

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

LYNDA C. EIKENBERRY

Appellant

v.

F. WILLIAM EIKENBERRY

Appellee

C.A. No. 09CA0035

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 07-DR-0392

DECISION AND JOURNAL ENTRY

Dated: June 28, 2010

Per Curiam.

{¶1} Plaintiff-Appellant, Lynda Eikenberry (“Wife”), appeals from the judgment of the Wayne County Court of Common Pleas, Domestic Relations Division, entering the terms of her divorce from Defendant-Appellee, F. William Eikenberry (“Husband”). This Court affirms in part and reverses in part.

I

{¶2} Husband and Wife met at an on-line dating site in December 2005. Husband was a retired federal employee who lived in Wheatland, Wyoming. Wife, who had divorced a year earlier following a 21-year marriage, resided with friends in Chicago, Illinois, and worked part-time for Nordstrom department store. The parties met in person in the weeks that followed and were eventually married on February 25, 2006, at which point Wife moved to Wyoming to begin her married life with Husband. At that time, Husband had a one-half interest in his Wyoming townhouse, a 19-acre cattle ranch which had always operated at a loss, two older vehicles, and

little in the way of savings. Husband had a pension benefit of approximately \$60,000 per year, half of which was paid directly to his first wife. Wife did not own a car at the time and brought only her personal possessions and some household furniture with her into the marriage with Husband. Wife did not work at any point in time during the marriage and testified that her annual income had never exceeded \$30,000 at any point in her life.

{¶3} After a few months of marriage, Wife moved to an apartment in Wooster, Ohio, the area in which she had resided in her childhood. Husband claims that there was no marital discord at the time and that the move was prompted by Wife's desire to attend an accelerated program in medical assisting, coupled with the parties' desire to obtain a second residence in Wife's hometown. Wife claims that Husband was very controlling and paranoid, so she decided in June 2006 that she would leave Wyoming to start school in Ohio while the couple was "sorting through" their relationship problems. Irrespective of their differing opinions as to the tenor of their relationship, the following financial transactions are undisputed.

{¶4} About the time Wife relocated to Wooster, both she and Husband came into various sums of money. In June 2006, Wife received a federal income tax refund of approximately \$30,000 as a result of the winding up activities of a business that she and her first husband had owned. Wife held the money from the tax refund in cash until a significant portion of it was later sent to her brother in Ohio. In August 2006, Husband received approximately \$276,000 as the sole heir to the estate of his former fiancée, who had passed away in 2003 while she was a member of a class action suit which had since resolved. Husband received a second disbursement of nearly \$180,000 from this estate in September 2006. Both of Husband's bequests, totaling over \$450,000, were deposited into the parties' joint accounts in Wyoming. The bulk of these funds were held in their joint savings account, with approximately \$90,000

being held in their joint checking account. Before Husband's bequests were deposited into the parties' savings and checking accounts, the balances in those accounts were \$13.21 and \$5,811.17 respectively.

{¶5} Shortly before her move to Ohio and without Husband's knowledge, Wife gave Husband's relatives cash that she had on hand from her tax refund in exchange for them writing checks for her in the same amount, payable to Wife's brother in Lakeville, Ohio. The four checks sent to Wife's brother totaled \$24,000. Wife testified she never intended to share any of these funds with Husband and was going to use them for living expenses in Ohio.

{¶6} Upon her arrival in Wooster in late July 2006, Wife established a checking account in her name only at Apple Creek Bank. She then initiated a wire transfer in the amount of \$30,000 from the parties' joint checking account in Wyoming into her separate account in Wooster. Within days of the account being opened, Wife also deposited \$8,000 in cash and a cashier's check for \$10,500. Wife closed the Apple Creek Bank account within a month, and in turn, opened a checking and savings account, again in her name only, at National City Bank.

{¶7} With Wife residing in Wooster and intending to pursue further schooling, the couple purchased a 2007 Toyota Camry. Wife selected the vehicle, and Husband signed and mailed a check to the dealership on July 22, 2006, paying in full for the vehicle. The check was drawn upon the parties' Wyoming joint checking account and the vehicle was titled in Ohio in both parties' names. In September 2006, Husband decided to trade in his 1989 pickup truck for a 2007 GMC truck. Again, Husband purchased the vehicle outright and had it titled in Wyoming in both parties' names.

