

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

JOANNE L. CARTER	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 54
v.	:	T.C. NO. 06 DR 1065
STEPHEN M. CARTER	:	(Civil appeal from Common
Defendant-Appellant	:	Pleas Court, Domestic Relations)

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OPINION

Rendered on the 24th day of July, 2009.

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HARSHA, J. (by assignment)

{¶ 1} In this contested divorce action, Stephen M. Carter appeals the trial court's judgment that valued the parties' marital residence at \$145,000 and that divided the parties' retirement benefits. He argues that the trial court improperly valued the residence at \$145,000 when neither of the parties' appraisers placed that value on the

property. Due to Mr. Carter's failure to request findings of fact and conclusions of law, we presume the regularity of the trial court's decision. Because the record contains some evidence to support the trial court's deviation from the appraisers' values and because the court is free to believe some, all, or none of a witness' testimony, the trial court did not abuse its discretion by valuing the property at \$145,000.

{¶ 2} Mr. Carter also argues that the trial court abused its discretion when dividing the parties' retirement benefits by considering his social security benefits and consequently, allocating a larger percentage of his private pension to Ms. Carter. He claims that the court failed to consider all of the relevant factors in making its award. Because Mr. Carter did not request findings of fact and conclusions of law, we presume that the court considered all appropriate factors. Nothing in the record indicates that the court abused its discretion by considering Mr. Carter's social security benefits when dividing the parties' retirement benefits. Although Ms. Carter receives a larger share of Mr. Carter's private pension benefits under the court's order, the net effect of the court's order is to equalize the total monthly marital retirement benefits each party is to receive. There is nothing irrational, inequitable or unreasonable about that decision. Thus, the court did not abuse its discretion by awarding Ms. Carter a greater share of the pension benefits.

{¶ 3} Accordingly, we overrule Mr. Carter's two assignments of error and affirm the court's judgment.

I. FACTS

{¶ 4} After an approximate forty-year marriage, Ms. Carter filed a complaint for divorce. At trial the evidence showed that the parties purchased a ten-acre "mini-farm"

for \$30,000 in 1970. Ms. Carter and her appraiser testified that the current fair market value of the property is \$125,000. Ms. Carter further testified that the property needs several repairs, including a new septic system and a new furnace. She stated that both are original to the house and no longer function optimally. Ms. Carter also stated that the property needs a new retaining wall and that some erosion had occurred around the barn. In contrast, Mr. Carter and his appraiser opined that the fair market value of the property is \$165,000. Mr. Carter stated that he would be willing to purchase the property for \$165,000. His appraiser testified that she attempted to determine the fair market value of the property by finding comparable property for sale. However, she admitted that the properties she used to determine the fair market value of the parties' mini-farm were not ideally comparable. None of the properties she used as comparables included ten acres, but rather, were all less than two acres. Furthermore, the comparable properties included more than one bathroom. Ms. Lewis's appraisal also did not account for the repairs that Ms. Carter stated were necessary.

{¶ 5} Mr. Carter is retired from International Harvester/Navistar and currently receives a monthly pension benefit of \$2,350. When he reaches the age of 62, he will begin receiving social security in the approximate amount of \$1,485 per month, which will reduce his pension benefit to \$1,315.86 per month. Ms. Carter currently works at a local library and contributes to the Ohio Public Employment Retirement System (OPERS). The current account value of her OPERS account is \$4,942.72. When she reaches the age of 62, she will be entitled to \$815 per month in social security benefits, plus approximately \$100 in OPERS payments.

{¶ 6} When the trial court granted the parties a divorce, it awarded Ms. Carter the mini-farm and valued the property at \$145,000. The court awarded Ms. Carter \$1,175 per month from Mr. Carter's pension until he reaches age 62. At that time, she shall receive \$992.43, leaving Mr. Carter \$323.43. The court awarded Mr. Carter one-half of Ms. Carter's OPERS account.

II. ASSIGNMENTS OF ERROR

{¶ 7} Mr. Carter raises two assignments of error.

First Assignment of Error:

{¶ 8} "The trial court abused its discretion and erred to the prejudice of the appellant in finding the value of the Hawk Road property to be \$145,000.00 and not \$165,000.00."

Second Assignment of Error:

{¶ 9} "The trial court abused its discretion and erred to the prejudice of the appellant in its order dividing the retirement benefits of the appellant."

