[Cite as *Dimmerling v. Dimmerling*, 2019-Ohio-2710.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

NORMA J. DIMMERLING,

PLAINTIFF-APPELLANT/
CROSS-APPELLEE,

v.

DUANE E. DIMMERLING,

DEFENDANT-APPELLEE/
CROSS-APPELLANT.

OPINION AND JUDGMENT ENTRY
Case No. 18 NO 0460

Civil Appeal from the
Court of Common Pleas of Noble County, Ohio
Domestic Relations Division
Case No. 215-0048

BEFORE:
Carol Ann Robb, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in part; Reversed in part; and Remanded in part.

Atty. Timothy C. Loughry, Loughry, Buell & Sipe, LLC, 322 Third Street, Marietta, Ohio 45750, for Plaintiff-Appellant/ Cross-Appellee and

Atty. Miles D. Fries, Gottlieb, Johnston, Beam & Dal Ponte, 320 Main Street, P.O. Box 190, Zanesville, Ohio 43702 for Defendant-Appellee/Cross-Appellant

Dated: June 24, 2019

Robb, J.

{¶1} Plaintiff-Appellant/Cross-Appellee Norma Dimmerling (Wife) and Defendant-Appellee/Cross-Appellant Duane Dimmerling (Husband) appeal the Noble County Common Pleas Court's divorce decree.

{¶2} Wife, in total, raises fourteen assignments of error. Her arguments concern the end date of the marriage, division of property, the trial court's reliance on certain witnesses for valuation of property, child support, and the trial court's failure to rule on her motion for contempt. Husband raises three assignments of error and his arguments focus on the division of property.

{¶3} For the reasons expressed below, all of the parties' arguments, except for one lack merit. Wife's division of property argument concerning Husband's bank Account # 896 has merit. The trial court in determining marital and separate property and dividing property did not account for Husband's bank Account # 896 that was opened immediately prior to Wife filing for divorce, in Husband's sole name, and was used to operate the farm. Thus, the matter is remanded for determination of whether that bank account is marital or separate, and if it is marital to account for it in the division of property.

Statement of the Case

{¶4} Husband and Wife were married on August 5, 1989 and had four children. The final divorce decree was issued February 27, 2018 and a nunc pro tunc order was issued March 26, 2018. At the time of the decree, one child was still a minor.

{¶5} Prior to marrying Wife, Husband, in 1988, purchased approximately 133 acres of land in Noble County, Ohio. The property was purchased for $96,500.00. Husband paid $40,000.00 as a down payment. At the date of the marriage in 1989, $47,000.00 was owed on the property. The parties paid off that mortgage during the marriage. The property was titled in Husband's name only.

{¶6} When Husband purchased the 133 acres a house was situated on the property. During the marriage renovations were made to the house. Testimony indicated the major renovation increased the value of the property by $90,000.00. The cost of the renovation was approximately $125,000.00. Also buildings for operating a beef cattle farm were added during the marriage.

{¶7} At the time of the divorce the farm, including the home and farm buildings, were appraised for $428,000.00 to $477,500.00.

{¶8} During the marriage, two additional pieces of property were acquired. The first was one acre of land that was situated in the middle of the 133 acres. This land was titled in both parties names and they paid $300.00 for it. The second tract of land was 19 acres that was not contiguous to their farm. The 19 acres was titled to both of them from the wife of Husband's friend who had passed away. The land was a gift.

{¶9} The farm operates as a beef farm and is Husband's sole income. Wife worked throughout the marriage and is a respiratory therapist. The parties have little to no debt.

{¶10} Wife filed for divorce in August 2015; Husband answered and filed a counterclaim in November 2015. Both parties sought divorce based on incompatibility and other grounds. The divorce trial was held on December 23, 2016 and March 15, 2017. Each party presented their own experts for the valuation of the farm, cattle, and farm equipment. The parties agreed Wife should be custodial parent of the minor child and Husband would be entitled to parenting time as long as he was sober.

{¶11} Following the hearing, the trial court found the parties incompatible and granted them a divorce. The trial court determined the value of the farm was $428,000.00 and the value of the marital portion of the farm, which included the one acre situated in the middle of the farm that was acquired during the marriage, to be $254,760.00. The total marital asserts were $735,434.08. Each party received certain cars and bank accounts, which are not at issue in this case. After division of property, the total marital assets Wife received equaled $130,404.44. Husband's total marital assets equaled $605,029.64. In order to equalize the distribution, the trial court ordered Husband to pay Wife $237,312.60 over 15 years. He was ordered to pay a

yearly installment of $15,000.00 every April 30 for the next 15 years. The trial court held as long as the payments were timely there would be no interest.

{¶12} As to the marital and separate portion of the 133 acre farm, the trial court determined 51.3% of the farm was Husband's separate property. Therefore, 48.7% was marital. The trial court also determined based upon that computation that Husband was entitled 75.65% of the mineral interests and Wife was entitled to 24.35%.

{¶13} As to the 19 acres of land gifted to Husband and Wife from the wife of Husband's deceased friend, the trial court determined that since it was deeded to both Husband and Wife it was not Husband's separate property. The court determined the parties are tenants in common in this 19 acres of land, each owning an undivided one-half interest in the 19 acres.

{¶14} The trial court did not award Wife spousal support, but did order Husband to pay child support in accordance with the statutory support guidelines. 2/27/18 J.E.; 3/26/18 Nunc Pro Tunc Order. The order did not explicitly specify the effective date of the child support order.

{¶15} Both Husband and Wife appealed the trial court's order. To conserve judicial resources we ordered the appeals to merge and proceeded under one case number. 6/11/18 J.E. Wife was named the Appellant/Cross-Appellee and Husband was named the Appellee/Cross-Appellant.

{¶16} Some of Husband and Wife's assignments of error overlap and therefore, will be addressed together in order to eliminate as much redundancy as possible.

Standard of Review

{¶17} The majority of the assignments of error address the trial court's division of property. The appropriate standard of review in a divorce proceeding is an abuse of discretion standard. *Cherry v. Cherry*, 66 Ohio St.2d 348, 421 N.E.2d 1293 (1981). An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). When applying this standard of review, we may not freely substitute our judgment for that of the trial court. *In re Jane Doe I*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991); *Berk v. Matthews*, 53

Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990). With that standard in mind we turn our attention to the assignments of error.

Wife's First and Second Assignments of Error
End Date of Marriage

"The court failed to specify the duration of the marriage."

"If the end date of the marriage is the date of the final hearing, then such finding is an abuse of discretion."

{¶18} Wife asserts the trial court failed to state in the divorce decree the start date or end date of the marriage and such failure constitutes reversible error. She contends the duration of the marriage is critical in determining marital and separate property. This is especially the case here where the property includes a cattle farm where cattle are bought and sold regularly and the business operates largely on cash.

{¶19} Husband counters asserting the court stated the parties were married on August 5, 1989, which is the start date of the marriage. He acknowledges the trial court did not specify an end date, but contends the statutes establish that the end date is presumed to be the final hearing date.

{¶20} Wife disagrees with Husband's position that there is a presumption regarding the end date of the marriage. She maintains the end date must be expressly stated in the judgment entry. In the alternative, she asserts if the end date is presumed to be the final hearing date, the presumption was rebutted. She contends Husband diverted funds into his personal account on April 21, 2015 and that should be considered the end date of the marriage. She further asserts using the end date as the final hearing date is an abuse of discretion because of the diverted funds and appraisals of the cattle and real property were done on dates prior to the final hearing. Since the value of real property and cattle change on a daily basis the end date should correspond with the appraisals, not the hearing date.

{¶21} "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 * * * [t]he duration of the marriage * * *." R.C. 3105.171(F)(1). Logically, this means, the trial court must determine the duration of the marriage prior to dividing marital assets. *See, e.g., Alexander v. Alexander,* 10th Dist. Franklin No. 09AP–262,

2009–Ohio–5856, ¶ 37 ("It is the duration of marriage that determines the valuation of the marital estate. Therefore, once the duration of marriage is established, assets and liabilities are determined in accordance with those dates.").

{¶22} A trial court's determination as to the duration of marriage under R.C. 3105.171(A)(2) is reviewed for an abuse of discretion. *Lemarr v. Lemarr,* 1st Dist. Hamilton No. C–100706, 2011–Ohio–3682, ¶ 4. *See also Walpole v. Walpole,* 8th Dist. Cuyahoga No. 99231, 2013–Ohio–3529, ¶ 102, citing *Berish v. Berish,* 69 Ohio St.2d 318, 321, 432 N.E.2d 183 (1982) ("The trial court has broad discretion in choosing the appropriate marriage termination date and this decision should not be disturbed on appeal absent an abuse of discretion.").