{¶8} Following the summer of 2006, Wife resided almost exclusively in Wooster. Husband traveled back and forth between Ohio and Wyoming because he was a candidate for the

Wyoming State Auditor position in the November 2006 election. Ultimately that fall, Wife's classes were cancelled based on low enrollment and Husband was unsuccessful in his election bid.

{¶9} At some point after Wife's move to Ohio, the parties established various accounts at National City Bank in Wooster. Husband testified they established one in his name only, one in her name only, and a joint account (in addition to the ones Wife had established on her own). According to Husband, the funds in the parties' joint account were to be used "only for necessities[.]" Husband later realized that Wife already had an account in her name only and he asked to have his name placed on that account, which Wife did.

{¶10} In January 2007, Husband transferred \$200,000 from the parties' savings account in Wyoming to the joint savings account at National City Bank ("the Wooster joint savings account"). On May 8, 2007, Husband initiated a \$23,000 wire transfer from the parties' joint checking account in Wyoming to Wife's individual savings account at National City Bank based on Wife's request for additional funds to cover their living expenses in Wooster. Based on the parties' desire to have dual residency in Ohio and Wyoming, on June 22, 2007, Husband and Wife placed a \$1,000 deposit on a lot in a condominium development that was planned for the Wooster area.

{¶11} On June 29, 2007, Wife withdrew \$103,000 of the then \$206,000 balance in the Wooster joint savings account. Within weeks of this withdrawal, Wife moved to Florida. On July 25, 2007, Wife initiated a \$103,000 wire transfer from her National City Bank savings account to a checking account she had established at Bank of America in Florida. The next day, Wife withdrew that entire amount from Bank of America, less a \$10 wire transfer fee. In August, Wife deposited an additional \$4,600 into her Bank of America account, and again,

withdrew the entire amount, less \$60, the next day. At the same time, Wife rented a safe deposit box at Bank of America. Upon withdrawing the money, Wife converted the funds into various denominations of cashier's checks, ranging in value from \$10,000 and \$5,000, to checks in the amount of a few hundred dollars.

{¶12} On August 14, 2007, Wife filed for divorce and Husband filed a counterclaim for the same. The trial court issued mutual restraining orders which enjoined the parties from, amongst other things, disposing of, encumbering, or transferring any of their assets. On January 22, 2008, Husband filed a motion for contempt alleging that Wife had disposed of a significant portion of the \$103,000 she withdrew from the Wooster joint savings account prior to filing for divorce. Husband simultaneously filed a motion requesting Wife deposit with the court any funds remaining from her \$103,000 withdrawal. Wife, in turn, filed a motion for spousal support requesting \$5,000 per month in spousal support in light of Husband's pending motions. Following a hearing on the matter, the magistrate issued an order on March 7, 2008, requiring Wife to deposit "all funds in [her] possession [] that have as their source the \$103,000 which she withdrew" in an interest bearing account in Husband's name. The magistrate delayed ruling on Wife's motion for spousal support and Husband's motion for contempt because Wife had not been properly served with the contempt motion. Shortly thereafter, Wife filed a motion to set aside the magistrate's March 7, 2008 order. Husband filed a motion in opposition to Wife's motions, and the trial court denied Wife's motion and adopted the magistrate's March 7, 2008 order.

{¶13} On May 29, 2008, Husband amended his motion for contempt and properly served Wife at her Florida address with the motion, summons, and order to appear. On July 2, 2008, Husband filed a supplemental contempt motion arguing that Wife had failed to abide by

the terms of the court's March 2008 entry, ordering her to deposit the balance of the \$103,000 in funds withdrawn from the Wooster joint savings account. At some point in late July 2008, Wife deposited \$1,000 with Husband's attorney in response to the court's March 2008 order.

