[Cite as *Iacampo v. Oliver-Iacampo*, 2012-Ohio-1790.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

JAMES A. IACAMPO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2011-G-3026**
- vs -	:	
KATHLEEN A. OLIVER-IACAMPO,	:	
Defendant-Appellee.	:	

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 07 DC 1149.

Judgment: Affirmed in part; reversed in part and remanded.

Elaine Tassi, 34900 Chardon Road, Suite 207, Willoughby Hills, OH 44094 (For Plaintiff-Appellant).

Mary K. Bender, Mary K. Bender Co., L.P.A., 401 South Street, Building 4-A, Chardon, OH 44024 (For Defendant-Appellee).

MARY JANE TRAPP, J.

{¶1} James A. Iacampo appeals from a divorce decree issued by the Geauga County Court of Common Pleas, Division of Domestic Relations. He raises a myriad of issues, including the court's characterization of separate property, division of marital property, distribution of personal property, and lack of spousal and child support awards. For the following reasons, we affirm in part, reverse in part, and remand the matter for further proceedings consistent with this opinion.

Substantive Facts and Procedural History

{¶2} Mr. Iacampo and Kathleen A. Oliver-Iacampo were married in 2000 in Las Vegas. This is the second marriage for both. James has two minor children from his first marriage; Kathleen has none from her prior marriage.[1] The Iacampos have a son together, born in 2003. During the marriage, James was employed by Independence Excavating. Kathleen was employed in her family business, Oliver Printing Co., Inc. ("Oliver Printing").

{¶3} On October 19, 2007, James filed for divorce on the ground of irreconcilable differences. The couple contested almost every financial aspect of their divorce, and the matter went to trial before a magistrate in January 2009. James objected to the magistrate's decision, and the trial court overruled the majority of his objections. James now appeals, raising nine assignments of error for our review.

Assignments of Error

{¶4} "[1.] The trial court erred and abused it's [sic] discretion in adopting the Magistrate's Decision of February 18, 2009 wherein the Magistrate failed to properly characterize assets and liabilities acquired during the marriage.

{¶5} "[2.] The trial court erred and abused it's [sic] discretion in adopting the Magistrate's Decision of February 18, 2009, where the Magistrate selected the testimony of Wife's real estate appraiser over that of Husband's appraiser without stating a reason and by finding that based upon Wife's appraisal there was negative equity in the real estate and offsetting the negative equity against the marital assets awarded to Wife.

1. This case involves a family business, with several witnesses sharing the same surname. For clarity and ease of discussion, we will refer to the parties and the witnesses by their first names.

{¶6} "[3.] The trial court erred and abused its' [sic] discretion in failing to order the Wife to refinance or otherwise cause Husband's name to be removed from the mortgage obligations on the marital home.

{¶7} "[4.] The trial court erred and abused its discretion in adopting the Magistrate's Decision of February 18, 2009, where the magistrate failed to consider and distribute certain marital assets, including savings account in the child's name, royalty checks and the bonus and distribution checks from Oliver Printing Co., Inc. which were restrained by the court.

{¶8} "[5.] The trial court erred and abused its discretion in adopting the Magistrate's Decision of February 18, 2009, wherein the Magistrate found the parties had divided their personal property by agreement.

{¶9} "[6.] The trial court erred and abused its discretion in adopting the Magistrate's Decision of February 18, 2009, wherein the Magistrate made an inequitable distribution of marital assets.

{¶10} "[7.] The trial court erred and abused its' [sic] discretion in adopting the Magistrate's Decision of February 18, 2009, wherein the Magistrate failed to award the Husband spousal support.

{¶11} "[8.] The trial court erred and abused its discretion in ordering the guideline amount of child support without considering the facts of this case, by not deviating from the guideline amount of support based upon those facts and by ordering the support retroactive to October 17, 2007.

{¶12} "[9.] The trial court erred and abused its' [sic] discretion in adopting the Magistrate's decision that failed to award Husband his reasonable attorney fees."

{¶13} James challenges practically every determination made by the magistrate and adopted by the trial court regarding the division of property. We begin our analysis with the applicable standard of review.

Standard of Review

{¶14} An appellate court will not disturb the trial court's distribution of marital property absent an abuse of discretion. *Sedivy v. Sedivy*, 11th Dist. Nos. 2006-G-2687 and 2006-G-2702, 2007-Ohio-2313, ¶19. An abuse of discretion is the trial court's "failure to exercise sound, reasonable, and legal decision-making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶15} Under the first assignment of error, James challenges the trial court's characterization of certain assets and debt: (1) the appreciation of Kathleen's 12.5% ownership of Oliver Printing; (2) various investment accounts owned by Kathleen; and (3) debt owed to Kathleen's parents. We will first examine the applicable principles of law on these issues.

