

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

CHRISTINA A. PETTIT, :
 :
Plaintiff-Appellee, : CASE NO. CA2011-08-018
 :
- vs - : OPINION
 : 4/23/2012
 :
MATTHEW T. PETTIT, :
 :
Defendant-Appellant. :

APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 09 DRA 00040

Mary E. King, 153 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Matthew T. Pettit, 1028 Mt. Olive Road, Washington C.H., Ohio 43160, defendant-appellant,
pro se

Shirley C. Hansgen, 1420 West Choctaw Drive, London, Ohio 43140, guardian ad litem

PIPER, J.

{¶1} Defendant-appellant, Matthew Pettit, appeals a decision of the Fayette County Court of Common Pleas, Domestic Relations Division, dividing property and fashioning the terms of a divorce decree.

{¶2} Matthew and plaintiff-appellee, Christina Pettit, were married in 1999 and had two children during the course of their marriage. The couple began divorce proceedings in

2009, both claiming that they were incompatible and that their relationship could not continue.

{¶3} Issues regarding the division of the parties' marital and separate property, as well as issues pertaining to a possible shared parenting agreement, were considered during several hearings, which occurred from October 1999 through June 8, 2010. At the end of the last hearing, Matthew had not yet presented the testimony of several of his witnesses, including himself. The magistrate ordered that any additional testimony Matthew wanted to offer would have to be presented via deposition. After Matthew submitted the depositions as ordered, the magistrate issued his decision.

{¶4} The magistrate divided personal property between the parties, and also awarded Christina the family business, a small grocery store. Christina also received the separate home purchased for her during the divorce proceedings, as well as the car she drove. Matthew was awarded the marital home, as well as real property located in Argentina. The magistrate ordered Christina to satisfy the mortgage on the marital property, as well as pay Matthew \$20,529 in order to equalize the property distribution. Christina was named residential parent and legal custodian of the couple's minor children, and Matthew was granted parenting time and ordered to pay child support.

{¶5} Both parties filed objections to the magistrate's decision, and the trial court overruled all but one of the parties' objections; finding that Christina should be entitled to a longer period of time to obtain a loan in order to refinance the mortgage and to secure funds to pay Matthew. Matthew now appeals the decision of the trial court to overrule his objections to the magistrate's decision, raising the following assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} THE TRIAL COURT ERRED BY FAILING TO GRANT DEFENDANT/APPELLANT'S MOTION FOR A NEW TRIAL.

{¶8} Matthew argues in his first assignment of error that the trial court erred in denying his motion for new trial.

{¶9} According to Civ.R. 59,

A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial.

{¶10} The decision to grant or deny a motion for a new trial pursuant to Civ.R. 59 is reviewed for an abuse of discretion. *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶11} Matthew first claims that he was entitled to a new trial because the court-appointed guardian ad litem (GAL) did not fulfill her obligations as set forth in Sup.R. 48 (Rules of Superintendence for the Courts of Ohio). According to that rule, "in order to provide the court with relevant information and an informed recommendation regarding the child's best interest, a guardian ad litem shall perform, at a minimum, the responsibilities stated in this division, unless impracticable or inadvisable to do so." Sup.R. 48(D). The rule goes on to specifically state that, "a guardian ad litem shall appear and participate in any hearing for which the duties of a guardian ad litem or any issues substantially within a guardian ad litem's duties and scope of appointment are to be addressed." Sup.R. 48(D)(4).

{¶12} Before we begin our analysis of Matthew's first argument regarding Sup.R. 48 and the GAL's participation, we address Matthew's contention that the Rules of Superintendence are mandatory and that the magistrate and trial court were bound to follow them. As this court has stated,

the Superintendence Rules have been construed to be "* * * administrative directives only, and are not intended to function as rules of practice and procedure." *State v. Mahoney* (1986), 34 Ohio App.3d 114, 116. Furthermore, the court in *State v. Gettys* (1976), 49 Ohio App.2d 241, 243, stated "* * * [rules of superintendence] are purely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual defendants."

Bevins v. The Central Trust Co. N.A., 12th Dist. Nos. CA92-02-034, CA92-03-042, CA92-03-043 and CA92-03-045, 1992 WL 357156, *5 (Dec. 7, 1992); see also *In re B.K.*, 12th Dist. No. CA2010-12-324, 2011-Ohio-4470. Thus, Matthew's reliance on Sup.R. 48 is misplaced.

{¶13} Matthew argues that the GAL failed to attend several portions of the hearings during which custody issues were discussed. Matthew also argues that the GAL failed to question certain witnesses who testified to custody issues. Essentially, Matthew asserts that because the GAL was not present during certain portions of the hearings that pertained to custody issues and did not choose to question several witnesses, that he was denied a fair trial. We disagree.