III. FAILURE TO REQUEST FINDINGS OF FACT

AND CONCLUSIONS OF LAW

{¶ 10} Mr. Carter did not file a Civ.R. 52 request for findings of fact and conclusions of law. Civ.R. 52 states: "When questions of fact are tried by a court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law." The failure to request findings of fact and conclusions of law ordinarily results in a waiver of the right to challenge the trial court's lack of an explicit finding concerning an issue. See

Pawlus v. Bartrug (1996), 109 Ohio App.3d 796, 801; *Wangugi v. Wangugi* (Apr. 12, 2000), Ross App. No. 2531; *Ruby v. Ruby* (Aug. 11, 1999), Coshocton App. No. 99CA4. When a party fails to request findings of fact and conclusions of law, we must presume the regularity of the trial court proceedings. See, e.g., *Bunten v. Bunten* (1998), 126 Ohio App.3d 443, 447; see, also, *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 356; *Security Nat. Bank and Trust Co. v. Springfield City Sch. Dist. Bd. of Educ.* (Sept. 17, 1999), Clark App. No. 98-CA-104; *Donese v. Donese* (April 10, 1998), Greene App. No. 97-CA-70. In the absence of findings of fact and conclusions of law, we must presume the trial court applied the law correctly and must affirm if there is some evidence in the record to support its judgment. See, e.g., *Bugg v. Fancher*, Highland App. No. 06CA12, 2007-Ohio-2019, at ¶10, citing *Allstate Financial Corp. v. Westfield Serv. Mgt. Co.* (1989), 62 Ohio App.3d 657; see, also, *Yocum v. Means*, Darke App. No. 1576, 2002-Ohio-3803, at ¶7 (“The lack of findings obviously circumscribes our review.”). As the court explained in *Pettet v. Pettet* (1988), 55 Ohio App.3d 128, 130:

{¶ 11} “[W]hen separate facts are not requested by counsel and/or supplied by the court the challenger is not entitled to be elevated to a position superior to that he would have enjoyed had he made his request. Thus, if from an examination of the record as a whole in the trial court there is some evidence from which the court could have reached the ultimate conclusions of fact which are consistent with [its] judgment the appellate court is bound to affirm on the weight and sufficiency of the evidence.

{¶ 12} “The message is clear: If a party wishes to challenge the*** judgment as being against the manifest weight of the evidence he had best secure separate

findings of fact and conclusions of law. Otherwise his already 'uphill' burden of demonstrating error becomes an almost insurmountable 'mountain.'" See, also, *Bugg; McClead v. McClead*, Washington App. No. 06CA67, 2007-Ohio-4624.

{¶ 13} In this case, the trial court entered a lengthy decision. However, it did not--nor was it required to do so in the absence of a proper Civ.R. 52 request--enter detailed findings of fact and conclusions of law. Because Mr. Carter failed to request findings of fact and conclusions of law, we will presume the regularity of the trial court proceedings, in the absence of evidence to the contrary.

IV. PROPERTY VALUATION

{¶ 14} In his first assignment of error, Mr. Carter asserts that the trial court abused its discretion by valuing the parties' marital property at \$145,000. He contends that the trial court was required to use one of the valuations that the parties' separate appraisers assigned to the property and could not simply average the two opposing values. He further contends that the court abused its discretion by not valuing the property at \$165,000.

{¶ 15} "The trial court enjoys broad discretion in determining the value of a marital asset; however, this discretion is not limitless. Our task on appeal is not to require the adoption of any particular method of valuation, but to determine whether, based on all the relevant facts and circumstances, the court abused its discretion in arriving at a value.'" *Entingh v. Entingh*, Montgomery App. No. 22117, 2008-Ohio-756, at ¶9, citing *James v. James* (1995), 101 Ohio App.3d 668, 681; see, also, *Focke v. Focke* (1992), 83 Ohio App.3d 552, 554; *Ulliman v. Ulliman*, Montgomery App. No.

22560, 2008-Ohio-3876.¹

{¶ 16} An abuse of discretion involves far more than a difference in opinion. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an "abuse" in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, certiorari denied (1985), 472 U.S. 1031; *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87.

{¶ 17} A trial court errs and abuses its discretion if it “ summarily arrives at a valuation of an asset or property, even though between the two extremes of the opposing parties’ witnesses, without a proper evidential predicate.” *Rodriguez v. Rodriguez* (Apr. 13, 1990), Geauga App. No. 89-G-1498, quoted in *McCoy v. McCoy* (1993), 91 Ohio App.3d 570, 578; see, also, *Patterson v. Patterson* (Dec. 14, 1998), Adams App. No. 97CA654; *Bollas v. Bollas* (Dec. 1, 1989), Trumbull App. No. 88-T-4089; *Bushman v. Bushman* (Mar. 31, 1989), Geauga App. No. 1442. “Even though the trier of fact is granted much leeway in obtaining a value, it must do so based upon the evidence before it. To achieve a middle of the road estimation without

¹Some courts have used the less deferential manifest weight of the evidence standard, see *Covert v. Covert*, Adams App. No. 03CA778, 2004-Ohio-3534, at ¶6 (stating that a trial court’s valuation of property is a factual finding reviewed under the manifest weight of the evidence standard). Under this approach the judgment must be affirmed if it is supported by some competent credible evidence in the record. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Our decision remains the same under either standard.

some basis for such an adjustment from one extreme or the other would constitute error as not being supported by the evidence.” *Rodriguez*, quoted in *McCoy*, 91 Ohio App.3d at 578. However, we will not disturb a trial court’s valuation as long as the record contains sufficient evidence to support it.