Marital v. Separate Property

{¶16} "The trial court must determine whether a particular property is separate or marital in nature, and then make an equitable distribution of that property." *Sedivy* at ¶20. In a divorce proceeding, the division of marital and separate property is governed by R.C. 3105.171. That statute directs a trial court to determine what constitutes marital property and what constitutes separate property, and, in either case, upon making such a determination, to "divide the marital and separate property equitably between the spouses." R.C. 3105.171(B).

{¶17} A trial court's characterization of property as separate or marital will be upheld when the record contains some competent credible evidence to support the trial court's conclusion. *Bizjak v. Bizjak*, 11th Dist. No. 2004-L-083, 2005-Ohio-7047, ¶10.

{¶18} "'Separate property' is defined in R.C. 3105.171(A)(6)(a)(ii) as '[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.' A trial court assumes that any property acquired during marriage is marital, unless evidence is offered to rebut that presumption." *Moore v. Moore*, 175 Ohio App.3d 1, 2008-Ohio-255, ¶59 (6th Dist.) "[P]roperty acquired during marriage is presumed to be marital unless it can be shown to be separate." *McLeod v. McLeod*, 11th Dist. No. 2000-L-197, 2002-Ohio-3710, ¶16 (citation omitted). "All property acquired by either or both parties during the marriage is presumed to be marital property, regardless of how title is held. This presumption may be overcome by proof that the property was acquired in such a manner that it should be declared nonmarital." *Ruthrauff v. Ruthrauff*, 5th Dist. No. 2009CA00191, 2010-Ohio-887, ¶7, quoting *Tomlin v. Tomlin*, 2d Dist. No. 10094, 1987 Ohio App. LEXIS 6101, *6 (Mar. 16, 1987).

Appreciation of Wife's 12.5 Percent Ownership of Oliver Printing

{¶19} With these principles in mind, we begin with the first issue raised under the first assignment of error – the appreciation of Kathleen's 12.5 percent ownership of Oliver Printing. The parties agreed that Kathleen's 12.5 percent ownership of the family business is separate property, and also that the business had appreciated in value during the marriage. They disputed, however, whether the appreciation is Kathleen's separate property.

1. Active v. Passive Appreciation

{¶20} In general, appreciation of property can be active or passive. Active appreciation, defined as an increase in the fair market value of property that is "due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage," is marital property. R.C. 3105.171(A)(3)(a)(iii); *Bizjak v. Bizjak*, *supra*, at ¶12. "Passive appreciation in value of a non-marital property, without the contribution of marital labor or funds, is non-marital." *Parks v. Parks*, 12th Dist. No. CA93-03-043, 1993 Ohio App. LEXIS 4343, *4 (Sept. 7, 1993), citing *Worthington v. Worthington*, 21 Ohio St.3d 73, 76 (1986).

2. Whether Appreciation in Wife's Ownership of Company was Passive

{¶21} Oliver Printing is a family business owned by Kathleen's family for 90 years and run by four generations of the Oliver family.

{¶22} On January 1, 1998, two years before the couple married, Kathleen was gifted by her father 75 Class-B non-voting shares, equal to a 12.5 percent ownership interest in the company. The parties stipulated the 12.5 percent ownership to be her separate property. They also stipulated her 12.5 percent ownership had increased in value by $593,000 during her marriage. The only dispute concerns whether the appreciation is active, making it a marital asset, or passive, making it a non-marital asset. Thus, the inquiry is whether the appreciation of her ownership interest in the company is due to her labor, monetary, or in-kind contribution during the marriage; in other words, whether her involvement with the company contributed to the growth of the company and hence the appreciation of its value.

{¶23} Gary Oliver, Kathleen's father, was the President of the company until 2001, when he retired and her cousin, George Oliver Jr., became its President. According to Gary and George's testimony, the company showed little growth from 1996, the year the Iacampos married, to 2001. After George took control of the

management of the company in 2001, the company began to show significant growth. George aggressively pursued major accounts; as a result of his efforts, the company's L'Oreal account increased from half a million to three to four million dollars in value. The company's sales force was increased from four to nine salesmen. To accommodate the increased sales, George also made major investments in equipment.

