

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

COLLEEN CAROW GIRTON,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA30
	:	
vs.	:	Released: August 26, 2009
	:	
SAMUEL DAVID GIRTON,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

T.E. Eslocker, Eslocker & Oremus Co., L.P.A., Athens, Ohio, for Appellant.

Gerald A. Mollica, Mollica, Gall, Sloan & Sillery Co., L.P.A., Athens, Ohio, for Appellee.

McFarland, J.:

{¶1} Appellant, Samuel David Girton, appeals from the judgment of the Athens County Court of Common Pleas granting a divorce to Appellant and Appellee, Colleen Carow Girton. On appeal, Appellant contends that the trial court 1) committed prejudicial error by failing to expressly determine the parties' marital property assets and separate property assets; 2) committed prejudicial error by awarding Appellee alleged premarital personalty, gifts, and debts since no evidence was presented regarding said assets and obligations; and 3) committed prejudicial error by failing to award

Appellant the \$16,360.00 premarital asset applied to the down payment of the parties' marital home. Because we conclude that the trial court failed to classify certain property, as either marital or separate, as required by R.C. 3105.171(B), we sustain Appellant's first assignment of error. Because the trial court's award of separate property to Appellee was supported by competent, credible evidence, and because Appellant failed to object to the admission of Appellee's Exhibit 19 and 20 into evidence, which identified certain marital debts and separate property and gifts belonging to Appellee, we conclude he has waived his right to raise any error as a result of the admission on appeal. Thus, we cannot conclude that the trial court erred in relying on those exhibits and adopting and incorporating them into the decree of divorce. Therefore, we overrule Appellant's second assignment of error. Finally, because we conclude that the trial court's denial of Appellant's request for reimbursement of a down payment on the parties' original marital home was supported by the evidence, we overrule Appellant's third and final assignment of error. Accordingly, the decision of the trial court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

FACTS

{¶2} The parties met while both were students at Ohio University. They were married on June 25, 1994 and both parties eventually became employed by Ohio University; Appellant, as an assistant professor, and Appellee, as an administrator with the college of engineering. After the parties married, they lived in a house located at 137 Franklin Avenue in Athens, Ohio, which was purchased by Appellant, Samuel Girton, three months prior to the parties' marriage. The parties lived at the Franklin Avenue address for roughly two years before selling the property. The profit made from the sale of Franklin Avenue was used as a down payment on the parties' next marital residence, located at 20 Elmwood, also in Athens, Ohio. The parties eventually refinanced the Elmwood property, using funds obtained from the refinance to purchase two investment properties, which were titled jointly in both parties' names.

{¶3} During the marriage, the parties were physically separated as a result of Appellee accepting a job in Dallas, Texas, which required her to be away for approximately two years during the marriage. The parties ultimately reunited, resulting in Appellee moving back to Athens, and the parties had one child. However, in August of 2008, while Appellee and the couple's son were visiting Appellant in Japan while he was on business for

the university the marriage deteriorated. As a result, Appellee and the child flew back to Ohio and Appellee immediately made arrangements to move out of the marital home. The parties subsequently filed for divorce in early 2008. The complaints filed by the parties were consolidated by the court on January 31, 2008.

{¶4} A final divorce hearing was held on August 8, 2008, at which both parties as well as various witnesses testified. The parties each submitted exhibits identifying various assets, both marital and nonmarital, and also provided testimony regarding their desire and ability to care for their minor son, who was approximately three years old at the time. The trial court, after hearing evidence presented by both parties, awarded various items to Appellee as her separate property, ordered the division of the rest of the marital property,¹ denied Appellant's claim for separate property, divided the parties' debts and ordered shared parenting of the parties' minor child. It is from the decree of divorce entered by the court on October 24, 2008, that Appellant now brings his timely appeal, assigning the following errors for our review.

¹ Although the court denied Appellant's request for separate property, in the form of his original down payment made on the Franklin Avenue property prior to the parties' marriage, the court did not address Appellant's additional separate property claims set forth in his trial exhibit F, which included various family heirlooms. Instead, the court simply ordered "any items not included in the foregoing allocations," which allocations did not address Appellant's other separate property claims, "shall be divided between the parties by means of a lottery system implemented by their counsel.

ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO EXPRESSLY DETERMINE THE PARTIES' MARITAL PROPERTY ASSETS AND SEPARATE PROPERTY ASSETS.
- II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY AWARDED APPELLEE ALLEGED PREMARITAL PERSONALTY, GIFT (SIC), AND DEBTS SINCE NO EVIDENCE WAS PRESENTED REGARDING SAID ASSETS AND OBLIGATIONS.
- III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO AWARD APPELLANT THE \$16360.00 PREMARITAL ASSET APPLIED TO THE DOWN PAYMENT OF THE PARTIES' MARITAL HOME."