{¶14} The record is clear that the court dismissed the GAL on several occasions because her testimony or participation was not necessary, and neither party objected to the GAL not being in attendance. The record is also clear that both parties obtained the GAL's report prior to trial, understood its contents, and had the opportunity to exam and cross-examine the GAL on her findings. The GAL spoke favorably about Matthew, and suggested that he receive ample time with the children. While the GAL ultimately determined that the children were young and needed the nurturing of their mother, the record does not contain any indication that Matthew was prejudiced in any way by the GAL not attending every moment of the proceedings. The conduct of the parties in this regard, and that of the GAL under the circumstances, was not an "irregularity" within the meaning of Civ.R. 59. Because Matthew was not denied a fair trial due to the GAL's lack of attendance, the trial court's

decision to deny Matthew's motion for a new trial was not arbitrary, unconscionable, or unreasonable, and did not constitute an abuse of discretion. Furthermore, by not objecting to the GAL's lack of attendance, Matthew waived the opportunity to complain of any error. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401.

{¶15} Matthew next argues that he was denied a fair trial because the magistrate required him to present portions of his case, including his own testimony, by way of deposition. According to Civ.R. 53(C)(2), "in performing the responsibilities described in Civ.R. 53(C)(1), magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities * * * ."

{¶16} As previously stated, the magistrate held several hearings. The first three dates, October 12, 2009, January 26, 2010, and February 9, 2010, included approximately 11 hours of the presentation of Christina's evidence and testimony of her witnesses. Matthew was then afforded over 11 hours of hearings before the magistrate, scheduled for three days on March 16, 2010, May 25, 2010, and June 8, 2010. Unfortunately, Matthew could not appear on May 25, 2010, due to a medical issue, and therefore did not present his testimony at that hearing.

{¶17} Christina filed a motion in March 2010 requesting that the court set additional hearing dates due to the complex issues mainly involving property distribution and custody. However, the trial court issued an entry stating that the hearings would be completed on June 8, 2010, and that "counsel are advised to utilize depositions in the event of witness unavailability." When Matthew missed the May 25, 2010 hearing date, he filed a motion to continue the proceedings. The court issued an additional journal entry stating that the June 8, 2010 hearing would be the final hearing date and that if that hearing failed "to afford the parties sufficient opportunity to present all the evidence they wish to adduce, they shall take

their witnesses' testimony by deposition and file all transcripts relating thereto ***."

{¶18} After the trial court made its order, neither party filed any objections to the trial court's decision. During the June 8 hearing, Matthew called several witnesses, and then with approximately 45 minutes before the hearing was set to close, Matthew's counsel informed the court that he was prepared to call Matthew as a witness, but that the examination would take close to three hours. Counsel then informed the court that "I know we've already set up deposition dates." The magistrate offered to stay an extra hour to permit a longer time in which Matthew could testify, but Matthew's counsel had a previous engagement and had to leave at 5:00 p.m. Matthew's counsel informed the magistrate that Matthew had planned at least one other deposition for another of his witnesses. Soon after this statement, Christina objected to the depositions, stating that the court would be denied "the opportunity to actually witness [Matthew] on the stand where the court's had the opportunity with [Christina] * * *."

{¶19} The trial court then offered Matthew the opportunity to start his testimony and be heard live until the time that counsel had to leave. However, counsel declined the option, saying instead that he preferred to "do it all in one setting so that there's no loss in flow." Christina's counsel then renewed her objection, and asked that the court consider video recordings of the deposition. After the hearing concluded, Christina filed a motion with the court that the depositions be recorded, and video recordings were made and submitted to the magistrate.

{¶20} Matthew now asserts that the magistrate abused its discretion in ordering his testimony via deposition. We disagree because we cannot say that Matthew was prejudiced as a result of the magistrate's order. Matthew's deposition was taken by video so that the trial court was able to view and observe his demeanor as he testified. Therefore, the magistrate was able to use the video as an aid in determining the credibility of Matthew's testimony.

{¶21} We also note that Matthew was given the opportunity to testify live for approximately one hour and 45 minutes of his estimated three-hour examination. However, he chose not to do so to guarantee a certain "flow" to his testimony. We find it somewhat incredulous that Matthew would decline the opportunity to have a large portion of his testimony heard live, or that he would not object during the hearing, as Christina did, if he were so convinced that deposition testimony would deny him a fair trial.

