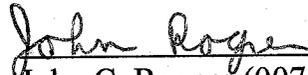


Notice of Certified Conflict

Appellant Jeffrey Morrow hereby gives notice that the Ninth District Court of Appeals has issued an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. Attached to this notice is the court of appeals journal entry certifying a conflict, a copy of the certifying court's opinion, and a copy of the conflicting court of appeal's opinion. On October 4, 2012, Appellant had filed a Notice of Appeal, Notice of Motion to Certify a Conflict, and a Memorandum In Support of Jurisdiction with the Ohio Supreme Court.

Respectfully submitted,



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COUNSEL FOR APPELLANT,
JEFFREY MORROW

Certificate of Service

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail to counsel of record for appellee, Linda Hoffman, 273 Main Street, Suite 200, Wadsworth, OH 44281 on November 7, 2012.



John C. Ragner (0075021)
COUNSEL FOR APPELLANT,
JEFFREY MORROW

STATE OF OHIO)
)ss: COURT OF APPEALS
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

12 NOV -5 AM 11:26

JEFFREY MORROW

Appellant

v.

SHERRI BECKER

Appellee

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

C.A. No. 11CA0066-M

JOURNAL ENTRY

Appellant has moved, pursuant to App.R. 25, to certify a conflict between the judgment in this case, which was journalized on August 27, 2012, and the judgment of the Seventh District Court of Appeals in *Spier v. Spier*, 7th Dist. No. 05 MA 26, 2006-Ohio-1289. Appellee has not responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the “judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]” “[T]he alleged conflict must be on a rule of law -- not facts.” *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

Appellant has proposed that a conflict exists between the districts on the following issue: “Whether company benefits, such as a company car, can be included as income for the purpose of child support calculations if the benefits the party receives do[] not come from self-employment, as proprietor of a business, or as a joint owner of a partnership or closely held corporation.”

We find that a conflict of law exists; therefore, the motion to certify is granted.



Judge

Concurs:

WHITMORE, P.J.

Dissents:

BELFANCE, J.

STATE OF OHIO
COUNTY OF MEDINA

JEFFREY MORROW

Appellant

v.

SHERRI BECKER

Appellee

COURT OF APPEALS

ss: AUG 29 AM 10:09

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

C.A. No. 11CA0066-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 04 PA 0199

DECISION AND JOURNAL ENTRY

Dated: August 27, 2012

CARR, Judge.

{¶1} Appellant Jeffrey Morrow appeals the judgment of the Medina County Court of Common Pleas, Domestic Relations Division. This Court affirms in part and reverses in part.

I.

{¶2} Jeffrey Morrow ("Father") and Sherri Becker ("Mother") are the parents of two children ("Mo" and "Mac"). Mac, who is two years younger than Mo, has special needs arising out of Down Syndrome. Mother was designated as the residential parent and Father was awarded parenting time with the children as follows: every other Wednesday from 6 p.m. until 9 a.m. the following morning with both children; alternate weekends from 6 p.m. Thursday until 9 p.m. Sunday with Mo; and the same alternate weekends on Sunday from 11 a.m. until 9 p.m. with Mac. The court order allowed for alternative parenting time arrangements as the parties may agree. Father was also ordered to pay child support in the amount of \$2,198.05 per month.

{¶3} A little over a year later, the trial court issued a judgment entry after a hearing on motions to modify parenting time. The trial court awarded Father parenting time pursuant to the court's standard visitation schedule, with the following modifications: the parties must exchange the children in public places; the parties would share time with the children equally during Thanksgiving and winter breaks; and Father would not have summer vacation parenting time. The standard order of visitation provided for alternate weekend visits from 6 p.m. Friday until 6 p.m. Sunday, plus one weekday evening, consisting of three hours on Wednesdays if the parties could not otherwise agree. Father appealed the trial court's reduction of his parenting time. This Court affirmed the trial court's judgment. *Morrow v. Becker*, 9th Dist. No. 07CA0054-M, 2008-Ohio-155.

{¶4} In August 2009, Father filed a motion to modify and reduce his child support obligation. A couple weeks later, Mother filed a motion to modify parenting time. Four months later, she filed a motion for contempt, alleging that Father had failed to pay child support as ordered. The magistrate scheduled and continued hearings on the motions multiple times at the parties' request. The magistrate heard Mother's motion to modify parenting time on July 27, 2010, and scheduled a hearing on the issues of the modification of child support and contempt for August 10, 2010. On July 29, 2010, Father's attorney moved to withdraw. His subsequent attorney moved on August 2, 2010, to continue the August 10 hearing. Given the numerous prior continuances coupled with Father's assertion that his new counsel would be prepared for hearing, the magistrate denied the motion for a continuance. She heard Father's motion to modify child support and Mother's motion for contempt on August 10, 2010. The magistrate issued separate decisions arising out of the two hearings. Father filed objections to both decisions.

{¶5} The trial court overruled the objections, although it corrected one typographical error. In sum, the trial court ordered the following. Father would have parenting time with the children on alternating weekends from Friday at 6:00 p.m. until Monday when he delivered the children to school or child care. He was no longer granted mid-week visitations, although the parties were free to consider overnight Wednesday visitations for Mo if Father's international travel schedule abated in the future. The parties were required to follow the court's standard parenting time schedule for holidays and days of special meaning if they could not otherwise agree regarding such days. Father would not have extended parenting time, including Christmas break, spring break, and summer, unless Mother agreed to such extended time. The trial court ordered Father to pay child support in the amount of \$2,154.95 per month, plus a 2% processing charge. The trial court found Father in contempt solely for failing to pay his child support obligation through wage withholding, imposed a \$250.00 fine, and ordered Father to pay Mother \$575.00 for attorney fees and costs expended to prosecute the contempt motion. Father appealed, raising five assignments of error for review. Some assignments of error are consolidated to facilitate review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ABUSED ITS DISCRETION BY (1) ELIMINATING MR. MORROW'S WEDNESDAY, THANKSGIVING, SPRING AND CHRISTMAS BREAK PARENTING TIME, AND (2) RESTRICTING MR. MORROW'S VISITATION WITH HIS CHILDREN TO ALTERNATING DAYS OF SPECIAL MEANING/HOLIDAYS AND EVERY OTHER WEEKEND UNLESS MS. BECKER AGREES TO ADDITIONAL VISITATION, THEREBY COMMITTING REVERSIBLE ERROR AND VIOLATING MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY MISINTERPRETING THE MAGISTRATE'S DECISION, THEREBY COMMITTING REVERSIBLE ERROR AND VIOLATING MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶6} Father argues that the trial court abused its discretion by modifying his parenting time with the children. Specifically, Father argues that the trial court erred by misinterpreting the magistrate's decision, reducing his parenting time, and leaving the issue of additional visitation to Mother's sole discretion. This Court disagrees.

{¶7} In cases where the matter was initially heard by a magistrate who issued a decision to which objections were filed and disposed, "[a]ny claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision. In other words, the standards for appellate review do not apply to the court's acceptance or rejection of the magistrate's findings or proposed decision." *Mealey v. Mealey*, 9th Dist. No. 95CA0093, 1996 WL 233491 (May 8, 1996), *2. Civ.R. 53(D)(4)(d) requires the trial court to conduct an independent review of the record when ruling on objections. Civ.R. 53(D)(4)(b) allows the trial court to adopt or reject the magistrate's decision, in whole or in part, with or without modification. In this case, the trial court conducted the required independent review and issued its judgment based on that review. Because we are constrained to consider the issues on appeal as they arise out of the trial court's determinations and orders, Father's argument that the trial court misinterpreted the magistrate's decision is not well taken. The second assignment of error is overruled.

{¶8} As we recognized in Father's first appeal, "A trial court's decision regarding visitation rights will not be reversed on appeal except upon a finding of an abuse of discretion."

