[Cite as *Collins v. Collins*, 2015-Ohio-2618.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

PATRICIA COLLINS	C.A. No. 27311
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
WALTER COLLINS, III	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. DR 2010-09-2791

DECISION AND JOURNAL ENTRY

Dated: June 30, 2015

WHITMORE, Judge.

{¶1} Defendant-Appellant, Walter Collins, III ("Husband"), appeals from the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms in part and reverses in part.

I

{¶2} Husband and Plaintiff-Appellee, Patricia Collins ("Wife"), were married in October 1987. The parties' one child was emancipated before Wife filed her complaint for divorce in September 2010. Thereafter, Husband filed an answer and counterclaim for divorce. The major issues before the trial court and on appeal involve (1) the classification of property as separate or marital and (2) spousal support.

{¶3} At the time of the marriage, Husband had a degree in Business Administration. Wife was attending college and completed her degree during the marriage. Throughout the marriage, Husband was the primary breadwinner. A magistrate issued temporary orders in

December 2010. The temporary orders set spousal support at $4,100 per month retroactive to September 2010, the date that Wife had filed her motion for temporary orders.

{¶4} The trial began in October 2012 and concluded in May 2013 with testimony held over a period of five days. Both parties testified and each had an expert testify on their behalf. At the conclusion of trial, the judge directed that the parties file briefs in place of closing arguments.

{¶5} Husband had worked for 23 years for a company most recently known as First Data Corporation. During the pendency of this case, Husband was laid off from his employment and given a severance package. Husband's severance package provided him with a gross income of $12,500 per month for six months beginning in May 2013. At trial, Husband indicated that he planned to retire following the expiration of the severance package.

{¶6} In August 2013, Husband filed a motion to modify his spousal support obligation. Following a hearing in November 2013, the magistrate issued an order finding temporary spousal support reasonable in a modified amount of $1,625 per month. Husband filed objections. Before the transcript of the magistrate's hearing was filed, the trial court issued its final divorce decree dated March 11, 2014. The trial court ordered Husband to pay spousal support in the amount of $4,608 per month beginning May 20, 2013.

{¶7} Prior to the marriage, Husband owned a home on Norma Drive in South Euclid, which was mortgaged. Husband and Wife sold that home during the first year of the marriage and bought a home on Shepard Hills Boulevard in Macedonia. After approximately twelve years, the parties sold the Shepard Hills Boulevard home and bought a home on Olde Farm Lane in Hudson. During the pendency of the divorce proceedings, the Olde Farm Lane home was sold and the sale proceeds were placed in the escrow accounts of the parties' attorneys. Husband

sought to have a portion of those proceeds designated as his separate property, claiming that he had traced them back to his premarital interest in the Norma Drive property. The trial court found all the proceeds from the sale of the Olde Farm Lane property were marital property.

{¶8} Husband also owned some stocks prior to the marriage. Of particular interest for this appeal were Oracle stocks that he had purchased in 1986. At some point during the marriage, Husband transferred these stocks to a Charles Schwab account ending in 1729. Over the years, the stock shares split and increased in value. At the time of the trial, no Oracle stocks remained in the 1729 account. Husband introduced numerous exhibits and expert testimony in an attempt to trace his premarital Oracle stocks to a percent of the current holdings in the 1729 account. The trial court found that the entire 1729 account was marital property.

{¶9} Husband now appeals raising three assignments of error for our review.

II

Assignment of Error Number One

> THE TRIAL COURT ERRED AND VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS BY ITS ORDER MODIFYING TEMPORARY SPOUSAL SUPPORT RETROACTIVE TO MAY 20, 2013 WHEN THE COURT HAD PREVIOUSLY ISSUED TEMPORARY ORDERS INCLUDING SPOUSAL SUPPORT AND THE COURT WAS NOT CONSIDERING AND DID NOT REFER TO THE POST-TRIAL MOTION TO MODIFY.

{¶10} In his first assignment of error, Husband argues that the court erred by increasing his spousal support obligation effective May 20, 2013, when it did not issue its decision until March 2014, by which time his severance pay had ended. We agree.