{¶22} Had Matthew been that concerned about placing his live testimony before the magistrate, he could have been first to testify at the final hearing to ensure that the magistrate observed his testimony live. Matthew was well-aware of the fact that the June 8, 2010 hearing would be the final hearing and that any testimony not heard that day would have to be submitted via deposition. However, Matthew chose not to testify at the beginning to insure that his testimony was heard live, and instead called other witnesses. We also note that while Matthew missed the May 25, 2010 hearing for a medical issue, that issue did not constitute a medical emergency, so that Matthew could have attended the hearing and still have received medical treatment later in the day.¹

{¶23} Although we have found that the lack of live testimony did not prejudice Matthew given the unique facts and circumstances of this case, we do not mean for this analysis to stand for the proposition that a court may order depositions in lieu of live testimony in any or all cases. The decidedly preferred practice is for a trial court to hear testimony live so that the court can judge the credibility of the witnesses. In fact, an appellate court is limited in its review of a trial court's decision regarding domestic issues such as those presented in this case because "the underlying rationale of giving deference to the findings of

1. The record contains an affidavit of the physician who treated Matthew on May 25, and he averred that Matthew's issue was not a medical emergency. Instead, Matthew had an appointment for 2:00 on May 25 to see the doctor, and the doctor averred that according to office policies, Matthew was not required to be in the office until ten minutes prior to his appointment time.

the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶24} However, and notwithstanding the importance of determining demeanor, gestures, and so forth, the magistrate was given the chance to view Matthew's testimony, and was not limited to written testimony.

{¶25} The record is clear that the parties often acted immaturely toward one another before, during, and after divorce proceedings began. The court was often pulled into the parties' quarrels and asked to decide motion after motion when the parties could not reach decisions regarding their children, business, or marital home. The proceedings themselves were time consuming for the court, and over one and one-half years passed from the initial filing to the June 2010 hearing. We are sympathetic to the magistrate's desire to move forward with the case and to set deadlines in an attempt to reach some measure of finality. However, magistrates and trial courts are better served to exert their authority to regulate the proceedings in a manner that does not require depositions in lieu of live testimony. Still, for the foregoing reasons we cannot say that Matthew was denied a fair trial, or that the trial court abused its discretion by denying his motion for a new trial.

{¶26} Matthew next argues that there was an irregularity in the proceedings because Christina was permitted to submit a business evaluation during the proceedings while he was not, and because the court denied his motion to have a custody evaluation. However, the record is clear that Matthew requested the evaluations well after the hearings began.

{¶27} Regarding the custody evaluation, and according to R.C. 3109.04(C),

Prior to trial, the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and financial worth of each parent and may order the parents

and their minor children to submit to medical, psychological, and psychiatric examinations. The report of the investigation and examinations shall be made available to either parent or the parent's counsel of record not less than five days before trial, upon written request. The report shall be signed by the investigator, and the investigator shall be subject to cross-examination by either parent concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

Matthew did not request the evaluation until March 2, 2010, well after the hearings on the issues began. Moreover, Matthew was not prejudiced by not having the evaluation because a GAL was requested, and appointed, in order to represent the children's best interests and to speak for them regarding custody issues.

{¶28} The GAL's report addressed several of the issues raised by Matthew in his motion, such as the conflict issues between himself and Christina, to what degree the children hear the parents expressing frustration or complaints about the other parent, and to what degree the parents were able (or unable) to co-parent. The magistrate was well-aware of the contentious relationship between Christina and Matthew, and the effects such inharmoniousness had on the children. Therefore, Matthew suffered no prejudice as a result of not having a separate custody evaluation.

{¶29} Similarly, Matthew argues there was an irregularity in the proceedings because he was denied the opportunity to file a financial evaluation of the grocery store. However, the record is clear that Matthew presented his own two witnesses, who testified to the value of the business. The court heard testimony from Ron Weade, a real estate appraiser, and Kenneth Pettit, Matthew's father and owner of two convenience stores in nearby Ohio cities. Additionally, Matthew presented his own testimony and exhibits regarding what he believed the store's value to be. Matthew was also afforded the opportunity to explain to the court through testimony and exhibits why the evaluation presented by Christina was inflated and did not represent a true valuation of the business. While both witnesses, as well as Matthew,

valued the business at a lesser amount than the financial evaluation presented by Christina, the magistrate and trial court chose not to rely on Matthew's asserted valuation. These circumstances were not irregularities that denied Matthew a fair trial. Moreover, the higher valuation did not prejudice Matthew, as he was credited with \$364,000 in order to equalize the property distribution.

{¶30} Matthew next argues that he was denied a fair trial because the court failed to value all of the couple's assets and debts and to divide all assets and debts equitably. However, the record is clear that the parties did not submit evidence of the value of their personal property, and instead asked that the trial court decide which party was entitled to certain pieces of personal property such as jewelry. The magistrate divided the property as requested, and the lack of valuation by the parties would be invited error. On appeal, Matthew fails to cite to the record or to specify what property or debt he believes the magistrate or trial court failed to divide. We therefore find that Matthew was not prejudiced by the division, and that no "irregularities" within the meaning of Civ.R. 59 occurred to deny Matthew a fair trial.

{¶31} After taking into consideration Matthew's arguments regarding his motion for a new trial, we cannot say that the trial court's decision denying such motion was arbitrary, unreasonable, or unconscionable. Having found no abuse of discretion, Matthew's first assignment of error is overruled.

