

OPINION NO. 89-030

Syllabus:

1. A board of education member is prohibited by R.C. 3313.33 from having any pecuniary interest in a contract of the board of education.
2. A member of the board of education has a pecuniary interest in a contract of the board where the member's spouse is a partner in a law firm that is paid to serve as counsel to the board, if any of the share of earnings from the contract is used for the support of the board member or the spouse or another dependent of the board member.

To: Michael Miller, Franklin County Prosecuting Attorney, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 16, 1989

I have before me your request for my opinion regarding the application of R.C. 3313.33. You have specifically asked:

Do the statutes and laws of the State of Ohio prohibit an individual from serving as a member of the board of education if the individual's spouse is a partner in a law firm that has been hired as legal counsel to the board of education? The individual's spouse is not a member of the firm's "schools division" and is not involved, directly or indirectly, in giving legal advice or participating in litigation with regard to school issues.

You indicate that an analysis of various statutes as they apply to the issue at hand is contained in Ohio Ethics Commission, Advisory Opinion No. 88-007.¹ Although several opinions have dealt with facts analogous to the situation outlined in your letter, the impact of R.C. 3313.33 has not been examined as applied to the board of education member.² This opinion will, therefore, directly address the prohibition of R.C. 3313.33 upon the board member.

¹ I will abstain from rendering an opinion with respect to the Ohio ethics statutes since the Ohio Ethics Commission has statutory authority to render advisory opinions in this area. R.C. 102.08; 1987 Op. Att'y Gen. No. 87-033; 1987 Op. Att'y Gen. No. 87-025. Because the Ethics Commission specifically declined to render an advisory opinion in this matter with respect to R.C. 3313.33, I am permitted to do so. I will restrict my opinion to the application of R.C. 3313.33.

² Employment of the spouse of a board of education member by the board was directly addressed by the Ohio Supreme Court in *Board of Education of Zaleski School District v. Boal*, 104 Ohio St. 482, 135 N.E.2d 540 (1922). The court declined to prohibit the employment on the basis that G.C. 12932 (now R.C. 3319.21) did not expressly enumerate "wife" as one of the classes of relatives of a board of education member that a board member may not vote to employ. The language of former G.C. 12932 (currently R.C. 3319.21) prohibits a board member from acting in a matter in which the member has a pecuniary interest. Inasmuch as the court affirmatively answered the narrow question presented, "Can the wife of a member of a board of education be legally employed by such board to teach school, and draw public funds as compensation?" the court did not invalidate the contract. In focusing on the *employee's* rights and interests the court did not address the prohibition against the board member, now contained in R.C. 3313.33, against having an interest in the contract. Also, the court based its decision to uphold the validity of the contract by applying G.C. 12932 (now R.C. 3319.21) without analyzing the predecessor of R.C. 3313.33.

Two of my predecessors have also dealt with the question of employment of the spouse of a board of education member. 1955 Op. Att'y

Members of a board of education are prohibited from benefiting from contracts entered into by the board. R.C. 3313.33 states, in relevant part, "No member of the board shall have, directly or indirectly, any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member." R.C. 3313.33 is a strong statement of public policy guarding against favoritism and fraudulent practices by prohibiting contracts in which a public official has any pecuniary interest moving directly or indirectly to the officer. *Doll v. State*, 45 Ohio St. 445, 15 N.E. 293 (1887); *Bellaire Goblet Co. v. City of Findlay*, 5 Ohio C.C. 418 (Hancock County 1891); 1971 Op. Att'y Gen. No. 71-020.

