[Cite as *Ruff v. Ruff*, 2023-Ohio-2349.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY

JESSICA RUFF, Plaintiff-Appellee, - vs - NATHAN RUFF, Defendant-Appellant.	**CASE NO. 2021-T-0043** Civil Appeal from the Court of Common Pleas, Domestic Relations Division Trial Court No. 2018 DR 00187

O P I N I O N

Decided: July 10, 2023
Judgment: Affirmed

James J. Crisan, Martin F. White Co., LPA, 156 Park Avenue, N.E., P.O. Box 1150, Warren, OH 44482 (For Plaintiff-Appellee).

Jennifer J. Ciccone, 3685 Stutz Drive, Suite 100, Canfield, OH 44406; and *Charles A.J. Strader*, 175 Franklin Street, S.E., Warren, OH 44481 (For Defendant-Appellant).

Elise M. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483 (Guardian ad Litem).

MARY JANE TRAPP, J.

{¶1} Defendant-appellant, Nathan Ruff ("Mr. Ruff"), appeals from the divorce decree of the Trumbull County Court of Common Pleas, Domestic Relations Division, terminating his marriage to plaintiff-appellee, Jessica Ruff ("Ms. Ruff").

{¶2} Mr. Ruff asserts five assignments of error, contending the trial court erred (1) in calculating the values of two parcels of real property located in Nebraska; (2) in finding he engaged in financial misconduct; (3) in calculating the value of his business;

(4) in calculating the parties' income for purposes of child and spousal support; and (5) in designating Ms. Ruff as the residential parent of the parties' minor child.

{¶3} After a careful review of the record and pertinent law, we find as follows:

{¶4} (1) The trial court did not abuse its discretion in calculating the marital and separate values of real property located in Nebraska. Mr. Ruff's argument involves the trial court's failure to use a particular valuation method, which is not an error, and he did not submit sufficient evidence for the trial court to apply his preferred method. To the extent Mr. Ruff challenges the trial court's determinations regarding the separate and marital interests in the properties, the manifest weight of the evidence supports such determinations. Mr. Ruff presented no evidence of the properties' values as of the date of marriage and no evidence tracing the funds used to pay down the mortgages to his separate property.

{¶5} (2) The manifest weight of the evidence supports the trial court's finding that Mr. Ruff engaged in financial misconduct. The evidence indicates Mr. Ruff diverted $360,000 in cash from a business of which he was the sole owner during the pendency of the parties' divorce without Ms. Ruff's knowledge or consent and offered conflicting testimony regarding the nature of the transaction and his involvement in a separate business.

{¶6} (3) The trial court did not abuse its discretion in calculating the value of Mr. Ruff's business. The trial court reasonably considered Mr. Ruff's financial misconduct in determining the company's value.

{¶7} (4) The trial court did not abuse its discretion in calculating the parties' income for purposes of spousal and child support. The trial court determined the parties'

respective incomes based on the evidence in the record it found to be most credible, which we will not disturb on appeal.

{¶8} (5) The trial court did not abuse its discretion by designating Ms. Ruff as the residential parent of the parties' minor child. The trial court expressly made findings under each applicable statutory factor and determined that designating Ms. Ruff as the residential parent served the child's best interest. In addition, the record contains competent, credible evidence to sustain the trial court's determination.

{¶9} Thus, we affirm the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division.

Substantive and Procedural History

{¶10} Ms. Ruff initiated the underlying proceedings by filing a complaint for divorce in the trial court on June 15, 2018. Mr. Ruff filed an answer and counterclaim on July 19, 2018. The matter was tried to the bench between July 27 and 31, 2020. On September 24, 2021, the trial court issued a divorce decree containing findings of fact and conclusions of law.

{¶11} One relevant issue involves the real property located at 7773 and 7765 Maywood Street in Ralston, Nebraska, that Mr. Ruff purchased prior to the parties' marriage. At trial, Mr. Ruff contended they were his separate properties and that his ownership interests had grown by passive appreciation. Although Mr. Ruff submitted certain evidence in support of his claims, he did not submit the values of the properties on the date of marriage. Accordingly, with respect to 7773 Maywood, the trial court determined Mr. Ruff had a separate property interest of $13,256.94 and there was a marital interest of $113,743.06 to be divided equally. With respect to 7765 Maywood, the

trial court determined Mr. Ruff had a separate property interest of $13,936.62 and there was a marital interest of $84,963.38.