{¶23} R.C. 3105.171 provides:

> (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.

R.C. 3105.171(A)(2)(a)(b).

{¶24} The trial court's judgment entry specifically indicated the parties were married August 5, 1989. 3/26/18 J.E. Despite Wife's statement to the contrary, considering the language of R.C. 3105.171(A)(2)(a), the trial court's statement of the date the parties were married is the start date of the marriage.

{¶25} The judgment entry, however, does not expressly state an end date. Husband contends that the language of R.C. 3105.171(A)(2) creates a presumption that when there is no end date stated it is the date of the final hearing. Wife asserts it must be expressly stated and cites subsection (G) of R.C. 3105.171, which states:

> 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."

R.C. 3105.171(G).

{¶26} The Second Appellate District has concluded that even when a party argues for a de facto end date and the trial court fails to state the end date in the judgment entry, there is no error when the trial court uses the presumed date – the final hearing date. *Lakkapragada v. Lakkapragada*, 2d Dist. Montgomery No. 25883T, 2014-Ohio-331, ¶ 54-56. The *Lakkapragada* court explained:

> We conclude that although the court did not expressly state the ending date of the marriage, it is clear from the record that the court considered "during the marriage" to include the time up to and including the final hearing. The court terminated the temporary orders as of July 24, 2013, and it designated June 30, 2013 as the valuation date for the SEI–Services and Siemens Savings Plans retirement accounts. There is nothing to suggest that the date of the final hearing is inequitable for purposes of dividing the marital property.

Id. at ¶ 56.

{¶27} The Sixth Appellate District in reviewing R.C. 3105.171(A)(2) and (G) has remanded a case for a determination of the start and end dates of the marriage; the trial court did not specify the dates used to determine "during the marriage." *Jackson v. Jackson*, 6th Dist. Fulton No. F-12-013, 2014-Ohio-1145, ¶ 10-15. In that case, it was the start date of the marriage that was at issue. As to the retirement accounts, the appellate court indicated that it appeared the trial court used the "default dates," the date of the marriage and date of the final hearing to define "during the marriage," because an expert testified as to what portion of the retirement was premarital and what portion was accumulated during the marriage. *Id*. at ¶ 10-11. However, as to a car that was purchased prior to the date of marriage, the trial court determined the

vehicle was marital property. *Id*. at ¶ 11. The appellate court concluded that it appeared the trial court was using a second date for the start date of marriage for this property. *Id*. The trial court did not explain why a de facto date was necessary for this property or even expressly indicate it was applying a de facto date instead of the presumed date. *Id*. at ¶ 11-12. In remanding for clarification, the appellate court stated:

> On this record, we cannot determine the basis of the trial court's decision to treat the Mustang as marital property. In its July 6, 2012 judgment, the trial court adopted "in toto" the allocations and valuations of personal property detailed in Ken's post-hearing brief. In the allocations, the Mustang was treated as marital property. However, the trial court did not make any findings concerning the Mustang and specifically did not state a determination under R.C. 3105.171(A)(2)(b) that it would be inequitable to use the default dates specified under R.C. 3105.171(A)(2)(a) to determine whether the Mustang is marital property. The court also did not select and specify other dates in its judgment for use in determining whether the Mustang is marital property.
>
> Pursuant to R.C. 3105.171(G), we reverse and remand the trial court's judgment with respect to classification of property as marital or separate and with respect to division of marital property, including treatment of retirement accounts, the Ford Mustang automobile, and other personal property. We remand to permit the trial court to clarify and, if necessary, correct its judgment. In revisiting these issues on remand, the trial court shall specify in its judgment the dates it employs to define the meaning of "during the marriage" for purposes of R.C. 3105.171. If it is the trial court's intent to employ dates other than those specified under R.C. 3105.171(A)(2)(a) to constitute "during the marriage," the court shall clarify whether it determined that utilizing the R.C. 3105.171(A)(2)(a) dates would be inequitable and also specify under R.C. 3105.171(A)(2)(b) any alternative dates it employs.

Id. at ¶ 14-15.

{¶28} The situation at hand is more akin to *Lakkapragada* than to *Jackson*. Here, there is nothing in the record to suggest the trial court used any other date than the date of the final hearing as the end date of the marriage. The presumption applies. While it would be better practice for a trial court to expressly state the start date and end date of the marriage in the judgment entry rather than relying on the presumption, when the record indicates the trial court used the presumed date, it does not appear there is a basis for reversal merely because the trial court did not expressly state the dates. *See Lakkapragada,* 2014-Ohio-331, ¶ 54-56.

{¶29} Wife asserts the presumption should not be used because the values of the cattle, feed, farm equipment, and real estate fluctuate with the market. She also argues Husband allegedly diverted funds in April 2015 to open a separate bank account. Accordingly, Wife asserts use of the presumed date is an abuse of discretion.

{¶30} These arguments are meritless. Wife's expert appraised the real estate and farm equipment in March 2016; he appraised the real estate at $477,500.00 and the farm equipment at $354,260.00. Tr. 20, 24; Plaintiff's Exhibit 1 and 2. This expert testified almost 9 months after the appraisal. He was asked whether the value of the property, both real and personal, changed since the appraisal in March 2016. As to the farm equipment, he avowed it would have been a "minimal change." Tr. 23. As to the real estate, he stated the valuation would not have "substantially or significantly" changed. Tr. 19. This expert also appraised the cattle; however, the trial court found he was not an expert on the valuation of cattle.

{¶31} Husband presented three experts. His first expert testified as to the value of the real estate; he testified it had a fair market value of $428,000.00. Tr. 117; Defendant's Exhibit V. The appraisal report is dated December 14, 2016, approximately three months prior to his testimony; this expert testified on March 15, 2017. Defendant's Exhibit V. His second expert testified about the value of the cattle. He testified he did the appraisal in early September 2016. Tr. 191. His appraisal was not a set amount, but a range. Tr. 194-195; Defendant's Exhibit A. He also indicated this was the range on the date he viewed the cattle; it would be different on the date of the hearing. Tr. 192. His third expert testified as to the value of the farm equipment. This appraisal was done in September 2016. Defendant's Exhibit F. This expert

testified that the value of the equipment probably did not change from the time of the appraisal. Tr. 203. His testimony occurred about six months after the appraisal report date.

{¶32} All property most likely will fluctuate in value from the time of appraisals to time of the hearing. That, however, does not mean that it is an abuse of discretion to use the final hearing date as the end date of the marriage rather than another de facto date. In this case, as to the real estate and farm equipment, the experts testified the value would have minimally changed from the time of the appraisal.

{¶33} As to the cattle, the trial court explained why Husband's expert's appraisal was used and why it was the most accurate value of the cattle:

> 29. Both parties had a cattle appraisal performed, Plaintiff by Jason Miller. Mr. Miller is not engaged on a full time basis in the buying and selling of cattle as is the Defendant's appraiser. The appraisals were performed months apart. The Defendant's inventory of cattle varies constantly as cattle are being bought and sold on a regular basis. The cattle being appraised by the Plaintiff's appraiser are not the same as were appraised by the Defendant's appraiser. Most of the cattle appraised by Plaintiff's appraiser, Jason Miller, are no longer in the possession of Defendant. Therefore, this appraisal is of no evidentiary value as it is an appraisal of assets that no longer exist.
>
> 30. Brad Haury, Defendant's cattle appraiser, is in the business of buying and selling cattle, and conducting cattle auctions, on a full time basis and has done so for many years. The Defendant, no longer owns most of the cattle appraised by Mr. Haury. However, his appraisal was conducted shortly before the case was originally scheduled for trial and, therefore, constitutes the best evidence of what should be considered marital property for purposes of equitably dividing the marital estate. The court finds that for purposes of establishing a valuation, the Defendant's appraisal should be used. Mr. Haury appraised the cattle using a range. His total cattle valuation is one hundred four thousand seven hundred twenty-five dollars

> ($104,725.00). The Court believed the Haury appraisal to be the most accurate representation of the value of the cattle.

3/26/18 J.E.

{¶34} This reasoning is logical and does not establish an abuse of discretion for using the presumed date rather than a de facto date for the end of the marriage.