Although the county prosecuting attorney is designated to serve as legal adviser for the boards of education of the county except for city school districts, R.C. 3313.35, R.C. 309.10 expressly permits the employment of private counsel. *See, Knepper v. French*, 125 Ohio St. 613, 183 N.E. 869 (1932) (county board of education authorized to appoint counsel other than county prosecuting attorney); 1983 Op. Att'y Gen. No. 83-038 (pursuant to R.C. 309.10, a school board may hire "in-house" legal adviser). Counsel other than the county prosecuting attorney, thus, is permitted to represent a board of education for which R.C. 3313.35 designates the county prosecuting attorney as legal adviser.³

The spouse of a board of education member, (referred to hereafter as the "spouse"), who is a partner in the law firm representing the board, has a direct interest in the public contract. Advisory Opinion No. 88-007 at 2 ("as a partner, the spouse receives a distributive share of the firm's earnings, and would be entitled to a percentage of the moneys paid by the board of education to the law firm for its services, regardless of whether he personally performed any work for the board. The board member's spouse would, therefore, have a definite and direct, pecuniary interest in the public contract between the board and his law firm.") The salient question to be answered is whether the spouse's direct, pecuniary interest in a public contract with the board of education is also a direct or indirect pecuniary interest of the board member in a contract of the board.

Initially, I must note that R.C. 3103.04 addresses the issue of one spouse's interest in the earnings of the other. R.C. 3103.04 states, in relevant part: "Neither husband nor wife has any interest in the property of the other except as mentioned in section 3103.03 of the Revised Code, the right to dower, and the right to remain in the mansion house after the death of either." The establishment of the legal relationship of marriage between two individuals does not, by itself, grant to one spouse property rights in the property owned by the other. *S.C. Kelley & Son v. Mills*, 1 Ohio N.P. 382 (C.P. Clinton County 1895). The earnings of a spouse are that spouse's separate property. *Board of Education of Zaleski School District v. Boal*, 104 Ohio St. 482, 135 N.E. 540 (1922); *Bechtol v. Ewing*, 89 Ohio St. 53, 105 N.E. 72 (1913). Marriage does not impair the right to convert separate property, including earnings, to another form of ownership by gift, contract or otherwise. *See, e.g., Bechtol* 89 Ohio St. at 53, 105 N.E. at 72 (syllabus, paragraph one); *Dillingham v. Dillingham*, 9 Ohio App. 248, 265 (Hamilton County 1917); *Richards v. Parsons*, 7 Ohio App. 422 (Tuscarawas County 1916); R.C. 3101.05. A spouse

Gen. No. 5811, p. 499; 1962 Op. Att'y Gen. No. 2855, p. 168. In both opinions the focus remained on a wife's right to contract and keep separate property as discussed in *Boal*. 1962 Op. No. 2855, at 171, did question the continued validity of *Boal* noting in that case "the allowance of salary to the wife would have seemed to be of some benefit to the husband." Although the facts presented in Op. No. 2855, at 171, demonstrated "some evidence of a pecuniary interest since the board member resides in the rent free house, and actually cannot be excluded from his wife's dwelling..." no improper interest was found on the strength of the decision in the *Boal* case.

³ A member of your staff has informed a member of my staff that the board of education that is the subject of your opinion request is one which you are obligated to serve as legal adviser pursuant to R.C. 3313.35. I, therefore, may render my opinion. *See* 1988 Op. Att'y Gen. No. 88-008.

may, however, treat his or her separate property as available for the support of either spouse. See *Richards*, 7 Ohio App. at 428 ("[s]uch parts of her daily income as she sees fit to use in the payment of household expenses without any agreement between her and her husband that the same should be repaid, cannot be recovered..."). Moreover, each party has a common law duty to support the other. *Cleveland Metropolitan General Hospital v. Oleksik*, 38 Ohio App. 3d 21, 23, 525 N.E.2d 831, 833 (Cuyahoga County 1987) ("both spouses are liable for necessary expenses incurred by either spouse in the course of the marriage. As long as the marriage subsists, the financial resources of both spouses should be available to pay a creditor who provides necessary goods and services to either spouse.")⁴