{¶12} A second relevant issue involves Mr. Ruff's alleged financial misconduct during the parties' divorce proceedings. Mr. Ruff owned a company named CRW Mechanical Consulting and Fabrication, LLC ("CRW"), which the trial court determined was a marital asset. In late 2015 or early 2016, Aaron Sandine was hired as CRW's chief financial officer. Mr. Sandine resides in Nebraska and worked remotely for CRW. Mr. Sandine was also purportedly the sole member and owner of a company named AFS Fabrication LLC ("AFS"). In January 2019, i.e., several months after Ms. Ruff filed for divorce, CRW "loaned" AFS the sum of $360,000 to purchase the CrossRoads Bar & Grill located in Southington, Ohio, which was close to where Mr. Ruff lived. Mr. Ruff was a patron of the bar and friends with one of its employees, Stephanie Anthony ("Ms. Anthony"). The transfer of $340,000 was memorialized in a promissory note executed by Mr. Ruff on behalf of CRW and Mr. Sandine on behalf of AFS. The actual purchaser of the CrossRoads was LJT Sales and Services, LLC ("LJT"), a Nebraska limited liability company of which Mr. Sandine is the managing member. Mr. Sandine registered LJT to transact business in Ohio with Ms. Anthony as its agent.

{¶13} In October 2019, CRW filed a civil complaint against Mr. Sandine, AFS, and LJT in the Trumbull County Court of Common Pleas. In an amended complaint, CRW alleged that it "intended to purchase the CrossRoads Bar & Grill, and the real estate upon which it was located by providing AFS the funds to make the acquisition as a straw man"; "[CRW] provided an initial amount of $20,000.00 to be used as a down payment for the acquisition" and "provided an additional investment of capital in the amount of * * *

$340,000.00 * * * on or about January 15, 2019"; "[Mr.] Sandine deposited the investment of capital funds in an account held by AFS"; "Defendants subsequently transferred said funds to an account held by LJT"; "[o]n or about January 16, 2019, Defendants, [Mr.] Sandine and LJT, purchased said real estate * * *"; and "[t]he parties began operating the CrossRoads Bar & Grill, and continue to do so at the time of this filing [November 12, 2019]." In an affidavit filed as part of the lawsuit, Mr. Ruff stated that he is "the majority owner of LJT Sales and Services, LLC."

{¶14} At trial, Mr. Ruff disclaimed any connection with AFS or LJT and maintained that his only interest in the transaction was "the money that was lent." Mr. Ruff also described the language of the amended complaint as "inaccurate." He testified that when Mr. Sandine defaulted on the loan, he petitioned the court to take over the operation of the CrossRoads to protect the investment. At the time of trial, the civil litigation against Mr. Sandine, AFS, and LJT remained pending. The CrossRoads was owned by LJT, operated by Mr. Ruff, and managed by Ms. Anthony.

{¶15} The trial court found that Mr. Ruff engaged in financial misconduct pursuant to R.C. 3105.171(E)(4) and (5), stating, "This Court is convinced that this is nothing more than an attempt to conceal, evade, and/or misappropriate the marital estate and [Mr. Ruff] wasn't even clever enough to not memorialize his treachery." The trial court also cited testimony indicating Mr. Ruff had instructed Mr. Sandine to direct revenue from CRW's clients to AFS.

{¶16} A third relevant issue involves the value of CRW. Mr. Ruff's expert testified it had a negative value of $49,315 based, in part, on the fact the company and the parties had failed to file taxes for several years, resulting in a large tax liability. The trial court

rejected this valuation, stating that much of the information provided to the expert was equivalent to "garbage in, garbage out." Instead, based on the "best evidence" before it, the trial court determined CRW has a value of $459,000. Specifically, Mr. Ruff's expert stated that the company's value as of December 31, 2019, was $99,000, which was closest in time to the termination of the parties' marriage on July 22, 2020. However, the expert's valuation did not include the $360,000 loan owed to CRW. Therefore, the trial court added the loan amount to the $99,000 figure.