Morrow at ¶ 8, quoting *Harrold v. Collier*, 9th Dist. No. 06CA0010, 2006-Ohio-5634, ¶ 6. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶9} First, Father argues that the trial court abused its discretion by reducing his parenting time by eliminating Wednesday evening visitation, as well as spring, Thanksgiving, and Christmas break parenting time.

{¶10} As an initial matter, the record indicates that, rather than reducing his parenting time, the trial court in fact increased Father's parenting time. Although the trial court eliminated the three-hour Wednesday evening visitation, it increased his bi-weekly weekend visitation to include an additional evening and overnight, which necessarily also gave him additional time on Monday morning with the children. Mother testified that both children suffer when faced with inconsistency and that Father's tardiness, failure to appear for some visits, and frequent absences due to international travel have disrupted their routines to their detriment. The evidence presented at the hearing demonstrated that Father made frequent trips to China which caused him to miss many scheduled visits with the children. In addition, Father missed some scheduled parenting time due to jet lag and his decision to attend Ohio State University football games instead of exercising visitation. Father admitted that his international travel would continue into the foreseeable future and that he could not commit to being available to spend every Wednesday evening with the children. In ordering the modification of parenting time, the trial court reasoned that eliminating the mid-week three-hour parenting time, while extending Father's

parenting time on alternate weekends was in the best interest of the children as it promoted consistency, stability, and structure for the children. Under the circumstances, this Court cannot say that the trial court abused its discretion when it so modified the parenting time order.

{¶11} Moreover, Father is incorrect in his assertion that the trial court eliminated his parenting time during spring, Thanksgiving, and Christmas breaks. The trial court ordered that “holidays and days of special meaning are to be divided as the parties agree or, if no agreement can be reached, pursuant to the Court’s Standard Parenting Time Order.” The Medina County Domestic Relations Court Standard Parenting Time Schedule, attached to the trial court’s judgment, sets out a “Holiday Parenting Time” schedule in section II. That section identifies “Holiday[s]” including “Spring Break,” “Thanksgiving,” and “Winter break.” Because these times are expressly designated as “holidays,” the trial court’s order entitles Father to visitation as delineated pursuant to the schedule, unless the parties agree to modify that parenting time. The trial court’s standard order sets forth two options for visitation during each of the above-referenced holidays and states that “in the event an option is not specified and the parties do not agree, then Option 1 shall be in effect.” Therefore, pursuant to the plain language of the trial court’s order and standard parenting time schedule, Father’s parenting time during spring, Thanksgiving, and Christmas breaks has not been eliminated. Accordingly, his argument in that regard is not well taken.

{¶12} Second, Father argues that the trial court abused its discretion by leaving the issue of extended parenting time in the sole discretion of Mother. In support, Father relies on *Barker v. Barker*, 6th Dist. No. L-00-1346, 2001 WL 477267 (May 4, 2001), in which the appellate court concluded that the trial court abused its discretion by leaving the decision to reinstate the father’s visitation in the sole discretion of the child’s psychologist. The *Barker* court concluded

such an order was unreasonable, however, because the child's psychologist could withhold her consent for visitation based on matters beyond the father's control and because the psychologist had previously exhibited bias in favor of the mother. *Id.* at *5. That is not the situation in this case.

{¶13} Here, the trial court ordered that “[Father] should receive no *extended* parenting time unless agreed to by [Mother].” (Emphasis added.) In contrast to *Barker*, the trial court did not empower Mother to determine whether Father could exercise parenting time at all. He clearly had the right to certain visitation with the children. Instead, the trial court merely acknowledged that Mother could allow Father to have additional time with the children beyond that which had been ordered. This Court concludes that the trial court did not abuse its discretion.

{¶14} Finally, Father complains that the trial court's parenting time order is biased against him because it penalizes him with forfeiture of parenting time if he is more than 30 minutes late when picking up the children for visitation. He argues that Mother, on the other hand, may disregard the times determined for exchange of the children with impunity.

{¶15} The trial court's order merely reiterates the court's local rule subsumed in the standard parenting time schedule under Section VI., captioned “Promptness.” Loc.R. 6.05, Form 6.04A. The rule states in pertinent part: “The residential parent has no duty to wait for the nonresidential parent to pick up the children longer than thirty (30) minutes, unless the nonresidential parent notifies the residential parent that she/he will be late, and the residential parent agrees to remain available after the thirty (30) minute waiting period. A parent who is more than thirty (30) minutes late loses the parenting time period.”

{¶16} The Ohio Supreme Court has held that state courts may adopt rules of local practice and that such local rules are enforceable as long as they are not inconsistent with the Ohio Rules of Civil Procedure. *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 554 (1992); *see, also*, Ohio Constitution, Article IV, Section 5(B); Civ.R. 83; Sup.R. 5. Loc. R. 1.01 of the Local Rules of the Court of Common Pleas of Medina County, Domestic Relations Division, states that these rules “were promulgated by the Medina County Court of Common Pleas, Domestic Relations Division, pursuant to Article IV, Section 5(B) of the Ohio Constitution and Rule 5 of the Ohio Supreme Court Rules of Superintendence for the Courts of Common Pleas.” Father has not argued that Loc.R. 6.05, which incorporates the standard parenting time schedule, is inconsistent with the Ohio Rules of Civil Procedure. Moreover, he has not demonstrated how such a local rule would be unenforceable.

{¶17} In addition, Father is incorrect in his assertion that Mother is free to delay his access to the children by disregarding the times designated for exchange. Mother is bound to comply with the court’s orders regarding parenting time. If she refuses or otherwise fails to do so, Father may file a motion for contempt and Mother would be subject to contempt sanctions. Accordingly, Father’s argument that the trial court’s order is biased in favor of Mother is not well taken. The first assignment of error is overruled.

{¶18} For the above reasons, Father’s first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO GRANT A CONTINUANCE AFTER MR. MORROW’S FORMER COUNSEL ABANDONED HIM ON THE EVE OF TRIAL, THEREBY COMMITTING REVERSIBLE ERROR AND VIOLATING MR. MORROW’S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH

AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION
16 OF THE OHIO CONSTITUTION.

{¶19} Father argues that the trial court erred by denying his motion to continue the hearing on his motion to modify child support. Additionally, he argues that the denial of his request for a continuance violated his right to due process of law. This Court disagrees.

{¶20} It is well settled that the decision to grant or deny a continuance lies in the sound discretion of the trial judge. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). The United States Supreme Court emphasized that “not every denial of a request for more time [] violates due process even if the party fails to offer evidences or is compelled to defend without counsel.” *Ungar*, 376 U.S. at 589. Whether a denial of a request for a continuance is so arbitrary as to violate due process depends on the circumstances of the case, particularly the reasons articulated to the trial court in support of the request. *Id.* “In determining whether the trial court abused its discretion by denying a motion for a continuance, this court must ‘apply a balancing test, weighing the trial court’s interest in controlling its own docket, including facilitating the efficient dispensation of justice, versus the potential prejudice to the moving party.’” *Kocinski v. Kocinski*, 9th Dist. No. 03CA008388, 2004-Ohio-4445, ¶ 10, quoting *Burton v. Burton*, 132 Ohio App.3d 473, 476 (3d Dist.1999).

{¶21} Father filed his motion to modify/reduce child support on August 4, 2009. The trial court scheduled a hearing on the motion on October 23, 2009. The hearing on Mother’s motion to modify parenting time was subsequently scheduled for the same date and time. Father moved to extend the time in which he must respond to Mother’s discovery requests until October 19, 2009, merely four days before the scheduled hearing. The hearing date was converted to a pretrial and the hearing was rescheduled for February 24 and 25, 2010. Father filed his witness and exhibit lists on February 11, 2010. Thirty-six minutes before the hearing was scheduled to

begin, Father filed a motion to continue because his attorney was involved in an ongoing complex trial in another court. The magistrate continued the hearing until May 21, 2010. On May 20, 2010, Father moved to continue the hearing due to his aunt's death on May 15, 2010, and an obligation to leave town for the funeral. The trial court bifurcated the motion hearings and continued the hearing on Mother's motion to modify parenting time to July 27, 2010, and continued the hearing on Father's motion to modify child support to August 10, 2010.