{¶14} In August 2008, Husband filed a motion to compel Wife to respond to discovery requests and a motion for attorney fees. Following a hearing, the court ordered the exchange of specified financial and other documentary evidence between the parties. After the parties exchanged those documents, Husband filed a second supplemental motion for contempt arguing that the financial documents Wife submitted in response to his discovery requests evidence her past expenditures and budget for future expenses based on her use of the remaining balance of the \$103,000 she had withdrawn from the Wooster joint savings account.

{¶15} On October 28, 2008, the matter was heard before a magistrate. The magistrate determined that the \$103,000 withdrawn from the Wooster joint savings account was Husband's separate property and that, based on Wife's return of only \$1,000 of that amount, Husband was entitled to judgment against Wife for \$102,000. The magistrate further concluded that the two vehicles purchased by the parties, a 2007 Toyota Camry and a 2007 GMC truck, were likewise purchased with Husband's separate funds and awarded him both vehicles, in addition to all the items listed on Husband's separate property exhibit. Additionally, the magistrate found that Wife was in contempt of the court's March 2008 order because she had continued to utilize the funds she had withdrawn from the Wooster joint savings account and had not re-deposited the remaining funds at the time she was directed to do so by the court. Accordingly, Wife was sentenced to 3 days in jail and fined \$250 for her contempt.

{¶16} Both parties filed objections to the magistrate's findings. The trial court overruled both parties' objections, with the exception of Wife's request to be restored to her

former name. The trial court adopted the magistrate's findings, including the finding of Wife's contempt.

{¶17} Wife timely filed an appeal from the court's entry of divorce, asserting three assignments of error for our review. We have consolidated two of her assignments of error to facilitate our analysis.

II

Assignment of Error Number One

“THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOCATED ALL OF THE ASSETS OF THE PARTIES AS SEPARATE PROPERTY OF WILLIAM EIKENBERRY AND ALLOCATING POSSESSION OF IT ALL TO HIM RESULTING IN A DIVISION OF WHICH WAS NOT FAIR OR EQUITABLE.”

Assignment of Error Number Two

“THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THE JOINT MARITAL BANK ACCOUNT TO BE WILLIAM EIKENBERRY'S SEPARATE PROPERTY IN ITS ENTIRETY.”

{¶18} Wife's first two assignments of error are that the trial court incorrectly identified certain assets as Husband's separate property and failed to equitably divide the marital property under R.C. 3105.171. Specifically, Wife argues in her first assignment of error that the trial court incorrectly awarded Husband all of the items he identified as his separate property, which included: (1) the 2007 Toyota Camry that was titled in both parties' names; (2) the contents of Wife's rental unit and storage unit in Florida; (3) all contents of Husband's Wyoming townhouse; (4) all jewelry, including Wife's watch, gold necklace, rings, and earrings; (5) Wife's clothing; (6) all televisions, including those in Wife's possession; and (7) all of Husband's personal property still in Wife's possession. In her second assignment of error, Wife argues that the funds she withdrew from the Wooster joint savings account were not Husband's

separate property, but were marital property that Husband intended for her to use to support herself. Wife argues that, by depositing the funds in the Wooster joint savings account to support Wife while living in Ohio, Husband demonstrated the donative intent necessary to consider the funds a marital asset because they were a gift from Husband to Wife.

{¶19} Section 3105.171 of the Ohio Revised Code defines marital and separate property and governs the division of assets in divorce and legal separation. Under Section 3105.171(A)(6)(a)(i), separate property includes any interest in property that was inherited by one spouse during the course of the marriage. “The commingling of separate property with other property of any type does not destroy [its] identity *** as separate[], except when the separate property is not traceable.” R.C. 3105.171(A)(6)(b). The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property. *West v. West* (Mar. 13, 2002), 9th Dist. No. 01CA0045, at *5.

{¶20} This Court has written that “[t]he characterization of property as either marital or separate is a factual inquiry, and we review such characterization under a manifest weight of the evidence standard.” *Morris v. Morris*, 9th Dist. No. 22778, 2006-Ohio-1560, at ¶23, citing *Boreman v. Boreman*, 9th Dist. No. 01CA0034, 2002-Ohio-2320, at ¶7-8. Inasmuch as a court cannot weigh evidence unless there is evidence to weigh, however, our first inquiry has to be whether Husband presented sufficient evidence that the items at issue either consisted of funds from his inheritance or were bought with funds from that inheritance. *Whitaker v. M.T. Auto. Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13.

