges the classification and distribution of the two properties titled to T&T.

{¶17} **Standard of Review**

{¶18} We will not disturb the trial court's distribution of marital property absent an abuse of discretion. *Sedivy v. Sedivy*, 11th Dist. Nos. 2006-G-2687 and 2006-G-2702, 2007-Ohio-2313, ¶19. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶19} **Marital v. Separate Property**

{¶20} The trial court must determine whether a particular property is separate or marital in nature, and then make an equitable distribution of that property. *Sedivy* at ¶20. In a divorce proceeding, the division of marital and separate property is governed by R.C. 3105.171. The statute directs a trial court to determine what constitutes marital property and what constitutes separate property, and, in either case, upon making such a determination, to "divide the marital and separate property equitably between the spouses." R.C. 3105.171(B).

{¶21} A trial court's characterization of property as separate or marital will be upheld when the record contains some competent credible evidence to support the trial court's conclusion. *Bizjak v. Bizjak*, 11th Dist. No. 2004-L-083, 2005-Ohio-7047, ¶10.

{¶22} "Separate property" is defined in R.C. 3105.171(A)(6)(a)(ii) as "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage." A trial court assumes that any property acquired during marriage is marital, unless evidence is offered to rebut that presumption. *Moore v. Moore*, 175 Ohio App.3d 1, 2008-Ohio-255, ¶59. Property acquired during marriage is presumed to be marital unless it can be shown to be separate. *McLeod v. McLeod*, 11th Dist. No. 2000-L-197, 2002-Ohio-3710, ¶16.

{¶23} "All property acquired by either or both parties during the marriage is presumed to be marital property, regardless of how title is held. This presumption may be overcome by proof that the property was acquired in such a manner that it should be declared nonmarital." *Ruthrauff v. Ruthrauff*, 5th Dist. No. 2009CA00191, 2010-Ohio-887, ¶7, quoting *Tomlin v. Tomlin* (1987), 2d Dist. No. 10094, 1987 Ohio App. LEXIS 6101.

{¶24} On appeal, Dr. Tochtenhagen focuses on arguing that it was inappropriate for the trial court to apply the doctrine of piercing the corporate veil and disregard the corporate entity of T&T. That is, however, a mischaracterization of what the trial court did in this case. The trial court correctly considered the real issue in this case to be a proper classification of the increase in value in the two marital homes since their acquisition.

{¶25} The evidence shows that T&T was funded by the rents paid by the Tochtenhagens. The couple paid rents to the corporation for the use of their marital homes, and the corporation in turn paid for utilities and other expenses, as well as for the improvements of the homes. Essentially, through this arrangement, Dr. Tochtenhagen funneled his income, which was marital funds, to the corporate entity.

{¶26} Regarding the McDonald home, in which Dr. Tochtenhagen currently resides, although the land was owned by T&T before the marriage and the construction of the home was financed by the sale proceeds of real estate owned by T&T before the marriage, the substantial improvements of the home since then were funded with marital funds from the income from Dr. Tochtenhagen's medical practice. The court specifically found that "significant improvements were made to it from marital funds originating from the income from the Husband's medical practice, and through the efforts of both Husband and Wife." The court therefore found that although the funds for the initial purchase of the land and for the construction of the home were separate property, the increase in value of the property constituted marital property.

{¶27} For the couple's Florida home, in which Mrs. Tochtenhagen currently resides, although it was purchased with the proceeds of the sale of the medical office building, which was owed by T&T before the marriage, the trial court found the increase in value was marital property. The court specifically found that "since its acquisition, the property has been improved with marital funds originating from Husband's medical practice income, and through the efforts of both Husband and Wife."

{¶28} **Transmutation**

{¶29} Although not directly referenced by the parties or the trial court, we find it necessary to discuss the notion of transmutation in reviewing the trial court's characterization of martial and separate property in this case. As we explained in *Frederick v. Frederick* (Mar. 31, 2000), 11th Dist. No. 98-P-0071, 2000 Ohio App. LEXIS 1458:

{¶30} "Transmutation is the process by which property that would otherwise be separate is converted into marital property. Under prior case law, the trial court, within its sound discretion, could consider multiple factors when assessing an alleged transmutation of property. These factors included: (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.

{¶31} "When R.C. 3105.171 became effective on January 1, 1991, however, the doctrine of transmutation was effectively supplanted by the concept of traceability, or the 'source of funds' rule. The latter is embodied by R.C. 3105.171(A)(6)(b), which provides:

{¶32} "'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.'

{¶33} "The act of commingling is no longer determinative. Instead, the traceability of separate property is the paramount concern. In enacting R.C. 3105.171, the General Assembly was codifying the view that if the right to hold separate property is to be meaningful, then the classification of property as marital or nonmarital must be determined by the source of contributions. Therefore, the only scenario by which transmutation may still occur under the current provisions of R.C. 3105.171 is a situation wherein a spouse is not able to trace his or her separate property." Id. at *26-28 (internal citations omitted).