{¶35} As aforementioned, Wife asserts Husband allegedly diverted funds in April 2015 and opened a new account, account #896, in his name only establishing the trial court should have used the April 2015 date as the de facto date for the end of marriage. Wife's arguments concerning this account are more directed to the equal distribution of the monies, which are addressed in the next assignment of error. That said, this allegation does not establish the failure to use April 2015 as the de facto end date of the marriage was an abuse of discretion. There are no appraisals for the real estate or real property from that date. Her complaint for divorce was not filed until a month later and both were still living in the marital residence together until November 2015. The Eleventh Appellate District has explained:

> "Generally, trial courts use a de facto termination of marriage date when the parties separate, make no attempt at reconciliation, continually maintain separate residences, separate business activities and/or separate bank accounts. * * * Courts should be reluctant to use a de facto termination of marriage date solely because one spouse vacates the marital home. * * * Rather, a trial court may use a de facto termination of marriage date when the evidence clearly and bilaterally shows that it is appropriate based upon the totality of the circumstances."

Marini v. Marini, 11th Dist. Trumbull No. 2005-T-0012, 2006-Ohio-3775, ¶ 13, quoting *Harris v. Harris,* 11th Dist. No. 2002 A 81, 2003-Ohio-5350, at ¶ 11 (citation omitted).

{¶36} Applying this reasoning, solely diverting funds from a marital account and opening an individual account does not necessarily justify using a de facto date rather than the presumed date.

{¶37} In conclusion, the first two assignments of error are meritless. Although the trial court did not state the end date of the marriage, the record supports the conclusion that it used the presumed date, which is the date of the final divorce hearing.

Wife's Third Assignment of Error and
Husband's Third Cross-Assignment of Error
Account # 896 and the 19 Acres

"The court did not divide all the marital assets."

"19.1 acres given as a gift should have been awarded to Appellee [Husband] as his separate property."

{¶38} These assignments of error address Account # 896 and the 19 acres acquired from the wife of Husband's deceased friend. Each property will be addressed separately.

1. Account # 896

{¶39} Husband opened Account # 896 in April 2015. Wife claimed at the hearing the account was opened with diverted marital funds. She was unclear where these funds originated, but believed it might have been from the 2015 cattle sales. Tr. 95-96. She claimed Husband kept large amounts of cash in his truck and operated mostly on a cash basis. Wife contends the trial court did not address Account # 896 when it distributed the property.

{¶40} Husband argues the account was used for the cattle business and there was significant fluctuations in the balance because of cattle being bought and sold. He asserts Wife did not present any evidence of the account balance at the December 23, 2016 divorce trial. Therefore, she did not prove there was any money in that account or that she was entitled to any of it. He notes she also did not reference this account in her proposed findings of fact. Furthermore, Husband states if her claim was that he depleted marital funds she should have presented evidence supporting that, which she did not.

{¶41} From the exhibits it appears Husband operated the farm using Account # 197 titled Double D Farms prior to April 2015. Plaintiff's Exhibit 18. That account was in both Husband and Wife's names. Plaintiff's Exhibit 18. Account # 197 was not closed and the trial court found that account was marital and awarded the $4,322.67 remaining in that account to Wife as a means to equalize the distribution since Husband was awarded the farm. 3/26/18 J.E.

{¶42} Husband opened a new account in April 2015, Account # 896, and it appears he used that account to operate the farm. Plaintiff's Exhibit 18. That account

was solely in Husband's name. Plaintiff's Exhibit 18. The balance in September 2016 was approximately $133,000.00. Plaintiff's Exhibit 18. This exhibit was introduced at the December 2016 hearing and admitted at the March 2017 hearing.

{¶43} Minimal testimony on Account # 896 was introduced at trial, and that account is not listed in the divorce decree. Wife did not include this account in her proposed findings of fact. Also, while Wife's Exhibit 18 does establish the amount in the account as of September 2016, no one testified about that amount. Husband is correct the exhibits do establish there is a fluctuation in this account, but Exhibit 18 indicates it averaged over $100,000.00.

{¶44} Pursuant to R.C. 3105.171(B), "[i]n divorce proceedings, the court shall * * * determine what constitutes marital property and what constitutes separate property." Considering the trial court does not address Account # 896 and does not indicate if it is marital or separate, and if marital divide it, this issue must be remanded for that determination. It appears given the amount of property being divided it was an oversight by the trial court to not address Account # 896.

{¶45} Therefore, there is merit with the argument that the trial court did not address Account # 896.

2. 19 acres

{¶46} Husband and Wife were deeded 19 acres of property during the marriage from Marjorie J. McElfresh. The deed to this property was admitted as evidence. Plaintiff's Exhibit 15. The deed specifically indicated it was given to both Husband and Wife. Plaintiff's Exhibit 15. This 19 acres is not adjacent to the 133 acre farm; it is a couple of miles away from the 133 acre farm.

{¶47} In dividing the property, the trial court stated:

> 22. During the marriage, nineteen (19) acres were acquired by deed from Marjorie McElfresh the surviving spouse of a life-long friend of the Defendant. The parties did not pay anything in consideration for the acquisition of these nineteen (19) acres, which is unimproved. Defendant bales hay on it once a year. It is not land that can be built upon. Defendant states that he believe that land was intended to be a gift to him. However, clearly the land was deeded to both Plaintiff and Defendant. Plaintiff and

> Defendant are and will remain tenants in common each owning an undivided one-half of that 19 acre parcel.
>
> * * *
>
> 15. Although Defendant claimed the nineteen (19) acres as a gift to him alone, the deed indicates otherwise (from a third party to both Plaintiff and Defendant). The nineteen (19) acres is marital property, each party owning an undivided one-half.
>
> 3/26/18 J.E.

{¶48} Both parties assert the trial court's decision was incorrect, albeit for different reasons. Wife contends the property is marital and the trial court's order in the decree "leaves the Dimmerlings where they are, as joint tenants." Husband argues the trial court erred when it determined the property is marital. He contends the evidence indicates it is his separate property.

{¶49} Husband's argument will be addressed first since it addresses the marital versus separate property aspect of the 19 acres.

{¶50} A party's separate property is not "marital" property. R.C. 3105.171(A)(3)(b). Separate property includes "[a]ny 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." R.C. 3105.171(A)(6)(a)(vii). "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶51} When the parties contest whether an asset is marital or separate property, the presumption is that the property is marital, unless proven otherwise. *Sanor v. Sanor,* 7th Dist. Columbiana No. 2001 CO 37, 2002-Ohio-5248, ¶ 53. The trial court's decision in designating property as a marital asset or separate property is

reviewed for abuse of discretion. *See e.g.*, *Peck v. Peck*, 96 Ohio App.3d 731, 734, 645 N.E.2d 1300 (12 Dist.1994).

{¶52} Husband relied on Wife's interrogatory statements and his own testimony to assert the 19 acres was gifted to him. At trial, Wife was asked about her interrogatory statements regarding the 19 acres. She admitted through interrogatories this property was willed to Husband and that it should stay as Husband's separate property. Tr. 143. She added that she had no interest in the property or the mineral interests to that property. Tr. 143. Husband testified at trial the property was gifted to him because of his friendship with the deceased and was his separate property.

{¶53} The deed, however, clearly indicates it was given to both Husband and Wife. Plaintiff's Exhibit 15. Furthermore, at trial Wife explained that at the time she answered the interrogatory about the 19 acres she believed her answer to be truthful. Tr. 146. At that time she had not seen the deed and she did not know the property was actually gifted to both of them. Tr. 146. Her opinion changed as to whether the property was marital or separate when she learned of the deed language. Tr. 146.

{¶54} Husband did not introduce testimony from anyone else indicating this property was to be gifted solely to him.

{¶55} Given the deed language, Wife's explanation, and Husband's lack of rebuttal, the trial court did not abuse its discretion in determining the property was marital. Husband's argument fails.

{¶56} We now turn to Wife's argument that the trial court erred when it held the parties each owned an undivided one-half interest in the 19 acres. It is difficult to understand Wife's argument concerning the 19 acre property. The property was deemed marital. Wife had a 1/2 undivided interest in the property; her interest was the same as Husband's interest and the division of property maintained that equal division. Without a specific argument as to how this is an unjust division, it is unclear how the trial court abused its discretion.

3. Conclusion

{¶57} The trial court's order regarding the 19 acres was correct and is upheld. As to Account # 896, the matter is remanded for the trial court to address this property.

Wife's Fourth Assignment of Error
Cash

"The court failed to 'require [Duane] to disclose in a full and complete manner all marital property . . . and . . . income' as R.C. 3105.171(E)(3) requires."

