

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

ROBERT URBANIC Plaintiff-Appellant v. TONI URBANIC Defendant-Appellee	: : : : : : : : : : : : : : : :	Appellate Case No. 26309 Trial Court Case No. 2012-DR-36 (Civil Appeal from Montgomery County Domestic Relations Court)
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OPINION

Rendered on the 10th day of April, 2015.

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HALL, J.

{¶ 1} Robert Urbanic appeals the final judgment and decree of divorce granting

him a divorce from the appellee, Toni Urbanic. He challenges the trial court's division of his Roth IRA account and the division of the equity in the parties' marital residence. Finding no error, we affirm.

I. FACTS

{¶ 2} Robert and Toni were married on July 27, 1991. (They had children together, but the children are not relevant to this appeal.) In January 2012, Robert filed a complaint for divorce, and two days later the parties separated. Although they agreed on many issues, the parties could not agree on the division of Robert's Roth IRA account or on the division of the equity in their marital residence. Robert claimed (and Toni denied) that \$44,929 of his Roth IRA account (rounded to the nearest dollar, as we will do with all figures that we cite) is his separate property and that \$69,000 of the equity in the marital residence is his separate property. A final hearing on these two issues was held in December 2013 at which Robert and Toni testified and presented several exhibits. Based on the evidence, the trial court found that Robert proved that only \$10,484 of the Roth IRA account is his separate property and proved that only \$27,165 of the equity in the marital residence is his. Later, the court entered its final judgment and decree of divorce.

{¶ 3} Robert appealed.

II. ANALYSIS

{¶ 4} Robert assigns two errors to the trial court. One challenges the court's division of his Roth IRA account and the other challenges its division of the marital-residence equity.

{¶ 5} A spouse's separate property is usually distributed to that spouse. R.C. 3105.171(D). "Separate property" includes all real and personal property and any interest

in real or personal property that one spouse acquired before the marriage. R.C. 3105.171(A)(6)(a)(ii). This includes “passive income and appreciation acquired from separate property by one spouse during the marriage.” R.C. 3105.171(A)(6)(a)(iii). “The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable.” R.C. 3105.171(A)(6)(b). “Traceable” here “refers to evidence demonstrating a connection between property currently owned and some antecedent article of separate property. Such proof overcomes the effect of commingling, by which separate property may be ‘transmuted’ into marital property.” *Maloney v. Maloney*, 160 Ohio App.3d 209, 2005-Ohio-1368, 826 N.E.2d 864, ¶ 22 (2d Dist.). So in determining whether property is separate or marital, “[t]he key issue is traceability.” *Janis v. Janis*, 2d Dist. Montgomery No. 23898, 2011-Ohio-3731, ¶ 48.

{¶ 6} The burden of proving that property is separate is on the proponent of the claim to prove by a preponderance of the evidence. *Cooper v. Cooper*, 2d Dist. Greene Nos. 2007 CA 76, 2007 CA 77, 2008-Ohio-4731, ¶ 14. “Because traceability presents a question of fact, we must give deference to the trial court’s findings, and the court’s decision on the matter will not be reversed as against the manifest weight of the evidence when it is supported by competent credible evidence.” *Maloney* at ¶ 23.

A. The Division of Robert’s Roth IRA Account

{¶ 7} The first assignment of error alleges that the trial court erred in its division of Robert’s Roth IRA account, which had a \$128,756 end-of-marriage value. Robert claims that \$44,929 of it is his separate property, but the trial court concluded that he proved only \$10,484. The court explained the basis of Robert’s claim and the rationale for its decision

this way:

In November of 1991, Robert rolled \$10,484.46 from his Wright Patterson Air Force Base account into Society Bank. On approximately May 27, 1992, Robert rolled approximately \$10,000.00 from Society Bank into his SAIC Retirement Account.