{¶22} On July 29, 2010, Father's attorney moved to withdraw from further representation. The trial court granted the motion. The record contains a signed letter from Father to the magistrate in which Father asserted that he did not challenge his attorney's withdrawal, that he had secured alternate counsel, and that his new attorney would be prepared for the hearing on August 10, 2010. On August 2, 2010, Father's new attorney filed a notice of appearance, a supplemental witness and exhibit list, and a motion to continue the hearing. In support of a continuance, Father's attorney asserted that he needed additional time to review documents and provide Mother's counsel with a supplemental witness and exhibit list. He further asserted that Father would be unfairly prejudiced by the inability to call any additional witnesses he might disclose in a supplemental witness list. Father did not suggest a new date for the hearing. The magistrate denied the motion to continue on August 4, 2010. The same day, Father's attorney filed a second supplemental witness and exhibit list. Father's attorney orally renewed his motion to continue immediately prior to the hearing. The magistrate again denied the motion.

{¶23} Based on a review of the circumstances of this case, this Court cannot say that the domestic relations court abused its discretion by denying Father's August 2, 2010 motion to continue the hearing on his motion to modify child support. Father filed his motion nearly a year

earlier, at a time he believed he could present evidence to justify the reduction. He moved for multiple prior continuances, which the court granted. Father's attorney did not move to withdraw on the "eve of trial," as Father asserts, but rather twelve days prior to trial. Father informed the magistrate by letter the following day that he had secured new counsel who "will prepare and be prepared for the hearing on August 10, 2010 regarding the modification of child support." Father's new counsel filed two supplemental witness and exhibit lists and requested leave to file a third supplement. Although the trial court denied leave to file the third supplement, Father was not precluded from presenting any evidence at the hearing, even over Mother's objection that he had not identified such evidence prior to hearing. Father was permitted to file two supplemental witness and exhibits beyond the deadline, and he was not precluded from presenting any witnesses at the hearing.

{¶24} Given the indefinite nature of the requested continuance, Father's role in creating the circumstances giving rise to the latest request, the inconvenience of repeated delays and uncertainty for Mother, the trial court's right to control its docket coupled with the efficient dispensation of justice outweighs any potential prejudice to Father. *See Kocinski* at ¶ 10. In fact, because Father was not precluded from presenting all evidence and testimony he desired, he has not demonstrated that he was prejudiced at all, let alone unfairly. Although he argues that he had no time "to investigate the approximately \$25,000 of unknown funds deposited into [Mother's] bank account in 2009[,]" he presented copies of Mother's bank statements evidencing such activity on her account and was able to cross-examine Mother extensively on the issue. Accordingly, the denial of a continuance did not violate Father's right to due process, and the trial court did not abuse its discretion by denying Father's third motion for a continuance. Father's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ABUSED ITS DISCRETION BY (1) IMPUTING AN ADDITIONAL \$16,756 OF INCOME FOR CORPORATE BENEFITS WHEN CALCULATING MR. MORROW'S CHILD SUPPORT OBLIGATION (2) AVERAGING MR. MORROW'S AND MS. BECKER'S INCOME OVER THE PRIOR THREE YEARS THEREBY IMPUTING A GROSS INCOME THAT DOES NOT ACCURATELY REFLECT CURRENT EARNINGS OR EITHER PARTY AND (3) IGNORING THE BASIC CHILD SUPPORT SCHEDULE AND TREATING THE INSTANT ACTION ON A CASE-BY-CASE BASIS. THUS, THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND VIOLATED MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶25} Father argues that the domestic relations court abused its discretion in its calculation of child support. Specifically, Father argues that the trial court erred by (1) including corporate benefits in his gross income, (2) averaging the parties' incomes and imputing income to Father, and (3) establishing child support outside the basic child support schedule. This Court disagrees.

{¶26} As an initial matter, a trial court's decision regarding child support obligations will not be overturned absent a showing of an abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989).

Corporate benefits as income

{¶27} Father argues that the trial court erred by including \$16,756 as company benefits as part of his gross income for purposes of determining his child support obligation. That amount consisted of the annual values of a company car (\$9,600), insurance (\$4,356), a cell phone (\$1,200), and Ohio State University football tickets (\$1,600). The trial court did not include the value of the laptop computer provided to Father by his business.

{¶28} R.C. 3119.02 requires the court to calculate the child support obligation in accordance with the applicable child support computation worksheet. The worksheet requires that child support be based on the gross income of the parents. R.C. 3119.01(C)(7) defines “gross income” as “the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable * * *.” The statute then sets out a non-exclusive list of the types of income included, for example, salaries, wages, tips, rents, interest, and pensions. The list concludes with “and all other sources of income.” Moreover, the statute expressly includes “self-generated income” in a parent’s gross income. However, certain types of income are expressly excluded from the definition of gross income. R.C. 3119.01(C)(7)(a)-(f). One such exclusion is “Nonrecurring or unsustainable income or cash flow items[.]” R.C. 3119.01(C)(7)(e).

{¶29} Father is the president of Ohio College of Massotherapy (OCM) and OCM Online. OCM is a non-profit corporation, while OCM Online is a for-profit corporation. Father receives a salary from both businesses. While those salaries are not distinguished clearly on his 2007 tax return, his 2008 tax return indicates he was paid a salary of \$121,897 by OCM and \$110,316 by OCM Online. He testified that he received certain non-monetary benefits from his employment, including a Lexus automobile, car insurance, a cell phone, and a laptop computer. He also admitted that the company buys four-seat season tickets for Ohio State University football games, but claimed those were a perk for “my” employees but a necessary business expense for himself when he attended games. It is not entirely clear whether OCM provided these benefits to Father or whether he received them from employment with both OCM and OCM Online.

{¶30} Father does not dispute that the monetary value of the above benefits comports with the trial court's finding. Rather, he argues that none of the above benefits should have been included in the calculation of his gross income. Specifically, he argues that the value of such benefits could only be included as "self-generated income" pursuant to R.C. 3119.01(C)(13), and that that provision is not applicable because Father has not received those benefits as "gross receipts received * * * from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rents[.]" Because R.C. 3119.01(C)(13) includes in the definition of self-generated income expense reimbursements and in-kind payments such as company cars, Father argues that such benefits are necessarily excluded as gross income under R.C. 3119.01(C)(7).

{¶31} This Court does not agree that reimbursements and in-kind payments such as company cars may only be included as gross income if a parent is self-employed or has an ownership interest in the business merely because R.C. 3119.01(C)(13) lists examples of such benefits. There is nothing in the statute which indicates that the provision of company cars, housing, meals, or other benefits may only be considered as gross income under the limited circumstances where a parent receives them as self-generated income. R.C. 3119.01(C)(7) expressly includes "all other sources of income" in the definition of gross income without regard for the parent's employment circumstances. R.C. 3119.01(C)(7) identifies six types of income expressly excluded from the definition of gross income. None of those exclusions mention benefits of the type included in the trial court's calculation of Father's gross income. "Inasmuch as the legislature chose not to include such an exception it must be presumed that none was intended." *Patton v. Diemer*, 35 Ohio St.3d 68, 70 (1988). Accordingly, even assuming that

Father received the above benefits from OCM, a non-profit corporation in which he necessarily had no ownership interest, there is no statutory support for excluding the value of those benefits.

{¶32} On the other hand, if Father received those benefits from his employment with OCM Online, a for-profit corporation in which he had an ownership interest, the value of most of those benefits would necessarily be included in his gross income as self-generated income because the benefits “are significant and reduce personal living expenses.” *See* R.C. 3119.01(C)(13).

{¶33} In either event, Father testified that he had no other car or cell phone for personal use. He admitted that he had no land line telephone at home. He testified that the company paid for his car insurance. He admitted in his appellate brief that he would lose the benefit of these items if he lost his job. He would, therefore, have to pay for such items out of pocket. Accordingly, the trial court did not abuse its discretion by including the value of these benefits as part of Father’s gross income.