{¶58} Wife argues the trial court failed to require Husband to disclose all marital assets, specifically the large amounts of cash he allegedly had in his possession. Husband counters asserting he disclosed all of his assets.

{¶59} During the divorce trial, Wife pursued the theory that Husband did not disclose a large amount of cash. She testified Husband primarily dealt in cash and would keep large amounts of cash in his truck:

> Q. Through the course of your long term marriage with Duane did he typically have cash?
>
> A. Yes.
>
> Q. And what was his practice for keeping cash?
>
> A. He normally like if he got paid money for beef or cattle that was in cash he would normally set the money back and a lot of times we would use that money for projects and stuff.
>
> Q. How much are we talking at any given time?
>
> A. Well, we had 40,000 saved up when we did the house and stuff so normally he had large amounts of cash.
>
> Q. Is this cash that's deposited into a financial institution or is this in a drawer somewhere?
>
> A. It was normally kept in his truck.
>
> Q. And was that through the course of your marriage his common practice to keep significant amounts of cash with him or in his truck?

A. Yes.

Q. You believe that to still be the case?

A. I have no idea.

* * *

Q. Do you believe there was cash at the time that he filed his financial affidavit?

A. Yes.

Q. Why do you believe that?

A. Well, part of it I know was timber cash and he always – he always has cash like when he gets paid for beefs and he sells beefs all the time. So when they pay him cash – I mean not to say that he keeps all the cash cause some of it may be deposited but he normally always has cash. He has for 27 years unless he changed overnight.

* * *

Q. You testified about money from the sale of timber. If Duane testifies that he used that money to pay expenses you don't have any evidence to refute that, do you?

A. I've never seen the money. I have no evidence. He told me that he used it to pay you.

Q. Well probably a good thing. You also testified that you believe that at the time Duane filed his financial affidavit that he had cash. You don't have any evidence that he had cash, do you?

A. I have no evidence other than he's always had cash.

Tr. 87-88, 136-137.

{¶60} She offered Exhibit 23, his financial affidavit, and Exhibit 22, labeled beef records, as a means to indicate there was some cash that was not accounted for, but she could not specify how much.

{¶61} Husband testified he did not fail to disclose a large amount of cash and he deals primarily in cash:

> Q. And your wife's testimony and her conclusion about possible cash,
>
> do you agree with that testimony?
>
> A. Not at all.
>
> * * *
>
> A. Some people pay in cash. I do have cash on hand sometimes. Has not been any large amount.
>
> * * *
>
> Q. So you don't have $145,000 in cash laying around, do you?
>
> A. No but I wish I did.
>
> * * *
>
> Q. So when she put on her Exhibit 22 $90,000 in possible cash you don't have $90,000 laying around, do you?
>
> A. No, sir.
>
> * * *
>
> Q. Is there an average amount of cash that you keep on hand?
>
> A. No, sir.
>
> Q. Do you ever keep more amounts than others?

A. Since the timber was cut is the most cash I've had on hand since 2009.

Q. Do you always have cash on hand?

A. I just answered that. Yes, usually. I have no credit card or debit card.

* * *

Q. Does the amount of cash that you have on hand vary from day to day and week to week?

A. Yes, it does.

Q. You don't use credit cards.

A. No.

Q. You're kind of a dinosaur. You don't believe in credit cards, right?

A. Don't have one.

Q. You don't use a debit card.

A. No.

Q. Pay for a lot of things in cash.

A. Yes, sir.

Tr. 169, 170, 174, 175, 220-221, 227.

{¶62} At the end of the hearing, the trial court stated:

> And one other – I understand as Mr. Dimmerling testified sometimes he would say that the tillable acreage on the farm was 17 acres, another time he may say 16. He may say that he paid mortgage payments on this property at $504.00 a month instead of $502.00 a month or vice versa. Those aren't lies. Those aren't lies. As a matter of fact I think based on the testimony I heard Mr. Dimmerling is the credible witness in this Court so you

> can take that into mind whenever you start making your findings of fact and conclusions of law because I will take it in effect whenever I review them.
>
> * * *
>
> One thing I wanted to say. I have been at this I don't know how long and I've reviewed I don't know how many financial affidavits. I don't think I've ever seen anybody list cash as an asset. And as I say I don't think that's because they're trying to hide anything. They just don't consider – I mean they don't go to their pocket and see how much they got in there. I mean I just – I don't know why we're talking about that.

Tr. 238.

{¶63} Wife asserts the trial court's statement absolved Husband of his obligation to disclose cash.

{¶64} R.C. 3105.171(E)(3) states, "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." Accordingly, Husband had a duty to disclose marital property.

{¶65} The evidence of whether or not Husband failed to disclose cash that was obtained from the sale of marital property was presented to the court. The above quoted testimony establishes Wife testified she believed, but could not prove he failed to disclose cash, and Husband testified he did not have a large sum of cash that he did not disclose. Thus, the issue of failing to disclose a large amount of cash was a credibility issue. Wife included findings and conclusions concerning this issue in her Proposed Findings of Fact and Conclusions of Law. 3/31/17 Proposed Findings of Fact and Conclusions of Law. The trial court did not utilize any of those propositions in its Findings of Fact and Conclusions of Law. 2/27/18 J.E.; 3/26/18 J.E. The trial court obviously believed Husband that he did not fail to disclose marital assets and he did not keep large amounts of cash in his truck that were unaccounted. This court will not second-guess the trial court in assessing the credibility of the witnesses. *In re L.F.*, 6th Dist. Sandusky No. S-18-006, 2019-Ohio-304, ¶ 43.

{¶66} Furthermore, the trial court's statement at the end of the hearing did not absolve Husband of having to disclose cash that was from the sale of marital assets; that statement does not mean that if Husband had $90,000.00 in his truck from the sale of cattle he was not required to disclose it. The trial court's statement merely is an indication that parties do not typically look in their wallet and piggy banks and count cash to list in a financial affidavit. It is noted Wife did not list any cash she had in her possession in her financial affidavit.

{¶67} This assignment of error is meritless; the trial court did not abuse its discretion in believing Husband and failing to hold an unspecified amount of cash as marital property.

Wife's Fifth Assignment of Error
No Interest Equalization Payment

"The court gave Duane 15 years to complete the equalization payment with no obligation to pay interest."

{¶68} After the trial court divided the marital property it determined the total marital assets awarded to Wife equaled $130,404.44 and the total marital assets awarded to Husband equaled $605,029.64. 3/26/18 J.E. In order to equalize the distribution of property, the trial court ordered Husband to pay Wife $237,312.60 in yearly installments of $15,000.00 due April 30 each year until paid in full. 3/26/18 J.E. The court stated, "Payments are without interest if paid timely." 3/26/18 J.E.

{¶69} This court is remanding this case to address Account # 896. Therefore, the equalization payment ordered may be altered depending on what the trial court determines. This means the only issue we can address under this assignment of error is whether any equalization payment can be ordered to be paid without interest.

{¶70} Wife argues it is an abuse of discretion to fail to order interest. Husband disagrees and cites our *Sanor* case to support his position.

{¶71} *Sanor*, similar to the case at hand, dealt with a farm and payments to equalize the distribution of the property so that the farm did not have to be sold. *Sanor*, 7th Dist. Columbiana No. 2001 CO 37, 2002-Ohio-5248. One of the narrow issues in *Sanor* was whether the trial court abused its discretion by electing to not add interest to the equalization payments. *Id*. at ¶ 30.

{¶72} In *Sanor,* we found the failure to award interest was not an abuse of discretion. We cited the Ohio Supreme Court's decision in *Koegel* for the proposition that the trial court has broad discretion in equalizing property division and property awards that do not include interest are not necessarily inequitable:

> The different facts and circumstances which each divorce case presents to a trial court requires that a trial judge be given wide latitude in dividing property between the parties. Because each divorce case is different, * * * equitable need not mean equal. A property award without interest may sometimes be inequitable, but it is not always so. * * * "This is why it is ill-advised and impossible for any court to set down a flat rule concerning property division upon divorce." * * * We therefore decline to hold that a trial judge is obligated as a matter of law to mandatorily affix interest to those monetary obligations which arise out of a property division upon divorce. To do so would impose an unnecessary restraint on a trial judge's flexibility to determine what is equitable in a special set of circumstances.

Sanor, 2002-Ohio-5248 at ¶ 32, quoting *Koegel v. Koegel*, 69 Ohio St.2d 355, 357 432 N.E.2d 206 (1982), quoting *Cherry*, 66 Ohio St.2d at 355.