The \$103,000 Withdrawal

{¶21} Wife argues on appeal that the \$200,000 Husband transferred into the Wooster joint savings account was a gift to Wife because, by placing the money there, Husband intended at the time of the transfer that Wife use those funds for her everyday needs and that she accepted those funds for her use. The evidence adduced at trial, however, demonstrates otherwise.

{¶22} There is no doubt that the money in the Wooster joint savings account was part of Husband's inheritance. Because Wife claims that that money was a gift from him to her, she had the burden to demonstrate that he intended the money to be a gift. *Wohleber v. Wohleber*, 9th Dist. Nos. 08CA009402 & 08CA009403, 2009-Ohio-995, at ¶16. Wife failed to sustain her burden to demonstrate that, at the time \$200,000 of Husband's inheritance was deposited into the Wooster joint savings account, Husband intended to gift the money to Wife. See *id.* Wife's testimony did establish the fact that the money was placed into a joint account. However, the form in which title is held is not determinative of whether the property is separate or marital. R.C. 3105.171(H); see, also, *Millstein v. Millstein*, 8th Dist. Nos. 79617, 79754, 80184, 80185, 80186, 80187, 80188 & 80963, 2002-Ohio-4783, at ¶118 ("R.C. 3105.171(H) means that the form of title is relevant to, but not conclusive of, the classification of property being either marital or separate"). Significantly, Wife offered no testimony at all regarding Husband's alleged donative intent at the time of transfer.

{¶23} Conversely, Husband produced bank records to trace his receipt of over \$450,000 in inheritance from his late fiancée shortly after he and Wife married. Before receiving that money, Husband and Wife had less than \$6,000 in savings in their joint savings account. Husband's bank records illustrated that in January 2007, he transferred \$200,000 from the parties' joint savings account in Wyoming to the Wooster joint savings account. Husband

testified that he and Wife agreed that the \$200,000 was “not to be used” and was placed there “only for necessities[.]” Husband further testified that he never told Wife that she could spend the money, that he viewed the inheritance as his, and that he intended it not to be spent without his consent. The bank records evidence this understanding, as no funds were withdrawn from the Wooster joint savings account by either party until Wife’s unilateral withdrawal of \$103,000 six months after the funds were deposited. Husband also testified that Wife understood that his inheritance money was not for use at her desire. In assessing the credibility of the witnesses, the trial court was free to believe Husband’s testimony as to what his intentions were at the time he transferred the funds to the account. *Saluppo v. Saluppo*, 9th Dist. No. 22680, 2006-Ohio-2694, at ¶56 (concluding it was not error for the trial court to find Husband’s testimony on the value of his business unbelievable).

{¶24} To the extent Wife argues the trial court’s decision was inequitable, we note that the trial court concluded based on the evidence presented that Husband’s payments of nearly \$14,000 of Wife’s pre-marital debt (including, in part, her attorney fees from her first divorce); payment of \$4,500 for a lifetime chiropractic benefit to a Wyoming chiropractor’s office; and payment of over \$13,000 for dental work Wife had done, constituted gifts of Husband’s separate property to Wife because they were transactions that Husband either knew or should have known about. In light of the evidence presented at trial, we conclude that Husband presented sufficient evidence that the money in the Wooster joint savings account was his separate property and the trial court’s conclusion that it was his separate property was not against the manifest weight of the evidence.

The Toyota Camry

{¶25} At trial, Husband presented multiple financial documents evidencing that the inheritance money he received shortly after the parties were married was the source of the funds he used to purchase the 2007 Toyota Camry for the couple to use in Ohio. Approximately \$90,000 of Husband's inheritance funds remained in the parties' joint checking account and a part of those funds was later withdrawn to purchase the vehicle.

