[Cite as *Richter v. Richter*, 2016-Ohio-400.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHARLES A. RICHTER	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 15-CA-24
	:	
DENISE G. RICHTER	:	
	:	
	:	
Defendant-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, Domestic Relations Division, Case No. 2013 DR 01261
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	January 22, 2016

APPEARANCES:

For Plaintiff-Appellant:	For Defendant-Appellee:
ANTHONY W. GRECO AARON E. KENTER 6810 Caine Rd. Columbus, OH 43235	DENNIS E. HORVATH 250 Civic Center Dr., Ste. 220 Columbus, OH 43215

Delaney, J.

{¶1} Plaintiff-appellant Charles A. Richter ("Husband") appeals from the Judgment Entry—Decree of Divorce entered March 24, 2015 in the Licking County Court of Common Pleas, Domestic Relations Division. Defendant-appellee is Denise G. Richter ("Wife").

FACTS AND PROCEDURAL HISTORY

{¶2} Husband and Wife were married on May 2, 2009. Wife has two children from a previous marriage. Together, the couple have one child, S.R., d.o.b. 9/11/2011. Prior to the marriage, Wife owned a residence on School House Road, Little Hocking, Washington County. When the parties married, they first lived separately until November 1, 2010, due to issues with Husband's employment.

{¶3} The parties the resided together with S.R. in Little Hocking until the end of May, 2013. At that time, Husband moved to his parents' home in Johnstown, Ohio.

{¶4} Husband filed a complaint for divorce on November 14, 2013. During the pendency of the divorce, the parties voluntarily exercised a week on/week off parenting schedule with S.R. traveling between Little Hocking and Johnstown.

{¶5} A guardian ad litem and a psychologist were appointed to evaluate the parties and S.R. Temporary orders were issued on October 22, 2014 awarding temporary custody to Wife. The matter proceeded to trial and the trial court issued its Judgment Entry – Decree of Divorce on March 24, 2015.

{¶6} Husband now appeals from the divorce decree and raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶7} "I. IN REFUSING TO PERMIT [HUSBAND] THE TIME TO PRESENT EVIDENCE TO DEMONSTRATE THE EXTENT OF THE MARITAL INTEREST IN THE MARITAL RESIDENCE, AND IN FAILING TO CONSIDER THIS EVIDENCE PROVIDED UPON THE TRIAL COURT'S REQUEST AFTER TRIAL, THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION AND MATERIALLY PREJUDICED [HUSBAND] BY EXCLUDING RELEVANT EVIDENCE."

{¶8} "II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DIVIDING THE MARITAL INTEREST IN THE MARITAL RESIDENCE AS IT DOUBLE COUNTED [HUSBAND'S] SHARE OF THE MARITAL DEBT IN DETERMINING [HUSBAND'S] INTEREST IN THE MARITAL RESIDENCE."

{¶9} "III. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CUSTODY OF THE PARTIES' MINOR CHILD TO [WIFE] BECAUSE THIS CUSTODY AWARD IS NOT SUPPORTED BY A SUBSTANTIAL AMOUNT OF CREDIBLE AND COMPETENT EVIDENCE."

ANALYSIS

I.

{¶10} In his first assignment of error, Husband argues the trial court should have permitted him to present unspecified additional evidence of "the marital interest in the marital residence" because he misunderstood a stipulation at trial. We disagree.

{¶11} The parties agreed the Little Hocking residence was Wife's separate property in that she owned it before the marriage. As Wife points out, the issue at trial regarding the marital residence was straightforward: whether the value of the residence

increased during the marriage as a result of any marital contribution. The trial court noted any post-marriage loss or gain in the value of the house would be apportioned between the parties. T. 143. Husband's position was that prior to the marriage, the house was in a largely unfinished condition which he remedied during the marriage. Upon cross examination, Husband was directly asked to detail his specific interest in the residence in light of the stipulation that the residence was Wife's separate property. T. 329. Husband thereupon testified to his contributions to the increased value of the residence: home improvements to bedrooms, bathrooms, a closet and a deck; installation of a geothermal energy system; winterizing the home; and maintenance of a dog kennel and pool. Husband acknowledged no appraisal was performed to assess any increase in value from these improvements. T. 332.