{¶17} A fourth relevant issue involves the parties' respective incomes for purposes of calculating spousal and child support. With respect to spousal support, the trial court found, "[Ms. Ruff] has primarily stayed home to raise the child and traveled with [Mr. Ruff] on business. She has studied photography and worked for her family. The Court finds her income to be $30,000.00 per year. * * * [Mr. Ruff] owns a business that works on oil and gas pipelines as well as a tavern in Southington, Ohio. Due to the enormous amount of inaccuracies in the accounting, the Court looked at the exhibits that purport to be W2s and tax returns. The Court finds [Mr. Ruff]'s income for spousal support is $70,000.00." With respect to child support, the trial court's income calculation was "based on the incomes in evidence and adduced through testimony. A gross income of $30,000.00 was used for [Ms. Ruff] and $70,000.00 for [Mr. Ruff] for the purposes of child support."

{¶18} A fifth relevant issue involves the trial court's allocation of the parties' respective parental rights and responsibilities for the care of their minor child. The trial court set forth express findings under R.C. 3019.04(F)(1) and (2). It also expressed a concern that the parties' "high conflict relationship" would endure "long after" its decision and warned that "until both parents engage in the appropriate counseling as suggested

by Dr. Aimee Thomas ('Dr. Thomas'), their frustrations with each other will continue and this will have a negative impact on their son and his relationship with them." (Emphasis sic.) Based on "the weight and preponderance of evidence," the trial court determined it was in the child's best interest for Ms. Ruff to be designated as the residential parent.

{¶19} On October 25, 2021, Mr. Ruff filed a notice of appeal. He raises the following five assignments of error:

{¶20} "[1.] The Trial Court erred in calculating the values of several real properties.

{¶21} "[2.] The Trial Court erred when making a finding of financial misconduct.

{¶22} "[3.] The Trial Court erred in the calculation of a business asset.

{¶23} "[4.] The Trial Court erred in the calculation of child support and spousal support calculations.

{¶24} "[5.] The Trial Court abused its discretion and thus erred when allocating parental rights and responsibilities."

Nebraska Properties

{¶25} In his first assignment of error, Mr. Ruff contends the trial court erred in calculating the marital and separate values of the Nebraska properties.

{¶26} This court has held that "[a] trial court is not required to use nor precluded from using any particular valuation method." *Speece v. Speece*, 2021-Ohio-170, 167 N.E.3d 1, ¶ 95 (11th Dist.). "Thus, when a 'value' question is raised on appeal, the task of the appellate court '"is not to require the adoption of any particular method of valuation, but to determine whether, based on all relevant facts and circumstances, the [trial] court abused its discretion in arriving at a value."'" *Davis v. Davis*, 11th Dist. Geauga No. 2011-G-3018, 2013-Ohio-211, ¶ 41, quoting *McLeod v. McLeod*, 11th Dist. Lake No. 2000-L-

197, 2002-Ohio-3710, ¶ 61, quoting *James v. James*, 101 Ohio App.3d 668, 681, 656 N.E.2d 399 (2d Dist.1995). An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶ 62, quoting *Black's Law Dictionary* 11 (8th Ed.2004).

{¶27} Mr. Ruff argues the trial court's valuations are in "direct opposition" to the formula established in *Sauer v. Sauer*, 8th Dist. Cuyahoga No. 68925, 1996 WL 284873 (May 30, 1996). He then sets forth a series of convoluted calculations purportedly based on that formula.

{¶28} Mr. Ruff's argument involves the trial court's failure to use a particular valuation method, which, by itself, does not constitute an abuse of discretion.

{¶29} Further, one component of the *Sauer* formula is the value of property on the date of marriage. *See Sauer* at *5. The trial court found Mr. Ruff failed to submit any evidence of that value, stating "[Mr. Ruff] provided evidence only of the mortgage balance as of the date of marriage and the fair market value *as of the date of purchase*, thereby failing to compare apples to apples. Had [Mr. Ruff] provided evidence of the fair market value at the time of the marriage[,] his formula may have merit." (Emphasis sic.) Thus, the trial court could not have applied the *Sauer* formula. Accordingly, Mr. Ruff has not demonstrated that the trial court abused its discretion.

{¶30} To the extent Mr. Ruff may be challenging the trial court's determinations regarding the separate and marital interests in the properties, that argument also lacks merit.

{¶31} We review the determination of whether individual items of property are marital or separate using a manifest weight of the evidence standard. *Sedivy v. Sedivy*,

11th Dist. Geauga Nos. 2006-G-2687 and 2006-G-2702, 2007-Ohio-2313, ¶ 105. "[W]eight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25. "Under this standard, the reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the decision must be reversed." *Calkins v. Calkins*, 2016-Ohio-1297, 62 N.E.3d 686, ¶ 17 (11th Dist.).