{¶32} Assignment of Error No. 2:

{¶33} THE TRIAL COURT ERRED IN EXTENDING THE PERIOD OF TIME WHICH PLAINTIFF/APPELLEE HAS TO OBTAIN FINANCING AND TO PAY DEFENDANT/APPELLANT THE PROPERTY SETTLEMENT AWARDED TO HIM HEREIN.

{¶34} Matthew argues in his second assignment of error that the trial court erred by granting Christina extended time in order to secure a refinancing of the mortgage on the

marital property and effectuate the property distribution.

{¶35} As previously stated, the magistrate awarded Christina the grocery store as well as the separate home purchased during the divorce proceedings. To equalize the distribution, the magistrate ordered Christina to satisfy the mortgage on the marital property, which was approximately \$313,000 at the time of the last hearing, as well as pay Matthew \$20,529. The magistrate gave Christina six months to secure the financing and the trial court increased that time to one year. Matthew now argues that the trial court erred because it should have ordered Christina to secure financing and pay Matthew his share *before* transferring the grocery store to Christina, not after.

{¶36} After reviewing the record, we cannot say that the trial court abused its discretion in increasing the time period for Christina to obtain the necessary financing. The record is clear that Christina did not receive liquid assets in the divorce decree. Instead, she received the grocery store, valued at \$364,000, as well as her automobile and the home she had been living in since her separation from Matthew. Matthew and Christina purchased the home that Christina lived in for \$140,000. Therefore, even if she were to mortgage her home, she still had to secure almost \$200,000 in order to pay Matthew his share. At the time of the hearing, Christina was preparing to resurrect her photography career, but had no other means of income. Therefore, it was not unreasonable to order the transfer of the grocery store so that she could begin to establish an income in order to secure the necessary financing.

{¶37} While Matthew claims that the timing of the exchange is unfair to him, the magistrate also ordered that, until the time that Christina is able to secure financing, she is required to pay the mortgage on the marital home. Terms and conditions involving a division of assets often present hardships and difficulties in one form or another. However, Matthew does not have a financial obligation as it relates to the marital home, and has not been

unfairly prejudiced by the extra time awarded to Christina to secure financing. Having found no abuse of discretion, Matthew's second assignment of error is overruled.

{¶38} Assignment of Error No. 3:

{¶39} THE TRIAL COURT ERRED IN FAILING TO ACKNOWLEDGE, VALUE, AND DISTRIBUTE BY WAY OF PROPERTY SETTLEMENT THE INVENTORY OF THE PARTIES' BUSINESS.

{¶40} Matthew argues in his third assignment of error that the trial court erred in failing to distribute the value of the grocery store's inventory.

{¶41} Prior to making an equitable division of marital property, a trial court must determine the value of marital assets. *Donovan v. Donovan*, 110 Ohio App.3d 615, 620-21 (12th Dist.1996). "Rigid rules to determine value cannot be established, as equity depends on the totality of the circumstances." *Baker v. Baker*, 83 Ohio App.3d 700, 702 (9th Dist.1992), citing *Briganti v. Briganti*, 9 Ohio St.3d 220, 221-22 (1984). Thus, a trial court has broad discretion in determining the value of marital property. *Donovan* at 621. A trial court's decision regarding property valuation will not be disturbed on appeal absent an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's judgment is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (8th Dist.1983). However, in determining the value of marital property, the trial court must have sufficient evidence in order to justify and/or support the figure that it establishes. *McCoy v. McCoy*, 91 Ohio App.3d 570, 575 (8th Dist.1993). Therefore, "[w]hatever valuation the trial court chooses must be supported by competent, credible evidence." *Moore v. Moore*, 12th Dist. No. CA2006-09-066, 2007-Ohio-4355, ¶ 45, citing *McCoy* at 575.

{¶42} As previously stated, Christina commissioned a financial evaluation for the grocery store, and such was performed by Heather Deskins, a managing partner in P.D. Eye Forensics, LLC. Deskins submitted a report and also testified at one of the hearings, and

concluded that the store's value was \$364,000. This amount was reached by considering the store's value, but did not include the store's fixtures, realty, or any amount regarding separate inventory.

{¶43} The magistrate heard testimony from Matthew's witnesses that the fixtures were worth \$7,200 and that the realty was worth \$134,700. The magistrate awarded Christina the fixtures and realty, along with the grocery store, and then credited Matthew with \$364,000 for the store, \$7,200 for the fixtures, and \$134,700 for the real estate. While the magistrate's written opinion stated that Deskin's valuation of \$364,000 was "without regard to the building it occupies, or the inventory it has in stock," the magistrate was free to determine that the inventory was included as an aspect of the ongoing business of the store. Despite Matthew's suggestions at oral arguments on appeal, there was no evidence submitted at the trial level regarding the value of any separate inventory.