{¶12} At the conclusion of the trial, the trial court stated there had been little or no showing of marital contribution to the value of the residence,[1] acknowledging the "vague" testimony as to several hundred dollars spent and a number of hours invested in the home improvements noted above. After both sides had rested, Husband's counsel asked to put on additional unspecified evidence and the trial court denied the request because the trial was over. There is some indication in the record the trial court gave the parties fourteen days to submit additional material but the parameters of this proposed submission are not evident from the record. T. 925-927.

[1] The trial court noted the value of the residence at the time of the marriage was disputed and could only be estimated, finding the fair market value to be $182,000 subject to the first mortgage. Both parties also failed to establish what was owed on the first mortgage at the time of the marriage, therefore the court used the then-current amount owed and arrived at a value of the separate property as $126,752.75.

{¶13} On appeal, Husband argues the trial court refused to permit him time to put on evidence of the marital interest in the marital residence. This contention is not supported by the record. As Wife points out, throughout the presentation of evidence, the trial court repeatedly delineated the issue with respect to the marital residence: how much did Husband's contribution, if any, increase the value of the residence after the marriage. The trial court encouraged Husband to present specific evidence:

> * * * *.
>
> THE COURT: Let me ask you a question. Is it your intention to talk about changes that were made? If so, I'd rather we talk about how it's unfinished and then you move on to whether changes were made during the marriage. It'll be more—it'll be less confusing. Cause if he's going to go floor-by-floor, if he's going to talk about what's wrong or what was not done at the time of the marriage. If it's been improved with marital assets I'd rather have that testimony—and it's your call how you present it but it'll be easier for the Court, to be honest with you, for taking notes if you could do it that way.
>
> [HUSBAND'S COUNSEL:] Absolutely. Okay.
>
> * * * *.
>
> T. 68-69.

{¶14} Later, the trial court noted it was still waiting on the financial evidence and Husband's counsel stated they were done with presentation of financial evidence. T. 160.

{¶15} Husband's argument, and his reliance here upon *Readnower v. Readnower*, ignore the fact that the instant case arose from a two-day trial. 162 Ohio

App.3d 347, 2005-Ohio-3661, 833 N.E.2d 752 (2nd Dist.). In *Readnower*, the trial court limited the parties to a twenty-minute presentation of evidence; in the instant case, the parties presented extensive evidence and we fail to see how the trial court could have been more specific in outlining the evidence it was looking for on the marital-residence issue. We also note the following observation in *Readnower*: "[T]ime limitations on evidence have been upheld when the appellant has not asserted what additional evidence he would have offered or how it would have changed the court's judgment." Id., 162 Ohio App.3d at 350, citing *Lynchburg v. Higgins* (C.A.6, 1987), 822 F.2d 1088.

{¶16} The "additional evidence" Husband would have offered, or how it might have changed the trial court's judgment, is not apparent from in the instant case. Husband acknowledges a failure to comply with Evid.R. 103(A)(2), which states "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." He argues, though, that we may examine this issue as plain error.

{¶17} We find the plain error doctrine does not apply under these circumstances. The instant case is not "the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Dorsey v. Dorsey*, 5th Dist. Richland No. 09-CA-0065, 2009-Ohio-4894, ¶ 20, citing *Goldfuss v. Davidson,* 79 Ohio St.3d 116, 679 N.E.2d 1099, 1997-Ohio-401, at syllabus. In fact, the trial court took exceptional care

to outline for the parties exactly the evidence they needed to present and gave both full opportunity to do so.

{¶18} We fail to find any support for Husband's argument that the trial court prevented him from presenting relevant evidence. Husband presented evidence of his alleged marital contribution; the underlying dilemma is that the contribution was not supported in any quantifiable way. Moreover, Husband has not explained, at the trial level or on appeal, what this additional evidence would have consisted of or how it would have changed the trial court's decision.