{¶32} We will not reweigh the evidence introduced in court but instead will uphold the trial court's findings when the record contains some competent and credible evidence to sustain its conclusions. *Sedivy* at ¶ 105. "A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984).

{¶33} In a divorce proceeding, the trial court must determine whether particular property is separate or marital in nature, and then make an equitable distribution of that property. *Tochtenhagen v. Tochtenhagen*, 11th Dist. Trumbull No. 2009-T-0011, 2010-Ohio-4557, ¶ 20. The division of marital and separate property is governed by R.C. 3105.171. *Id*.

{¶34} "Marital property" includes "[a]ll real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during

the marriage"; "[a]ll interest that either or both of the spouses currently has in any real or personal property, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage"; and "[e]xcept as otherwise provided in this section, all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage * * *." R.C. 3105.171(A)(3)(a)(i)-(iii).

{¶35} "'Marital property' does not include any separate property." R.C. 3105.171(A)(3)(b). "Separate property" includes "[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 "passive income and appreciation acquired from separate property by one spouse during the marriage." R.C. 3105.171(A)(6)(a)(ii) and (iii). "The party asserting that the appreciation on a property was passive, and therefore separate property, bears the burden of proof." *Tochtenhagen* at ¶ 45.

{¶36} "Under present Ohio law, the primary means for deciding whether an asset is marital or separate property is traceability." *Davis*, *supra*, at ¶ 36. "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*." (Emphasis added.) R.C. 3105.171(A)(6)(b). "'The party attempting to prove that the asset is traceable separate property must establish such tracing by a preponderance of the evidence.'" *Id*., quoting *Price v. Price*, 11th Dist. Geauga No. 2000-G-2320, 2002 WL 99534, *2 (Jan. 25, 2002). In "a situation wherein a spouse is not able to trace his or her separate property," "'transmutation'" may occur, which is "'the process by which property that would otherwise be separate is converted into marital property.'"

Tochtenhagen at ¶ 30, ¶ 33, quoting *Frederick v. Frederick*, 11th Dist. Portage No. 98-P-0071, 2000 WL 522170, *10 (Mar. 31, 2000).

{¶37} The evidence before the trial court was undisputed that Mr. Ruff purchased the properties before the date of marriage. The properties were then commingled with marital funds because the parties paid down the existing mortgages during the marriage. Thus, in order to demonstrate that the properties remained separate property, Mr. Ruff was required to trace his initial investment to the properties' present values. *See Davis* at ¶ 38. The following chart sets forth the only evidence pertaining to values and tracing, as determined by the trial court:

7773 Maywood	
Purchase price on 12/5/2007	$100,000
Mortgage balance as of date of marriage	$86,743.06
Value of property on date of marriage	?
Stipulated value of property	$127,000
Appreciation from date of purchase	$27,000
Mortgage balance as of 7/1/2020	$35,669.80
Mortgage amount paid down during marriage	$51,073.26
7765 Maywood	
Purchase price on 4/30/2009	$90,000
Mortgage balance as of date of marriage	$76,063.38
Value of property on date of marriage	?
Stipulated value of property	$98,900
Appreciation from date of purchase	$8,900
Mortgage balance as of 7/1/2020	$40,232.20
Mortgage amount paid down during marriage	$35,831

{¶38} Mr. Ruff presented no evidence of the properties' values as of the date of marriage and no evidence tracing the funds used to pay down the mortgages to his separate property. Therefore, the trial court reasonably concluded that Mr. Ruff's separate interests were untraceable. Consequently, with respect to 7773 Maywood, the

trial court determined Mr. Ruff's separate interest was $13,256.94, which was calculated by subtracting the mortgage balance as of the date of marriage ($86,743.06) from the original purchase price ($100,000), and that the marital interest was $113,743.06, which was calculated by subtracting Mr. Ruff's separate interest ($13,256.94) from the stipulated value ($127,000). With respect to 7765 Maywood, the trial court determined Mr. Ruff's separate interest was $13,936.62, which was calculated by subtracting the mortgage balance as of the date of marriage ($76,063.38) from the original purchase price ($90,000), and that the marital interest was $84,963.38, which was calculated by subtracting Mr. Ruff's separate interest ($13,936.62) from the stipulated value ($98,900). Since there is competent, credible evidence supporting the trial court's determinations, there is no basis for reversal.

{¶39} Mr. Ruff's first assignment of error is without merit.