{¶ 18} The Fourth District Court of Appeals considered a case involving similar facts to those present in this case. See *Patterson*, supra. There, the appellant asserted that the trial court abused its discretion by adopting a value different from the appraisal. The *Patterson* court disagreed, explaining:

{¶ 19} “While a court may not simply adopt an intermediate figure without a supporting rationale when the parties present substantially different valuations of an asset, it may believe all, part, or none of any witness’s testimony. There is competent, credible evidence to support the magistrate’s determination that the Adams County property has a fair market value of \$50,000. The appraisal estimated the fair market value at \$56,000. Mrs. Patterson testified that the heat pump no longer works, the roof on the mobile home leaks, and during heavy rains, the area under the mobile home floods. The appraisal acknowledged these problems, but took them into account only to the extent that the appraiser could see them and recommended that Mrs. Patterson seek professional advice. Mrs. Patterson’s testimony supports the trial court’s reduction of the value of the Adams County property from the value arrived at by the appraiser. Therefore, the trial court did not err in finding the fair market value of the Adams County property to be \$50,000.” See, also, *Covert v. Covert*, Adams App. No. 03CA778, 2004-Ohio-3534.

{¶ 20} Here, the trial court did not abuse its discretion by valuing the property at

\$145,000. Although the trial court did not explain its rationale for valuing the property at \$145,000, the court was not required to do so due to Mr. Carter's failure to request findings of fact and conclusions of law. Thus, we will uphold its valuation as long as the record contains some rational basis to support it.

{¶ 21} The record contains evidence that supports the court's decision to reject the parties' appraisers' valuations and to instead choose a valuation in the middle. Ms. Carter testified that the property needs several repairs. She stated that the house needed a new furnace and septic system and that a retaining wall needed repair. Ms. Carter also stated that some erosion had occurred around the barn and that the pipe for a wood burning stove needed to be replaced. Mr. Carter's appraiser testified that her \$165,000 appraisal did not account for any repairs to the property. Thus, the trial court could have determined that Ms. Lewis's appraisal provided an appropriate starting point but then found that due to the nature of the repairs, the fair market value of the property should be reduced by \$20,000. This decision appears rational and is based upon evidence in the record. The court was not required to accept either appraisal but instead, was free to believe some, none, or all of the witnesses' testimony. For these same reasons, the trial court did not abuse its discretion by failing to value the property at \$165,000.

{¶ 22} We further reject Mr. Carter's argument that his statement that he would purchase the property for \$165,000 constitutes the best evidence of the fair market value. While, generally, the sale price might be the best evidence of fair market value in an arms-length sales transaction, see *Berea City Sch. Dist. Bd. Of Edn. V. Cuyahoga Cty. Bd. Of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, at ¶9, Mr.

Carter's potential purchase of the marital property from Ms. Carter would hardly constitute an arms-length property transaction.

{¶ 23} Accordingly, we overrule Mr. Carter's first assignment of error.

{¶ 24} In his second assignment of error, Mr. Carter argues that the trial court abused its discretion when it divided his retirement benefits. He contends that the court should not have considered his Social Security benefits when dividing the parties' retirement benefits. He also argues that the court failed to consider all relevant factors when dividing these marital assets.

{¶ 25} The trial court has broad discretion to divide property in domestic relations cases. *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 401, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. Accordingly, an appellate court will uphold a division of marital property absent a determination that the trial court abused its discretion. An abuse of discretion is more than an error of law or judgment; it implies that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. See, e.g., *Middendorf*, 82 Ohio St.3d at 401. When applying an abuse of discretion standard, the appellate court is not free to simply substitute its judgment for that of the trial court. See, e.g., *Shehata v. Shehata*, Montgomery App. No. Civ.A. 20612, 2005-Ohio-3659, ¶11. "If there is some competent, credible evidence to support the trial court's decision, there is no abuse of discretion." *Middendorf*, 82 Ohio St.3d at 401; see, also, *Cooper v. Cooper*, Greene App. Nos. 2007-CA-76 and 2007-CA-77, 2008-Ohio-4731, at ¶5.