{¶73} We noted in *Sanor* that the trial court did not explicitly express why it chose not to grant interest on the distributive award. *Sanor* at ¶ 33. We found, however, the reasons for no interest could be inferred from the language of the entry and it was because the husband had been allocated 100 percent of the debts. *Sanor* at ¶ 33.

{¶74} Wife contends *Sanor* is distinguishable. She asserts there was no marital debt, except minimal credit card debt that was awarded to her. The trial court's division of property was equal, unlike in *Sanor* where the husband assumed the debt. She further asserts the wife in *Sanor* agreed to the payment schedule; Wife contends she did not agree to a payment schedule. Therefore, according to Wife, the case at hand is not comparable to *Sanor* and interest should have been awarded.

{¶75} We disagree with Wife's assertion that *Sanor* is distinguishable because the wife in *Sanor* was willing to accept a payment schedule and Wife was not willing to accept a payment schedule. The wife in *Sanor* was willing to accept a payment

schedule for the purposes of keeping the farm together. The wife in *Sanor* did not acquiesce to a payment schedule that did not include interest; the issue in *Sanor* was whether the trial court abused its discretion in failing to award interest. Therefore, the cases are not distinguishable in that matter because neither wife agreed to interest free payments.

{¶76} That said, admittedly there are distinguishing factors between the *Sanor* case and the case at hand. It is noted Wife does state she was awarded the credit card debt. At the hearing, Wife admitted the credit card debt was her own debt. Furthermore, that credit card debt was minimal. There was no marital debt in the matter at hand. This is unlike *Sanor* where there was a large amount of marital debt and that debt was awarded to the husband. Thus, there are distinguishing factors.

{¶77} The distinguishing factors, however, does not mean the trial court abused its discretion in failing to award interest on the equalization payment. The trial court in setting forth the equalization payment stated:

> Considering all the foregoing, to equalize the distribution of property that Husband shall pay to the wife $237,312.60, payable in yearly installments of $15,000.00, due April 30, of each year, until paid in full. First payment is due April 30, 2018. Payments are without interest if paid timely. Any late payment will bear interest at the then judgment rate. If any payment is late 90 days or more, wife may accelerate the remaining payments and collect the full outstanding balance. Wife is granted a lien on the real estate retained by husband to secure payment of the equalization amount.

3/26/18 J.E.

{¶78} Possibly the trial court's reasoning for no interest unless the payment is untimely was a way to ensure Husband paid. The record indicates Husband does not believe in credit and operates on mostly a cash basis. During the marriage, the parties acquired little debt and paid off debt quickly. It appears cash was saved and used to buy cars and to partly finance the addition to the house. Therefore, interest could have been used as an incentive to pay Wife timely. The conditions the trial court set into place for payment of the equalization amount seems to be used to ensure the payments are made.

{¶79} Regardless, even without a reason for the no interest, it is not clear the trial court abused its discretion in failing to award interest on the equalization payment. This assignment of error lacks merit.

Wife's Sixth, Seventh, and Eighth Assignments of Error

Expert Witness Testimony

"The court, without explanation, adopted the opinion of Duane's expert as to the value of the 133-acre farm residence."

"The court relied upon Howery's testimony."

"The court excluded Mr. Miller's testimony regarding the value of cattle."

{¶80} These three assignments of error address the trial court's decision to rely on certain experts for the valuation of the farm and cattle.

1. Farm

{¶81} Wife argues her expert on the valuation of the farm was more reliable than Husband's expert. Husband counters arguing it is within the province of the trial court to determine which expert opinion to accept and the trial court did not abuse its discretion in relying on the Husband's expert's opinion.

{¶82} Two experts testified at the hearing regarding the value of the farm. Wife's expert, Jason Miller, testified the fair market value of the property was $477,500.00. Tr. 15. He explained a recent sale in the area of a similar property confirmed his valuation. Tr. 18. That property had similar acreage with an older home that had not been updated and that property sold for $418,000.00. Tr. 18-19. He indicated although a lot of the pasture land of the farm sits in the flood plain, it did not affect the value of the property since it is used for agricultural purposes. Tr. 31-33. His testimony did not explain what value the improvements made to the property during the marriage were attributable to the fair market value; he merely looked at the value as of the date of the appraisal. Tr. 20.

{¶83} Husband's expert, Benjamin Schafer, testified the fair market value of the property was $428,000.00. Tr. 117. He explained that in order to come up with this number he first determined the value of the house as if it was a residential lot and then added in the price per acre. Tr. 117. A portion of this 133 acres sits in the flood plain and therefore, there were different acre valuations for different portions of the farm. Tr.

117. Any value for the buildings on the property was then added. Tr. 117. Mr. Schafer also determined the value of the improvements made to the property during the marriage; the addition to the house and farm buildings. Tr. 118-119. He determined the value of the improvements attributable to the fair market value was $90,000.00. Tr. 118-119.

{¶84} The trial court used Husband's expert's valuations. 3/26/18 J.E. In doing so, the trial court explained that Wife's expert was not asked to and did not offer an opinion on the value of the improvements to the property. 3/26/18 J.E. The court noted Wife did not dispute Husband's expert's opinion that the improvements caused the value of the real estate to increase by $90,000.00. 3/26/18 J.E. Accordingly, the court stated, "Since this appraiser [Schafer] dealt with the issue of improvements and valued them the court will accept this appraisal as it does address all issues." 3/26/18 J.E.

{¶85} A trial court has broad discretion to make a determination as to the value of property. *Donovan v. Donovan,* 110 Ohio App.3d 615, 620–621, 674 N.E.2d 1252 (12th Dist.1996). A trial court's decision regarding property valuation will not be disturbed on appeal absent an abuse of discretion. *Id.*

{¶86} Considering the standard of review and the fact that both experts were credible, we cannot find that the trial court abused its discretion in utilizing Husband's expert's opinion over Wife's expert's opinion.

2. Cattle

{¶87} Wife contends the trial court abused its discretion in finding her witness was not an expert on cattle. She also asserts Husband's expert's opinion on cattle was arbitrary because he did not give a specific dollar amount but rather a range, and admitted he did not personally verify the head count. Similar to his argument regarding the farm, Husband argued it is within the province of the trial court to determine which expert opinion to accept and the trial court did not abuse its discretion in relying on his expert's opinion.

{¶88} Wife attempted to use Jason Miller's valuation of the cattle as evidence. Husband objected to Miller being considered an expert on cattle valuation. Tr. 24. Wife attempted to lay a foundation for his expertise:

Q. And how often do you get involved in the sale of cattle?

A. I actually raise cattle and so I sell cattle both inaudible [sic] as well as break cows from time to time. And I sell at times as an auctioneer for Muskingum Livestock, Carrollton Livestock. In addition to that at the time of this valuation I also used the market reports that are available in the farm and diary. I also called – actually I called Mr. Daniel Mitchell who is a sale mart owner in Jackson County, West Virginia and also sells at Muskingum Livestock to get current market prices established, just kind of to confirm what I thought and that's what I used for the valuation of the cattle.

Q. And do you have the opportunity through the course of your business in other case, not just this case, to put values on cattle?

A. Very rarely other than selling them at auction.

Tr. 25.

{¶89} Wife then moved for Miller to be considered an expert on valuation of cattle. Tr. 25. Husband renewed his objection indicating the testimony did not establish how many auctions Miller had done, how many cattle he had sold, etc. Tr. 25-26. The trial court sustained the objection and as such, determined Wife had not established that Miller was an expert in cattle valuation. Tr. 26. Thus, Miller was not permitted to testify what his opinion was on the value of the parties' cattle. Tr. 26. However, Miller's valuation of the cattle was part of Wife's Exhibit 2; Miller prepared a spreadsheet that valued equipment and cattle. That exhibit was admitted into evidence.

{¶90} It has been explained that the determination of whether a witness is qualified to testify as an expert is a matter for the court to determine pursuant to Evid.R.104 (A). *Bedard v. Gardner,* 2d Dist. Montgomery No. 20430, 2005-Ohio-4196, ¶ 58. The competency of the proposed expert witness is a matter left to the discretion of the trial court, and the court's ruling will be reversed only for an abuse of discretion. *Alexander v. Mt. Carmel Medical Center*, 56 Ohio St.2d 155, 157, 383 N.E.2d 564 (1978).

{¶91} Considering the testimony, the objection, and the standard of review, it is difficult to find the trial court abused its discretion in determining Miller was not qualified as an expert on cattle valuation.

