[Cite as *Stotts v. Stotts*, 2017-Ohio-5738.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

CHAROLETT J. STOTTS,	:	
Plaintiff-Appellant,	:	Case No. 16CA14
vs.	:	
RONALD K. STOTTS,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellee.	:	

APPEARANCES:

Charles A. Cohara, Athens, Ohio for appellant.

Joseph Nemic, Athens, Ohio, for appellee.

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:6-19-17
ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment that granted the parties a divorce and divided their marital property. Appellant assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT ERRED IN FAILING TO DETERMINE WHETHER THE APPELLEE HUSBAND GIFTED THE WIFE A SHARE OF THE MARITAL HOME WHEN HE PLACED HIS WIFE ON THE DEED."
>
> SECOND ASSIGNMENT OF ERROR:
>
> "IN THE ALTERNATIVE, THE TRIAL COURT FOUND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BY FINDING THAT

93% OF THE MARITAL HOME'S PROPERTY WAS TRACEABLE AS SEPARATE PROPERTY."

THIRD ASSIGNMENT OF ERROR:
"IN THE ALTERNATIVE, THE TRIAL COURT ERRED BY FAILING TO PROPERLY TREAT THE APPRECIATION OF THE HOME'S VALUE THAT OCCURRED DURING THE MARRIAGE DUE TO SUBSTANTIAL IMPROVEMENTS THAT OCCURRED TO THE PROPERTY DURING THE MARRIAGE AS MARITAL PROPERTY."

{¶ 2} On October 7, 1995, the parties married. Appellant filed for divorce on August 2, 2013. Appellee answered and counterclaimed. The Domestic Relations Magistrate heard the case on October 29, 2014 and April 1, 2015.

{¶ 3} Appellant testified at the hearing that while she and appellee had been married nineteen years, they lived together in the marital home for a little over a year prior to the marriage. Prior to that, they had "halfway lived together" for almost 4 years, noting that "He stayed at my place a lot and we stayed at his a lot." Appellant stated that appellee was making a house payment at the time they got married and that the property was paid off in 1997.

{¶ 4} Appellant testified that later in 1997, appellee put her name on the deed "after his father had passed and with some of the hassle that his mother had to go through and what have you, and course we was at one point was gonna see about getting a double wide to put on it, at one point before his father passed and have a house build." Appellant further explained that she had been in a car accident prior to the marriage and had received a $33,000 settlement and that she used a portion of the settlement proceeds to pay off the property. In addition to contributing part of her settlement, appellant testified that there were a few years where she would get on the roof herself to coat the roof of their trailer as part of the regular maintenance. She also helped with the mowing and testified that

"[u]sually it was just me doing whatever because either he's working, too hot, wanting to cool off set in the air conditioning, or didn't feel like walking ya know." Appellant also noted that her son helped them build a large two-car garage with a loft on the property with his discount through the local lumber company.

{¶ 5} Appellee testified that he purchased the home in December 1989 for $30,000 with a ten year mortgage, and the couple married on October 7, 1995. Appellee stated that the mortgage was "almost paid off" when the couple married and that he was "working a lot of overtime so a lot of times I would double up my payment, or well I'd always send at least fifty dollars ($50) more than what I had to in. So it was paid off early. It was paid off in like seven and a half (7 ½) years)." Further, appellee stated that appellant had paid "like two thousand dollars ($2,000)" from her personal injury settlement to pay off the mortgage. Appellee noted, however, that he no longer had documentation of these dates and amounts, and that he had contacted the bank and had learned that the bank had destroyed the relevant records. At the time of the hearing, appellee was living in the marital residence.

{¶ 6} On December 1, 2015, the magistrate issued her decision, and made several findings of fact and conclusions of law, including a determination that the marital residence is marital property. The magistrate noted that on May 24, 1997, appellee executed a Warranty Deed conveying the property from himself to himself and appellant, jointly with rights of survivorship. The magistrate further concluded that the property had a fair market value of $53,500.00 based on the only appraisal submitted, and that the property is unencumbered.

{¶ 7} On April 7, 2016, appellee objected to the magistrate's decision and contended that (1) the magistrate failed to adequately consider appellee's health or ability to pay, (2) the magistrate did

not exclude appellee's disability retirement from consideration, as disability retirement should constitute separate property, (3) the magistrate erred in giving the tractor to appellant, and (4) that the magistrate did not analyze whether the marital home was marital or separate property. With regard to the marital residence, the appellee stated: "Ronald testified he bought the marital home with $30,000 of separate property, a number of years prior to becoming married to Charolett, in 1995. He later testified he signed the deed, putting his wife on it. However, the Magistrate did no analysis of whether any portion of that property should be classified as separate. Defendant would argue, at a minimum, he should get his down payment before she receives any additional money, which, aside from the OPERS, would negate his obligation to her entirely. That would not even include the monthly payments he had made for years before they were married."