ASSIGNMENT OF ERROR I

{¶5} In his first assignment of error, Appellant contends that the trial court committed prejudicial error by failing to expressly determine the parties' marital property assets and separate property assets. Specifically, Appellant contends that although the trial court's October 24, 2008, decision directs certain property assets should be awarded to Appellant or Appellee, the court failed to make findings regarding "marital" or "separate" property, as required by R.C. 3105.171(B). Appellee counters by arguing that both parties presented proposals to the court as to how they wished their property divided and thoroughly presented their views to the court as to what they considered marital property, separate property, gifts, as well as their

individual responsibility for debts. Appellee further cites the court's adoption and incorporation of her Exhibits 19 and 20 into its decision as proof of the court's determination of marital versus separate property, noting that the items listed on those exhibits as her personal or premarriage property and gifts were given to her by the court.

{¶6} Under R.C. 3105.171(B), a court is under a mandatory duty to classify property in a divorce proceeding as either marital or separate before dividing the property. *Childers v. Childers*, Scioto App. No. 05CA3007, 2006-Ohio-1391; citing *Knight v. Knight* (Apr. 12, 2000), Washington App. No. 99CA27, 2000 WL 426167; *Wright v. Wright* (Nov. 10, 1994), Hocking App. No. 94CA02. A court must comply with its duty by making findings in sufficient detail to allow for meaningful appellate review of its decision. *Childers*, supra; See also *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 518 N.E.2d 1197, paragraph two of the syllabus.

{¶7} In the case at bar, the trial court directed that certain property assets should be awarded to Appellant and Appellee, but it did not expressly state whether those assets constituted separate or marital property. However, the trial court did adopt and incorporate into its decision Appellee's Exhibit 20, which was entered into evidence without objection by Appellant, and which provided categories for many of the parties' assets. Specifically,

Exhibit 20 categorized certain assets as Appellee's premarriage property, personal property or gifts. Further, the record before us indicates that the trial court awarded Appellee assets in accordance with her requests set forth in her Exhibit 20.

{¶8} Nonetheless, we conclude that the trial court entered findings in sufficient detail to allow this court to ascertain the basis of its decision and to allow for meaningful appellate review only with respect to those items listed in Appellee's Exhibit 20. The record reveals that Appellant testified regarding his own Exhibit F, which was also admitted into evidence without objection by Appellee. Appellant's Exhibit F listed many items not covered by Appellee's Exhibit 20, and which Appellant claimed were his separate property. For instance, Appellant testified regarding several of these items at trial, which included various family heirlooms. The divorce decree did not classify this property as either marital or separate and otherwise made no reference at all to these items, which Appellant claimed were his separate property. Therefore, we conclude that the trial court did, in fact, fail to classify certain items of property, as set forth in Appellant's Exhibit F, as marital or separate property, as required by R.C. 3105.171(B). Thus, we sustain Appellant's first assignment of error. Accordingly, we reverse the

decision of the trial court and remand this matter for further proceedings with regard to the classification of the parties' property.

ASSIGNMENTS OF ERROR II AND III

{¶9} Appellant's second assignment of error contends that the trial court committed prejudicial error by awarding Appellee alleged premarital personalty, gifts and debts, since no evidence was presented at trial.

Appellant's third assignment of error contends that the trial court committed prejudicial error by failing to award him the \$16,360.00 premarital asset applied to the down payment of the parties' marital home. Because Appellant's second and third assignments of error both challenge the trial court's classification and division of property, both assignments of error must be analyzed under the same standard of review.

{¶10} Generally, a court dividing property upon divorce must award each spouse his or her separate property. R.C. 3105.171(D). Absent an abuse of discretion, we will not reverse a trial court's property award. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355, 421 N.E.2d 1293. "However, a trial court's characterization of property as separate or marital is reviewed under a manifest weight of the evidence standard of review." *Nance v. Nance* (Mar. 6, 1996), Pike App. No. 95CA553, 1996 WL 104741, at *5. Thus, the court's characterization "will not be reversed if it is supported by some competent,

credible evidence.” *Id.* The fact finder “is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of proffered testimony.” *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

Therefore, the trier of fact determines the credibility to be afforded testimony and the weight to be given evidence. *State v. Ball*, Hocking App. No. 07CA2, 2008-Ohio-337, ¶ 21, citing *State v. Dye*, 82 Ohio St.3d 323, 329, 1998-Ohio-234, 695 N.E.2d 763; *State v. Frazier*, 73 Ohio St. 3d 323, 339, 1995-Ohio-235, 652 N.E.2d 1000. “The factfinder may accept or reject all, part, or none of the testimony of each witness.” *In re A.E.*, Greene App. No. 2006 CA 153, 2008-Ohio-1864, ¶ 15, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

{¶11} In his second assignment of error, Appellant first contends that the trial court erred by awarding Appellee alleged premarital personalty, gifts and debts, arguing that no evidence was presented regarding the assets and obligations. Appellant argues that the Appellee simply offered exhibits into evidence as proposals, without providing any testimony as to her basis for claiming them as separate property. Appellant specifically argues that Appellee failed to offer any evidence of donative intent relative to claimed gifts, which must be proven by clear and convincing evidence. Appellee

counters by arguing that she identified Exhibit 20 on direct examination and explained its contents. Appellee further argues that she was cross-examined at length by Appellant regarding the exhibit and that Exhibit 20 was ultimately admitted into evidence without objection.