{¶11} A trial court's award of spousal support is reviewed for an abuse of discretion. *Organ v. Organ*, 9th Dist. Summit No. 26904, 2014-Ohio-3474, ¶ 6. An abuse of discretion indicates that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶12} "[W]hen the parties are operating under temporary support orders without a request for modification, it is inequitable to retroactively apply an increase to the period between the trial and the final judgment entry." *Morrison v. Morrison*, 9th Dist. Summit No. 27150, 2014-Ohio-2254, ¶ 23, citing *Ostmann v. Ostmann*, 168 Ohio App.3d 59, 2006-Ohio-3617, ¶ 43-45 (9th Dist.). In that situation, "any modification * * * may equitably be applied only prospectively from the date of the decree." *Morrison* at ¶ 23, quoting *Ostmann* at ¶ 45.

{¶13} In the present case, Husband was ordered to pay Wife temporary spousal support in the amount of $4,100 per month beginning in September 2010. Neither party filed a motion to modify this amount prior to the conclusion of the trial on May 29, 2013. On the last day of trial, Husband informed the court that he had been laid off and would receive severance pay of approximately $12,500 a month for up to six months. Husband admitted that he was "going to make more money in this year than one might think, for being laid off, because of the severance package." Husband further testified that he planned to retire following the expiration of the severance package.

{¶14} In August 2013, prior to the issuance of the final divorce decree, Husband filed a motion to modify his temporary support obligation because his severance payments were going to end in November 2013. After a hearing, a magistrate found that it was appropriate and reasonable to modify temporary support to $1,625 per month based on Husband's reduced income. Husband objected arguing that the magistrate failed to impute minimum wage to Wife, improperly found the amount of his farm income, and improperly included certain pension income that he claimed was his separate property.

{¶15} On March 11, 2014, the court entered a final divorce decree. The decree did not explicitly mention Husband's motion to modify spousal support, the magistrate's order

concerning that motion, or Husband's objections thereto. But, it did address Wife's earning ability, Husband's farm income, and Husband's separate property pension.

{¶16} The court ordered Husband to pay $4,608 per month in spousal support beginning May 20, 2013. The court noted that Husband had been laid off from his job and that he "*will* receive[, as part of a severance package, a] monthly gross income of $12,500 per month for six months commencing in May 2013." (Emphasis added.) The court used this severance income when calculating Husband's spousal support obligation and specified that the amount could be modified "upon a showing of a substantial change of circumstances by either party including but not limited to * * * termination of [Husband's] monthly severance package payments."

{¶17} Husband's severance payments had terminated approximately four months prior to the final decree. Because the court used income that Husband was no longer receiving in its calculation of spousal support, we conclude the court abused its discretion. *See Jump v. Jump*, 6th Dist. Lucas No. L-00-1040, 2000 WL 1752691, *6-7 (Nov. 30, 2000) (court erred in using husband's military income to calculate spousal support after he had retired from the military).

{¶18} Further, in May 2013, the parties were operating under temporary support orders without a pending motion to modify. Consequently, it was error to retroactively increase Husband's support obligations to May 2013. *See Morrison*, 2014-Ohio-2254, at ¶ 23. Husband does not argue that the court could not modify spousal support retroactive to the date of his motion to modify or the date that his severance package ended, but those dates were in August and November 2013, respectively.

{¶19} Lastly, Husband argues that the court erred when it failed to "preserve the issue of the pending motion to modify temporary spousal support as of the date when Husband's monthly severance package payments terminated." Because this matter is being remanded for the court to

re-determine the date and recalculate the amount of spousal support, Husband's argument regarding the preservation of this issue is moot.

{¶20} To the extent stated above, Husband's first assignment of error is sustained.

Assignment of Error Number Two

> THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT HAD NOT TRACED ANY OF HIS SEPARATE PROPERTY INTEREST FROM THE PREMARITAL NORMA DRIVE PROPERTY TO THE PROCEEDS FROM THE SALE OF 2307 OLDE FARM LANE, HUDSON, OHIO 44236.

{¶21} In his second assignment of error, Husband argues that the court erred in finding that he failed to meet his burden to trace his separate property from a home he purchased prior to the marriage through subsequent home purchases to the proceeds from the sale of the marital home. We disagree.

{¶22} Separate property includes any interest in real property that was acquired by one spouse prior to the date of the marriage. R.C. 3105.171(A)(6)(a)(ii). "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). The party seeking to have property designated as separate bears the burden of proving its status by a preponderance of the evidence. *Barlow v. Barlow*, 9th Dist. Wayne No. 08CA0055, 2009-Ohio-3788, ¶ 7.