{¶34} On the other hand, in regard to the Ohio State tickets, Father testified that he provided the dates of the football games to his employees and asked them to let him know which games they were interested in attending. He further testified that he sometimes gives some tickets away to non-employees who have business with the companies. While Father attends some football games every season, he reasonably does not derive a personal benefit from all four seats of every game. Therefore, while he derives some personal economic benefit, he does not derive the full \$1,600 value of the tickets as a benefit. He did not, however, testify regarding how many tickets he used for himself and his personal guests, such as his child Mo. Accordingly, the trial court erred by including that entire amount in his gross income. However, based on our resolution of the remaining issues in this assignment of error and the negligible

result the slightly reduced income would have on Father's child support obligation, any error was harmless.

Imputation of income and income averaging

{¶35} Father argues that the trial court erred because it averaged his income from the prior three years and imputed the averaged income to him without making an express finding that he was underemployed. He further argues that the trial court erred by averaging Mother's income to calculate her gross income.

{¶36} R.C. 3119.01(C)(5) defines "income" depending on the circumstances of the parent: "(a) For a parent who is employed to full capacity, the gross income of the parent; (b) For a parent who is unemployed or underemployed, the sum of the gross income of the parent and any potential income of the parent." This Court has consistently held that a trial court must expressly find a parent to be voluntarily unemployed or underemployed before imputing income to that parent. *Misleh v. Badwan*, 9th Dist. No. 24185, 2009-Ohio-842, ¶ 7, citing *Musci v. Musci*, 9th Dist. No. 23088, 2006-Ohio-5882, ¶ 17. However, in this case, the trial court did not impute income to Father. Instead, the trial court averaged Father's income based on fluctuations in his income. Father's reliance on law that requires the trial court to make an express finding of voluntary underemployment before averaging income is misplaced.

{¶37} R.C. 3119.05(H) states: "When the court or agency calculates gross income, the court or agency, when appropriate, may average income over a reasonable period of years." This Court had held that the decision as to the propriety of averaging a parent's income lies in the sound discretion of the trial court which is in the best position to weigh the facts and circumstances. *Akin v. Akin*, 9th Dist. Nos. 25524, 25543, 2011-Ohio-2765, ¶ 13; *Krone v. Krone*, 9th Dist. No. 25450, 2011-Ohio-3196, ¶ 32.

{¶38} Father testified that his income has fluctuated based on the recent decrease in student enrollment. His accountant testified that the businesses have recently rebounded after the economic downturn. Father testified as to the changes he made in the year before the hearing to cut business overhead, and the accountant testified that those actions greatly improved the companies' financial positions. Under the circumstances, the trial court did not abuse its discretion by averaging Father's income from the prior three years based on the fluctuations in his income.

{¶39} Father further argues that the trial court erred by averaging Mother's income because her income has steadily increased rather than fluctuated. His argument is not supported by the record. Mother's tax returns submitted into evidence indicated that Mother's adjusted gross income was \$58,588 in 2007, \$42,212 in 2008, and \$51,716 in 2009. She testified that she received a one-time \$500 employee of the month bonus and a one-time \$5000 employee of the year bonus in 2009. By averaging Mother's income over the past three years, properly not including the bonuses as nonrecurring or unsustainable income pursuant to R.C. 3119.01(C)(7)(e), the trial court arrived at an amount nearly \$3000 more than it would have had it merely used Mother's gross income from 2009 minus the nonrecurring income. By doing so, a higher percentage of the support obligation was attributed to Mother, thereby inuring a benefit to Father. Under the circumstances, the trial court did not abuse its discretion by averaging Mother's income from the prior three years based on fluctuations in her income.

Basic child support schedule

{¶40} Father argues that the trial court erred by failing to apply the basic child support schedule because the parents' combined gross income was not more than \$150,000.

{¶41} R.C. 3119.021 sets out the basic child support schedule which must be used to calculate child support unless the parents' combined gross income is less than \$6,600 or more than \$150,000. R.C. 3119.04(B) states, in relevant part: "If the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court * * * shall determine the amount of the obligor's child support obligation on a case-by-case basis and shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents."

{¶42} Father argues that the trial court was precluded from determining his child support obligation on a case-by-case basis because the combination of the parents' actual income is less than \$150,000. He argues that, because R.C. 3119.01(C)(7) defines gross income as income earned during a calendar year, the trial court erred by using the parties' averaged incomes. This Court has already concluded that the trial court did not err by averaging the parents' prior three years' incomes to determine their annual gross incomes. The average of Father's prior three years' incomes was \$143,622, while Mother's was \$49,954, resulting in a combined gross income of \$193,576 for the parents. Accordingly, the trial court was required to determine Father's child support obligation on a case-by-case basis.

{¶43} Father further argues that his child support obligation is more than 50% of his current take home pay. In support, he cites *Siebert v. Tavarez*, 8th Dist. No. 88310, 2007-Ohio-2643, ¶ 36, for the proposition that the trial court must "ensure that the obligor parent is not so overburdened by child support payments that it affects that parent's ability to survive." Father fails, however, to explain how his current obligation impacts his ability to survive.

{¶44} On the other hand, the evidence adduced at trial demonstrated that Father continued to live well. He recently bought a \$405,000 home with a pool on which he was able to

make an \$80,000 down payment even before he sold his prior home for \$260,000. He made certain improvements to the property and acquired new furnishings. Father was driving a Lexus automobile, furnished by OCM, as well as an \$11,000 motorcycle for which he paid cash. He continued to travel internationally, ostensibly for business, although he had not secured any new business opportunities from his numerous and frequent trips to China. Moreover, even though Father recently voted to decrease his salary, because of the control he exerts on the board of trustees for the college, he retains considerable power to establish his salary. He did not testify that his recent decrease in salary caused him to downsize his lifestyle in any way.

{¶45} Moreover, Father cites no law to show that withholding of "over 50%" is not permissible under these circumstances. In fact, in a garnishment context, 15 U.S.C. 1673(b)(2)(B) would allow withholding of up to 60% of Father's disposable earnings as he is not supporting a spouse or other dependent children. Accordingly, Father's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING MR. MORROW IN CONTEMPT, THEREBY COMMITTING REVERSIBLE ERROR AND VIOLATING MR. MORROW'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶46} Father argues that the trial court erred by finding him in contempt for failing to pay his child support obligation through wage withholding. This Court agrees.

{¶47} This Court reviews contempt proceedings for an abuse of discretion. *Akin* at ¶ 44, citing *Thomarios v. Thomarios*, 9th Dist. No. 14232, 1990 WL 1777 (Jan. 10, 1990). An abuse of discretion connotes that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore*, 5 Ohio St.3d at 219.

{¶48} As this Court previously recognized: “Contempt of court is defined as disobedience of an order of a court. It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.” *Poitinger v. Poitinger*, 9th Dist. No. 22240, 2005-Ohio-2680, ¶ 31, quoting *Windham Bank v. Tomaszczyk*, 27 Ohio St.2d 55 (1971), paragraph one of the syllabus. Although contempt is generally classified as either civil or criminal to facilitate review, the Ohio Supreme Court has recognized that contempt proceedings are sui generis, i.e., neither wholly civil nor wholly criminal. *Brown v. Executive 200, Inc.*, 64 Ohio St.2d 250, 253. The *Brown* court elaborated:

While both types of contempt contain an element of punishment, courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by the character and purpose of the punishment. Punishment is remedial or coercive and for the benefit of the complainant in civil contempt. Prison sentences are conditional. The contemnor is said to carry the keys of his prison in his own pocket, since he will be freed if he agrees to do as ordered. Criminal contempt, on the other hand, is usually characterized by an unconditional prison sentence. Such imprisonment operates not as a remedy coercive in its nature but as punishment for the completed act of disobedience, and to vindicate the authority of the law and the court. Therefore, to determine if the sanctions in the instant cause were criminal or civil in nature, it is necessary to determine the purpose behind each sanction: was it to coerce [Father] to obey the [child support order], or was it to punish [him] for past violations?