{¶ 26} "A domestic relations court is required, when granting a divorce, to equitably divide and distribute the marital property between the parties. When dividing

marital property, the trial court must divide it equally between the parties unless an equal division would be inequitable. In determining what is an equitable division of the marital property, the court must consider “all relevant factors,” including those found in R.C. 3105.171(F).” *Clemens v. Clemens*, Greene App. No. 07-CA-73, 2008-Ohio-4730, at ¶67, quoting *Kestner v. Kestner*, 173 Ohio App.3d 632, 637, 2007-Ohio-622, at ¶10 (citations omitted).

{¶ 27} R.C. 3105.171(F) sets forth the following factors that a court must consider when dividing property in a divorce proceeding:

{¶ 28} “(1) The duration of the marriage;

{¶ 29} “(2) The assets and liabilities of the spouses;

{¶ 30} “(3) The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;

{¶ 31} “(4) The liquidity of the property to be distributed;

{¶ 32} “(5) The economic desirability of retaining intact an asset or an interest in an asset;

{¶ 33} “(6) The tax consequences of the property division upon the respective awards to be made to each spouse;

{¶ 34} “(7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;

{¶ 35} “(8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;

{¶ 36} “(9) Any other factor that the court expressly finds to be relevant and

equitable.”

{¶ 37} In *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, the Ohio Supreme Court held that in making an equitable distribution of marital property in a divorce proceeding, the trial court may consider the parties' future Social Security benefits in relation to all marital assets.² “[V]irtually every appellate court has determined that although a party's interest in future Social Security benefits cannot be directly divided as a marital asset, that interest must be evaluated and considered by the court in effecting an equitable distribution of the parties' marital assets. More specifically, the interest in Social Security benefits must be evaluated and considered by the court in order to effect an equitable division of the parties' pension and retirement funds.” *Hurte v. Hurte*, 164 Ohio App.3d 446, 2005-Ohio-5967, at ¶14, quoting *Neel v. Neel* (1996), 113 Ohio App.3d 24, 29-30 (citations omitted).

{¶ 38} Here, the trial court did not abuse its discretion when it divided the parties' retirement benefits and considered the amount of social security benefits that Mr. Carter would receive upon reaching age 62. Because Mr. Carter did not request findings of fact and conclusions of law, we presume that the trial court properly applied the law and considered all of the relevant factors. Furthermore, due to his failure to request findings of fact and conclusions of law, he cannot now complain that the trial court failed to explain the rationale for its division of the parties' retirement benefits or that it failed to engage in a detailed analysis of the statutory factors.

²On April 7, 2009, the General Assembly amended R.C. 3105.171 with the apparent intent of limiting *Neville*. R.C. 3105.17(F)(9) now prohibits a court from considering “the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension.”

{¶ 39} Mr. Carter would have us look at each asset in isolation rather than looking to the equitable nature of the retirement benefits as a whole. We do not believe the law requires us or the trial court to take that approach. The record shows that the trial court considered all of the parties' marital retirement benefits, including Mr. Carter's pension, Mr. Carter's social security benefits, Ms. Carter's social security benefits, and Ms. Carter's OPERS payments. The court then entered an order to equalize those payments once Mr. Carter reaches the age of 62. The court's order awarding Ms. Carter \$992.43 per month of Mr. Carter's pension is an equalization payment. Under the court's order, when Mr. Carter attains the age of 62, he will receive \$323.43 from his pension plus \$1,485 in social security benefits, for a total of \$1,808.43. Ms. Carter will receive \$992.43 per month of Mr. Carter's pension and \$815 in social security benefits, for a total of \$1,807.43. The court ordered Ms. Carter's OPERS benefits equally split. Thus, by awarding Ms. Carter a greater share of Mr. Carter's pension, the court was not granting Ms. Carter a windfall. Instead, the court's decision equalized the marital retirement benefit payments. Had the court simply equally split Mr. Carter's pension, then Mr. Carter's monthly marital retirement benefits would have been approximately \$670 more than Ms. Carter's monthly benefits. The trial court obviously determined that an equal division of the parties' marital retirement benefits was fair and equitable. Nothing in the record shows that the court abused its discretion or that it failed to consider all relevant factors. Simply because the trial court's weighing of those factors resulted in an apparently less-than-desirable result for Mr. Carter does not mean that the court abused its discretion or failed to consider all relevant factors.

{¶ 40} Accordingly, we overrule Mr. Carter's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

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BROGAN, J. and FROELICH, J., concur.

(Hon. William H. Harsha, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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