{¶23} Because the determination of whether property is marital or separate is a fact-based determination, we review a trial court's decision under a manifest-weight-of-the-evidence standard. *Morris v. Morris*, 9th Dist. Summit No. 22778, 2006-Ohio-1560, ¶ 23. When reviewing the manifest weight of the evidence, the appellate 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 * * *." *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). "Only in the exceptional case, where the evidence presented weighs heavily in favor of the party seeking reversal, will the appellate court reverse." *Boreman v. Boreman*, 9th Dist. Wayne No. 01CA0034, 2002-Ohio-2320, ¶ 10.

{¶24} The burden to prove the separate identity of property can be met with "documents and/or testimony." *Eikenberry v. Eikenberry*, 9th Dist. Wayne No. 09CA0035, 2010-Ohio-2944, ¶ 27. But "merely claim[ing] that the property * * * constitutes * * * separate property does not make it so." *Id.* at ¶ 28. The proponent must demonstrate the amount of separate property traced. *See Morris* at ¶ 26; s*ee also Measor v. Measor*, 11th Dist. Geauga No. 2002-G-2491, 2005-Ohio-1417, ¶ 55 (finding funds not adequately traced when proponent failed to provide documentation of the exact amount or source of the funds). "Oral testimony as evidence of the separate nature of the property, without documentary proof, may *or may not* be sufficient to carry the burden." (Emphasis added.) *Fisher v. Fisher*, 2d Dist. Montgomery No. 20398, 2004-Ohio-7255, ¶ 9.

{¶25} Husband testified that the sale proceeds from each home were applied to the purchase of each subsequent home. In other words, Husband contends that the sale proceeds from the Norma Drive property were applied to the purchase of the Shepard Hills Boulevard property and the sale proceeds of the Shepard Hills Boulevard property were applied to the purchase of the Olde Farm Lane property. Therefore, the first step in analyzing his separate property claim involved determining the amount of the sale proceeds from the Norma Drive property.

{¶26} Husband argues that the trial court speculated that there were closing costs involved with this transaction and further erred by requiring him to provide documentary evidence to establish the amount of those closing costs. According to Husband, he "testified that he netted sufficient funds from the closing of the Norma Drive property to make a $34,000 down payment on the Shepard Hills Blvd[.] property."

{¶27} Husband purchased the Norma Drive property approximately ten years before the marriage. He testified that the purchase price was $41,000. Husband provided the court with printouts from the auditor's website, a copy of his mortgage, and a loan amortization schedule. Within a year after the marriage, the couple sold the Norma Drive property and bought a house on Shepard Hills Boulevard. The Norma Road property sold for $60,000. Husband testified that the net proceeds from the sale were $37,045.

{¶28} The purchase price of the Shepard Hills Boulevard house was $117,000. The mortgage for that home was $83,000. According to Husband, the down payment amount of $34,000 came from the proceeds of the sale of the Norma Road house.

{¶29} After examining the evidence, the trial court found, "[t]he amount of this down payment [on the Shepard Hills Boulevard property] was in excess of the proceeds from the sale of Norma Drive." According to the mortgage for the Norma Drive property, payments were to commence on December 1, 1977. Husband and Wife were married on October 3, 1987. As of the date of the marriage, 118 monthly payments would have been due. The court used the amortization schedule to determine the balance of the mortgage at the date of the marriage was $29,288.55, which corresponds to 118 months on the amortization schedule. The trial court then noted the mortgage balance at the time of sale was $28,828.90, which also corresponds to the

amortization schedule. Based on this, the court determined that the equity in the home at time of sale was $31,171.11.[1] This amount is insufficient to cover a $34,000 down payment.

{¶30} In addition, the record supports that there were closing costs associated with the sale of the Norma Road property and the purchase of the Shepard Hills Boulevard property. According to the auditor's website, there was a conveyance fee for the sale of the Norma Drive property. Husband testified that there was a transfer fee associated with the purchase of the Shepard Hills Boulevard property. The property and mortgage deeds indicate that there were also fees paid to the county recorder.