{¶92} That said, in the judgment entry, the trial court does not restate its oral ruling that it did not allow Miller to testify about cattle valuation. Instead, the court stated:

> 29. Both parties had a cattle appraisal performed, Plaintiff by Jason Miller, Mr. Miller is not engaged on a full time basis in the buying and selling of cattle as is the Defendant's appraiser. The appraisals were performed months apart. The Defendant's inventory of cattle varies constantly as cattle are being bought and sold on a regular basis. The cattle being appraised by the Plaintiff's appraiser are not the same as were appraised by the Defendant's appraiser. Most of the cattle appraised by Plaintiff's appraiser, Jason Miller are no longer in the possession of Defendant. Therefore, this appraisal is of no evidentiary value as it is an appraisal of assets that no longer exist.
>
> 30. Brad Haury, Defendant's cattle appraiser, is in the business of buying and selling cattle, and conducting cattle auctions, on a full time basis and has done so for many years. The Defendant, no longer owns most of the cattle appraised by Mr. Haury. However, his appraisal was conducted shortly before the case was originally scheduled for trial and, therefore, constituted the best evidence of what should be considered marital property for purposes of equitably dividing the marital estate. The court finds that for the purpose of establishing a valuation, the Defendant's appraisal should be used. Mr. Haury appraised the cattle using a range. His total cattle valuation is one hundred four thousand seven hundred twenty-five dollars ($104,725.00). The Court believe [sic] the Haury appraisal to be the most accurate representation of the value of the cattle.

3/26/18 J.E.

{¶93} While the trial court did not specifically state Miller was not qualified to value the cattle, Miller's qualifications versus Haury's qualifications was a factor the trial court considered in concluding the Haury appraisal was more accurate. As quoted above, Miller's testimony did not establish how many cattle auctions he had done or how many cattle he had sold. Conversely, Defendant's expert, Brad Haury, testified he works for United Producers which is a company that is in the business of livestock marketing, livestock financing, risk management, and running a sale barn at a weekly auction. Tr. 189. He testified he has worked there for 25 years and he has sold livestock his whole life. Tr. 189. He indicated he is very familiar with the valuation of cattle because that is what he does for a living. Tr. 190. He explained he gave a range for the value of cattle because he did not go through and count how many old cows and how many young cows. Tr. 192. He stated his valuation was a reasonable estimate. Tr. 192.

{¶94} Given each expert's testimony on their qualifications, we cannot conclude the trial court abused its discretion in finding Haury more qualified. His testimony established his business was the valuation of cattle; Miller's testimony did not.

{¶95} Wife argues that Haury's opinion is unreliable or not as reliable as Miller's because Haury did not verify the head count of the cattle and only offered a range for valuation. These arguments are meritless. The testimony of both experts established neither one viewed each cow individually. The opinions would carry equal weight if that is the only consideration. As to Haury only offering a range for the valuation and not a single number, that was explained to the trial court. The trial court believed that range and took the figures and determined the valuation to be $104,725.00. That was within the trial court's discretion and that number falls within the range given by Haury.

{¶96} Wife also argues the trial court's rationale for distinguishing Haury's opinion from Miller's opinion is flawed. She focuses on the trial court's statements in paragraph 29 quoted above where the trial court indicated the cattle appraised by Miller were not the same cattle appraised by Haury and many of the cattle appraised by Miller were no longer in Husband's possession. She asserts the same is true about Haury's appraisal.

{¶97} Paragraph 30 of the findings of fact quoted above verify the trial court took into consideration Husband no longer owned most of the cattle appraised by Haury. However, the trial court noted Haury's appraisal was closer in time to the originally scheduled trial. That is an accurate statement. Miller's valuation was done March 21, 2016. Tr. 24. Haury's valuation was done in late August or early September 2016. Tr. 191. The first hearing date of the trial was December 23, 2016 and the second hearing date was March 15, 2017.

{¶98} Considering all the above, the trial court did not abuse its discretion in determining Haury's appraisal to be the most accurate representation of the value of the cattle. The testimony supported the trial court's conclusion Haury was more qualified than Miller in appraising the value of the cattle.

3. Conclusion

{¶99} These three assignments of error lack merit for the reasons stated above.

Wife's Ninth Assignment of Error and
Husband's Second Cross-Assignment of Error
Mineral Interest

"The court divided the mineral rights under the 133-acre farm residence 75.65%/24.35%."

"The mineral rights to Appellee's premarital real estate should have been awarded exclusively to him."

{¶100} In her merit brief, Wife asserted the trial court gave no reason supporting the division of the mineral rights. In her reply brief, Wife withdrew this assignment of error and acknowledged the trial court's computation was based on the percentage of separate interest Husband had in the property prior to the marriage. She conceded the trial court's division of mineral interest was correct.

{¶101} Husband argues in his cross assignment of error that all of the mineral rights are his separate property. He asserts that the trial court determined the farm was his separate property and Wife was only entitled to active appreciation. Therefore, he contends since mineral rights are considered realty until they are physically severed from the land, he is entitled to all the mineral rights.

{¶102} Husband is correct that case law holds minerals while in the earth are a part of the realty. *Miller v. Cloud*, 7th Dist. Columbiana No. 15 CO 0018, 2016-Ohio-

5390, 76 N.E.3d 297, ¶ 57, quoting *Back v. Ohio Fuel Gas Co.,* 160 Ohio St. 81, 88–89, 113 N.E.2d 865 (1953), citing *Kelley v. Ohio Oil Co.,* 57 Ohio St. 317, 49 N.E. 399 (1897). Likewise, mineral rights are considered realty until they are physically severed from the land. *Hickman v. Hickman*, 5th Dist. Tuscarawas No. 2008AP110072, 2009-Ohio-2237, ¶ 10, citing *Lighthorse v. Clinefelter*, 36 Ohio App.3d 204, 205, 521 N.E.2d 1146 (9th Dist.1987), citing *Kelley*, 57 Ohio St. 317.

{¶103} Husband, however, is not correct in his characterization that the trial court awarded the farm to him as his separate property. The trial court only awarded a portion of the farm as his separate property; a portion of the farm was marital property.

{¶104} The facts in this case indicate Husband put a $40,000.00 down payment on the farm prior to marriage. The purchase price of the farm was $96,500.00. Husband paid off part of the mortgage prior to marriage. At the time of the marriage the remaining balance of the mortgage was $47,000.00. That amount was paid off during the marriage. Therefore, Husband separately paid $49,500.00 prior to the marriage. That amount constitutes 51.3% of the purchase price. Accordingly, 51.3% of the farm was his separate property and 48.7% of the farm was marital property. The trial court accurately made these findings in paragraph 17 of the findings of fact and in paragraph 21 of the conclusion of law:

> 17. * * * At the time of the marriage, defendant had paid $49,500.00 to the purchase price, of 51.3%, therefore, 48.7% of the real estate is marital.
>
> * * *
>
> 21. Defendant should be awarded as his separate property, 51.3% of the 133 acre farm.

3/26/18 J.E.

{¶105} Therefore, if we consider the above numbers, half of the marital percentage portion is 24.35%. Adding 24.35% to 51.3% is 75.65%. Therefore, the Wife's portion of the 133 acre farm is 24.35% and Husband's is 75.65%. The trial court divided the mineral rights in conformity with these numbers; "Mineral rights under the

133 acre farm are owned 75.65% by Defendant and 24.35% by the Plaintiff." 3/26/18 J.E.

{¶106} Since the mineral rights are part of the realty, the trial court's determination is correct and not an abuse of discretion.

{¶107} Husband's assignment of error lacks merit.

Wife's Tenth and Eleventh Assignments of Error and
Husband's First Cross-Assignment of Error
Separate and Marital Division of 133 Acre Farm

"The divorce decree misstates: "48.7% of the real estate [the 133 acre farm residence] is marital."

"The divorce decree [mis]states: Defendant should be awarded as his separate property, 51.3% of the 133 acre farm."

"The trial court erred in its determination of the marital equity in Appellee's premarital real estate."

{¶108} Both parties assert the trial court's division of equity in the farm was incorrect.

{¶109} Wife next argues the trial court made mathematical errors in calculating the marital interest in the farm. She contends that the numbers used by the trial court indicate her interest in the farm should be stated as 29.76% and Husband's as 70.24%, not as 24.35% and 75.65% respectively. The trial court's percentages are based on the purchase price. She contends they should have been based on the purchase price, active appreciation, and passive appreciation.