{¶19} Husband's first assignment of error is thus overruled.

II.

{¶20} In his second assignment of error, Husband argues the trial court improperly "double counted" Husband's share of the marital debt in determining his interest in the residence. We disagree.

{¶21} R.C. 3105.171(B) requires the trial court to determine what constitutes marital property and what constitutes separate property. "In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses * * *." R.C. 3105.171(B). The Revised Code further requires that a trial court divide the marital property equally unless an equal division would be inequitable, in which case "the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable." R.C. 3105.171(C)(1). The court may make a distributive award to facilitate, effectuate, or supplement a division of marital property. R.C. 3105.171(E)(1).

{¶22} Trial courts have "broad discretion to determine what property division is equitable in a divorce proceeding." *Cherry v. Cherry,* 66 Ohio St.2d 348, 421, 421 N.E.2d 1293 (1981), paragraph two of the syllabus. A trial court's decision allocating marital property and debt will not be reversed absent an abuse of discretion. "Abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶23} The trial court determined the residence is Wife's separate property. Two mortgages are associated with the property: 1) M & T Bank in the amount of $55,247.25 and 2) People's Bank in the amount of $46,381.75. As the parties stipulated, the first mortgage existed prior to the marriage and was found to be Wife's separate debt. The second mortgage was taken out during the marriage; $20,000 of the amount was used by Wife to pay her own separate debt to an ex-husband and the remaining $26,381.75 was found to be marital debt.

{¶24} The trial court exhaustively analyzed the value of the residence in light of Husband's argument that marital funds were used to pay down the mortgages and to make improvements and described its formula for determining the value of the marital contribution. The trial court accepted Wife's testimony that the fair market value of the residence prior to any marital contribution was $182,000, subject to the first mortgage amount of $55,247.25, resulting in the value of the residence as separate property being $126,752.75.

{¶25} The trial court determined the amount of the marital contribution to be $49,536.25 based upon materials associated with home improvements and payment of

marital funds toward the first and second mortgages. The trial court further found the current fair market value of the residence to be $162,500 minus the two mortgages, or $60,871. The marital value of the residence was found to be $17,104.75 with the remaining $43,766.25 being the separate property of Wife. Husband was found to be entitled to half the marital portion, or $8,552.38, but combined with Husband's half of the marital debt ($23,190.88), the result would be a net loss of $14,638.50 to Husband.

{¶26} Wife, however, petitioned the trial court to award all of the equity and debt associated with the residence to her. We further note Husband stated in his "Combined Closing Argument and Proposed Finding of Fact and Conclusions of Law" that "* * * if the [trial court] disagreed with [Husband's argument that he was entitled to half his claimed equity in the residence, or a credit between $16,196.52 and $26,196.52], **then it should distribute the marital residence, the mortgage, and home equity line of credit to [Wife] * * *** as this is what [Wife] requested at trial." 7.

{¶27} The trial court found this suggestion to be of benefit to Husband in light of the fact he otherwise lost money in seeking his marital portion of the separate property. On appeal, Husband argues this resolution includes impermissibly double-counting the value of the second mortgage: the second mortgage is included in the fair market value factor of the residence and deducted again from Husband's half of the marital portion of the marital residence.

{¶28} We find no abuse of discretion corresponding to that in Husband's cited case, *Saluppo v. Saluppo*, 9th Dist. Summit No. 22680, 2006-Ohio-2694. In that case, a trial court made a mathematical mistake that created an unequal distribution of assets without supporting the award without making sufficient findings of fact to support the

unequal reward. The court found: "When dividing marital property, 'the trial court must indicate the basis for its award in sufficient detail to enable a reviewing court to determine that the award is fair, equitable and in accordance with the law.'" Id., 2006-Ohio-2694, at ¶ 12, citing *Quigley v. Quigley,* 6th Dist. No. No. L-03-1115, 2004-Ohio-2464 and *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988), paragraph two of the syllabus. In this case, the trial court exhaustively supported its estimates at each turn in the calculations, eventually arriving at the alternative suggested by Wife and agreed to by Husband.