{¶31} The trial court noted that it did not have settlement statements for the sale of the Norma Drive property or the purchase of the Shepard Hills Boulevard property to review regarding the costs.[2] The trial court, however, based its determination on Husband's failure to trace the amount of his separate property interest. The amortization schedule indicates that the Norma Drive property had less than $34,000 worth of equity. Based on this evidence, Husband did not net enough to cover the down payment. Without evidence of the total amount of the closing costs and who paid them, the trial court was unable to "determine the exact amount of the separate premarital property proceeds and marital proceeds that arose from the sale of Norma Drive." Husband failed to offer any testimony regarding the total amount of the closing costs or which party paid the closing costs that were reflected in the record. Consequently, the trial court was unable to determine the net amount of the sale proceeds.

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[1] Taking the $60,000 sale price and subtracting $28,828.90 results in $31,171.10. We presume the trial court made a typographical error in stating there was $31,171.11 in equity.

[2] Husband did introduce settlement statements for the sale of the Shepard Hills Boulevard property, and the purchase and sale of the Olde Farm Lane property. Each of those statements itemized closing costs and identified whether the costs were paid by the buyer or seller.

{¶32} Indeed, Husband's own testimony indicates that settlement statements or some other evidence of closing costs are needed to determine the net proceeds from a sale of real property. In discussing how he determined the net proceeds from the subsequent sale of the Shepard Hills Boulevard property, Husband testified, "[i]t would be the difference between the mortgage balance and the sale price of the [Shepard Hills Boulevard,] Macedonia home, *less any costs*." (Emphasis added.) He further testified that the resulting number could be found "on the settlement statement."

{¶33} Based on Husband's incomplete testimony and the inconsistencies between the documents and his testimony, we cannot say that this is the exceptional case where the evidence weighs heavily in favor of the party seeking reversal. The trial court did not lose its way in resolving the conflicts in the evidence by relying on the numbers in the amortization schedule rather than Husband's self-serving testimony. Nor can we say that the trial court erred by requiring Husband to produce some evidence, whether by testimony or documents, regarding the closing costs associated with the sale of the Norma Drive property and the purchase of the Shepard Hills Boulevard property.

{¶34} Finally, Husband argues that the trial court erred in not awarding him at least the amount of his original down payment on the Norma Drive property. Following the trial, which was held over several days separated by months, the trial court requested the parties file written briefs instead of making closing arguments. Husband did not file a post-trial brief, but he did file proposed findings of fact and conclusions of law. After reviewing his own testimony, Husband claimed that he traced $34,000 of separate property from the Norma Drive property through the Shepard Hills Boulevard property and to the proceeds from the sale of the Olde Farm Lane property. He did not argue to the trial court, as he does on appeal, that he was entitled to a

minimum amount of $8,200, representing his down payment on the Norma Drive property. Accordingly, he has forfeited this argument and we decline to address in the first instance on appeal. *See Palazzo v. Palazzo*, 9th Dist. Summit No. 27332, 2015-Ohio-1254, ¶ 18.

{¶35} Because Husband failed to meet his burden to trace his separate property interest from the Norma Drive property to the Shepard Hills Boulevard property, it is unnecessary to analyze the evidence presented regarding the Olde Farm Lane property. The trial court did not lose its way in determining that Husband failed to meet his burden of proof to trace his separate property interest from the Norma Drive home to the proceeds from the Olde Farm Lane home.

{¶36} Husband's second assignment of error is overruled.

Assignment of Error Number Three

> THE TRIAL COURT ERRED IN CONCLUDING THAT HUSBAND HAD NOT TRACED HIS SEPARATE PROPERTY IN THE CHARLES SCHWAB IRA ACCOUNT NO. XXX-1729.

{¶37} In his third assignment of error, Husband argues that the court erred in determining that he had not traced his separate, premarital Oracle stocks to the Charles Schwab account ending in 1729 because he produced every statement and expert testimony containing two different methodologies. We disagree.

{¶38} "Property acquired during a marriage is presumed to be marital property unless it can be shown to be separate." *Reed v. Reed*, 3d Dist. Allen No. 1-09-63, 2010-Ohio-4550, ¶ 8. Separate property includes, as relevant to this appeal, "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage [and p]asssive income and appreciation acquired from separate property * * *." R.C. 3105.171(A)(6)(a)(ii) and (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).

{¶39} We review a trial court's characterization of property as marital or separate under a manifest-weight-of-the-evidence standard. *Morris*, 2006-Ohio-1560, at ¶ 23. Under this standard, we are "mindful of the presumption in favor of the finder of fact." *Eastley*, 132 Ohio St.3d 328, 2012-Ohio-2179, at ¶ 21. A reversal is warranted only in the exceptional case where the trier of fact clearly lost its way, thereby, creating a manifest miscarriage of justice. *Id.* at ¶ 20.