Financial Misconduct

{¶40} In his second assignment of error, Mr. Ruff challenges the trial court's finding that he engaged in financial misconduct.

{¶41} "While a trial court enjoys broad discretion in deciding whether to compensate one spouse for the financial misconduct of the other, the initial finding of financial misconduct must be supported by the manifest weight of the evidence." *Calkins*, *supra*, at ¶ 17.

{¶42} In a divorce proceeding, "[t]he court shall require each spouse to disclose in a full and complete manner all marital property, separate property, and other assets, debts, income, and expenses of the spouse." R.C. 3105.171(E)(3). "If a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction,

concealment, nondisclosure, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property." R.C. 3105.171(E)(4). "If a spouse has substantially and willfully failed to disclose marital property, separate property, or other assets, debts, income, or expenses as required under [R.C. 3105.171(E)(3)], the court may compensate the offended spouse with a distributive award or with a greater award of marital property * * *." R.C. 3105.171(E)(5).

{¶43} Although the statute "'does not set forth an exclusive listing of acts constituting financial misconduct, those acts that are listed * * * all contain some element requiring wrongful scienter. Typically, the offending spouse will either profit from the misconduct or intentionally defeat the other spouse's distribution of marital assets.'" *Calkins* at ¶ 15, quoting *Hammond v. Brown*, 8th Dist. Cuyahoga No. 67268, 1995 WL 546903, *3 (Sept. 14, 1995).

{¶44} ""The time frame in which the alleged misconduct occurs may often demonstrate wrongful scienter, *i.e.*, use of marital assets or funds during the pendency of or immediately prior to filing for divorce."" *Id*. at ¶ 16, quoting *Lindsay v. Lindsay*, 6th Dist. Sandusky No. S-11-055, 2013-Ohio-3290, ¶ 21, quoting *Jump v. Jump*, 6th Dist. Lucas No. L-00-1040, 2000 WL 1752691, *5 (Nov. 30, 2000). "Another consideration is whether the spouse made 'critical and unilateral decisions concerning the parties' retirement funds and other assets in anticipation of his divorce.'" *Id*., quoting *Smith v. Smith*, 9th Dist. Summit No. 26013, 2012-Ohio-1716, ¶ 21.

{¶45} Mr. Ruff asserts that "financial misconduct" does not encompass an individual "purchas[ing] a business, which would then be transferred to a pass-through

entity, which would then be transferred to another entity." Mr. Ruff cites no legal authority in support of this proposition, nor is it an accurate characterization of his actions. Rather, the evidence indicates Mr. Ruff diverted $360,000 in cash from a business of which he was the sole owner during the pendency of the parties' divorce without Ms. Ruff's knowledge or consent. He then presented conflicting testimony regarding the nature of the transaction and his involvement in the CrossRoads business. Thus, Mr. Ruff's conduct may be reasonably described as the dissipation, concealment and/or nondisclosure of assets.

{¶46} Mr. Ruff also argues that the trial court "failed to take in[to] consideration the current lawsuits" regarding the property. According to Mr. Ruff, there was no evidence indicating Mr. Sandine held the property "to purposely evade [its] disclosure to the Trial Court." The trial court expressly referenced the litigation in the decree. However, the court's finding of financial misconduct was properly focused on Mr. Ruff's actions, as the statutes require, not the alleged conduct of a third party.

{¶47} Mr. Ruff's second assignment of error is without merit.

Valuation of CRW

{¶48} In his third assignment of error, Mr. Ruff contends the trial court erred in calculating the value of CRW.

{¶49} As stated, our standard of review is whether, based on all relevant facts and circumstances, the trial court abused its discretion in arriving at a value. *Davis*, *supra*, at ¶ 41.

{¶50} Mr. Ruff argues the trial court failed to consider "the tax liability of CRW," which he asserts "is contrary to prevailing statute [sic]." The trial court expressly noted

that "the tax liabilities of CRW are actually that of the parties due to the flow through nature of the entity." Although the trial court was entitled to make a distributive award to Ms. Ruff based on Mr. Ruff's financial misconduct, it chose not to do so. Instead, the trial court considered Mr. Ruff's financial misconduct in its allocation of the parties' tax liabilities. Specifically, the trial court found such liabilities resulted from Mr. Ruff's "failure to file and pay taxes." In a later portion of the decree, the trial court found Mr. Ruff was responsible for 100% of the "marital tax debt" due to his financial misconduct. Mr. Ruff does not identify the "prevailing statute" the trial court's valuation allegedly violates and, thus, has failed to affirmatively establish error. *See* App.R. 16(A)(7).

