[Cite as *Henderson v. Henderson*, 2015-Ohio-1759.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

TERRI HENDERSON,

PLAINTIFF-APPELLEE, **CASE NO. 1-14-09**

v.

WAYNE HENDERSON, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Allen County Common Pleas Court
Trial Court No. CR 2013 0188

Judgment Affirmed

Date of Decision: May 11, 2015

APPEARANCES:

John A. Poppe **for Appellant**

Richard W. Miller, III **for Appellee**

SHAW, J.

{¶1} Defendant-appellant Wayne Henderson ("Wayne") appeals the March 26, 2014, judgment of the Allen County Common Pleas Court, Domestic Relations Division, granting Wayne and plaintiff-appellee Terri Henderson ("Terri") a divorce and distributing the parties' retirement assets.

{¶2} The facts relevant to this appeal are as follows. Wayne and Terri were married on February 14, 2004. On August 9, 2011, they were granted a legal separation. The legal separation divided all of the parties' assets and liabilities with the *sole* exception of the parties' "employment [retirement] benefits." The provision related to retirement benefits stated that if either party was granted a divorce or retired on or before July 6, 2019, the marital value of the retirement accounts would be added together and divided equally between the parties.

{¶3} On April 17, 2013, Terri filed a complaint for divorce alleging that the parties were incompatible and had been living separate and apart for more than a year. (Doc. 1).

{¶4} On May 23, 2013, Wayne filed an answer admitting that the parties were incompatible and that they had been living separate and apart for more than a year. (Doc. 8).

{¶5} Throughout the course of the proceedings, multiple motions were filed by both parties, which included Terri filing a motion to compel discovery regarding Wayne's retirement account information, and a motion for contempt against Wayne for failing to provide that discovery. (Docs. 19, 26).

{¶6} The matter proceeded to a final hearing, which was held on two separate dates. The first day of the final hearing was November 5, 2013. On that day Terri called Wayne to the stand to testify regarding the parties' retirement assets. In an attempt to identify retirement assets that he felt were his own separate premarital property, Wayne identified a document titled as an "antenuptial agreement," which despite the title, had actually been entered into after the parties were already married.[1] Wayne testified that Exhibit B, which was attached to the agreement, contained a list of Wayne's "assets." The list contained three items, a 1998 Oldsmobile Bravada, a 1982 Honda Motorcycle, and a "Mercer Savings – 7 day Notice Account – Balance as of 2/13/2004."[2]

{¶7} Wayne testified that the "7 Day Notice Account" had been created before the marriage, and that he had withdrawn $15,526.76 from a Roth IRA retirement account and placed into this "7 Day Notice Account" just prior to his marriage to Terri. According to Wayne, after the parties were married, the money in the 7 Day Notice Account was withdrawn and placed into a joint checking account, which was used by both Wayne and Terri. Wayne testified that both he and Terri made deposits into that joint checking account, and that they used the

[1] The date the "antenuptial agreement" appears to be notarized was April 23, 2007, over three years after the parties married.
[2] The balance was not included anywhere in the agreement.

joint checking account for various expenses. Wayne also testified that in 2005, he used $3,500 from the joint checking account to contribute to an IRA. (Tr. at 30-31).

{¶8} Before Wayne's testimony concluded on the first day of the hearing, court adjourned. The final hearing resumed on December 17, 2013. At the beginning of the second day of the hearing, Terri called William T. Dicke, a certified financial planner, investment advisor, and insurance agent. Terri also worked for Dicke. Dicke testified that both parties' attorneys asked Dicke to value the parties' retirement accounts. Dicke testified that he had some difficulty securing all the information from Wayne and Wayne's attorney, despite making at least four calls to Wayne's attorney. Dicke stated that he then had to make his best estimate regarding Wayne's retirement accounts based on the information that he was actually provided.

{¶9} Dicke then provided testimony as to the value of the parties' retirement accounts, and how he arrived at those numbers.[3] Ultimately Dicke testified that the marital value of Wayne's retirement account was $67,382.75. (Pl.'s Ex. 25). Dicke testified that the marital value of Terri's retirement accounts were $137,053.07. (*Id.*) According to Dicke, to equalize distribution of marital retirement assets, Wayne was thus owed $34,835.15 from Terri. (*Id.*)

[3] As these amounts are not in dispute on appeal, we will not further elaborate on exactly how Dicke reached these numbers.

{¶10} After Dicke's testimony was concluded Terri took the stand and testified that it was her understanding the legal separation left only one issue unresolved, which was the distribution of the retirement assets. (Tr. at 85, 89, 103).