In [Plaintiff's] Exhibit 44 [a spreadsheet created by Robert], Robert conducts a complex financial calculation in an attempt to demonstrate what the present value of the \$10,484.46 was that he had in retirement prior to the parties' marriage. This money was co-mingled in the parties' investment accounts, but Robert argues he can demonstrate its present value. After having gone through his numerical calculations, Robert arrives at a pre-marital figure of \$44,929.00. Robert acknowledges that in 1999 the parties converted their investment account into a Roth IRA and at that time they had to pay \$8,000.00 in tax for the conversion. Additionally, Robert acknowledges that some of the money in the TD Ameritrade Account was Toni's pre-marital funds from an investment. Toni testified that in November of 1991, she rolled over \$1,724.29 into the parties' retirement fund, and in August of 1991, rolled over \$2,206.19 into the parties' retirement fund.

After having considered the statutory factors in O.R.C. § 3105.171, the testimony of the witnesses, their credibility and demeanor, the court finds that Robert has proved by a preponderance of the evidence that he has a non-marital interest in his Roth IRA in the amount of \$10,484.46. This is the amount that Robert rolled over in November of 1991 from his Wright

Patterson Air Force Base account into Society Bank. Roughly this same amount was rolled over several times until it eventually ended up in the parties' Roth IRA. The court acknowledges that Robert attempted to demonstrate the present value of the \$10,484.46 and estimated that the present value is now \$44,929.00. However, the court finds that expert testimony would have been needed to arrive at this figure. The court finds that there were several discrepancies in Robert's mathematical calculations, and as a result, finds that he has failed to demonstrate that he has any non-marital interest other than the \$10,484.46.

(March 7, 2014 Decision, 9-10).

{¶ 8} Robert first contends that the law does not require him to present expert testimony to prove the present value of the \$10,484. The law does not require expert testimony to prove appreciation on separate property in every case. But in some cases it is necessary to meet the burden of proof.

{¶ 9} "A party who claims that property is traceable to his separate property," we have said, "has * * * the burden to prove that proposition by a preponderance of the evidence. *Oral testimony as evidence, without corroboration, may or may not satisfy the burden.*" (Citations omitted.) (Emphasis added.) *Maloney*, 160 Ohio App.3d 209, 2005-Ohio-1368, 826 N.E.2d 864, at ¶ 23. We have also said that a court does not improperly require documentation as a condition of tracing merely because it finds undocumented oral tracing testimony not credible on the facts. *Baker v. Baker*, 2d Dist. Montgomery No. 23962, 2011-Ohio-2181, ¶ 15. In sum, while traceability of separate property may be established by the proponent's testimony alone, such testimony does

not necessarily support the separate-property assertion adequately. See *West v. West*, 9th Dist. Wayne No. 01CA0045, 2002 WL 388845, *5 (Mar. 13, 2002) (saying that “[w]hile traceability of separate property may be established by the proponent’s testimony alone,” the husband’s testimony did not “adequately support his assertion” that the property was traceable).

{¶ 10} Here, if Robert’s Roth IRA account had been left alone during the marriage, it would be clear that any additional amount in the account above the original \$10,484 is his separate property. No expert would be needed. As it is, however, during the parties’ marriage, there were numerous contributions of both separate funds and marital funds. And there were a dizzying number of account rollovers, including a rollover in 1999 of the entire account to a Roth IRA. This rollover, accomplished during the marriage, required the payment of \$8,000 for taxes due to convert the account. We note that Toni testified that the money to pay the taxes came from marital funds; Robert admitted that this was “potentially” true (Tr. 94). If marital funds were used, it would mean that marital funds were used to pay the taxes on pre-marital money.

{¶ 11} Robert’s spreadsheet (Plaintiff’s Exhibit 44) purports to trace the appreciation of his original \$10,484 contribution. But the spreadsheet is far from intuitive and, as the trial court noted in its decision, does not mention the tax payment. Robert’s testimony does little to clarify the matter. He explained that he used account statements to make the spreadsheet and that the tax payment is not on any statement. Robert admitted that he is not an accountant, and no evidence gives a reason to think that he has any particular knowledge of accounting or taxation principles. The trial court could reasonably have decided that it did not give full credence to Robert’s calculations. While expert

testimony is not required as a matter of law, we cannot fault the trial court for concluding that an expert's opinion was required in this case.