{¶44} There was no testimony or evidence offered to establish how, or even if, the inventory had a separate value other than its relation to the continuing business of the grocery store. Although Matthew now asserts that the inventory was a separate unit with its own value, akin to the realty or fixtures, the more reasonable conclusion is that the magistrate included the inventory in the equitable distribution to Christina as a continuing aspect of the business. Including the inventory with the business is a completely reasonable decision, as Matthew would have little use for half the inventory when he no longer owns the store. If Matthew believed the inventory to be a separate unit with a separate divisible value, he could have submitted evidence, or offered testimony, as to its value. He did not. In fact, when asked to produce an inventory ledger, Matthew stated that the grocery store did not even keep one. See *Burke v. Burke*, 2nd Dist. No. 2011-CA-2, 2011-Ohio-3723 (noting that a trial court "may only decide a case with the evidence the parties present to it").

{¶45} Deskins also testified that the little information Matthew provided her to assist in

her valuation of the business was unhelpful, and that she was forced to determine or recreate much of the financial information based on invoices and bank statements due to the lack of straightforward and sufficient evidence from Matthew, which included the lack of documentation as to the inventory.

{¶46} After reviewing the record, we cannot find the magistrate's decision awarding the inventory as part of the ongoing business to Christina to be an abuse of discretion. The trial court was not presented any evidence, competent, credible or otherwise, to establish that the inventory has a value separate from the ongoing business. As such, Matthew's third assignment of error is overruled.

{¶47} Assignment of Error No. 4:

{¶48} THE TRIAL COURT ERRED IN FAILING TO PROPERLY DETERMINE DEFENDANT/APPELLANT'S PREMARITAL PROPERTY INTEREST IN THE SABINA, OHIO PROPERTY.

{¶49} Matthew argues in his fourth assignment of error that the trial court erred in failing to give him credit for separate, nonmarital property.

{¶50} According to R.C. 3105.171, a court may award a party his or her separate property without effecting the equitable division of property. R.C. 3105.171(6)(a) defines separate property as "all real and personal property and any interest in real or personal property that is found by the court to be any of the following: * * * (ii) 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 * * *." The statute goes on to mandate that "(b) [t]he commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, *except when the separate property is not traceable.*" (Emphasis added.) "Thus, separate property may be converted to marital property when it is commingled with marital property. The party seeking to have a particular asset classified as

separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property." *Pruitt v. Pruitt*, 8th Dist. No. 84335, 2005-Ohio-4424, ¶ 70.

{¶51} Before the parties were married, Matthew purchased property in Sabina, Ohio. According to Matthew's testimony, he purchased the property for \$68,000, made a \$14,000 down payment, and mortgaged the remaining \$54,000. Through the help of a roommate who paid rent, Matthew allegedly paid the mortgage down to \$6,000 by the time of his marriage and when Christina moved into the home. Based on these figures, Matthew claims that a total of \$62,000 should be credited to him as separate property. However, Matthew conceded that he could not present the magistrate any documentary evidence to support his claim that the mortgage on the date of his marriage was only \$6,000. To complicate matters, two subsequent mortgages encumbered the Sabina home in the years after Matthew purchased the home and after the marriage.

{¶52} The sale of the Sabina property netted the couple \$83,314.51, and the parties applied much of the money to the building of the new marital home. The magistrate analyzed the issue, and determined that Matthew's \$14,000 down payment could be traced based on the documented purchase price and original mortgage amount. However, in the absence of any documentary evidence regarding the mortgage balance as of the marriage date, Matthew's testimony was insufficient to establish that he had paid the mortgage down to \$6,000 prior to the marriage. While Matthew asserts that his testimony was sufficient to establish the \$6,000 figure, the magistrate is in the best position to determine Matthew's credibility, and was within his discretion to weigh Matthew's testimony in the absence of documentation, and to make his decision accordingly.

{¶53} We cannot say that the magistrate's decision to find that Matthew failed to carry his burden of proving the amount of his separate property was arbitrary, unreasonable, or unconscionable. Having found no abuse of discretion, we overrule Matthew's fourth

assignment of error.

{¶54} Assignment of Error No. 5:

{¶55} THE TRIAL COURT ERRED IN RETAINING JURISDICTION OVER THE TRANSFER OF THE BUSINESS AND PAYMENT OF THE MORTGAGE OBLIGATION AS SET FORTH IN THE TRIAL COURT'S DECISION.

{¶56} Matthew argues in his fifth assignment of error that the trial court erred in retaining jurisdiction over the distribution of property.

{¶57} The magistrate made its property division orders, and then stated,

the Court hereby retains jurisdiction herein to administer and enforce [the provisions specifying property division] until each party hereto has fully satisfied his or her obligations thereunder. Said power reserved by the Court shall include, but is not limited to, the authority to revise or reconstruct the manner of property division set forth herein, should same become necessary due to a party's inability to bring the Court's Decree to fruition.