{¶34} Therefore, the trial court here was correct in focusing on the source of the funds used to acquire and improve the marital homes and in classifying marital and separate properties accordingly. The evidence establishes the portion of the value of the homes directly traceable to property outside the marriage: $66,250 for the McDonald home, which includes the funds for the purchase of the land and for the construction of the home; $236,872.20 for the Florida home, which was the purchase price of the home. Under the "source of funds" theory, the trial court properly determined these funds are separate property.

{¶35} The court found that both the husband and wife contributed to subsequent improvements of the properties and that the improvements were made ultimately with the husband's income from his medical practice, which constituted marital funds. Dr. Tochtenhagen failed to trace the increase in value of the two marital homes to a non-marital source. Thus, we agree with the trial court's finding that the increase in value in the homes were marital property, despite the fact that the *title* to the homes is held in the name of the corporation.

{¶36} As the courts have emphasized, a domestic court is given broad discretion to fashion a decree that is equitable under the facts and circumstances of each case. *Guziak v. Guziak* (1992), 80 Ohio App.3d 805. In this case, the trial court did not abuse its discretion in determining that it would be inequitable to deny Mrs. Tochtenhagen the right to participate in a division of the real estate assets, especially in light of the length of this marriage and her contributions.

{¶37} Based on the particular circumstances presented by this case, we find no abuse by the trial court in concluding that, although the title to the two marital homes is held in the name of T&T, Mrs. Tochtenhagen is entitled to half of the appreciation of the homes. To hold otherwise would be to allow Dr. Tochtenhagen to improperly funnel his income through a corporation and convert marital property to separate party. The trial court properly recognized the inequity posed by such a financial arrangement regarding the couple's marital homes.

{¶38} Having properly characterized the marital and separate property regarding the two homes in its analysis, the trial court awarded Dr. Tochtenhagen the McDonald home and ordered him to pay Mrs. Tochtenhagen $129,375, her one-half interest in the increase in value of the home. We find no error in the court's division of this home.

{¶39} Regarding the Florida home, however, the trial court inexplicably awarded Mrs. Tochtenhagen the Florida home and found her to owe Dr. Tochtenhagen $202,838 for this home. First of all, there appears to be a mathematical or clerical error in the trial court's calculation of the marital property portion of the home, i.e., its increase in value during the marriage. The trial court calculated the increase in value (the marital property portion) to be $405,677 by subtracting $209,323 from the current market value

of the home ($615,000), even though the purchase price (Dr. Tochtenhagen's separate property) was not $209,323 but $236,872.20. The correct amount of increase in value (the marital property portion) would appear to be $378,128 (= $615,000 - $238,872).

{¶40} More importantly, by finding Mrs. Tochtenhagen to owe Dr. Tochtenhagen *only* $202,838 -- presumably representing half of the appreciation of the home, the court seemingly contradicted its own analysis. Applying the trial court's own analysis and figure to the Florida home, she is *only* entitled to $202,838, representing half of the increase in value of the home since its purchase, while Dr. Tochtenhagen is entitled to half of the increase in value plus his separate property in the home, i.e., its initial purchase price of $236,872.

{¶41} Therefore, the first assignment of error is sustained in part, and the matter is remanded for the trial court to recalculate the marital property portion of the Florida home and to clarify its property division regarding this home, consistent with the finding that Dr. Tochtenhagen has a separate property in the Florida home equal to its initial purchase price, and that each spouse is entitled to half of the increase in the value of the home since its initial acquisition.

{¶42} **Active v. Passive Appreciation**

{¶43} Without pointing to any relevant portion of the record, Dr. Tochtenhagen argues on appeal that "[t]he increase in value was either due to improvements made or increases in market value. All improvements were made using T-and-T funds."

{¶44} First, regarding the funds for the properties' improvements, the record contains competent credible evidence that, despite the existence of the corporation, the funds for improvements, maintenance, and upkeep of the homes originated from the

income from Dr. Tochtenhagen's medical practice. Such income was marital property. Second, regarding the increase in the market value of the homes, Dr. Tochtenhagen essentially argues the appreciation of the home is passive instead of active.