{¶ 12} Ultimately, the court concluded that Robert proved that only the original \$10,484 is his separate property. In essence, then, the court found that Robert failed to show a connection between the \$10,484 and the \$34,445 that he claimed as passive income and appreciation. There is competent, credible evidence to support the trial court's decision, so we will not disturb it.

{¶ 13} The first assignment of error is overruled.

B. The Division of the Equity in the Marital Residence

{¶ 14} The second assignment of error alleges that the trial court erred in its determination that only \$27,165 of the equity in the marital residence is Robert's separate property.

{¶ 15} Robert claims that he is entitled to \$69,000 of the equity as his separate property as a result of his owning a home that he bought before the parties married. In 1988, Robert bought a house on Vale Avenue for \$59,000. The trial court said in its decision that to pay for the house Robert "incurred a mortgage of \$32,735.00." (March 7, 2014 Decision, 7). "This would suggest," said the court, "that Robert made a down payment of \$27,165.00." (*Id.* 7-8). In 1991, Robert and Toni were married, and they paid off the Vale mortgage two years later. In 1995, they decided to build the marital residence, located on Koster Lane, in Dayton. To help pay for their new home, they obtained a \$69,000 swing loan using the Vale home (appraised at \$87,000) as collateral. They closed on the marital residence in November 1995, and a few months later, in March

1996, they sold the Vale home for \$89,900.

{¶ 16} Finding that Robert adequately traced only his \$27,165 investment in the Vale property, the trial court noted that other than the evidence of the down payment on the Vale property Robert did not provide any evidence of that property's value at other times. The court also noted that the Vale property was sold five years after the parties were married.

{¶ 17} We note that the trial court may have misconstrued some of the evidence. Robert testified that the Vale mortgage was \$47,900. (Tr. 18); *see also* Defendant's Exhibit O (showing a mortgage for this amount). So the down payment was \$12,000. It is the principal balance of the mortgage just before the parties were married that was \$32,735. (Plaintiff's Exhibit 35). Still, the court's determination of Robert's pre-marital investment is a correct figure. The \$12,000 down payment plus the \$15,165 of the mortgage that Robert paid before the marriage (the \$47,900 opening principal balance minus the \$32,735 balance just before the marriage) equals \$27,165.

{¶ 18} Robert contends that \$69,000 of the sale proceeds can be traced to the marital residence through the swing loan. The loan, he says, was taken out against the Vale house and used to pay for the marital residence. And, he continues, the swing loan was later paid off using proceeds from the sale of the Vale house. At the very least, says Robert, the Vale home's \$30,000 in passive appreciation is his separate property.

{¶ 19} The evidence shows that Robert's separate interest in the Vale property is only partial. Of the \$59,000 purchase price, \$27,165—or 45%—was paid by Robert using pre-marital funds. The remainder was paid from marital funds. Robert's separate interest

in the sale proceeds, then, could be viewed as \$40,050 (45% of \$89,900)—\$27,165 in pre-marital funds and \$12,885 of appreciation. This assumes, of course, that the property’s appreciation was entirely passive. The evidence suggests that this may not be the case. Toni testified that she and Robert made improvements to the Vale house after they were married. She said that they remodeled and updated the bathroom, installed a dishwasher and a garbage disposal, put in a new furnace, and installed new flooring. She also said that they did landscaping. Toni testified that all of these improvements were paid for out of marital funds.

{¶ 20} The trial court could have found that Robert failed to prove that the appreciation in the Vale property was entirely passive, and failed to present evidence from which it could determine how much of the appreciation was active and how much was passive. There is competent, credible evidence to support the trial court’s decision that only \$26,165 of the marital-residence equity is Robert’s separate property. We will not disturb that decision.

{¶ 21} The second assignment of error is overruled.

{¶ 22} The trial court’s judgment is affirmed.

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DONOVAN, J., and WELBAUM, J., concur.

Copies mailed to:

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- Hon. Timothy D. Wood