{¶26} Wife asserts that because the vehicle was titled in both parties' names, was paid for by a check drawn upon an account they held jointly, and was generally driven by her, it was error for the trial court to conclude that the vehicle was Husband's separate property. We note, however, that R.C. 3105.171(H) expressly provides that "the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." Consequently, Wife's argument lacks merit, as Husband was able to demonstrate, by a preponderance of the evidence, that the funds used to purchase the 2007 Toyota Camry were traceable as his separate property and Wife offered no additional evidence demonstrating Husband's donative intent. Accordingly, Husband presented sufficient evidence that the Toyota was his separate property, and the trial court's conclusion that it was his separate property was not against the manifest weight of the evidence.

Other Personal Property

{¶27} Wife likewise argues that the trial court erred in concluding that Husband's separate property included the contents of her Florida rental and storage unit; his Wyoming townhouse; her jewelry, clothing, televisions; and his personal property that remained in her possession. Husband introduced and attested to an exhibit itemizing his separate property, which included all of the property about which Wife now complains. We have concluded above that

the trial court correctly determined that the \$103,000 Wife withdrew from the Wooster joint savings account was Husband's separate property, as the funds were directly traceable to his inheritance funds. Thus, in order to support his claim that the property in Wife's possession is actually his separate property, Husband must demonstrate that the property was purchased with part of the \$103,000. *West* at *5. Husband can satisfy his burden through documents and/or testimony. See, generally, *Ostmann v. Ostmann*, 9th Dist. No. 05CA0081-M, 2006-Ohio-3617 (husband sufficiently traced his separate property through testimony and exhibits); *Salmon v. Salmon*, 9th Dist. No. 22745, 2006-Ohio-1557, at ¶¶12-13 (holding that husband failed to adequately trace property as his separate property and wife's testimony, unsupported by other evidence, was sufficient for the trial court to find that the property was marital).

{¶28} Husband did not testify as to any specific items of property in Wife's possession that she purchased with part of the \$103,000. Additionally, he did not present any receipts for Wife's purchases in Florida. Husband's support for his claim was an exhibit he submitted that identified categories of personal property he claimed as his separate property. The fact that Husband merely claimed that the property listed in his exhibit constitutes his separate property does not make it so. Such an exhibit without more is insufficient to *trace* the property in Wife's possession as his separate property.

{¶29} However, Wife admitted to withdrawing the money without Husband's knowledge and taking the \$103,000 "[t]o start [her] life over [and] to live on" once she relocated to Florida. Wife admitted that she bought several home furnishings with the \$103,000 when she relocated to Florida. She also testified as to an exhibit representing her accounting of how she spent the \$103,000 and specifically itemized certain purchases and provided some receipts and pictures of the items as follows:

living room and bedroom furniture	\$3612
armoire	\$2799
television	\$1819
rug	\$269
sofa table and décor	\$429
throw pillows	\$52.98
living room décor	\$124.66
towels, picture frames and art	\$226.36
dinning room table and chairs	\$1532
kitchen table and chairs	\$1199
bedding	\$350
pillows	\$85
computer	\$906.29
computer desk	\$210
printer	\$399
lamp	\$50
battery back-up	\$75
items for the master bathroom	\$535.10
towels	\$76.05
drinking glasses	\$31.98
cups	\$34.32
bowls	\$65
extra drinking glasses	\$30
ironing board	\$16.99
iron	\$59.99

ladder	\$45
set of pots and pans	\$89.99
miscellaneous kitchen items	\$194.23
extra pots and pans	\$117.98
dishes	\$52.70
mixer	\$320
telephone	\$180.61
household cleaning items	\$75

Wife admits to buying the above items, totaling \$16,318.22, with part of Husband's inheritance funds. In light of Wife's admissions, there was evidence that directly traced Husband's separate funds to the purchase of the above items. Thus, it was not error for the trial court to award these items as Husband's separate property.

{¶30} However, Husband generally claims that *all* of the furniture, housewares, televisions, and the computer in Wife's possession in Florida are his separate property. Because Husband did not present sufficient evidence to trace the property; his recovery is properly limited to the purchases Wife admitted to making with the \$103,000. Husband did not meet his burden with respect to any other of the furnishings in Wife's Florida home. Thus, the trial court erred in awarding these untraced items to Husband as his separate property.