{¶12} Based upon the facts before us, we conclude that the trial court did not err in awarding Appellee the personal and premarriage items and gifts identified on her Exhibit 20. Appellee's Exhibit 20 consisted of a detailed list of belongings, some of which were identified as Appellee's personal property, premarriage property and gifts. The exhibit contained values for each item and in many instances the reason for identifying the item as Appellee's separate property. Appellee testified regarding the exhibit during direct examination and was cross examined regarding the exhibit as well. Appellant's cross examination of Appellee with regard to her labeling of claimed separate property was limited to the following:

“Q. Okay. You note the Honda motorcycle was a gift to you?

A. Yes.

Q. And how is it titled?

A. I believe it's in either both of our names or in Sam's name.

Q. I see. And do you have any documentation of a gift?

A. No, I don't have any documentation. All of that is at the marital residence and I haven't been allowed access to any of that paperwork."

{¶13} At no point during his cross examination of Appellee did Appellant further challenge the labeling of the items at issue as gifts or personal/premarriage property of Appellee. The record further reveals that Exhibit 20 was admitted into evidence without qualification and without any objection from Appellant. Additionally, Appellant testified as follows regarding the parties' claims for separate property and specifically, his claims for separate property contained in his Exhibit F:

"Q. The items that you'd like to keep you've designated. (Inaudible) that Colleen designated are the items of personal property she would like to keep. And you don't have any problems as long as they're segregated along those lines? Is that correct?

A. That's correct. There are only a few things that are at her residence that have any importance to me. And I've marked those. * * *"

{¶14} As such, we conclude that the trial court's decision awarding Appellant separate property in accordance with her Exhibit 20 was supported by competent, credible evidence. Further, as set forth above, Appellant failed to object to the admission of Exhibit 20 into evidence. We will not consider any error a party failed to bring to the trial court's attention at a time when the trial court could have avoided or corrected the error. *Bishop v. Bishop*, Scioto App. No. 03CA2908, 2004-Ohio-4643; citing

Schade v. Carnegie Body Co. (1982), 70 Ohio St.2d 207, 210, 436 N.E.2d 1001. It is axiomatic that a litigant's failure to raise an issue in the trial court waives the litigant's right to raise that issue on appeal. *Shover v. Cordis Corp.* (1991), 61 Ohio St.3d 213, 220, 574 N.E.2d 457, overruled on other grounds in *Collins v. Sotka* (1998), 81 Ohio St.3d 506, 692 N.E.2d 581.

Because Appellant failed to object to Exhibit 20 or assert that it misrepresented Appellee's separate property, we find that he has waived his right to raise this issue now. Accordingly, we affirm the trial court's award of separate property as to Appellee.

{¶15} Appellant also challenges the court's division of debt under his second assignment of error. Appellant contends that the trial court "merely accepted the paper assertion in Trial Exhibit 19 that such obligations were 'marital debts'" when "no evidence of any kind (credit card statements, receipts, cancelled checks, bills or other documents) was submitted by Appellee." Appellant specifically challenges the decision of the trial court insofar as it ordered him to pay a Sprint telephone bill, an AEP electric bill, a cable bill, a credit card obligation, a termination fee, a relocation fee, and finally for an office renovation, which Appellant claims was intended as a gift for him from Appellee.

{¶16} For the same reasons set forth in response to Appellant’s first argument contained in his second assignment of error, we affirm the trial court’s division and allocation of marital debt. Appellant had every opportunity to cross examine Appellee with regard her contention that the various debts listed in her Exhibit 19 were marital debts to be divided between the parties. The cross examination was limited and mainly focused on an office renovation and whether or not Appellant should have to partially reimburse Appellee for airfare home from Japan, an expense which was incurred unexpectedly and which Appellee claimed Appellant promised to pay half. Ultimately, the trial court ordered that Appellant had no obligation to reimburse Appellee for the plane tickets and only had to reimburse Appellant for half of the office renovation expenses. The office renovation partial reimbursement was based upon the court’s reasoning that Appellant received the furniture and benefits and “should be comfortable with reimbursing half of the expenses.”