{¶51} Mr. Ruff also argues that the trial court could not "impute" the $360,000 loan to CRW because whether that amount is actually owed to CRW is in dispute and because the court did not know whether CRW would prevail in its lawsuit. Mr. Ruff cites no authority indicating that a company's questionable loan should be excluded as an asset for valuation purposes, much less in the context of financial misconduct. Further, the trial court appears to have reasonably concluded that Mr. Ruff, as the party who unilaterally loaned the funds, was the appropriate party to bear the risk of nonpayment.

{¶52} Mr. Ruff's third assignment of error is without merit.

Income Calculations

{¶53} In his fourth assignment of error, Mr. Ruff contends the trial court erred in its calculation of the parties' income for the purposes of spousal and child support.

{¶54} A trial court's award of spousal support is reviewed on appeal for an abuse of discretion. *Speece*, *supra*, at ¶ 59. In a divorce action, "the court of common pleas may award reasonable spousal support to either party." R.C. 3105.18(B). In making an

award of spousal support, the court "shall consider," among other factors, "[t]he income of the parties, from all sources * * *." R.C. 3105.18(C)(1)(a).

{¶55} Like spousal support, "a trial court's decision regarding child support obligations falls within the discretion of the trial court." *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 686 N.E.2d 1108 (1997). "In any action in which a court child support order is issued * * *, the court * * * shall calculate the amount of the parents' child support and cash medical support in accordance with the basic child support schedule, the applicable worksheet, and the other provisions of Chapter 3119. of the Revised Code." R.C. 3119.02. "In order to determine a child-support award, a court must calculate the gross incomes of each parent." *A.S. v. J.W.*, 157 Ohio St.3d 47, 2019-Ohio-2473, 131 N.E.3d 44, ¶ 3; *see* R.C. 3119.021.

{¶56} Mr. Ruff argues the trial court did not properly rely on the W-2s and tax returns to determine his income since it found that his valuation evidence for CRW was unreliable. He also argues the trial court provided no justification for finding Ms. Ruff's income to be $30,000.

{¶57} As stated, the parties did not file tax returns for several years. Submitted into evidence were draft tax returns for the years 2014 to 2018 and two W-2s issued to Mr. Ruff by CRW for the years 2018 and 2019; however, no tax returns for these years had actually been filed at the time of trial. Further, the draft tax returns contained wide fluctuations in income.

{¶58} When confronted with divergent and/or doubtful evidence regarding a party's income, this court has held that "the trial court can exercise its discretion to make an income determination for the purposes of child support." *Cireddu v. Clough*, 11th Dist.

Lake No. 2013-L-092, 2014-Ohio-2454, ¶ 55. "As trier of fact, the trial court [is] in the best position to weigh the evidence and assign appropriate credibility." *Onyshko v. Onyshko*, 11th Dist. Portage No. 2008-P-0035, 2010-Ohio-969, ¶ 88.

{¶59} Here, the trial court determined the parties' respective incomes based on the evidence in the record that it found to be most credible. Accordingly, we will not disturb the trial court's determinations.

{¶60} Mr. Ruff's fourth assignment of error is without merit.

Residential Parent

{¶61} In his fifth and final assignment of error, Mr. Ruff contends the trial court erred by designating Ms. Ruff as the residential parent of the parties' minor child.

{¶62} The trial court's judgment involving the allocation of parental rights and responsibilities will not be disturbed absent a showing of an abuse of discretion. *Ash-Holloway v. Holloway*, 11th Dist. Trumbull No. 2021-T-0031, 2022-Ohio-4248, ¶ 8. "This court, as well as the Supreme Court of Ohio, has held that decisions involving the custody of children are within the discretion of the trial court and accorded great deference on review." *Id*. "The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988). Thus, "the reviewing court * * * should be guided by the presumption that the trial court's findings were indeed correct." *Id*.

{¶63} Mr. Ruff argues that the trial court should have decided this issue by applying R.C. 3109.051(D). However, that statute involves a trial court's determination

"whether to grant parenting time to a parent." The trial court granted Mr. Ruff parenting time pursuant to its standard companionship guidelines (with one exception).