A significant exception to the separate property doctrine has been applied to property acquired during marriage; such property has frequently been referred to as "marital" property. See, e.g., *Cherry v. Cherry*, 66 Ohio St. 2d 348, 421 N.E.2d 1293 (1981). In discussing the division of property on termination of a marriage,⁵ the Ohio Supreme Court has explicitly recognized that property accumulated during the marriage represents the contribution of both spouses. "The property of the husband is usually the result of the joint efforts of both husband and wife..." *Weidman v. Weidman*, 57 Ohio St. 101, 104, 48 N.E. 506, 507 (1897). "Recognizing the right of the wife to participate in the accumulations which are presumably the result of their joint efforts and joint economies,...the law wisely awards the wife a just and equitable portion of the whole..." *State ex rel. Cook v. Cook*, 66 Ohio St. 566, 573, 64 N.E. 567, 568 (1902). See also *Strong v. Bueschner & Sons Co.*, 19 Ohio N.P. (n.s.) 49, 58 (C.P. Cuyahoga County 1916) ("In this state we have legislation which seems to proceed upon the theory that husband and wife are, for all practical purposes, partners engaged in a joint enterprise, not only of raising and maintaining a family, supporting themselves and making a home, but also in accumulating property.") The Ohio Supreme Court adopted this analysis in *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 413, 350 N.E.2d 413, 422 (1976), by stating: "The court must approach the proceeding much like a suit in partition or an action to dissolve, windup and distribute the assets and liabilities of a partnership." The court subsequently explained its use of the partnership analogy and stated: "Marriage is a union of equals." *Cherry*, 66 Ohio St. 2d at 355, 421 N.E.2d at 1299.

Therefore, although R.C. 3103.04 explicitly recognizes a spouse's right to keep separate property from control or use by the other spouse, the Ohio Supreme Court implicitly acknowledges that such property, especially earnings or profits generated during a marriage, may be treated as "marital property" subject to an equitable division between the spouses. To the extent that separate property of one spouse is used or made available to meet the expenses of either spouse, a benefit is bestowed on the other spouse because that other spouse need not meet that duty of support to the extent the expenses are already met. While it is clear that R.C. 3103.04 permits separate property completely beyond the control of the other spouse, when separate property is expended within the marriage to meet a marital obligation to support either spouse or to meet an obligation of the board member to support another dependent, the expenditure bestows a pecuniary benefit on the board member.

⁴ I am aware that R.C. 3103.03 provides in part: "The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able." The language of R.C. 3103.03, however, has been held to embody "archaic assumptions" and found to be "unconstitutional as being gender-based discrimination." *In re Rauscher*, 40 Ohio App. 3d 106, 110-111, 531 N.E.2d 745, 750 (Cuyahoga County 1987). The same court noted, in discussing R.C. 3103.03, that "[s]elective use of the Equal Protection Clause based on gender ought not to be permitted in cases of this nature." *Cleveland Metropolitan General Hospital v. Oleksik*, 38 Ohio App. 3d 21, 23, 525 N.E.2d 831, 833 (Cuyahoga County 1987).

⁵ R.C. 3105.18 allows the common pleas court to decree alimony in a divorce, dissolution of marriage or alimony proceeding. Division of property is one part of alimony. *Cherry v. Cherry*, 66 Ohio St. 2d 348, 421 N.E.2d 1293 (1981); *Tolerton v. Williard*, 30 Ohio St. 579 (1876).

R.C. 3103.04, by expressly providing for spousal separate property, makes it possible for the member of the board of education to have no pecuniary interest in the earnings of the spouse, if none of the earnings are used to discharge the marital support obligation. Whether, in a given case, separate property is applied to marital support obligations is a question of fact. If separate property is applied to the marital support obligation of either spouse, a pecuniary benefit exists and R.C. 3313.33 is violated.

Therefore, it is my opinion, and you are advised that:

1. A board of education member is prohibited by R.C. 3313.33 from having any pecuniary interest in a contract of the board of education.
2. A member of the board of education has a pecuniary interest in a contract of the board where the member's spouse is a partner in a law firm that is paid to serve as counsel to the board, if any of the share of earnings from the contract is used for the support of the board member or the spouse or another dependent of the board member.