(Internal citations omitted.) *Id.* at 253-254.

{¶49} In this case, the trial court fined Father after finding that he had failed to pay his child support through wage withholding. However, the court gave him the opportunity to purge his contempt and avoid paying the fine by establishing wage withholding within thirty days of the court’s judgment. Because the trial court’s punishment was remedial and coercive in nature, and Father had the opportunity to purge the contempt, it was civil in nature. In civil contempt proceedings, a finding of contempt must be premised on clear and convincing evidence. *Romans*

v. Romans, 9th Dist. No. 23181, 2006-Ohio-6554, ¶ 9. This Court has long recognized that the movant's burden of proving a prima facie case of contempt may be met by producing the order and proof of the contemnor's failure to comply. *Rossen v. Rossen*, 2 Ohio App.2d 381, 383-384 (9th Dist.1964).

{¶50} Mother alleged in her contempt motion that Father had failed to pay child support and that he had failed to effect the mandatory wage withholding. The trial court found Father in contempt solely on the basis that he had failed to pay his child support obligation by wage withholding "as ordered by this Court and pursuant to the Ohio Revised Code." The domestic relations court cited to the parties' March 30, 2005 agreed judgment entry which addressed interim issues of parenting time and child support pending trial to ultimately resolve those issues. The March 30, 2005 entry ordered Father to pay child support by wage withholding through the Ohio Child Support Payment Central, in Columbus. That entry included the following order in bold font: "All child support and spousal support under this order shall be withheld or deducted from the income or assets of the Obligor pursuant to a withholding or deduction notice or appropriate court order issued in accordance with Section 3121.03 of the Ohio Revised Code." Mother cited neither the March 30, 2005 order nor R.C. 3121.03 in her contempt motion.

{¶51} On March 1, 2006, the domestic relations court issued a final judgment in which it designated Mother as the residential parent; ordered parenting time for Father, and ordered Father to pay child support. The child support order stated: "Effective October 1, 2005, Mr. Morrow shall pay child support through the Medina County Child Support Enforcement Agency in the amount of \$2,198.05 per month, which includes 2% processing fee." There was no order that the support be paid through wage withholding. Moreover, the March 1, 2006 order did not

include any notice identical or similar to the notice in the March 30, 2005 order, referencing R.C. 3121.03 or otherwise mentioning wage withholding.

{¶52} Mother relied on the March 1, 2006 order for her allegation that Father was required to pay child support by wage withholding. However, at the hearing, Mother admitted that the current order for child support ordered Father to pay CSEA directly, not by wage withholding.

{¶53} Mother failed to present clear and convincing evidence that Father violated the current child support order. Before a party may be held in contempt for disobeying a court order, the prior order ““must spell out the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed upon him.”” *Collette v. Collette*, 9th Dist. No. 20423, 2001 WL 986209 (Aug. 22, 2001). The interim child support order issued on March 30, 2005, was superseded by the final judgment issued on March 1, 2006. While the interim order ordered Father to pay child support by wage withholding to the central agency in Columbus, the final judgment ordered Father to pay child support directly to Medina County CSEA. Moreover, the final judgment made no reference to R.C. 3121.03 or any other code provision which would have put Father on notice of any obligation to pay child support by wage withholding. Accordingly, the domestic relations court erred when it found Father in contempt for failing to pay child support by wage withholding based on the evidence adduced at trial. Father’s fifth assignment of error is sustained.

III.

{¶54} Father’s first, second, third, and fourth assignments of error are overruled. Father’s fifth assignment of error is sustained. The judgment of the Medina County Court of

Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part, and the cause remanded for further proceedings consistent with this opinion.

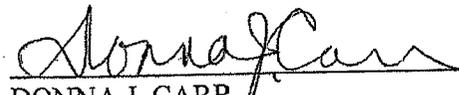
Judgment affirmed in part,
Reversed in part,
And cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.


DONNA J. CARR
FOR THE COURT

WHITMORE, P. J.
BELFANCE, J.
CONCUR.

APPEARANCES:

JOHN C. RAGNER, Attorney at Law, for Appellant.

LINDA HOFFMAN, Attorney at Law, for Appellee.

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C

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Seventh District, Mahoning County.
Katina Marie SPIER, Plaintiff-Appellee,

v.

Michael Ewald SPIER, et al., Defendants-Appellant.

No. 05 MA 26.
Decided March 7, 2006.

Civil Appeal from Common Pleas Court, Domestic
Relations Division, Case No. 04 DR 113. Affirmed.
Attorney Mark A. DeVecchio, Canfield, for Plain-
tiff-Appellee.

Attorney Lynn Sfara Bruno, Youngstown, for De-
fendant-Appellant.

DEGENARO, J.

*1 ¶ 1 Defendant-Appellant, Michael Spier, appeals the decision of the Mahoning County Court of Common Pleas, Domestic Relations Division, that granted a divorce between he and Plaintiff-Appellee, Katina Spier, and, among other things, established a child support order and divided the marital property. Michael raises eight issues on appeal which address these aspects of the trial court's divorce decree, but none of the arguments Michael raises in his eight assignments of error have any merit. Accordingly, the trial court's decision is affirmed.

Facts

¶ 2 Michael and Katina were married in April 1994. At the time of the marriage, Michael owned a home in Canfield, Ohio, which subsequently became the marital residence. The parties have three children who are all unemancipated. During the marriage, Michael worked for General Motors and was the primary wage-earner. Near the end of the marriage, Katina began working for Avon and became a manager. As part of her employment package, Katina paid Avon \$135.00 per month for unlimited use of a vehi-

cle, gasoline, and automobile insurance.

¶ 3 Katina filed a complaint for divorce in February 2004. After a hearing, a magistrate entered temporary orders dealing with child custody, child support, and spousal support in April 2004. That order, among other things, required that Michael pay child and spousal support, prevented either party from incurring debt on the credit of the other party, and provided that Katina would only be responsible for the monthly expenses set forth in her affidavit of income.

¶ 4 While the divorce was pending, Michael fell behind in paying his child and spousal support and incurred an arrearage. Furthermore, he gave several checks directly to Katina, rather than to the child support agency, and sought to have these payments credited toward his arrearage at the final divorce hearing.

¶ 5 Prior to the final hearing, the parties entered into an agreement regarding the custody of the children, which left only monetary issues related to child support, spousal support, and the property division for the trial court to decide. They also stipulated that the de facto date the marriage ended was April 3, 2004.

¶ 6 During the divorce hearing, Michael requested that he be reimbursed for one-half of the mortgage payments and other expenses he paid while the divorce was pending. He also tried to introduce evidence showing that much of the appreciation in the value of the marital residence since the marriage was due to improvements he made to the home prior to the marriage.

¶ 7 In its judgment, the trial court refused to award Michael any increase in the value of his separate property interest in the marital home, finding that he failed to prove that any increase in the value of the home was passive income. It also refused to reimburse Michael for the payments he made toward various obligations while the divorce was pending. The trial court further refused to credit most of the payments Michael made directly to Katina toward his arrearage. Finally, the trial court refused to impute income to Katina based on the automobile-related employment

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benefits she enjoyed.

*2 {¶ 8} On appeal, Michael has raised eight assignments of error, but some of these assignments of error address similar subjects. Accordingly, we will address those together.

Standard of Review

{¶ 9} In each of his eight assignments of error, Michael challenges either the manner in which the trial court calculated child support or the manner in which it divided the couple's marital property. We review both child support orders and property divisions under the same standard, abuse of discretion. Neville v. Neville, 99 Ohio St.3d 275, 2003-Ohio-3624, at ¶ 5; Pauly v. Pauly, 80 Ohio St.3d 386, 390, 1997-Ohio-0105. The term "abuse of discretion" implies more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. This court may not substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion. Holcomb v. Holcomb (1989), 44 Ohio St.3d 128, 131. Further, this court should not independently review the weight of the evidence but should be guided by the presumption that the trial court's findings are correct. Miller v. Miller (1988), 37 Ohio St.3d 71, 74.