{¶110} Husband argues the trial court's computations are incorrect. He contends the marital interest in the property was the $47,000.00 plus $90,000.00, which equals $137,000.00. The $47,000.00 is the amount of the mortgage on the date of the marriage, which the parties paid off during the marriage. The $90,000.00 is the amount of active appreciation of the real property. Husband is essentially arguing Wife is entitled to none of the passive appreciation even though marital funds were used to pay off the mortgage.

{¶111} Husband's argument will be addressed first because if there is merit with the argument, Wife's argument fails.

{¶112} As explained earlier, the marital portion of the farm was 48.7% and Husband's separate portion was 51.3%. The trial court divided passive appreciation using those percentages.

{¶113} Classification of property is governed by R.C. 3105.171. "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)(a)(iii). The type of appreciation described in this statutory section is termed active appreciation. Separate property is any real and personal property and any interest in real or personal property that was acquired by one spouse prior to the date of the marriage. R.C. 3105.171(A)(6)(a)(ii). Passive income and appreciation acquired from separate property by one spouse during the marriage, remains that spouse's separate property. R.C. 3105.171(A)(6)(a)(iii), (D). Appreciation that occurs on separate property due solely to market forces, such as location and inflation is known as passive appreciation and remains separate property. R.C. 3105.171(A)(6)(a)(iii).

{¶114} It is undisputed the $90,300.00 is active appreciation; marital funds were used during the marriage to add an addition on to the house, place farm buildings on the property, and purchase the middle one acre. Furthermore, it is undisputed this property passively appreciated; the purchase price was $96,500.00 in 1988 and in 2016 the property was appraised for $428,000.00.

{¶115} Husband is correct that if property is solely separate property and it appreciates during the marriage, the other spouse is not entitled to the passive appreciation of the property and is only entitled to active appreciation. The property in the matter at hand is partially separate property and partially marital property. Husband is failing to acknowledge the difference between acquiring unencumbered property prior to the marriage and acquiring encumbered property prior to the marriage. The trial court acknowledged this distinction when it awarded Wife 50% of the passive appreciation on the marital portion of the property.

{¶116} Case law supports the trial court's decision. The Ninth Appellate District has held a Husband who has a separate property interest in real estate is entitled to the passive appreciation on that separate interest. *Ostmann v. Ostmann*, 168 Ohio

App.3d 59, 2006-Ohio-3617, 858 N.E.2d 831, ¶ 28-29 (9th Dist.), citing R.C. 3105.171(A)(6)(a)(iii). *Ostmann* dealt with a home that was acquired during the marriage and during the marriage husband used his separate property to pay off part of the mortgage, which amounted to 40% of the property. *Ostmann* at ¶ 22-24. This amount was traceable as his separate property. *Id*. at ¶ 22-23, 28. The parties agreed that the home increased in value during the marriage and the increase in value was due to passive appreciation. *Id*. at ¶ 29. The trial court determined the entire passive appreciation was marital property. *Id*. at ¶ 28-29. The Ninth Appellate District reversed and determined husband was entitled to passive appreciation on the portion that was separate property. *Id*.

{¶117} Admittedly, that decision dealt with property that was purchased during the marriage and sometime thereafter separate property was used to pay off part of the mortgage. In the situation before us we are dealing with real property purchased prior to the marriage, but the mortgage was paid off during the marriage with marital funds. However, both cases deal with real property consisting of both a marital property portion, a separate property portion, and passive appreciation. Thus, although the *Ostmann* decision is factually different, it is logical that the same principals apply. Husband is entitled to his separate property and the passive appreciation on that separate property. Likewise, the marital portion of the property also includes some passive appreciation. It is unjust to conclude that even though the marital portion of this property is 48.7% of the property, 100% of the passive appreciation is Husband's.

{¶118} Furthermore, dividing the passive appreciation in conformity with the marital and separate property percentages of the property does not violate the statute. R.C. 3105.171(A)(6)(a)(iii), states, in pertinent part:

> (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:
>
> * * *
>
> (iii) Passive income and appreciation acquired from separate property by one spouse during the marriage.

{¶119} This language clearly indicates the passive appreciation during the marriage acquired from separate property is separate property. Here, only a portion of the property was separate. A portion of it was marital. Thus, while the language of the statute clearly indicates Husband was entitled to the passive appreciation on his separate portion of the farm, it does not indicate he was entitled to all of the passive appreciation. In other words, he is not entitled to the passive appreciation on the entire property merely because prior to the marriage he acquired an interest in the property.

{¶120} Husband argument is meritless.

{¶121} We will now consider Wife's argument. Wife takes the final figures the trial court determined each party was entitled from the farm and then determines the percentages that each party received. The trial court stated the value of the farm was $428,000.00. The marital portion's value was $254,760 and Husband's separate portion's value was $173,240.00. The trial court divided the marital portion evenly; each party was entitled to $127,380.00. Husband's marital portion value was then added to his separate portion value and that amounted to $300,620.00. Therefore, Wife's value was $127,380.00 and Husband's value was $300,620.00. Using those figures Husband received 70.24% of the value of the farm and Wife received 29.76%. However, in the judgment entry the trial court stated the percentage of the farm that was Husband's separate property was 51.3% and the percentage of the farm that was marital was 48.7%. The marital portion then was split in half and Husband's award portion was 75.65% and Wife's was 24.35%. Wife indicates these percentages do not match the actual award and thus, there were computational errors or misstatements in the judgment entry. She believes the judgment entry should indicate her portion is 29.76% and Husband's is 70.24%.

{¶122} Her argument is meritless. Wife acknowledged in Assignment of Error Number 9 the trial court correctly determined the marital and separate portion of the farm; Husband's separate property was 51.3% and the marital portion was 48.7%. As stated above, those percentages were used to determine the value of the farm that was separate and marital. The farm was valued at $428,000.00. The active appreciation during the marriage by purchasing the one acre, adding the addition to the house, and placing farm buildings on the farm increased the value of the farm by

$90,300. That entire amount was marital property and thus, had to be subtracted from the value of the farm to divide the remainder in accordance with the above percentages. Therefore, the value of the farm excluding the active appreciation was $337,700.00. This was the amount of passive appreciation plus the purchase price. Husband's separate property of the $337,700.00 was 51.3% or $173,240.00. The marital portion was then 48.7% or $164,460.00. However, the $90,300.00 of marital active appreciation had to be added to the marital portion, which means the marital portion was $254,760.00. That amount then was divided in half to award each party their equal division of the marital portion of the farm, which means each party's marital portion value was $127,380.00.

{¶123} These are the numbers the trial court used and Wife does not dispute the actual dollar valuation is correct. The percentages used and stated by the trial court in the judgment entry were the correct percentages used for determining separate and marital property of the farm and the values of each parties' portion of the farm. The percentages in the beginning do not equal the same percentages at the end because of the active marital appreciation that was marital property. However, since Wife does not dispute the actual dollar valuation, it is not clear what harm she is claiming. For that reason her assignments of error is overruled; changing the percentages or acknowledging that percentages changed because of active appreciation does not affect the correct computation of the value of each parties' portion of the property.

{¶124} In conclusion, Wife's tenth and eleventh assignments of error lack merit and Husband's first cross-assignment of error lacks merit. The trial court correctly computed each parties' interest in the farm and divided the marital portion equally.

Wife's Twelfth and Thirteenth Assignments of Error
Child Support

"The court failed to specify an effective date for the child support."

"The court failed to expressly award to Norma the right to declare daughter Faith as a dependent for federal income tax purposes."

{¶125} These assignments of error address child support. Wife contends that the trial court failed to specify an effective date of the child support order and failed to

expressly award her the right to declare the minor child as a dependent for federal income tax purposes. She asserts the trial court must have intended the child support to be retroactive to the date of the complaint because at the time she filed for divorce she asked for child support.

{¶126} Husband counters arguing the minor child was emancipated when the decree was issued. He asserts Wife did not seek a temporary order for child support when she filed for divorce. According to Husband, if the trial court modifies the child support order that would be a retroactive modification of a temporary order which is impermissible.

{¶127} The divorce decree was issued February 27, 2018 and a nunc pro tunc order was issued March 28, 2018. Although the decree states the child was born February 4, 2000, both parties agree the child was born July 3, 2000. 11/2/15 Husband Answer; 11/6/15 Wife Reply. Thus, the child would not turn 18 years old until July 3, 2018.

{¶128} A termination of child support order is in the record before us. 5/21/18 Termination Order. That order indicates neither party objected to the April 19, 2018 notice concerning the child support termination investigation. 5/21/18 Termination Order. The April 19, 2018 notice proposes termination of child support effective July 3, 2018. 5/21/18 Termination Order. The trial court approved that date and adopted it. 5/21/18 Termination Order. Consequently, Husband was obligated to pay child support through July 3, 2018.