{¶45} Appreciation of property can be either active or passive. Active appreciation, defined as an increase in the fair market value of property "due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage," is marital property. R.C. 3105.171(A)(3)(a)(iii); *Bizjak* at ¶12. Passive appreciation, in contrast, is defined as "an increase in the fair market value of the home due to its location or inflation" and it is separate property pursuant to R.C. 3105.171(A)(6)(a). *Bizjak* at ¶12. "Passive appreciation in value of a non-marital property, without the contribution of marital labor or funds, is non-marital." *Parks v. Parks* (Sept. 7, 1993), 12th Dist. No. CA93-03-043, 1993 Ohio App. LEXIS 4343, *3. The party asserting that the appreciation on a property was passive, and therefore separate property, bears the burden of proof. See *Ghai v. Ghai*, 182 Ohio App.3d 479, 2009-Ohio-2449.

{¶46} Dr. Tochtenhagen failed to carry his burden showing the increase in value was entirely due to location or inflation. Rather, there is competent credible evidence supporting the trial court's finding that the increase in value of the marital properties was due to the contribution of marital labor and funds; hence, this is active appreciation and thus marital property.

{¶47} Finally, we note that the court held a hearing on the motion filed by T&T to determine whether the two residential properties were non-marital assets. In the divorce decree the court denied the motion. No transcript of that hearing was filed in

this appeal. Without a transcript of the proceedings, we must presume the regularity of the proceedings in the trial court. *Knapp v. Edwards Lab.* (1980), 61 Ohio St.2d 197, 199. "Any lack of diligence on the part of an appellant to secure a portion of the record necessary to his appeal should inure to appellant's disadvantage rather than to the disadvantage of appellee." *Wood v. Wood*, 11th Dist. No. 2009-T-0082, 2010-Ohio-1154 , citing *Rose Chevrolet, Inc. v. Adams* (1998), 36 Ohio St.3d 17, 19. "Unless the record transmitted on appeal includes an App.R. 9(C) statement that affirmatively demonstrates error, we must presume the trial court committed no error despite the fact the record is not complete." Id., citing *State v. Hill* (Dec. 30, 1996), 4th Dist. No. 96 CA 4, 1996 Ohio App. LEXIS 6097, 14.

{¶48} **Consideration of Tax Consequences**

{¶49} Dr. Tochtenhagen also maintains the trial court erred in failing to consider the tax consequences of his distribution of the two marital properties.

{¶50} R.C. 3105.171(F) states, in pertinent part:

{¶51} "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:

{¶52} "***.

{¶53} "The tax consequences of the property division upon the respective awards to be made to each spouse; ***"

{¶54} In interpreting R.C. 3105.171(F)(6), the general rule is that if the award is such that it forces a party to dispose of an asset to meet obligations imposed by the court, the tax consequences of that transaction should be considered. *Rice v. Rice*,

11th Dist. Nos. 2006-G-2716 and 2006-G-2717, 2007-Ohio-2056, ¶31, citing *Day v. Day* (1988), 40 Ohio App.3d 155. However, "where an appellant has failed to produce evidence of tax consequences in the trial court *** tax consequences are speculative and need not be considered. Id., quoting *Bauman v. Bauman*, 6th Dist. No. E-01-025, 2002-Ohio-2172, ¶16. "The rationale is that without evidentiary support to show what the tax consequences would be, the court would be asked to erroneously engage in determining the tax consequences of the transaction based upon mere conjecture or speculation." Id., citing *White v. White* (Feb. 18, 1988), 9th Dist. No. 18275, 1998 Ohio App. LEXIS 538, *9.

{¶55} In *Rice*, this court rejected the appellant's claim that the trial court should have considered the tax consequences, on the ground that the appellant failed to produce evidence as to what the tax consequences would be. See, also, *Ferrero v. Ferrero* (June 8, 1999), 5th Dist. No. 98-CA-00095, 1999 Ohio App. LEXIS 2848, *15-16 (the trial court was not obligated to consider the tax consequences because any determination on the issue would have been purely speculative); *Pearlstein v. Pearlstein*, 11th Dist. No. 2008-G-2837, 2009-Ohio-2191, ¶146. Similarly here, Dr. Tochtenhagen failed to produce evidence regarding the purported tax consequences, or even demonstrate that the parties would be forced to dispose of the properties to meet their obligations under the distribution made by the trial court. Moreover, since Dr. Tochtenhagen offered no evidence on the tax issue at the trial court, he has waived the right to assert this argument on appeal. *Rice* at ¶32; *Ferrero* at *15-16. This assignment is overruled.

{¶56} The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed in part, reversed in part, and this case is remanded for further proceedings consistent with this opinion.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶57} In affirming the trial court's decision with respect to the award to Mrs. Tochtenhagen of an interest in property owned by T-and-T Land Company, the majority disregards the existence of a duly constituted Ohio corporation and the legal implications of its existence. Accordingly, I respectfully dissent.

