# *VALUATION OBSERVATIONS*

*Some practical observations from a practicing business appraiser.*

**VLC**

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## CAN YOU TRACE IT?
### *Dust off those boxes*

It was separate property. Is it still? Commingling of separate and marital property does not necessarily destroy the character of the separate property, unless its identity as separate property is not traceable. R.C. 3105.171(A)(6)(b). The inquiry becomes whether the separate property is traceable after being commingled with marital property. And 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. *Peck v. Peck (1994), 96 Ohio App.3d 731.*

In *Paras v. Paras (Dec 7, 2000), Cuyahoga App. No. 77253*, the husband had inherited money that initially constituted separate property. A portion of the funds were used to improve the marital home. The court found that by investing the money into home improvements to increase the value of the home, a marital asset, the funds lost their separate nature and became marital property. The court in *Paras* further recognized that investing a sum of money into home improvements does not necessarily increase the value of the realty to the same extent. The court concluded that the parties evidenced an intent to combine their separate property to increase the value of their home, a marital asset, and the funds thereby became marital property.

Add Mr. Murph to the mix (*Murph v. Murph, 2004-Ohio-1312).* Mr. Murph entered the marriage in 1968 with two apartment buildings and an airplane. One year after the marriage a third property was purchased. A year after that, all three apartment buildings were traded for a single apartment building. The values at the time of the marriage were established, but limited documentation was provided about this "trade". Furthermore, the new building's mortgage was listed in the names of both husband and wife. With both parties being legally obligated on the loan and no contradictory documentary evidence, the court presumed the new property to be marital. The husband submitted a chart with a time-line and only scattered documents, such as partial pages of a loan book. He was unable to produce contracts for sale or loan agreements. Additionally, his testimony was not altogether consistent. Most courts find documentary evidence necessary for tracing assets back to non-marital property. The reason for this is that courts must have some basis upon which to make decisions, particularly where the testimony of the parties conflicts, as it often does in divorce cases.

Mr. Murph's separate property claim did not fly any better with the airplane. He attempted to show that funds from the sale of the Cessna airplane owned prior to the marriage ($173,000) were (1) partially invested in another airplane, (2) partially deposited in a joint marital account, and (3) used the rest ($86,000) to purchase a single-family home. The court noted that Mr. Murph failed to submit a cancelled check, bank receipt, or any other document establishing that he used money from a separate account to pay for this house. Furthermore, the wife signed a mortgage note for the property. Mr. Murph's "friend" lived in the home. He paid for all the expenses to upkeep the house, and did not charge her rent for living there for seven years. The lack of documentation in addition to the facts of the case did not enhance Mr. Murph's credibility. The court focused on the lack of documentary evidence supporting the separate property claim, and added that the documents Mr. Murph did submit failed to support his testimony.

A different result was reached in *Ockunzzi v. Ockunzzi, 2006-Ohio-5741*, where the 8th District concluded that Mr. Ockunzzi met his burden of proof. Although the premarital equity in the residence was borrowed against when the home was refinanced, this did not cause the separate interest to become untraceable. In this case, the home was refinanced and the home equity lines were used to pay off existing mortgages, car loans and other debts, as well as make major purchases and build an addition onto the home. Simply because the premarital interest in the home was used as collateral to secure a home equity loan, which was used to purchase goods and services that became marital assets, did not convert the separate interest to marital property. The repayment of the debt was made using marital funds, and the separate interest remained intact and traceable.

Again, the commingling of separate property with other property does not, on its own, destroy the nature of the separate property. Instead, the pivotal question is whether the separate property is traceable.

We so often want to get rid of the clutter in our homes. It is human nature to get rid of those boxes that only collect dust. If your clients have separate property claims, hopefully they will have those dusty boxes as well. Those old contracts, cancelled checks, bank statements, and written notes will have value.

If you would like additional information, or have a question, please do not hesitate to call.

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Terri Lastovka is the founder of Valuation & Litigation Consulting, LLC. Her practice focuses on business valuations and litigation consulting in the areas of domestic relations, gift and estate tax, probate, shareholder disputes, economic damages, and forensic accounting. She draws from a wide range of experiences, including public accounting, law, banking, and CFO. She has received extensive training from the American Society of Appraisers in the area of business valuation and works closely with members of the bar to effectuate practical settlements. Terri also serves as the Director of Legal & Finance for Journey of Hope, a grass roots non-profit organization providing financial support to cancer survivors.