{¶40} The parties agree that Husband owned 260 shares of Oracle valued at approximately $8,060 prior to the marriage. Additional Oracle shares were purchased during the marriage. Over the years, the Oracle stock split many times and increased in value. By the time of the trial, there were no Oracle shares in the 1729 account. But, Husband's expert testified that $378,507.46 in the 1729 account was traceable to the Oracle shares that Husband owned before the marriage.

{¶41} At trial, Husband presented the expert testimony of Jason Bogniard, a financial analyst; and Wife presented the expert testimony of Mark Bober, a certified public accountant. In addition, Husband submitted multiple binders containing account statements. In its decision, the trial court stated that it had "carefully reviewed the testimony" of Husband and both experts and had "carefully reviewed all exhibits relevant to this issue."

{¶42} Bogniard testified that Husband's records were "completely intact and represent a complete history during the entire marriage." He further indicated that he reviewed statements beginning prior to the marriage and covering approximately 26 years. Bogniard acknowledged that the 1729 account contained shares of multiple companies and cash, but testified that he

"focused exclusively on the Oracle shares and the subsequent transactions relating to those Oracle shares."

{¶43} Husband argues that Bogniard used two alternate tracing methodologies to support his claim, namely the first-in, first-out and the pro-rata approaches. Husband continues, "if the [c]ourt did not accept the analysis presented in the first approach [first-in, first-out] the [c]ourt should have considered the alternative pro-rata approach." This characterization misconstrues both the trial court's order and Bogniard's testimony.

{¶44} Bogniard indicated that there are various methods of tracing including: first-in, first-out; last-in, first-out; pro-rata; and average cost basis. Bogniard explained that within his analysis he used multiple methods. He testified, "in this case, if there were longer periods of time, [he] felt a normal pro-rata approach was appropriate, and * * * for very short periods of time of commingling, a first-in, first-out approach was appropriate." Thus, while Bogniard used both the pro-rata and the first-in, first-out approaches, he did not utilize those two methods as alternative methods; rather, he used both within his single tracing analysis.[3] In addition, the trial court did not state that it was rejecting a first-in, first-out approach.

{¶45} Bober, Wife's expert, testified that he "was asked to analyze the tracing that was done" by Bogniard. Bober criticized the inconsistent methods used within Bogniard's report. Bober opined that the standard for tracing was not met due to gaps and irregularities in the tracing of the 1729 account.

{¶46} Bober testified:

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[3] Bogniard also performed a "sanity check" using a "coverture fraction." This appears to be what Husband is inaccurately calling the pro-rata approach. Bogniard indicated that his "sanity check" yielded a significantly higher result, but testified that this result was not his opinion of the value of Husband's separate property within the account.

> One of the gaps is that there are specific securities that are * * * analyzed, but what is not tracked is * * * the funds go into the cash accounts or the Money Market accounts. There's no accounting at all, at least as far as I've been provided, for the activity that goes into the cash accounts. And whenever a security is sold, the practice is it goes into this cash reserve account, and then the purchases come out of the cash reserve account.

Bober noted that other transactions that were "predominantly marital took place at the same time." Bober reported that Bogniard failed to account for the allocation of marital versus separate property in the cash accounts when tracing the stocks.

{¶47} According to Bober, Bogniard seemed to be "picking and choosing which securities got the higher marital allocation and which ones got a lower marital allocation when the transactions were all being done at the same time." He further testified that when a mistake is made in tracing it "affect[s] all of the other allocations to the extent that there's subsequent sales and purchases in those securities."

{¶48} In its findings of fact, the court explained that some of the stock sales and purchases were "pass through" transactions while others were "uneven" transactions.[4] The court found that, up until 2003, the transactions were pass through transactions and Husband's separate property was traceable to his premarital Oracle shares. But, the court found Bogniard's tracing analysis began "to crumble with [the] significant number of uneven transactions" after that date.