{¶29} The predominant problem for the trial court was that "* * * it was forced to make estimations in coming up with [the] marital portion of the separate property, that was only due to the failure of the parties to present the evidence necessary to determine a more precise value." Entry, 32. Where a party fails to present evidence relative to property division, the party has essentially forfeited its argument as to division. See, *Kautz v. Kautz,* 5th Dist. Stark No.2011 CA00034, 2011–Ohio–6547, ¶ 16, citing *Roberts v. Roberts,* 10th Dist. Franklin No. 08AP–27, 2008–Ohio–6121, ¶ 22 ("[I]f a party fails to present sufficient evidence of valuation, that party has presumptively waived the right to appeal the distribution of those assets because the trial court can only make decisions based on the evidence presented [.]").

{¶30} As Wife points out, the trial court could have chosen to allocate the residence and its attached debt in such a way as to make Husband responsible for depreciation in value of the residence. Instead, the trial court effectively fashioned an equitable result from the conflicting and often vague evidence before it, an alternative suggested by Wife and supported by Husband as noted supra. In light of our review of

the record, including the parties' testimony as to the value of the residence and the marital contribution thereto, we find the trial court did not abuse its discretion in allocating the residence and its accompanying debt to Wife.

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

III.

{¶32} In his third assignment of error, Husband argues the trial court's decision to award custody of the minor child to Wife is not supported by a substantial amount of credible evidence. We disagree.

{¶33} The trial court found it to be in the best interest of S.R. that Mother was designated residential parent, sole legal custodian and guardian of S.R. Father was designated the nonresidential parent.

{¶34} Custody issues are some of the most difficult decisions a trial judge must make. When reviewing a ruling pertaining to the allocation of parental rights, the trial court is to be afforded great deference. *Tipton v. Tipton,* 5th Dist. Fairfield No. 13–CA–19, 2013–Ohio–4901, ¶ 19, citing *Miller v. Miller,* 37 Ohio St.3d 71, 523 N.E.2d 846 (1988). We will not reverse a child custody decision that is supported by a substantial amount of competent, credible evidence absent an abuse of discretion. *Bechtol v. Bechtol,* 49 Ohio St.3d 21, 550 N.E.2d 178 (1990), syllabus.

{¶35} R.C. 3109.04(F)(1) sets forth the following factors for the court to consider when determining the best interests of a child in allocating parental rights:

(a) The wishes of the child's parents regarding the child's care;

(b) If the court has interviewed the child in chambers pursuant to division

(B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

(h) Whether either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; * * *;

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶36} Husband argues the trial court's legal and factual analysis is not supported by the "mere scintilla of credible and competent evidence" required for us to affirm the

decision of the lower court. In its written opinion, though, the trial court addressed the evidence presented upon each of the R.C. 3109.04(F) factors and the weight given thereto.

{¶37} The trial court noted the difficulty in the decision was the parents' dysfunctional relationship with each other. In terms of bonding with extended family and positive relationships with S.R., both parents demonstrate that they care deeply for S.R. and both could provide a positive home environment. The guardian ad litem testified at trial and recommended Mother should be designated residential parent. The court-appointed psychologist evaluated the parents and S.R., testified at trial, and also recommended that Mother should be designated residential parent.

{¶38} The record fully supports the trial court's conclusion that Father loves S.R. and would provide a positive environment for her, but Mother is better suited as the residential parent. We note our review of the record includes the trial exhibits containing the sealed reports and recommendations of the psychologist and the guardian ad litem.

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

CONCLUSION

{¶40} Plaintiff-appellant Husband's three assignments of error are overruled and the judgment of the Licking County Court of Common Pleas, Domestic Relations Division is affirmed.

By: Delaney, J. and

Gwin, P.J.

Baldwin, J., concur.