{¶129} The divorce decree ordered child support in conformity to the statutory guidelines. If health insurance was provided, Husband was required to pay child support in the amount of $415.15 per month plus the processing charge. If health insurance was not provided, he was required to pay child support in the amount of $351.23 per month plus the processing charge and cash medical in the amount of $112.00 per month. 2/17/18 J.E.; 3/26/18 J.E. The trial court did not indicate an effective date and did not designate who could claim the minor as a dependent for federal income tax purposes.

{¶130} Since no other effective date was stated in the order, logically it is concluded the effective date of the child support order is the date it was issued. Wife

is essentially arguing this court should hold the trial court abused its discretion in failing to retroactively award child support back to the date of the complaint.

{¶131} Wife's argument fails. At the time a divorce complaint is filed a party can request a temporary child support order. In this case, despite that option, Wife did not make such a request. Admittedly, she did seek a temporary order that the parties be required to split the household bills. 5/14/15 Affidavit in Support of Motion for Temporary Orders. The Temporary Order entered stated, "Both parties are granted nonexclusive occupancy of the marital residence. All expenses of the household, including, but not limited to, utilities, repairs, taxes, insurance, food and costs associated with the minor child shall be evenly divided between the parties, including school fees and uncovered health insurance expenses." 5/14/15 J.E. This order, however, did not indicate a temporary child support amount. The May 2015 Temporary Order was modified months later to order Husband to vacate the marital home and grant Wife exclusive use and occupancy of it. 11/3/15 J.E. The trial court further ordered the parties to continue to abide by the initial temporary order requiring all expenses of the household and child to be divided. 11/3/15 J.E. Similar to the earlier order it did not include a temporary child support amount.

{¶132} Courts are permitted to retroactive apply a modification of child support to the date the modification motion was filed because of the time it takes for modification support motions to process through the courts. *Zitkus v. Zitkus*, 12th Dist. Butler No. CA2018-04-073, 2019-Ohio-660, ¶ 30. However, for the initial order the need is not the same because a temporary child support order could have been requested and obtained.

{¶133} Furthermore, even if the trial court could order support retroactive, Wife never clearly requested a retroactive effective date for the child support. The divorce complaint filed by Wife did specifically ask for child support but did not indicate what effective date she was requesting. Likewise, her proposed findings of fact and conclusions of law also did not suggest a retroactive effective date of child support. The determination of whether to make a child support modification order retroactive is within the discretion of the trial court and will not be reversed on appeal absent a showing of an abuse of discretion. *Zitkus v. Zitkus*, 12th Dist. No. CA2018-04-073,

2019-Ohio-660, ¶ 30; *In re Day*, 7th Dist. Belmont No. 01 BA 28, 2003-Ohio-1215, ¶ 21. If there is no request for a retroactive effective date it is difficult to conclude that the trial court abused its discretion in not ordering a retroactive effective date.

{¶134} Consequently, considering the record, the trial court did not abuse its discretion when it did not state the effective date of the child support order was the date the divorce complaint was filed. The assignment of error regarding child support is meritless.

{¶135} As to the federal tax dependency claim, the trial court was required to designate which parent could claim the minor child. R.C. 3119.82 states, "Whenever a court issues * * * a court child support order, it shall designate which parent may claim the children who are the subject of the court child support order as dependents for federal income tax purposes as set forth in section 151 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended." Thus, the trial court's judgment was required to indicate which parent could claim the minor child as a dependent. *See Taylor v. Taylor*, 7th Dist. Belmont No. 01-BA-17, 2002-Ohio-6884, ¶ 9, ("Appellant argues that the court failed to designate which party was entitled to claim the federal income tax deduction for the minor children as required by newly enacted R.C. 3119.82. Indeed, the record does not reflect which party is entitled to claim the federal income tax deduction for the parties' minor children. Therefore, upon remand of this case to the trial court, it is instructed to clarify and make those determinations.").

{¶136} Given the facts of this case, although the trial court was required to indicate which parent could claim the minor child as a dependent, the issue is now moot. The tax filing deadline has passed. This was the first year the parties filed their taxes separately as nonmarried people. *See* 26 U.S.C.. 7703(a)(1) ("the determination of whether an individual is married shall be made as of the close of his taxable year."). This is the only year the trial court's divorce decree would dictate who can claim the child (who turned 18 in July 2018) as a dependent. Consequently, the issue is moot.

Wife's Fourteenth Assignment of Error
Contempt

"The court failed to conduct a hearing upon, and failed to expressly rule upon, Norma's May 8, 2017 motion for contempt."

{¶137} Lastly, Wife argues the trial court erred when it failed to rule on her motion for contempt.

{¶138} There were competing motions for contempt filed in this case. Wife filed her motion alleging Husband harassed and threatened her and blocked her access to her Corvette, which was located in the garage at the marital home. 5/8/17 Wife's Motion for Order to Show Cause. She asked for him to be held in contempt for violating the temporary order prohibiting him from harassing and threatening her. 5/8/17 Wife's Motion for Order to Show Cause. Husband then filed a motion for contempt claiming that when Wife moved out of the marital residence she damaged the home and that constituted a violation of the court's restraining order. 5/30/17 Husband's Motion for Contempt. A contempt hearing was scheduled for June 5, 2017. The matter was continued and set for a January 2018 hearing. 11/3017 Notice of Hearing. It appears the hearing did not occur and the trial court issued the divorce decree in February and a nunc pro tunc order in March. 2/27/18 J.E; 3/26/18 Nunc Pro Tunc J.E. The trial court did not rule on the contempt motions.

{¶139} Wife asks this court to remand the matter to the trial court to rule on her contempt motion.

{¶140} Wife's contempt motion is based on alleged violations of the trial court's temporary order. Temporary orders typically merge into the final order and become moot. It has been explained, "In a domestic relations action, interlocutory orders are merged within the final decree, and the right to enforce an interlocutory order does not extend beyond the decree, unless the interlocutory obligation has been reduced to a separate judgment or has been specifically referred to in the decree." *Cotter v. Cotter*, 9th Dist. Summit No. 25656, 2011-Ohio-5629, ¶ 10, citing *Colom v. Colom*, 58 Ohio St.2d 245, 389 N.E.2d 856, syllabus (1979). *See also Bokeno v. Bokeno*, 12th Dist. Butler No. CA2001-07-170, 2002-Ohio-3979, ¶ 6 ("Unlike the parties' obligation to pay their respective credit card debts, Rose's obligation to pay the mortgage and utilities was also not specifically referred to in the final divorce decree. As a result, such temporary order was merged within the divorce decree and that divorce decree replaced all that transpired before it.").

{¶141} Furthermore, the presumption is that motions not ruled upon when a final order is issued are deemed denied if the final judgment disposed of all pending matters or when the motion is rendered moot due to the circumstances of the case. *State v. Davies*, 11th Dist. Ashtabula No. 2017-A-0049, 2018-Ohio-5370, ¶ 27. *See also State v. Duncan*, 8th Dist. Cuyahoga No. 97208, 2012-Ohio-3683, ¶ 4 (motions not ruled on when a trial court enters final judgment are considered denied); *MB Financial Bank, N.A., v. Mitchell*, 12th Dist. Warren No. CA2018-04-041, 2019-Ohio-84, ¶ 28, citing *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998). In this instance, the final divorce decree disposed of all matters and the temporary order merged into the final order rendering the temporary order and any alleged violation of it moot.

{¶142} Consequently, for those reasons this assignment of error is without merit.

Conclusion

{¶143} Wife's first, second, fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, and fourteenth assignments of error lack merit. Her ninth assignment of error is withdrawn. Husband's three cross-assignments of error lack merit. Wife's third assignment of error has merit; the trial court failed to address Account # 896 in dividing the property. The trial court's division of property is reversed and the matter is remanded to address Account # 896. However, the trial court's determination that the 19 acres was marital property, that Husband did not fail to disclose an unidentified amount of cash, that equalization payments would be without interest, reliance on Husband's expert's valuation of real estate and cattle, division of mineral interest, and determination of what portion of farm was marital and separate are affirmed. Thus, the trial court's order is affirmed in part and reversed and remanded in part.

Donofrio, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are sustained and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Noble County, Ohio, Domestic Relations Division is affirmed in part; reversed in part; and remanded in part. We hereby remand this matter to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.