{¶49} The court found that the commingling of funds in the cash management account did not impact the tracing "in pass through transactions where the separate property shares sold and the shares purchased are virtually identical." But, the court stated that in uneven transactions

[4] Neither party nor the court precisely define what constitutes a "pass through" or "uneven" transaction. In finding the pass through transactions traced by Bogniard, the court indicated that the value of the separate property shares sold and the shares purchased were virtually identical. By contrast, the uneven transaction the court references on November 17, 2003, involved the sale of both separate and marital stocks and the purchase of new stocks in a higher amount than the combined sale proceeds.

"the tracing is adversely impacted *if* the total balance in the cash management account is unknown." (Emphasis added.) Husband argues that the balance was not unknown because he produced every statement for the account. The court did not find that the balance was unknown. Rather, the court explained its concern involved how those funds were allocated to separate and marital property. For uneven transactions, the court elaborated:

> the separate property and marital property percentages [should be] recalculated based upon that deposit and upon the separate and marital property portions already on deposit in that cash management account. These recalculated percentages would then pass on to the new stocks purchased from the cash management account.

The court found that Bogniard failed to trace the cash management account balances and failed to correctly calculate the percentages to pass on to the stocks that were subsequently purchased. Similar to Bober, the court also noted that once a mathematical error was made it "will continue as these shares are sold and others purchased."

{¶50} Although Husband produced voluminous records and an expert, the trial court found that his expert failed to analyze the records fully. Husband's implication that he met his burden by the sheer volume of the records he produced is incorrect. "Weight is not a question of mathematics, but depends on its effect in inducing belief." *Melick v. Melick*, 9th Dist. Summit No. 26488, 2013-Ohio-1418, ¶ 25, quoting *Eastley*, 132 Ohio St.3d 328, 2012-Ohio-2179, at ¶ 12.

{¶51} Having reviewed the record, we cannot say that the trial court lost its way in determining that Husband failed to meet his burden of tracing his premarital Oracle holdings to the current holdings in the 1729 account.

{¶52} Husband's third assignment of error is overruled.

III

{¶53} Husband's first assignment of error is sustained. Husband's second and third assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with the foregoing 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 Summit, 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(C). 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 equally to both parties.

BETH WHITMORE
FOR THE COURT

HENSAL, P. J.
CONCURS.

CANNON, J.
CONCURRING IN PART, AND DISSENTING IN PART.

{¶54} I respectfully concur in part and dissent in part.

{¶55} Although I agree with the judgment and analysis in the vast majority of the opinion, I find merit with the last issue under the second assignment of error. The trial court acknowledged Husband made an initial $8,200 down payment for the real estate on Norma Drive in South Euclid. The trial court further acknowledged this asset was purchased for $41,000 by Husband in 1977, 10 years prior to the marriage. It was sold in 1988 for $60,000, only 10 months after the marriage. These figures are not disputed. Neither the gain of $19,000, nor the original down payment of $8,200, was awarded to Husband as separate property.

{¶56} In the findings of fact by the trial court, it found that the equity at the time of sale based on the amortization schedule would have been $31,171.11, "of which $30,711.46 was separate premarital property, and $459.65 was marital property." The trial court then speculated that there would have been closing costs, but there was no evidence or testimony as to the amount or estimate of those costs. As a result, the trial court denied all $30,711.46 of the separate property claim. While this certainly seems inequitable, I do not believe it was error for the trial court to determine Husband simply did not meet his burden to establish, or at least estimate, a more accurate figure. The seller's closing costs are typically computed as a factor of the sale price. The prime examples would be a real estate commission and the county transfer fee. There was no testimony offered as to whether any realtor was involved in the transaction or what the fee may have been. Therefore, there was no accurate establishment of what portion of

the proceeds represented separate property. The *entire* proceeds from this transaction could therefore not be traced.

{¶57} However I do not believe the initial down payment ever lost its identity as separate property. There simply is not any question that at least $8,200 of these proceeds was paid by Husband and used in subsequent transactions to purchase additional property. As the majority notes, this point was not argued. However, I imagine it was not specifically argued because it was not in dispute; the dispute was with regard to subsequent transactions. Therefore, I believe it was error to fail to recognize $8,200 as separate property awarded to Husband. In all other respects, I concur with the majority.

(Cannon, J., of the Eleventh District Court of Appeals, sitting by assignment.)

APPEARANCES:

RANDAL A. LOWRY and KENNETH L. GIBSON, Attorneys at Law, for Appellant.

CHARLES E. GRISI, Attorney at Law, for Appellee.