Matthew argues that the magistrate improperly retained jurisdiction because such retention permits the trial court to modify its previous property division. We agree.

{¶58} According to R.C. 3105.171(I), "division or disbursement of property or a distributive award made under this section is not subject to future modification by the court except upon the express written consent or agreement to the modification by both spouses." This court has recognized that "while the trial court retains its ability to enforce its division of marital property, the trial court may not reserve the right to modify the order, pursuant to the plain language of R.C. 3105.171(I)." *Schiavone v. Schiavone*, 126 Ohio App.3d 780, 782 (12th Dist.1998); see also *Haller v. Haller*, 12th Dist. No. CA95-06-063, 1996 WL 116140 (Mar. 18, 1996).

{¶59} Although the order stated that the court retains jurisdiction "to administer and enforce" the property division, the order also retained jurisdiction to "revise or reconstruct the manner of property division set forth herein, should same become necessary due to a party's

inability to bring the Court's Decree to fruition." The order also plainly stated that its jurisdiction was not limited to only that purpose.

{¶60} Unlike enforcing or clarifying a previous property distribution order, the court made specific reference to revising or reconstructing the division. We find this reservation of jurisdiction in conflict with the legislature's clear mandate that courts not retain jurisdiction to modify a previous property division. Once the magistrate made his orders, and the trial court adopted them, the manner by which the property was divided was fully adjudicated and cannot be modified in the future.

{¶61} While the court retains jurisdiction to administer and enforce the property division, it abused its discretion by maintaining jurisdiction to modify the property distribution. To that extent, we sustain Matthew's fifth assignment of error and modify the court's judgment by removing the following language from the final decree:

the Court hereby retains jurisdiction herein to administer and enforce Provision B, Provision C and Provision D of this Decision, until each party hereto has fully satisfied his or her obligations thereunder. Said power reserved by the Court shall include, but is not limited to, the authority to revise or reconstruct the manner of property division set forth herein, should same become necessary due to a party's inability to bring the Court's Decree to fruition.

{¶62} Assignment of Error No. 6:

{¶63} THE TRIAL COURT ERRED IN RETAINING JURISDICTION OVER THE ISSUE OF SPOUSAL SUPPORT AS IT RELATES ONLY TO PLAINTIFF/APPELLEE.

{¶64} Matthew argues in his sixth assignment of error that the trial court erred in retaining jurisdiction over possible changes to the spousal support order as it relates to Christina, but not to Matthew. The decision to retain jurisdiction to modify an award of spousal support is reviewed for an abuse of discretion. *Wolf v. Wolf*, 12th Dist. No. CA2009-01-001, 2009-Ohio-3687, ¶ 15.

{¶65} Christina moved for spousal support, and the magistrate denied such after reviewing the statutory factors relating to spousal support. The magistrate determined that Christina had no "need" because profits from the grocery store would provide Christina more than ample income to fulfill her needs. However, the court retained jurisdiction over the spousal support issue "for six months from the turnover of the business to [Christina], as the issue of spousal support involves the viability of the business."

{¶66} Matthew now argues that because Christina was awarded the business, the trial court should have retained jurisdiction over both parties so that the court could possibly determine whether he was entitled to spousal support within the six months. However, we cannot say that the trial court's decision to retain jurisdiction as such was an abuse of discretion. The record indicates that Matthew never requested spousal support, and did not move the court for any spousal support in his answer or counterclaim. Moreover, in his closing argument, Matthew stated that "it would be unjust to award either party one-half of the value of the business and then expect the other party to pay spousal support when they already have paid out the value of the business or been ordered to assume the indebtedness that is associated with said business."

{¶67} In exchange for Christina receiving the business, the magistrate ordered that she pay the mortgage on the marital home until such mortgage could be completely satisfied. Christina was also ordered to pay Matthew \$20,529 to further the equalization of property. In fact, during his closing arguments, Matthew asked that Christina receive the business if the magistrate was considering using the \$364,000 valuation figure. Therefore, Matthew was well aware that Christina could receive the grocery store, and yet he still did not ask for spousal support.

{¶68} We also note that throughout the proceedings, the magistrate made reference to the fact that the parties lived a somewhat lavish lifestyle. The couple's marital home was

custom built and was appraised at \$375,000, the couple could afford to purchase a separate home for Christina to live in during the divorce proceedings, Christina drove a luxury vehicle valued at over \$40,000, Matthew paid cash for his \$20,000 vehicle, the couple donated \$20,000 to their church for restoration purposes, they often traveled and enjoyed international vacations, and had considerable personal property, including several pieces of valuable jewelry. The magistrate often noted that he was unsure how the couple could afford to live such a lifestyle when the couple's reported income was approximately \$40,000 a year. This court is also unaware how a \$40,000 income could support this lifestyle, especially considering that at one point, the parties paid their mortgage at a rate of \$5,000 a month.