Imputing Income for Child Support Purposes

{¶ 10} In his first assignment of error, Michael argues:

{¶ 11} "The court failed to impute necessary income to the Appellee in the Ohio Child Support Guidelines Worksheet pursuant to Ohio Revised Code Section 3109.05(A)(1) and Ohio Revised Code Section 3119.01 through 3119.967 which was set forth in Exhibit B in the fact and conclusions of law order filed by the court on or about February 1, 2005."

{¶ 12} According to Michael, Katina had two sources of income other than her salary from her employer: 1) income from teaching aerobics and 2) vehicle-related benefits, such as a car, auto insurance, and gasoline reimbursement, from her employer. He believes this income should be imputed to her for the purposes of child support. In particular, Michael argues that R.C. 3119.07(C)(7) requires that the vehicle-related benefits be included as part of her income

for child support purposes.

{¶ 13} Michael argues that Katina's aerobics-related income was not included in the child support calculations because he assumes that her Avon-related income would be listed on the first line of the child support computation worksheet, while her aerobics income would be listed on the sixth line of that worksheet. His argument ignores both the plain language of the worksheet and the trial court's findings of fact and conclusions of law.

{¶ 14} First, line one of the child support computation worksheet does not distinguish between types of employment-related income. Instead, it requires that the trial court use "annual gross income from employment" to fill that line. Michael's claim that a trial court should only include a party's income from his or her primary employer on this line ignores the language in the worksheet. The phrase "annual gross income from employment" clearly contemplates that a party's total income from all employment be listed on this first line of the worksheet. Michael's argument to the contrary is meritless.

*3 {¶ 15} Second, the trial court's findings of fact and conclusions of law explicitly states at page 18 that Katina was employed both as a district sales manager for Avon and an aerobics instructor. The trial court calculated Katina's total income from both employers to be \$40,430.84, the amount listed on the first line of the child support computation worksheet. Michael's claim that the trial court erred by not including Katina's aerobics-related income is factually incorrect.

{¶ 16} His argument regarding the employment benefits is just as meritless. Michael refers to R.C. 3119.01(C)(7) to argue that these employment benefits are income for the purposes of child support calculations. However, these kinds of benefits are income only if the party receiving those benefits is self-employed, the proprietor of a business, or is a joint owner of a partnership or closely held corporation.

{¶ 17} R.C. Chapter 3119 requires that the parties' gross incomes be used to calculate a proper amount of child support. R.C. 3119.01(C)(7) defines "gross income" and provides:

{¶ 18} " 'Gross income' means, except as ex-

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cluded in division (C)(7) of this section, the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses to the extent described in division (D) of section 3119.05 of the Revised Code; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest; trust income; annuities; social security benefits, including retirement, disability, and survivor benefits that are not means-tested; workers' compensation benefits; unemployment insurance benefits; disability insurance benefits; benefits that are not means-tested and that are received by and in the possession of the veteran who is the beneficiary for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration; spousal support actually received; and all other sources of income. 'Gross income' includes * * * self-generated income * * *."

{¶ 19} This definition does not specifically include employment-related benefits as income, leading to the conclusion that they should not be included as income. This conclusion is supported by the statutory definition of "self-generated income."

{¶ 20} " 'Self-generated income' means gross receipts received by a parent from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rents minus ordinary and necessary expenses incurred by the parent in generating the gross receipts. 'Self-generated income' includes expense reimbursements or in-kind payments received by a parent from self-employment, the operation of a business, or rents, including company cars, free housing, reimbursed meals, and other benefits, if the reimbursements are significant and reduce personal living expenses." R.C. 3119.01(C)(13).

*4 {¶ 21} If the phrase "gross income" included expense reimbursements or in-kind payments received in the course of employment, then there would be no need for the Revised Code to specifically include these kinds of employment-related benefits in the definition of "self-generated income." The specific inclusion of these kinds of benefits in R.C. 3119.01(C)(13) indicates that they are not a part of a person's "gross income" unless that person is self-employed, a proprietor of a business, or a joint owner of a partnership or

closely held corporation.

{¶ 22} This conclusion is not altered by the cases Michael cites. In Pruden-Wilgus v. Wilgus (1988), 46 Ohio App.3d 13, the trial court included employment-related benefits in a husband's income when calculating his child support obligation, but the husband was self-employed at the time of the divorce. Likewise, in Offenberg v. Offenberg, 8th Dist. Nos. 78885, 78886, 79425, 79426, 2003-Ohio-0269, the parent whose employment-related benefits were used to calculate his child support obligation came from the operation of a closely held corporation which he owned. These cases do not support Michael's argument that these kinds of benefits should be imputed to Katina; they merely show that they must be imputed to a parent if the income is self-generated.

{¶ 23} In this case, the evidence demonstrates that Katina was employed by Avon and, therefore, R.C. 3119.01(C)(13) does not apply to her. The trial court could not have included her employment-related benefits as income for the purposes of calculating child support. Michael's argument to the contrary is meritless.

Child Support Arrearage

{¶ 24} In his second assignment of error, Michael argues:

{¶ 25} "With regard to the order of the court, specifically at page 36, paragraph 7, the court erred in failing to consider in kind contributions and credibility of the Appellee in establishing that no child support arrearage should have been assessed to the Appellant based upon direct payment to the Appellee as and for the benefit of the parties' minor children."

{¶ 26} Michael does not challenge the trial court's conclusion that he owed a child support arrearage; rather, he argues the trial court erred by not giving him more credit for payments he made directly to Katina. According to Michael, Katina's testimony demonstrated that her credibility was suspect and that the trial court erred when it relied on her statement that she only received \$500.00 for child support payments.

{¶ 27} R.C. 3121.44 and 3121.45 require that any payment to satisfy a child support obligation be made to the office of child support in the department of job and family services and that any payment made di-

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rectly to the other parent will be considered a gift, unless the payment is made to discharge an obligation other than child support. These statutes became effective in 2001, but their predecessor, R.C. 2301.36, contained the same mandatory language. Nevertheless, Ohio appellate courts have held that a trial court has the discretion to credited in-kind payments made while a divorce was pending toward a child support arrearage. See *Rodriguez v. Frieze*, 4th Dist. No. 04CA14, 2004-Ohio-7121, at ¶ 43; *Campbell v. Campbell*, 9th Dist. No. 21996, 2004-Ohio-5553, at ¶ 8; *Neiheiser v. Neiheiser* (Jan. 13, 2000), 8th Dist. No. 75184. A trial court's decision to credit in-kind contributions for child support will not be reversed absent an abuse of discretion. *Rodriguez* at ¶ 43.

*5 {¶ 28} In this case, the trial court did precisely that; it credited a \$500.00 in-kind payment toward the child support arrearage which occurred while the divorce was pending. Michael's argument is that the trial court did not credit him enough. According to Michael, he introduced evidence that he gave her three other checks totaling \$2,200.00 and that this amount should also be credited to his arrearage since "the Appellee was not able to prove that those were for anything other than support."

{¶ 29} This statement shows that Michael misunderstands the burden of proof on this issue. R.C. 3121.45 states that all child support obligations be paid through the child support office and places the burden of rebutting the presumption that any payment not made through that office was a gift. *Cox v. Cox* (1998), 130 Ohio App.3d 609, 616. In other words, Katina did not need to prove that the payments were for something other than support; rather, Michael must prove that the payments were for the purposes of child support.

{¶ 30} In her testimony, Katina admitted that Michael gave her a check for \$1,200.00 on February 19, 2004, but denied that it was for the purposes of child support. Instead, she testified that Michael wrote her the check because her paycheck was improperly deposited in the wrong bank account. She also admitted that Michael wrote her two checks for \$500.00 apiece in March 2004. She stated that one of those checks was to reimburse her for charges he made on her credit card and admitted that the other one was for child support.