{¶17} Otherwise, Appellant did not challenge Exhibit 19 insofar as it included the various utility bills, credit card bill and relocation expenses. As set forth above, because Appellant failed to object to Exhibit 19 or assert that it misrepresented the parties’ debt, we find that he has waived his right

to raise this issue now. Accordingly, we affirm the trial court's allocation of marital debt.

{¶18} In his third assignment of error, Appellant contends that the trial court erred by failing to award him the \$16,360.00 premarital asset applied to the down payment of the parties' marital home. Appellant argues that the money was his separate property and should have been awarded to him, along with four percent interest. Appellee contends that Appellant's pre-marital down payment on what became the marital home lost its identity during the parties thirteen years of marriage, which included a sale of the property, purchase of another marital home, and subsequent refinance in order to purchase additional properties.

{¶19} Marital property includes all real property that currently is owned by either or both of the spouses and that was acquired by either or both of the spouses during the marriage. R.C. 3105.171(A)(3)(a)(i). Therefore, property acquired during the marriage is presumed to be marital in nature unless it is shown to be separate. Separate property includes any property acquired by one spouse prior to the date of the marriage. R.C. 3105.171(A)(6)(a)(ii). The commingling of separate and marital property does not destroy the character of the separate property unless its identity as separate property is not traceable. R.C. 3105.171(A)(6)(b). See, also,

Barkley v. Barkley (1997), 119 Ohio App.3d 155, 160, 694 N.E.2d 989.

Therefore, it is presumed that a spouse's premarital property remains separate property so long as it is traceable, regardless of whether it has been commingled with other property. Thus, the key question is whether an asset may be traced to a separate property source. *Knight v. Knight*, supra, citing *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734, 645 N.E.2d 1300. The party seeking to establish that an asset or a portion of it is their own separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to the separate property source. *Id.*

{¶20} Here, Appellant testified regarding a \$16,360.00 down payment made on March 15, 1994, prior to his marriage, for property located at 137 Franklin Avenue. The record reveals that the parties married soon after, on June 25, 1995, and lived at that residence for roughly two years. Appellant testified that the house was titled in his name only. Appellee testified that while she didn't make a down payment on the house, she contributed to the household by working, helping to pay the mortgage every month and jointly maintaining and improving the property.

{¶21} In 1997, the parties sold the Franklin Avenue property, making a \$20,000.00 profit, which they used as a down payment for their new home, located at 20 Elmwood. The record further reveals that the parties

subsequently refinanced the Elmwood property, using funds obtained from the refinance as down payments on two investment properties. Appellant testified that the deeds to the investment properties were titled and financed jointly, but that they were intended to be a gift to Appellant only. Appellee, however, testified that she did not gift the properties to Appellant.

{¶22} In support of his request for reimbursement of \$16,360.00 as his separate property, Appellant entered into evidence a copy of a check dated March 15, 1994, written in the amount of \$16,360.00 that was used as a down payment on the Franklin Avenue property. Appellant also introduced a copy of a fiduciary deed for the 20 Elmwood property indicating a sale price of \$155,000.00. Appellant further testified that the Elmwood property was financed for \$124,000.00 as a result of the profit from the Franklin Avenue profit, which was used as a down payment on the Elmwood property.

{¶23} The trial court ultimately denied Appellant's request for reimbursement of the \$16,360.00 as his separate property, finding "that proof of this separate property was inadequate to support the contention that he should be reimbursed for the downpayment." In light of the evidence presented at trial, which included the use of the Franklin Avenue property as a marital home, its eventual sale and subsequent purchase of a second,

marital home, as well as a later refinance in order to purchase investment properties owned by both of the parties, we cannot conclude that the trial court erred in denying Appellant's request for reimbursement of his original down payment as his separate property. As set forth above, while commingling does not destroy the separate identity of property, there remains a separate issue of traceability. Here, the trial court concluded the evidence introduced by Appellant was inadequate to support his contention. We cannot conclude that the trial court erred in reaching its decision. As such, Appellant's third assignment of error is overruled.

**JUDGMENT AFFIRMED IN
PART, REVERSED IN PART
AND THE CAUSE REMANDED.**

Harsha, J., Dissenting:

{¶24} I would affirm the trial court's judgment in all respects. To the extent that the trial court may have failed to characterize any asset as separate or marital, I believe the appellant joined the appellee in inviting such an error. Moreover, any error in this regard is harmless because appellant apparently obtained possession of the very items that the court failed to characterize.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART AND THE CAUSE REMANDED and that the Appellee and the Appellant split the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, J.: Concurs in Judgment and Opinion.

Harsha, J.: Concurs in Judgment and Opinion as to Assignments of Error II and III and Dissents with Dissenting Opinion as to Assignment of Error I.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.