{¶69} Regardless of what income was or was not reported, the record indicates that Matthew was secure enough in his financial position that he did not request spousal support from Christina. Taking into consideration all the circumstances surrounding the spousal support issue, we cannot say that the trial court abused its discretion in retaining jurisdiction over Christina's request for spousal support without retaining the same over Matthew. See *Gordon v. Gordon*, 5th Dist. Nos. CT2007-0072, CT2007-0081, 2009-Ohio-177 (finding no abuse of discretion in trial court's decision not to award spousal support where appellant had not requested any).

{¶70} Finding no abuse of discretion, Matthew's sixth assignment of error is overruled.

{¶71} Assignment of Error No. 7:

{¶72} THE TRIAL COURT ERRED IN ITS VALUATION OF THE TWO VACANT LOTS IN CORDOBA, ARGENTINA.

{¶73} Matthew argues in his seventh assignment of error that the trial court erred in its valuation of two lots of land the couple owned in Argentina.

{¶74} As previously stated, a trial court has broad discretion in determining the value of marital property. *Donovan*, 110 Ohio App.3d at 621. A trial court's decision regarding

property valuation will not be disturbed on appeal absent an abuse of discretion. *Id.*

{¶75} The parties purchased two vacant lots in Cordoba, Argentina for a total of \$24,020, and paid that amount via a wire transfer.² Matthew testified that the lots, in his opinion, were worth approximately \$7,000 each, and that the parties owed \$3,500 in taxes to the Argentine government. Matthew based his value on the fact that he was trying to have a real estate agent sell the property for around that amount, and because he had a foreign document relating that the value of the properties was \$7,000 each. However, neither party offered any professional appraisal of the property or any documentation regarding the amount of taxes, if any, owed upon the land.

{¶76} While Matthew testified to his estimation of the value and the taxes, the magistrate declined to accept such valuation in the absence of "evidence to corroborate his claim." Instead, the magistrate used the purchase price of the lots in order to determine their value. Given the lack of evidence to the contrary, we find no abuse of discretion in the trial court's decision, and overrule Matthew's seventh assignment of error.

{¶77} Assignment of Error No. 8:

{¶78} THE TRIAL COURT ERRED IN FAILING TO ADOPT THE SCHOOL YEAR PARENTING SCHEDULE RECOMMENDED BY THE GUARDIAN AS IN THE BEST INTERESTS OF THE PARTIES' MINOR CHILDREN.

{¶79} Matthew argues in his eighth assignment of error that the trial court erred in adopting an older version of the GAL's report, rather than the updated version where the GAL suggested that Matthew have more parenting time with the children.

2. There is some discrepancy in the record if the \$24,020 is the amount paid for one lot, or two. Christina testified that Matthew purchased the first lot in 2006 for \$29,000 and then purchased the second soon thereafter for \$24,020. Matthew claimed in his testimony that he did not remember what he paid for the lots, but admitted that a \$24,020 wire transfer in the couple's bank statements was "probably" payment for both lots. Regardless of the discrepancy, the magistrate used the \$24,020 as the total amount paid for both lots combined, and Matthew was given the benefit of having one price covering both lots.

{¶80} "Ordinarily, a GAL's report is not considered evidence, but is merely submitted as additional information for the court's consideration, similar to a pre-sentence investigation report in a criminal proceeding." *In re Daneasha Sherman*, 3rd Dist. Nos. 05-04-47, 05-04-48, 05-04-49, 2005-Ohio-5888, ¶ 29. Therefore, "a trial court is not *bound* by the GAL's or custody evaluator's recommendation." *Cichanowicz nka Lutz v. Cichanowicz*, 3rd Dist. No. 3-08-04, 2008-Ohio-4779, ¶ 16. (Emphasis in original).

{¶81} The magistrate was not required to adopt the GAL's report, let alone the more current of the two reports. The first report discussed the parties' inability to cooperate fully with one another, even when it came to the interests of their children. Matthew claims that the second report, written a year after the original one, demonstrated that the parties were acting more cooperatively when exchanging the children. While such discussion may have been in the second report, the record is also replete with evidence that the parties' relationship remained contentious and that they were unable to act cooperatively on many occasions regarding the children.

{¶82} After reviewing the record, we cannot say that the magistrate abused his discretion by relying on information contained in the GAL's first report. Therefore, Matthew's eighth assignment of error is overruled.

{¶83} Assignment of Error No. 9:

{¶84} THE TRIAL COURT ERRED IN ITS CALCULATION OF DEFENDANT/APPELLANT AND PLAINTIFF/APPELLEE'S INCOMES FOR CHILD SUPPORT CALCULATION PURPOSES.

{¶85} Matthew argues in his final assignment of error that the trial court erred in setting his child support obligation.