{¶64} The trial court's determination involved the allocation of parental rights and responsibilities, which is governed by R.C. 3109.04. "When making the allocation of the parental rights and responsibilities for the care of the children * * *, the court shall take into account that which would be in the best interest of the children." R.C. 3109.04(B)(1). "In determining the best interest of a child * * *, the court shall consider all relevant factors," including "[t]he wishes of the child's parents regarding the child's care"; "[t]he child's interaction and interrelationship with h[is or her] parents * * *"; "[t]he child's adjustment to [his or her] home, school, and community"; "[t]he mental and physical health of all persons involved"; "[t]he parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights"; "[w]hether either parent has failed to make all child support payments * * *"; and "[w]hether the residential parent * * * has continuously and willfully denied the other parent's right to parenting time in accordance with an order of the court." R.C. 3109.04(F)(1)(a), (c)-(g), and (i).

{¶65} "In determining whether shared parenting is in the best interest of the children, the court shall consider all relevant factors," including "[t]he ability of the parents to cooperate and make decisions jointly, with respect to the children"; "[t]he ability of each parent to encourage the sharing of love, affection, and contact between the child and the other parent"; "[t]he geographic proximity of the parents to each other * * *"; and "[t]he recommendation of the guardian ad litem of the child * * *." R.C. 3109.04(F)(2)(a), (b), (d), and (e).

{¶66} Mr. Ruff argues that the trial court failed to articulate how naming Ms. Ruff as the residential parent was in the child's best interest. However, R.C. 3109.04 does not impose this obligation. As stated, the trial court was required to consider all relevant factors and determine the child's best interest. R.C. 3109.04(B)(1), (F)(1), and (F)(2). Here, the trial court expressly made findings under each applicable factor and determined that designating Ms. Ruff as the residential parent served the child's best interest.

{¶67} Mr. Ruff also cites evidence that is purportedly "in direct conflict" with naming Ms. Ruff as the residential parent, such as her desire to remove the child from the only school he has ever attended, her failure to vaccinate the child until after the divorce commenced, and instances where she denied Mr. Ruff companionship time with the child.

{¶68} Ms. Ruff disputes the accuracy of Mr. Ruff's assertions. In addition, Mr. Ruff's argument does not acknowledge the evidence in the record that supports the designation of Ms. Ruff as the residential parent, including the guardian ad litem's recommendation and the testimony of Dr. Thomas, who conducted psychological evaluations of the parties and the child. "In determining whether the trial court has abused its discretion, a reviewing court is *not to weigh the evidence*, but, rather, must determine from the record whether there is some competent, credible evidence to sustain the findings of the trial court." (Emphasis added.) *Lucas v. Byers*, 11th Dist. Lake Nos. 2020-L-010, et al., 2021-Ohio-246, ¶ 6. Accordingly, Mr. Ruff has not established an abuse of discretion.

{¶69} Mr. Ruff's fifth assignment of error is without merit.

{¶70} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

EUGENE A. LUCCI, J., concurs,

MATT LYNCH, J., concurs in part and dissents in part, with a Dissenting Opinion.

MATT LYNCH, J., concurs in part and dissents in part, with a Dissenting Opinion.

{¶71} I concur in the majority's Opinion with respect to all assignments of error except the first assignment, concerning the division of the Nebraska properties (7773 Maywood and 7765 Maywood). The trial court's division of these properties is contrary to law, fact, and logic. Accordingly, I respectfully dissent in part.

{¶72} The "undisputed" evidence is that Mr. Ruff purchased these two properties prior to the date of marriage with his own funds. *Supra* at ¶ 37. The trial court, therefore, properly held that "all testimony and exhibits show that at the time of the marriage these were separate properties." The purchase price of 7773 Maywood was $100,000 and the purchase price of 7765 Maywood was $90,000. Without more, these properties would be awarded to Mr. Ruff as his separate property.

{¶73} Both properties, however, were encumbered by mortgages. At the time of the marriage, 7773 Maywood had a mortgage balance of $86,743.06 and 7765 Maywood had a mortgage balance of $76,063.38. During the course of the marriage, the balance of the mortgage on 7773 Maywood was paid down by $51,073.26 and the balance of the 7765 Maywood mortgage was paid down by $35,831.18. As these mortgages were paid

down using marital funds, there was a marital interest in these properties of $51,073.26 and $35,831.18 respectively. This marital interest in the properties, $86,904.44 in the aggregate, was subject to division. *Gosser v. Gosser*, 11th Dist. Trumbull No. 2006-T-0029, 2007-Ohio-3201, ¶ 42 ("[t]he reduction in the amount of mortgages on the marital residence during the marriage by payment of marital funds is marital property subject to equitable division").