{¶ 8} On April 21, 2016, appellant filed a "Memorandum in Opposition to Defendant's Objections to Magistrate's Decision" in which she asserted that the magistrate made detailed findings about the identity and value of the parties' real and personal, tangible and intangible, property. With regard to the marital residence, appellant stated: "The record reflects that the marital residence was purchased by Defendant in December 1989 for $30,000 financed for 10 years. The parties married five and one-half years later in October 1995. When the Plaintiff received a settlement from a personal injury accident, she paid off the mortgage on the home. Subsequently, on May 24, 1997, the Defendant executed a Warranty Deed from himself solely to himself and the Plaintiff jointly with rights of survivorship. The Plaintiff testified that she worked doing maintenance of the home through the course of the marriage." Appellant also disagreed with appellee's assertion that appellee should recover his down payment as an offset before appellant received any money.

{¶ 9} On May 26, 2016, the trial court issued its ruling on the objections and the decree of divorce. Among other findings, the court concluded that the appellee's objection with regard to the marital residence was well taken. The court concluded that appellee had been paying the mortgage solely until the 1995 marriage and that the mortgage was satisfied in May 9, 1997. The court noted that by 1997 most of the mortgage would have been satisfied because appellee had made extra payments and that the mortgage would have been in its 7th or 8th year after a ten year mortgage. Further, the court held that, based upon the information before it, appellant contributed $2000 towards the purchase price of $30,000 for the marital home which should be awarded to her as separate property and that she has a 7% interest in the marital property ($2000 contribution/$30,000 purchase price). Thus, the court found that appellee had a separate marital property interest of $28,000 towards the $30,000 purchase price in the marital home or 93% ($28,000 contribution/$30,000 purchase price). This appeal followed.

I. FIRST ASSIGNMENT OF ERROR

{¶ 10} In her first assignment of error, appellant asserts that the trial court erred by failing to determine whether the appellee gifted appellant a share of the marital home when appellee placed appellant on the deed.

{¶ 11} In a divorce proceeding, a trial court shall determine "what constitutes marital property and what constitutes separate property" and then "shall divide the marital and separate property equitably between the spouses * * * ." R.C. 3105.171(B). Generally, a court should award each spouse his or her separate property and then distribute the marital estate equally, unless an equal division would be inequitable. R.C. 3105.171(C) and (D). "Marital property" is that "real and personal property that currently is owned by either or both the spouses * * * and that was

acquired by either or both * * * during the marriage." R.C. 3105.171(A)(3)(a)(i). Marital property does not include separate property. R.C. 3105.171(A)(3)(b). Relevant to this case, "{s]eparate property" means all real and personal property and any interest in real or personal property that is found by the court to be any "real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage." R.C. 3105.171(A)(6)(a)(ii).

{¶ 12} Appellant argues that while the marital residence was appellee's separate property upon entering the marriage, appellee transmuted that separate property into marital property through an inter vivos gift. It is well-settled that parties can transmute separate property into marital property by means of an inter vivos gift. *Helton v. Helton*, 114 Ohio App.3d 683, 685, 683 N.E.2d 1157 (2nd Dist.1996). "An inter vivos gift is an immediate, voluntary, gratuitous and irrevocable transfer of property by a competent donor to another." *Smith v. Shafer*, 89 Ohio App.3d 181, 183, 623 N.E.2d 1261 (3d Dist.1993), citing *Saba v. Cleveland Trust Co.* 23 Ohio App. 163, 165, 154 N.E. 799 (8th Dist.1926). The essential elements of an inter vivos gift are: "(1) [the] intent of the donor to make an immediate gift, (2) delivery of the property to the donee, [and] (3) acceptance of the gift by the donee." *Barkley v. Barkley*, 119 Ohio App.3d 155, at fn. 2, 694 N.E.2d 989 (4th Dist.1997), citing *Bolles v. Toledo Trust Co.*, 132 Ohio St. 21, 4 N.E.2d 917 (1936). "The burden of showing that an inter vivos gift was made is on the donee by clear and convincing evidence." *In re Fife's Estate*, 164 Ohio St. 449, 456, 132 N.E.2d 185 (1956).

{¶ 13} R.C. 3105.171(H) provides: "Except as otherwise provided in this section, the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." Thus, "the form of title is relevant to, but not conclusive of, the classification of property as being either marital or separate."

Barkley at 161. Therefore, the determinative issue is whether, when appellee put appellant's name on the deed with joint survivorship rights he had the donative intent to transfer to appellant a present possessory interest in his separate property. *Helton* at 686.

{¶ 14} Because a trial court has broad discretion to divide property in a domestic case, appellate courts typically apply an abuse-of-discretion standard of review to a trial court's distribution of the parties' property. *See Middendorf v. Middendorf,* 82 Ohio St.3d 397, 401, 696 N.E.2d 575 (1998). Further, the factual findings of a trial court relating to its classification of property as marital or separate are reviewed under a manifest weight standard. *Barkley* at 159, *Jones v. Jones*, 4th Dist. Athens No. 07CA25, 2008-Ohio-2476, ¶ 18. Therefore, appellate courts may not independently weigh the evidence, but should presume that a trial court's findings are correct when supported by competent and credible evidence. *Myers v. Garson,* 66 Ohio St.3d 610, 614, 614 N.E.2d 742 (1993); *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988).