{¶11} Wayne then testified again, identifying several items that he felt were premarital retirement assets that should have been considered his separate, premarital retirement assets. Among these items were his 7 Day Notice Account, and an "inheritance" from his mother in the amount of $1,000. When asked on cross-examination whether he had any documentation to show the amount of the inheritance, Wayne testified that he could get it, or bring his mother in to testify, but he did not actually provide any documentation. (Tr. at 174). Wayne did again testify that the money from the 7 Day Notice Account had been transferred into a joint account that the parties both used, and both made deposits into. (Tr. at 171). Wayne admitted on cross-examination that all accounts, including the joint checking account, had been dealt with in the legal separation. (Tr. at 176-177).

{¶12} The hearing was concluded once Wayne's testimony was completed. The court then took the matter under advisement. On February 26, 2014, the court filed a decision outlining its findings. The court divided the retirement assets according to the calculations of Dicke, and awarded Wayne $34,835.15 from Terri's retirement account and granted the parties a divorce.

{¶13} Regarding Wayne's claims for an offset for premarital retirement assets, the trial court found that Wayne "failed to provide documentation to establish that any premarital funds were incorporated into the accounts established or contributed to during the marriage as identified in this case by the degree of evidence necessary to establish the same under Ohio Revised Code 3105.171." (Doc. 44). The trial court thus found that Wayne would not be awarded any offset for premarital retirement assets based on his 7 Day Notice Account. (*Id*.) In addition, Wayne was also found to be in contempt for failing to disclose and provide appropriate discovery. (*Id*.)

{¶14} A judgment entry entering the final decree of divorce was subsequently filed on March 26, 2014. It is from this judgment that Wayne appeals, asserting the following assignment of error for our review.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO AWARD APPELLEE-HUSBAND HIS SEPARATE PROPERTY INTEREST IN HIS RETIREMENT ACCOUNT.

{¶15} In Wayne's assignment of error, he argues that the trial court erred by not classifying his 7 Day Notice Account as a retirement asset that was separate property. Specifically, Wayne contends that the balance of the 7 Day Notice Account was entered into evidence and that the trial court overlooked the "uncontroverted testimony as to the amount of [Wayne's] premarital interest in his retirement account." (Appt.'s Br. at 3).

{¶16} The party seeking to have an asset classified as separate property must prove by a preponderance of the evidence that the asset can be traced to separate property. *Taub v. Taub,* 10th Dist. Franklin No. 08AP–750, 2009–Ohio–2762, ¶ 28. The factual findings of a trial court relating to its classification of property as marital or separate are reviewed to determine whether they are against the manifest weight of the evidence. *Barrientos v. Barrientos*, 3d Dist. Hancock No. 5-12-13, 2013-Ohio-424, ¶ 20. In determining whether a trial court's ruling is against the weight of the evidence:

> **[t]he [reviewing] court * * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.**

(Internal quotations and citations omitted.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103. 115 (9th Dist.2001). "In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact." *Eastley* at ¶ 21 (citations omitted).

{¶17} In this case it is undisputed that the parties' legal separation divided all of the parties' assets, with the sole exception of the parties' retirement/employment benefits. The portion of the legal separation covering the retirement/employment benefits reads,

> **In the event that either party is granted a divorce or retires on or before July 6, 2019, the parties agree that the retirement accounts of both parties will be divided as follows.**
>
> **The marital value of all retirement accounts as they exist at the time of the execution of this Agreement will be added together (subtracting any premarital value as outlined in the antenuptial agreement executed by these parties) and will be divided equally between the parties. Only marital contributions from the date of marriage (February 14, 2004) until the execution of this agreement (July 6, 2011) are subject to division. If neither party is granted a divorce or retires prior to July 6, 2019, then any claim for benefits in this section is forever waived.**

{¶18} The "antenuptial agreement" referenced in the legal separation was a document that was prepared after the actual marriage. This was acknowledged by both parties and the trial court. The "antenuptial agreement" contained two attached exhibits, one detailing Terri's retirement accounts, and another exhibit containing a list of three items identified as "Assets of Wayne Henderson." This list consisted of a car, a motorcycle, and the 7 Day Notice Account. The 7 Day Notice Account did not have a value attached to it as part of this exhibit, but Wayne provided documentation and testimony that it was in the amount of $15,526.76.

{¶19} At the final hearing, on both dates, Wayne testified that 7 Day Notice Account was created just before his marriage to Terri from money Wayne had removed from a Roth IRA. However, Wayne also testified that the money in the 7 Day Notice Account was all subsequently placed into a joint checking account that was used by both Terri and Wayne. According to Wayne, they both made deposits into the joint checking account, and used the money to pay bills, take vacations, and buy frozen meat, among other things.[4] Wayne testified that money from the joint checking account was used to fund a new IRA in his name, with an initial deposit of $3,500. Wayne testified that the remainder of the money was incrementally placed into this IRA.

{¶20} On appeal, Wayne argues that the 7 Day Notice Account in the amount of $15,526.76 had been a retirement asset, and that it was traceable as separate property, which should have been awarded to him in the final distribution. We disagree.