{¶58} The following facts are undisputed. T-and-T Land Company is a type "C" corporation, incorporated on August 3, 1966, by John Masternick, Thomas LaPolla, and Jeanette Leaman. At the time of Dr. Tochtenhagen's marriage to Mrs. Tochtenhagen in 1974, he and his father, S.E. Tochtenhagen, Sr., were the sole shareholders of T-and-T. Dr. Tochtenhagen's father died in 1989.

{¶59} Prior to the Tochtenhagens' marriage, the T-and-T Land Company owned an office building in Girard, Ohio, and two unimproved parcels of land in McDonald, Ohio. The office building generated rents for T-and-T from Dr. Tochtenhagen's medical practice, his father's medical practice, and the Hogan Grocery store.

{¶60} After the Tochtenhagens' marriage, a house was built on one of the T-and-T Land Company's lots in Girard with money from the sale of other T-and-T real estate. During the course of the marriage, improvements, wholly funded by T-and-T, were made to the property. T-and-T paid the taxes, insurance, and utilities for the house in Girard. The Tochtenhagens paid rent to T-and-T.

{¶61} In 1995, Dr. Tochtenhagen created a living trust as an estate planning device and began gifting his stock in the T-and-T Land Company to his children through the trust. At the time Mrs. Tochtenhagen filed for divorce in 2006, Dr. Tochtenhagen only owned 28% of the T-and-T shares.

{¶62} In 2000, T-and-T Land Company sold the office building and purchased residential property in Big Pine Key, Florida. Again, the Tochtenhagens paid rent to T-and-T for the use of this property.

{¶63} This evidence establishes the existence of the T-and-T Land Company as a valid, functioning corporation independent of the Tochtenhagens' marriage. The court below erred, fundamentally, by treating the corporation as Dr. Tochtenhagen's separate property when, in fact, the corporation is an independent entity. *State ex rel. Attorney General v. Standard Oil Co.* (1892), 49 Ohio St. 137, 177 ("a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it"); cf. *Miller v. Marrocco* (1986), 28 Ohio St.3d 438, 439 (a professional corporation was "a separate legal entity distinct and apart" from the physician who was both an employee and shareholder).

{¶64} Since the Girard and Big Pine properties are owned by a distinct legal entity, the T-and-T Land Company, not the spouse of Mrs. Tochtenhagen, the lower

court could not validly award Mrs. Tochtenhagen an interest in the appreciation of these properties.

{¶65} Assuming, arguendo, that property belonging to a third party could be transmuted into marital property, the only reasonable interpretation of the evidence before the lower court is that the appreciation of the two properties occurred without the contribution of marital labor or funds.

{¶66} With respect to the Girard property, various improvements were made during the course of the marriage, such as adding an attached apartment, an outdoor kitchen, and greenhouse/sauna. The uncontroverted testimony is that T-and-T Land Company funded these improvements. The majority, however, concludes that there is "evidence supporting the trial court's finding that the increase in value of the marital properties was due to the contribution of marital labor and funds." The majority fails to identify this evidence.

{¶67} It is claimed, instead, that marital funds earned by Dr. Tochtenhagen were "improperly" funneled to T-and-T Land Company as rent[3], and that these monies were the source of the funds for the improvements. The record does not support this conclusion. Dr. Tochtenhagen's income from his medical practice was only one source of T-and-T's funding. Dr. Tochtenhagen's father and the Hogan grocery also paid rents to T-and-T and these monies were neither marital nor Dr. Tochtenhagen's separate property. These were independent sources of income which helped finance the improvements. Moreover, Dr. Tochtenhagen's parents lived in the attached apartment on the Girard property. Thus, T-and-T did not merely serve as the Tochtenhagens'

3. Why the payment of marital funds as rent for both the husband's and wife's use of real property is improper is not explained by the majority.

"corporate pocketbook." The appreciation of the Girard property, if not recognized as belonging to T-and-T, is better characterized as Dr. Tochtenhagen's separate property.

{¶68} With respect to the Big Pine property, there is no evidence of any capital improvements to the property. Mrs. Tochtenhagen testified that she did not begin to spend "the season" at the property until 2004. A spouse may be "entitled to share in appreciation of the other spouse's separate property where she contributed substantial work to improving and maintaining the property." *Simoni v. Simoni* (1995), 102 Ohio App.3d 628, 639. Without more, the appreciation of the Big Pine property should be considered passive, i.e. due to location or inflation, and, thus, Dr. Tochtenhagen's separate property. R.C. 3105.171(A)(6)(a).

{¶69} The majority faults Dr. Tochtenhagen for not presenting evidence of passive appreciation. However, evidence that no capital improvements were made to the property and that the property was not inhabited regularly compel the conclusion that such appreciation was passive, rather than active. This is particularly true where, as here, the property at issue was titled in an independent third party.

{¶70} For the foregoing reasons, I respectfully dissent. The judgment of the lower court should be reversed and this case remanded for a recalculation of the division of property.