{¶ 15} In the case sub judice, our standard of review varies due to the unusual procedural circumstances of this case. Here, the magistrate determined that the marital home was an inter vivos gift from appellee to both the appellant and the appellee, thus finding that the marital residence constituted marital property. After considering appellee's objections, the trial court rejected this, finding. However, it appears that the court did not consider appellant's response to appellee's objections. In fact, on the first page of the trial court's decision the court notes that "The Magistrate issued her recommendations on December 1, 2015. Defendant filed objections April 7, 2016. Transcripts of the proceedings were filed. Plaintiff did not file a response." However, this statement is incorrect as appellant's "Memorandum in Opposition to Defendant's Objections to Magistrate's Decision" is included in the trial court record with a file stamp date of April 21, 2016.

{¶ 16} In *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 604 N.E.2d 138 (1992), the Supreme Court of Ohio held: "A reviewing court, even though it must conduct its own examination of the record, has a different focus than the trial court. If the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court." *Murphy* at 360. In light of *Murphy*, "we, as an appellate court, should not first consider an argument that the trial court did not address." *Lang v. Holly Hill Motel, Inc.*, 4th Dist. Jackson No. 05CA6, 2005-Ohio-6766, at ¶ 22.

{¶ 17} Therefore, in view of the foregoing we reverse the trial court's judgment as it relates to the marital home and we remand this matter to the trial court so that it may properly consider appellant's response to appellee's objections and address this issue anew. Once again, a reviewing court cannot consider evidence that the trial court did not use in reaching its decision. To do so would usurp the trial court's function. *Murphy* at 360. "Failing to remand would mean that we would, in effect, be sitting as a trial court rather than reviewing a trial court's decision." *Lang* at ¶ 23. *See also Bentley v. Pendleton*, 4th Dist. Pike No. 03CA722, 2005-Ohio-3495, at ¶ 9; *Farley v. Chamberlain*, 4th Dist. No. 03CA48, 2004-Ohio-2771, at ¶ 12, *Dingess v. Smith*, 4th Dist. Washington No. 09CA18, 2010-Ohio-343, at ¶ 28.

{¶ 18} Also, we point out that we take no position as to whether the marital residence was marital or separate property. Instead, we recognize that it would be inappropriate for this court to review this issue when the trial court appears not to have taken the appellant's response to appellee's objections into account.

II. SECOND AND THIRD ASSIGNMENTS OF ERROR

{¶ 19} Our disposition of appellant's first assignment of error renders her second and third

assignments of error moot. *State v. Elkins*, 4th Dist. Lawrence No. 16CA15, 2016-Ohio-8579, ¶ 18, citing *State v. Rinehart*, 6th Dist. Wood No. WD–08–015, 2010-Ohio-2259, ¶ 12, and *State v. Hurlburt*, 10th Dist. Franklin No. 12AP-231, 2013-Ohio-767, at ¶ 8 (both finding assignments of error challenging validity of guilty plea moot when case remanded due to trial court's failure to hold hearing regarding defendant's request to withdraw plea); *see State ex rel. Cincinnati Enquirer v. Hunter*, 141 Ohio St.3d 419, 2014-Ohio-5457, 24 N.E.3d 1170, ¶ 4 (explaining that issues are moot "when they are or have become fictitious, colorable, hypothetical, academic or dead"); *State v. Hudnall*, 4th Dist. Lawrence No. 15CA8, 2015-Ohio-3939, ¶ 7 ("A [n issue] is moot when a court's determination on a particular subject matter will have no practical effect on an existing controversy."); *State v. Moore*, 4th Dist. Adams No. 13CA987, 2015-Ohio-2090, ¶¶ 6 and 7 ("The principle of "judicial restraint" mandates that Ohio courts should not exercise jurisdiction over questions of law that have been rendered moot"; and "an issue is moot when it has no practical significance and, instead, presents a hypothetical or academic question."); *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912, ¶ 10 (1st Dist.) ("The duty of a court of appeals is to decide controversies between parties by a judgment that can be carried into effect, and the court need not render an advisory opinion on a moot question or a question of law that cannot affect the issues in a case."). We therefore need not address appellant's second and third assignments of error. App.R. 12(A)(1)(c).

{¶ 20} Accordingly, we sustain appellant's first assignment of error, reverse the trial court's judgment as it relates to the marital home and remand the matter to the trial court to properly consider the appellant's response to appellee's objections.

JUDGMENT REVERSED AND

CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the judgment be reversed and this cause be remanded to the trial court for further proceedings consistent with this opinion. Appellant and Appellee shall equally divide the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.