{¶ 31} Michael testified that he gave her each of these checks because Katina "needed money for her bills, * * * for this, * * * for that, and for my kids not to go without anything." When specifically asked about each of these checks, Michael's testimony tended to support Katina's version of events. He stated that he gave Katina the February 19th check because she deposited money into the account, but didn't have any money and he "felt sorry for her and [] wanted to make sure [his] kids had food to live on." He denied knowing whether Katina's check had been improperly deposited in his account. While this version of events does not precisely correlate to the version given by Katina, it is reasonable to interpret Michael's testimony as a garbled version of Katina's version of events. Michael further testified that he gave both of the March checks so Katina could "take care of [his] children" and denied that either check was meant to reimburse Katina for charges to her credit card.

{¶ 32} Given these facts, the trial court reasonably concluded that the only check which was intended as an in-kind payment for the purposes of child support was one of the \$500.00 March checks. Although Michael challenges Katina's credibility, the credibility of witnesses and the weight of the evidence are matters to be determined by the trier of facts. *Simoni v. Simoni* (1995), 102 Ohio App.3d 628, 634. Accordingly, Michael's second assignment of error is meritless.

Separate Property

*6 {¶ 33} In his third and eighth assignments of error, Michael argues

{¶ 34} "The court erred at paragraph 12, page 38 of its order in awarding to the Appellee a portion of the certificate of deposit located at Sky Bank to be equally divided between the parties when the certificate of deposit was separate premarital property and no claim, testimony or evidence was made to same during the course of the trial on this matter."

{¶ 35} "The court failed to adequately protect and preserve the Appellant's premarital interest in the marital residence known as 6900 Kirk Road, Canfield, OH 44406."

{¶ 36} In these assignments of error, Michael maintains that the trial court erred when it determined the nature and value of his separate property in two

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respects: 1) by not recognizing that a certificate of deposit was separate property and 2) by undervaluing his separate property interest in the marital residence. He contends that Katina never proved that the certificate of deposit was a marital property or that she made any contribution toward that certificate of deposit. According to Michael, he sufficiently proved that the certificate of deposit was his marital property since it was in his name only. He further argues that the evidence demonstrates that much of the increase in the value of the marital residence was due to improvements he made to the home before the marriage.

{¶ 37} R.C. 3105.171(B) requires that a trial court determine what constitutes marital property and what constitutes separate property. The phrase "marital property" includes, among other things, "[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." R.C. 3105.171(A)(3)(a)(i). In contrast, "separate property" includes, among other things, "[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." R.C. 3105.171(A)(6)(a)(ii).

{¶ 38} When the parties contest whether an asset is marital or separate property, the presumption is that the property is marital, unless proven otherwise. *Sanor v. Sanor*, 7th Dist. No.2001 CO 37, 2002-Ohio-5248, at ¶ 53. The burden of tracing separate property is upon the party claiming its existence. *DeLevie v. DeLevie* (1993), 86 Ohio App.3d 531, 536. An appellate court applies a manifest weight of the evidence standard of review to a trial court's designation of property as either marital or separate. *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159. Therefore, the judgment of the trial court will not be disturbed upon appeal if supported by some competent, credible evidence. *Fletcher v. Fletcher*, 68 Ohio St.3d 464, 468, 1994-Ohio-0434.

{¶ 39} Although Michael's third assignment of error deals with the trial court's division of the certificate of deposit, he refers to the property divided as an "account" throughout his brief. This leads Katina to conclude that Michael is confusing the Sky Bank certificate of deposit with a Sky Bank savings account. This conclusion may be correct since Michael's ar-

gument refers to contributions made to the "account" during the marriage, premarital savings accounts or the lack thereof, and the possible commingling of marital assets in that "account." Of course, a certificate of deposit is not a savings account. So none of the evidence about premarital savings accounts or the commingling of assets in an account have any relevance to whether this certificate of deposit is a marital asset.

*7 {¶ 40} At page six of its judgment entry, the trial court found as follows:

{¶ 41} "Defendant testified that he had a certificate of deposit at Mahoning Bank, now known as Sky Bank. Defendant testified that prior to marriage the certificate had an original balance of \$2,000.00. Defendant did not present documentation of this account showing the balance prior to marriage. In fact, neither party testified to the present day balance, the term of said certificate, or whether said account actually exists. Plaintiff did not admit that the certificate is Defendant's separate property and requested in her Proposed Findings of Fact and Conclusions of Law that it be divided between the parties. The Court finds that Defendant failed to prove that he has a separate property interest in the certificate. The Court finds that the certificate is a marital asset subject to distribution by the Court."

{¶ 42} The trial court's description of the facts in this regard is accurate. The only place in the transcript where this certificate of deposit is addressed is in Michael's testimony. He stated that he owned a certificate of deposit with Mahoning National Bank, which is now known as Sky Bank, in the 1980s and that the value of that certificate in the 1980s was \$2,000.00, but that it would probably be worth more now. However, he admitted that he could not support his claim that this was a separate asset with any documentation.

{¶ 43} Although the evidence introduced into the record states that the property is separate property and there is no evidence contradicting that testimony, the trial court is the ultimate trier of fact in this case. It believed that Michael did not prove by a preponderance of the evidence that this certificate of deposit, if it now exists, was actually separate property since he provided absolutely no documentation supporting his claim. The trial court's decision in this regard is rea-

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sonable, since Katina had no burden to prove that the property was marital property. Thus, Michael's arguments regarding the certificate of deposit are meritless.

{¶ 44} The same holds true for Michael's argument that the trial court undervalued his separate property interest in the parties' marital residence. Michael bought the residence in 1988 for \$75,000.00 and, at the time of the marriage, it was worth \$91,600.00. The trial court found that a mortgage balance of \$48,872.00 was outstanding at the time of the marriage. Thus, it concluded that he had a separate property interest in that real estate of \$42,728.00 at the time of the marriage.

{¶ 45} Michael argues this valuation was incorrect. During the divorce hearing, Michael tried to have expert witnesses to gauge the present value of the various improvements he made to the marital residence before the marriage and mentions these attempts in his appellate brief, but the value of the improvements would have been reflected in the value of the home at the time of the marriage. If Michael were to be awarded the value of the home at the time of the marriage and the value of the improvements he made to the home prior to the marriage, then he would be receiving a windfall. The trial court recognized this by finding that "[a]lthough Defendant made many substantial improvements to the residence prior to marriage, those improvements would have been reflected in the value of the property at the time of marriage." Michael's arguments in this regard are meritless.

*8 {¶ 46} Michael also argues that the trial court erred when it failed to find that he was entitled to any passive interest on his premarital interest in the property. Separate property includes "[p]assive income and appreciation acquired from separate property by one spouse during the marriage." R.C. 3105.171(A)(6)(a)(iii). "Passive income" is defined as "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse" and includes an increase in the value of property resulting from either inflation or the property's location. R.C. 3105.171(A)(4); *Slomcheck v. Slomcheck*, 11th Dist. No.2001-T-0098, 2002-Ohio-4952, at ¶ 11.

{¶ 47} In this case, the trial court concluded that Michael failed to meet his burden of proof to demonstrate that any increase in the value of the marital

residence after the marriage was Michael's passive income, rather than a result of the labor, monetary, or in-kind contribution of either spouse during the marriage. In order to prove that some portion of the marital residence's value was passive income, Michael presented the testimony of an accountant, Louis DiPaolo, who presented two different ways to calculate Michael's passive income. First, DiPaolo used the interest rates published by the federal Treasury Department for a treasury bill to calculate a conservative interest rate. He then used this interest rate to calculate the passive growth in Michael's separate interest in the property, which was \$73,900.00 in April 2004. According to DiPaolo, this is the standard practice to estimate passive growth. However, on cross-examination DiPaolo conceded that he did not know if the value of the marital residence appreciated at the same rate as a treasury bill.