{¶31} With respect to clothing, Husband's exhibit again simply stated that "all [of Wife's] clothes" were his separate property. Wife admitted to buying \$3500 worth of clothing with the \$103,000. However, Husband did not provide evidence as to what items of clothing were purchased with the \$103,000. Husband did not establish that the only clothing Wife owned at the time of trial was the clothing she purchased with part of the \$103,000. Thus, Husband did not present sufficient evidence to meet his burden of establishing that all of Wife's clothes were

his separate property, and the trial court erred in awarding all of Wife's clothing as Husband's separate property.

{¶32} Husband also generally claimed that all of Wife's jewelry was his separate property. Again, Husband did not specifically identify any items of jewelry that he claimed were his separate property and did not offer any evidence to trace the use of his separate funds to the purchase of jewelry. Consequently, Husband did not meet his burden to trace the jewelry as his separate property.

{¶33} In her merit brief, Wife suggests that the trial court erred in failing to award her personal property as her separate property. Although Wife testified that she owned clothing and other personal property prior to her marriage and that she packed personal property and clothing when she moved to Florida, she did not specifically identify any items of personal property that she claimed were her separate property. Thus, Wife likewise failed to meet her burden to establish that any personal property in her possession was her separate property.

{¶34} Based on the foregoing analysis, we conclude that Husband sustained his burden of establishing, by a preponderance of the evidence, that Wife utilized his separate funds from the Wooster joint savings account to purchase the specifically identified pieces of furniture, home furnishings and electronics totaling \$16,318.22. Conversely, although Husband and Wife generally assert a separate property interest in the remaining personal property, neither party presented sufficient evidence from which the trial court could find that either party had a separate property interest in the remaining personal property.

{¶35} Accordingly, Wife's first assignment of error is sustained in part and overruled in part. Wife's second assignment of error lacks merit and is overruled.

Assignment of Error Number Three

“THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING LYNDA EIKENBERRY IN CONTEMPT OF COURT AND SENTENCING HER TO A JAIL TERM OF THREE DAYS WITHOUT ABILITY TO PURGE HERSELF OF THE CONTEMPT.”

{¶36} In her third assignment of error, Wife argues that the trial court erred when it found her in contempt of its March 2008 order because she had complied with the “spirit” of the order when she returned to Husband the remaining \$1,000 of the funds she had in her possession in late July 2008. Wife asserts that, by returning these funds, she satisfied the court’s order, and even if she did not, the trial court abused its discretion by failing to provide her with an opportunity to purge the contempt.

{¶37} “Contempt of court may be defined as disobedience of a court order or conduct that brings the administration of justice into disrespect or impedes a court’s ability to perform its functions.” *Freeman v. Freeman*, 9th Dist. No. 07CA0036, 2007-Ohio-6400, at ¶45, quoting *Willis & Linnen Co., L.P.A. v. Linnen*, 9th Dist. No. 22452, 2005-Ohio-4934, at ¶17. Contempt may be classified as either civil or criminal in nature. *Denovchek v. Bd. of Trumbull Cty. Commrs.* (1988), 36 Ohio St.3d 14, 16. This distinction is based on the character and purpose of contempt sanctions imposed. *Id.* In addressing the differences between two classifications, we have explained that:

“Punishment is remedial or coercive and for the benefit of the complainant in civil contempt. Prison sentences are conditional. The contemnor is said to carry the keys of his prison in his own pocket, since he will be freed if he agrees to do as ordered. Criminal contempt, on the other hand, is usually characterized by an unconditional prison sentence. Such imprisonment operates not as a remedy coercive in its nature but as a punishment for the completed act of disobedience, and to vindicate the authority of the law and the court. Therefore, to determine if the sanctions in a cause were criminal or civil in nature, it is necessary to determine the purpose behind each sanction: was it to coerce the [party] to obey the court order, or was it to punish [the party] for past violations?” (Internal citations, quotations, and alterations omitted.) *Doerfler v. Doerfler*, 9th Dist. No.

06CA0021, 2006-Ohio-6960, at ¶16, quoting *Brown v. Executive 2000, Inc.* (1980), 64 Ohio St.2d 250, 253-54.