{¶86} "Although the standard of review for a trial court's child support determination is abuse of discretion, challenges to factual determinations upon which the child support order

is based are reviewed using the 'some competent credible evidence' standard." *Heywood v. Heywood*, 12th Dist. No. CA2010-02-013, 2010-Ohio-3565, ¶ 12. We must therefore review the trial court's decision to determine whether it is supported by competent, credible evidence because a determination of gross income for support purposes is a factual finding. *Id.*

When determining a parent's income for purposes of calculating child support, the trial court must verify the income 'with suitable documents, including, but not limited to, paystubs, employer statements, receipts and expense vouchers related to self-generated income, tax returns, and all supporting documentation and schedules for the tax returns.' R.C. 3119.05. Federal and state tax documents provide a proper starting point to calculate a parent's income, but they are not the sole factor for the trial court to consider.

Foster v. Foster, 150 Ohio App.3d 298, 2002-Ohio-6390, ¶ 12 (12th Dist.).

{¶87} Before calculating Matthew's child support obligation, the magistrate found the evidence relating to his actual annual earnings "immensely sketchy." As previously discussed, Matthew's reported income, via federal tax documentation, was approximately \$40,000 a year, and less in years before 2009. However, both the magistrate and this court have noted that the lifestyle the parties enjoyed could not have been supported by a \$40,000 gross income. The record lacks any documentation as to where the additional funds came from which supports the lifestyle the parties testified about and which Christina confirmed was "high on the hog."

{¶88} The record is clear that the trial court was forced to extrapolate Matthew's annual income from the limited verified financial data it had before it, mainly his tax documents which reported an approximate gross income of \$40,000 a year. "Ohio courts have held that if a parent is evasive or avoidant in providing income verification, a court may use the financial data that is available to determine the parent's income * * *." *Massey v. Lambert*, 7th Dist. No. 09 CO 29, 2011-Ohio-1341, ¶ 58.

{¶89} In *Massey*, the Seventh District Court of Appeals upheld the trial court's

decision to deduce Massey's gross income based on tax information, as well as commissions he earned as a salesman. The court noted in its analysis that the trial court was forced to do as much because Massey failed to provide proper documentation of his actual income, and that the income Massey reported on his taxes was insufficient to support the lifestyle to which he was accustomed. The court understood from the record that Massey was "evasive" regarding his income, even when directly asked about it during cross-examination, and could not otherwise explain how he was meeting his monthly expenses on such a low reported income.

{¶90} Similarly, the court in *Cole v. Cole*, 5th Dist. No. 2006-CA-00190, 2007-Ohio-54, also found that the trial court did not abuse its discretion in calculating income based on what limited financial data it had before it. There, the father testified that he was unaware of his income and also failed to provide proper documentation. The trial court used documentation from a previous hearing to set child support, and the father appealed. The Fifth District Court of Appeals affirmed the trial court's child support calculations based on the prior documentation where the father "testified evasively" and provided little or no documentation. *Id.* at ¶ 21-23. The *Cole* court noted that the father could move for modification if he was able to present sufficient financial information regarding his income.

{¶91} Here, the record is clear that Matthew was also evasive in submitting proper documentation of his income. The trial court relied on documentation presented by the parties when determining the temporary orders. The matter initially came before the magistrate on April 7, 2009, and the documentation indicated that Matthew earned \$40,000, while the magistrate imputed \$15,184 to Christina after finding that she was voluntarily unemployed. After over a year had passed and multiple hearings occurred, the magistrate determined that Matthew had not provided the proper documentation of his income, and therefore used the gross income determination made for calculating the temporary orders.

This documentation provided the competent, credible evidence necessary to support the magistrate's findings, and we cannot say that such a decision was an abuse of discretion.

{¶92} Matthew asserts that because the magistrate awarded the grocery store to Christina that the \$40,000 gross income computation is erroneous, and further argues that he became unemployed once Christina received the business. However, the record is clear that the magistrate considered that Matthew's income was not limited to the salary he supposedly drew from owning or working in the grocery store. In fact, the testimony of Heather Deskins, the business evaluator, indicated that a normal salary for Matthew's position would be \$75,000 annually. Had the magistrate been basing Matthew's income solely on his work in the store, he could have set Matthew's salary at \$75,000 in the absence of clear documentation of Matthew's true income. However, the magistrate did not, and instead relied on the only competent, credible evidence of Matthew's income, the tax information supplied during for the April 7, 2009 hearing.

{¶93} Much like the Fifth District, we note that Matthew has the option of moving for modification of the child support obligation if and when he is able to provide sufficient and candid documentation of his income. Until then, we cannot say that the trial court's decision was an abuse of discretion, and we overrule Matthew's final assignment of error.

{¶94} Judgment affirmed as modified.

HENDRICKSON, P.J., and HUTZEL, J., concur.