{¶ 48} DiPaolo was also asked to calculate Michael's passive income based on the change in value in the residence during the marriage. According to DiPaolo, the value of the residence increased by 43% during the marriage. He testified that if Michael's separate interest in the property increased at the same rate, then his separate interest in the property would be valued at \$61,101.00 at the time of the divorce.

{¶ 49} The trial court refused to accept either of the options presented by DiPaolo. It found "that the improvements that were made after the parties were married could have very well affected the value of the marital residence" and "were the direct result of labor, monetary, or in-kind contribution from the parties during the marriage." In particular, the trial court pointed to the fact that Michael never presented any evidence showing "that the appreciation on his separate property interest was limited to outside passive forces, such as location or inflation." Given the "insufficient evidence showing that the increase in value was due to passive appreciation," the trial court refused to increase Michael's share of the marital property above \$42,728.00.

*9 {¶ 50} The trial court's conclusion is reasonable and supported by the evidence. Michael bore the burden of proving that any increase in value after the marriage was passive income. The evidence in the record shows that the value of the residence increased during the marriage, but also showed that the couple made improvements to the home during the marriage.

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Michael failed to introduce any evidence distinguishing from an increase in value due to passive income from the increase in value due to the labor, monetary, or in-kind contribution of either spouse during the marriage. Accordingly, Michael's challenge to the trial court's valuation of his separate interest in the marital residence is meritless.

Credit for Mortgage Payments while Divorce was
Pending

{¶ 51} In his fourth and fifth assignments of error, Michael argues:

{¶ 52} "The court erred in allowing Appellant upon sale or auction of the vacant property owned by the parties only one-half (1/2) credit for any payments made from the date of the entry of February 1, 2005 until the property is sold or auctioned. The Appellant should have been granted one hundred percent (100%) credit for those payments."

{¶ 53} "At page 41, the court further erred in not granting the Appellant credit for mortgage payments made including payments on insurance and real estate taxes on the former marital residence during the pendency of the divorce and after the stipulated de facto termination date of the marriage which was prejudicial to the Appellant."

{¶ 54} The parties stipulated that the marriage was terminated on April 3, 2004. After this date, Michael was ordered to continue to make the mortgage payments on the parties' real estate while the divorce was pending. Michael argues the trial court erred when it failed to award him a greater share of the parties' marital real estate, or reimburse him in another manner, for the payments made after the marriage ended. However, Michael waived these arguments by not moving either to set aside or modify the magistrate's temporary order.

{¶ 55} Civ.R. 53(C)(3)(a) gives magistrates the power to enter orders without judicial approval in, among other things, hearings under Civ.R. 75(N), which governs temporary child support, spousal support, and custody orders while a divorce is pending. If a party is unsatisfied with a magistrate's orders entered under Civ.R. 53(C)(3)(a), then that party may move to set the order aside, stating the party's objections with particularity, within ten days after the magistrate's order is entered. Civ.R. 53(C)(3)(b). A

party may also move to modify a temporary order entered under Civ.R. 75(N). Civ.R. 75(N)(2).

{¶ 56} Courts have held that a party who moves neither to set aside an order entered under Civ.R. 53(C)(3)(a) nor to modify that order cannot raise any issue which could have been addressed in that order at the final divorce hearing. See Douglas v. Douglas (1996) 110 Ohio App.3d 615, 621; Beran v. Beran, 6th Dist. No. WD-03-070, 2004-Ohio-2455, at ¶ 30; Wichman v. Wichman (Mar. 22, 1996), 2nd Dist. No. 95 CA 31. Who will pay the mortgage while a divorce is pending and whether that party will receive credit for that payment are issues that are clearly within the scope of Civ.R. 75(N). For instance, in Watson v. Watson, 10th Dist. No. 03AP-104, 2003-Ohio-6350, at ¶ 14, the appellate court specifically approved of a magistrate's temporary order which ordered one party to make the payments for the parties' mortgage and ordered that the party making the payments "receive credit for one-half of the payments made to the mortgage company and on the equity line of credit."

*10 {¶ 57} In this case, the magistrate's temporary orders required that Michael pay the mortgage on both parcels of property, but did not specify that he would receive credit for those payments. Michael never moved to set aside that order and he never moved to modify that order. Accordingly, he has waived any argument regarding whether he should receive credit for the mortgage payments on those properties made while the divorce was pending. Thus, these arguments are meritless.

Division of Marital Property

{¶ 58} In his sixth assignment of error, Michael argues:

{¶ 59} "The Appellee was not assessed her fair portion of the outstanding marital debt."

{¶ 60} Michael maintains the trial court did not equitably divide the marital debt. He particularly complains about the division of the credit card debt, but he also mentions the home mortgage, utility, tax, insurance, and dental costs associated with the marital debt.

{¶ 61} Although Michael's argument is framed in the context of the trial court's property division, the record does not support such an argument. Michael

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introduced evidence of the various aspects of the marital debt in February 2004, when Katina left the marital residence, but he failed to introduce any evidence showing the status of those debts in April 2004, the de facto date the marriage was terminated, or at the time of the final hearing. At the final hearing, he did not ask that the remaining debts be divided between the parties; rather, he asked that the trial court order that Katina reimburse him for one-half of the payments he made toward the bills outstanding at the time the parties separated in February 2004.

{¶ 62} In essence, even though this assignment of error is couched in terms of property division, it appears to be another effort to challenge the temporary order issued by the magistrate. For the reasons stated above, Michael waived these issues since he moved neither to set aside the magistrate's order nor to modify that order. See *Douglas* at 621.

{¶ 63} Furthermore, since the record contains no evidence about the state of these marital obligations at the time of the divorce, the trial court could not have equitably divided these debts. We previously held that a trial court does not need to equitably divide an asset or debt if the record does not provide sufficient evidence for the trial court to value and equitably divide that asset or debt. *Didisse v. Didisse*, 7th Dist. No. 04 BE 4, 2004-Ohio-6811, at ¶ 23. For these reasons, these arguments are meritless.

2003 Tax Preparation and Refund

{¶ 64} In his seventh assignment of error, Michael argues:

{¶ 65} "The court failed to adequately divide the 2003 tax refund and give the Appellant credit made to the State of Ohio for the parties' joint marital taxes and payment made to the tax preparer."

{¶ 66} In its judgment entry, the trial court found that someone received a \$763.00 tax refund at the marital residence, but both parties denied receiving that refund. Thus, the trial court found that there was "insufficient evidence concerning the whereabouts of the refund" and it "decline[d] to award either party a share of same." According to Michael, the trial court should have split the tax refund between the parties even though both parties claim they never received the check. He further contends that he should be reimbursed for the costs of preparing and filing the taxes.

*11 {¶ 67} A trial court does not need to equitably divide an asset if the record does not provide sufficient evidence for the trial court to value and equitably divide that asset. *Didisse* at ¶ 23. In this case, both parties denied receiving the tax refund and, without an equitable way to decide which party to believe, the trial court could not have equitably divided that asset. Accordingly, the trial court did not abuse its discretion when it refused to divide the 2003 tax refund.

{¶ 68} The trial court also did not err when it refused to reimburse Michael for the cost of preparing the taxes and paying back taxes. The trial court refused to reimburse Michael for those expenses because he voluntarily incurred them without first seeking a modification of the magistrate's Civ.R. 75(N) temporary order. As discussed above, the failure to request a modification of a temporary order waives the issue for purposes of appeal. See *Douglas* at 621. Thus, Michael's final assignment of error is meritless.

Conclusion

{¶ 69} Michael challenges various aspects of the divorce decree relating to the property division and child support. However, each of his assignments of error is meritless. He failed to preserve many of his arguments by failing to move to either set aside the magistrate's temporary order or to modify that order and his other assignments of error are not supported by the record. Accordingly, the judgment of the trial court is affirmed.

DONOFRIO, P.J., concurs.
WAITE, J., concurs.

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