{¶38} Here, the contempt sanctions recommended by the magistrate and adopted by the trial court were criminal in nature, as the jail time imposed was unconditional and designed to punish Wife for her disregard of the court’s March 2008 order. It is evident that the trial court sought to punish Wife for her failure to abide by the court’s March 2008 order to return whatever funds remained in her possession, as she admitted at trial that, despite having received the court’s order, she spent nearly all of the \$103,000 she withdrew because she needed “to have money to survive and live on[, ***] to pay rent[, *** and] to pay utilities.” Wife’s testimony revealed that she continued to spend the money well beyond March 2008, including paying a portion of her attorney fees, prepaying her rent and utilities through the end of 2008, and buying food and gas cards for use in the future.

{¶39} In previous matters of contempt, this Court has noted that “[a] court order must be obeyed by any person who comes under its ambit, otherwise the dignity and authority of the courts would be compromised. *** [L]itigants who simply do not agree with a court order or its terms are not exempt from compliance on mere philosophical grounds.” *Noll v. Noll*, 9th Dist. No. 03CA008216, 2003-Ohio-5358, at ¶17. Despite Wife’s belief that it was acceptable to continue to spend the funds on her current and future living expenses, the court had expressly ordered her to deposit into Husband’s account the funds that remained at the time. Her failure to do so supports the court’s finding of contempt. Because the court imposed criminal contempt sanctions, Wife’s argument that it erred by not affording her the opportunity to purge herself of the contempt is misplaced. *Musselman v. Musselman*, 9th Dist. No. 03CA0032, 2004-Ohio-833, at ¶14 (concluding that in the instance of criminal contempt, “[a]ppellant was not entitled to an opportunity to purge his contempt prior to the imposition of the jail sentence”).

{¶40} Accordingly, the trial court did not err by imposing criminal contempt sanctions upon Wife for her willful disregard of its March 2008 order. Wife's third assignment of error lacks merit and is overruled.

III

{¶41} Wife's first assignment of error is sustained in part. Wife's second and third assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas, Domestic Relations Division is affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

CLAIR E. DICKINSON
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR IN JUDGMENT ONLY

WHITMORE, J.,
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶42} I write separately to note several concerns I have with the approach taken in the foregoing opinion.

{¶43} Initially, I note that generally this Court reviews a trial court's action with respect to a magistrate's decision for an abuse of discretion. *Fields v. Cloyd*, 9th Dist. No. 24150, 2008-Ohio-5232, at ¶9. Thus, the question before this Court in this case is whether the trial court abused its discretion in characterizing certain property as Husband's separate property and in holding Wife in contempt of its orders to return Husband's funds to him. See *Barlow v. Barlow*, 9th Dist. No. 08CA0055, 2009-Ohio-3788, at ¶11 (concluding that "the trial court did not abuse its discretion when it overruled Husband's objection to the magistrate's decision with regard to [his separate property claim]") and *Malson v. Berger*, 9th Dist. No. 22800, 2005-Ohio-6987, at ¶6 (noting that "[t]his [C]ourt will not overturn a lower court's determination in a contempt proceeding absent an abuse of discretion").

{¶44} With respect to Wife's manifest weight challenge to the characterization of property, we will affirm the trial court's decision on the matter if it is supported by competent, credible evidence. *Morris v. Morris*, 9th Dist. No. 22778, 2006-Ohio-1560, at ¶23, citing *Boreman v. Boreman*, 9th Dist. No. 01CA0034, 2002-Ohio-2320, at ¶7. This standard of review "is highly deferential and even 'some' evidence is sufficient to sustain the judgment and prevent a reversal." *Bucalo v. Bucalo*, 9th Dist. No. 05CA0011-M, 2005-Ohio-6319, at ¶12, quoting *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159. "Oral testimony as evidence, without

corroboration, may or may not satisfy the burden” to adequately trace property as separate under R.C. 3105.171. *Vertrees v. Vertrees*, 2d Dist. No. 06-CA-482007-Ohio-2604, at ¶18, citing *Fisher v. Fisher*, 2d Dist. No. 20398, 2004-Ohio-7255, at ¶9.