{¶21} In reviewing the evidence presented on this issue, the trial court held as follows.

> **Ultimately the testimony presented by Wayne Henderson indicated that he had some premarital funds that he had made contribution to accounts during the marriage that were in his name and he should have received a credit for those premarital accounts, which he indicates came from a seven day notice account.**
>
> **The bottom line is that Wayne Henderson failed to provide documentation to establish that any premarital funds were incorporated into the accounts established or contributed to during the marriage as identified in this case by the degree of evidence necessary to establish the same under Ohio Revised Code 3105.171.**

[4] Wayne also testified that profit from the sale of Terri's condo was placed into this account, and that some of the money in the joint account was used for a breast enlargement for Terri.

(Doc. 44).

{¶22} Wayne contends that in making its finding, the trial court ignored two exhibits entered into evidence that established the status of his 7 Day Notice Account as a retirement asset and confirmed its traceability. The first exhibit referenced by Wayne, Plaintiff's Exhibit 22, contains approximately one-third of a single page of what appears to be some type of partial bank account statement. The exhibit contains transactions for deposits, withdrawals, and interest gained. Both Terri and Wayne's names appear in different places on the document. The document also contains a handwritten note that reads, " 'PreMarital' 7 Day Notice Money was from closed out Roth IRA. It was not an IRA as a 7 Day CD [Account]." (Plaintiff's Ex. 22).

{¶23} The second exhibit referenced by Wayne is a document he created stating the value of the 7 Day Notice Account as $15,526.76 and identifying it and other amounts as "premarital retirement assets." (Def's Ex. LL). Wayne contends that these two exhibits along with his testimony that the 7 Day Notice Account was a premarital retirement account satisfied his burden of proof to show that it was separate property.

{¶24} Despite Wayne's arguments, it is not clear that Wayne's 7 Day Notice Account should even be classified as a "retirement asset." The only remaining assets to be divided at the final hearing were retirement assets. The 7

Day Notice Account was in no way identified as a "retirement asset" on the "antenuptial agreement." In fact, it is simply listed among other non-retirement "assets," which included a car and a motorcycle. Unlike Terri's documented retirement assets attached to the "antenuptial agreement" Wayne attached no documentation establishing its value. The 7 Day Notice Account was just listed as one of several assets. Moreover, the money from the 7 Day Notice Account was placed into a joint checking account, which was, according to Wayne's testimony on cross-examination, taken care of in the Legal Separation. (Tr. at 176-177). Therefore, we cannot find that Wayne clearly satisfied his burden to establish that the 7 Day Notice Account was a retirement asset at all.

{¶25} Nevertheless, even assuming that the 7 Day Notice Account qualified as a retirement asset, we cannot find that the trial court's decision finding that it was not sufficiently traceable was against the weight of the evidence. While Wayne did provide undisputed testimony that the 7 Day Notice Account was created after he closed out a Roth IRA and that the money from the 7 Day Notice Account subsequently went into a joint checking account, the joint checking account contained comingled funds. Wayne admitted that both he and his wife contributed to that joint checking account, and that they both used money from it for various marital reasons including taking vacations and buying meat.

{¶26} Thus on this record it cannot be determined that Wayne's funds from the 7 Day Notice Account were clearly traceable such that they consistently maintained their status as separate property. He simply did not provide enough documentation to show that the money from his 7 Day Notice Account was traceable through the joint checking account to the IRA. As a result, we cannot find that the trial court's decision on this issue was against the weight of the evidence.

{¶27} Lastly, Wayne also argues at the end of his appellate brief that that he should have been awarded an offset in his retirement assets for an inheritance he received from his mother in the amount of $1,000,[5] money for the proceeds from the sale of a 1984 Camaro,[6] money from tax returns, and money from a another 401(k) rollover in the amount of $224.91. However, Wayne has not established his burden that these items should have been classified as retirement assets as he provided little or no documentation for them, nor has he established the requisite traceability, which he similarly did not provide documentation for.[7] As to the 401(k) rollover, Wayne did not clearly establish through documentation that this rollover was for premarital funds. Thus these arguments are also not

---

[5] Testimony indicated his mother was still alive, perhaps suggesting that "inheritance" was not the appropriate designation.

[6] Wayne's testimony indicated that the proceeds from the sale of the Camaro were placed into the joint checking account.

[7] The only support cited by Wayne in his brief for these items as premarital, separate retirement assets are Wayne's testimony and documents Wayne testified he prepared himself listing the items as "retirement assets" and their value.

well-taken. Accordingly, having found no error prejudicial to Wayne, Wayne's assignment of error is overruled.

{¶28} For the foregoing reasons Wayne's assignment of error is overruled and the judgment of the Allen County Common Pleas Court is affirmed.

Judgment Affirmed

ROGERS, P.J., concurs.
WILLAMOWSKI, J., concurs in Judgment Only.

/jlr