{¶74} Moreover, both properties appreciated in value during the course of the marriage. 7773 Maywood appreciated in value in the amount of $27,000 and 7765 Maywood appreciated in value in the amount of $8,900. As there was no evidence in the record that these increases in value were due to passive appreciation, the appreciation in value, $35,900 in the aggregate, was also marital and subject to division. *Tochtenhagen v. Tochtenhagen*, 11th Dist. Trumbull No. 2009-T-0011, 2010-Ohio-4557, ¶ 45 ("[t]he party asserting that the appreciation on a property was passive, and therefore separate property, bears the burden of proof").

{¶75} Combining the paydown in mortgage with the appreciation in value, the total marital interest in these properties is $122,804.44 ($86,904.44 for the paydown in mortgage and $35,900 for appreciation). The trial court determined the marital interest in both properties to be $198,706.44 ($113,743.06 for 7773 Maywood and $84,963.38 for 7765 Maywood, *supra* at ¶ 38). That is a difference of $75,902, for which there is no legal or factual justification. Therefore, the trial court's award with respect to these properties constitutes an abuse of discretion.

{¶76} The majority, as well as the trial court, finds that these "properties were then commingled with marital funds because the parties paid down the existing mortgages

during the marriage." *Supra* at ¶ 37. This purported "commingling" of Mr. Ruff's separate property with marital funds does not explain how a marital interest could exist $75,902 in excess of the combined paydown in mortgage and appreciation. Arguably, commingling is not even an accurate description of what has occurred here. Marital funds were not commingled with the Nebraska properties but were paid to a third party against the mortgage thereby increasing Mr. Ruff's equity in the properties. There is no evidence of marital funds contributing directly or indirectly to the appreciation in value of the properties. The undisputed evidence is that the Nebraska properties were and are Mr. Ruff's separate property. The question is not whether these properties were commingled with marital funds, but what amount of the increase in equity and/or value is subject to division as marital property.

{¶77} Assuming, arguendo, that commingling is what occurred here, it does not justify the result. "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). "[T]he only scenario by which transmutation [of separate into marital property] may still occur under the current provisions of R.C. 3105.171 is a situation wherein a spouse is not able to trace his or her separate property." (Citation omitted.) *Iacampo v. Oliver-Iacampo*, 11th Dist. Geauga No. 2011-G-3026, 2012-Ohio-1790, ¶ 53.

{¶78} The majority states that "Mr. Ruff presented no evidence of the properties' values as of the date of marriage and no evidence tracing the funds used to pay down the mortgages to his separate property," and, therefore, "the trial court reasonably concluded that Mr. Ruff's separate interests were untraceable." *Supra* at ¶ 38. The

majority's reasoning does not withstand scrutiny. Mr. Ruff purchased the properties prior to marriage and his ownership of the properties did not change during the course of the marriage. Mr. Ruff did not present evidence tracing the funds used to pay down the mortgages to his separate property because these funds were not his separate property. That claim was never raised. As demonstrated above, the mortgages were paid down in the amount of $86,904.44. This represents the marital interest subject to division as result of the pay down in mortgages. Additionally, the appreciation in value of the properties may be considered marital. As shown above, the properties appreciated $35,900 in value. If Mr. Ruff had presented evidence of the value of the properties at the time of the marriage, this figure could have been adjusted to exclude pre-marital appreciation. But he did not present such evidence and so the whole of the appreciation may be rightly regarded as marital. Beyond this, however, the failure to present evidence of the value of the properties at the time of marriage has no relevance to traceability or the determination of the marital interest in Mr. Ruff's Nebraska properties.

{¶79} The error in the trial court's division of the Nebraska properties has nothing to do with the method used to determine the value of the properties and nothing to do with the value of the mortgages or the pay down of the mortgages or the appreciation in value of the properties. These values as determined by the trial court (and reproduced *supra* at ¶ 37) are undisputed. The error is that these values reasonably support, at most, a marital interest of $122,804.44 in the properties, not the $198,706.44 as determined by the trial court. By finding the marital interest to be $75,902 more than can be reasonably accounted for, the trial court abused its discretion. There is nothing in the lower court's decision or the majority's Opinion that accounts for this excessive award.

{¶80} Accordingly, I respectfully dissent and would find the first assignment of error to be with merit.