{¶45} Moreover, I write to point out that this Court has previously acknowledged under *State v. Wilson*, 113 Ohio St.3d. 382, 2007-Ohio-2202, that “[t]he Supreme Court of Ohio noted that the standards of sufficiency and manifest weight are merged in the civil context[.]” *In re J.S.*, 9th Dist. No. 23842, 2008-Ohio-179, at ¶15. Accord *Chivukula v. Williams*, 12th Dist. No. CA2009-07-187, 2010-Ohio- 1634, at ¶8 (noting that “[a]lthough separate standards of review apply in criminal cases, the standards for sufficiency and manifest weight have essentially merged in civil cases” and “[t]he appropriate standard of review is whether competent, credible evidence exists to support the trial court’s decision”). Accordingly, I disagree with the framework imposed in the lead opinion which returns to a pre-*Wilson* state of distinguishing between sufficiency and manifest weight in a civil context. This approach is contrary to the express direction of the Supreme Court as set forth in *Wilson* and this Court’s precedent. See *Wilson* at ¶24, 26; *Barlow* at ¶6.

{¶46} Bearing these clarifications in mind, I would conclude based on the rationale articulated in the lead opinion that the trial court did not abuse its discretion in finding that the funds held in the Wooster joint saving account were Husband’s separate property because Husband provided competent, credible evidence to support such a determination. Similarly, Husband provided competent, credible evidence that the 2007 Toyota Camry was purchased with funds that were his separate property. Therefore, the trial court did not abuse its discretion in so finding. I dissent, however, with the lead opinion’s decision to sustain a portion of Wife’s first assignment of error and reverse the trial court’s judgment to award Husband a separate property

interest in Wife's other personal property, including her jewelry, clothing, and other possessions kept in her Florida storage unit and Husband's Wyoming townhouse. Despite Wife's claim on appeal that she has a separate property interest in these items, the record reveals that she made no such claim before the trial court, nor did she introduce any evidence at trial to support such a conclusion, other than to state that "all my belongings from *** my prior marriage [are] in the possession of [Husband]." Furthermore, Wife did not challenge Husband's claim at trial that these items were his separate property. Husband's testimony and supporting exhibit as to this matter went unchallenged before the trial court. Wife failed to object to Husband's exhibit being admitted, nor did she cross-examine Husband as to any of the property included in his itemized exhibit. Moreover, the record reveals that Wife admitted to withdrawing the money without Husband's knowledge and that she took those funds "[t]o start [her] life over [and] to live on" once she relocated to Florida. It is also apparent from the record that Wife had no other source of income at the time of her relocation and outfitted her Florida rental unit within weeks of her arrival. The evidence further reveals that once Wife did obtain employment in Florida nearly six months later, her income was sporadic and inconsistent. She earned a net income of less than \$3,000 in a hostess job she held from late December 2007 to mid March 2008 and had earned less than \$3,500 from mid July 2008 through mid September 2008 in a furniture sales role she held at the time of trial. Based on her nominal earnings after leaving Ohio, it was reasonable for the trial court to conclude that the possessions Wife had accumulated at her Florida residence, were obtained through the use of Husband's separate funds.

{¶47} Wife's argument on appeal of this issue is comprised of a one sentence, unsupported and blanket claim that "[t]here is simply no law in the Ohio Revised Code that allows a divorce court to make such an order as this one." In light of the great deference this

Court must accord to the trial court's judgment in such matters and the absence of any attempt by Wife to claim these items as her separate property at trial or to account for how she might have otherwise obtained the property, I would consider Husband's uncontested testimony and exhibit in support thereof to constitute competent, credible evidence in support of his separate property interest in these items. Accord *Salmon v. Salmon*, 9th Dist. No. 22745, 2006-Ohio-1557, at ¶12-13 (reversing a separate property award to Husband because Husband had failed to testify on the matter at trial or adequately trace the separate property he was claiming, and concluding that Wife's testimony alone, unsupported by any other evidence, was sufficient to determine the property marital). See, also, *Vertrees* at ¶18-20 (affirming a separate property award based on husband's unsupported testimony). Because there was "some" evidence to sustain the trial court's decision, I would affirm its judgment on this issue. *Bucalo* at ¶12.

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