{¶24} Another cousin, Daniel Oliver, is the Treasurer of the company. He operates the print shop, oversees production details, and handles certain customer matters. George, however, makes all pivotal decisions for the company, manages the sales department, and has the sole authority for hiring and firing the employees.

{¶25} Regarding Kathleen's involvement in the company, she has been employed by the company for 13 years, initially as a secretary/receptionist. She became the company's bookkeeper after the retirement of her father and uncle in 2001. She holds the title of Secretary of the corporation, and works as its bookkeeper. Her job responsibilities include overseeing the accounts receivable ledger, accounts payable, billing, and payrolls, as well as performing customer service.

{¶26} George stated that he alone exercises all controls over the corporation. Kathleen lacks any management power; nor is she involved in any corporate matters. He testified that the job performed by Kathleen did not contribute to the growth of the company.

{¶27} Oliver Printing pays Kathleen a salary of $120,000, which, according to Robert Turner, the expert she hired to appraise the company, significantly exceeds the market compensation for her position as a bookkeeper.

{¶28} Kathleen also receives a generous annual dividend and bonus from Oliver Printing. The bonus and dividend income is not based on her contribution, but rather, on a "family formula." George determines his compensation, and applies a certain

formula for the other family members. According to the parties' stipulations, Kathleen received $126,501 in dividends in 2006; $158,436 in dividends in 2007, and a $199,709 bonus in 2008.

{¶29} The magistrate found the growth and increase in value of Oliver Printing to be exclusively attributable to the pivotal role played by George after he became the company's president. His management style and aggressive sales approach landed lucrative contracts such as the L'Oreal account, and significantly increased the company's sales overall.

{¶30} The magistrate, citing Kathleen's lack of ability to vote in corporate matters and lack of participation in any financial, personnel, or management decisions, found her duties as a bookkeeper did not contribute to the growth of the company. The magistrate found the lack of value of her position was also demonstrated by James' testimony that Kathleen had to fight to keep her job after her father and uncle retired from the company.

{¶31} Consequently, the magistrate determined the appreciation of Kathleen's 12.5 percent interest in Oliver Printing to be her separate property. The trial court adopted the determination.

{¶32} We recognize that property acquired during marriage, in this case, the appreciation of Oliver Printer from 2001 to 2007, is presumed to be marital. However, our review shows Kathleen presented competent, credible evidence to demonstrate that the growth of the company was solely attributable to its change of management, and that her position in the company as its bookkeeper did not contribute to the company's significant growth since 2001. Therefore, she has offered proof to overcome the presumption that the appreciation of Oliver Printing is martial property.

{¶33} James maintains that Kathleen was actively involved in the management of the company, and that her responsibilities contributed to the significant growth of the company. He points to her title as the Secretary of the company; her responsibility for the preparation of the company's sales tax filings; her interaction with the vendors and customers; her ability to sign checks for the company; and her 55-hour work week. Such evidence, however, only establishes that she works diligently for the company in her position, justifying her higher-than-market compensation. It does not establish that the growth in the company's sales is attributable to her job duties, which, undisputedly, involve no sales, management, or corporate decision-making matters.

{¶34} James cites several cases to support his contention that Kathleen's "labor, money, or in-kind contribution" caused the increase in the value of Oliver Printing. However, the inquiry regarding the proper characterization of a property's appreciation is highly fact-specific. The outcome in each of the cited cases is reached upon the facts and circumstances particular to the case, rather than as a matter of law, and therefore, has little application to our inquiry.

{¶35} James also argues the company's increase in value is partly due to Kathleen's monetary contribution to the company. He cites Mr. Turner's testimony that the company did not distribute to its shareholders all of its earnings, holding some profits to ensure that cash would be available to buy equipment, if necessary, or to acquire other businesses, if such opportunities arose. James, however, did not present any evidence to show a direct link between the retention of the company's earnings to the increased sales, or the increased value in lucrative accounts such as the L'Oreal account. Therefore, the claim that the company's appreciation is partly due to Kathleen's monetary contribution, pursuant to R.C. 3105.171(A)(3)(a)(iii), lacks evidentiary support.

3. Whether Oral Testimony of Wife's Expert was Admissible

{¶36} As to the trial court's decision regarding Kathleen's ownership interest in Oliver Printing, James also complains that the oral testimony of Kathleen's expert, Robert Turner, should not have been admitted.

{¶37} Prior to the trial, the parties stipulated to the admission of Mr. Turner's report, which appraised the value of Kathleen's 75 Class-B non-voting shares in Oliver Printing on the dates of December 31, 2000 and December 21, 2007. The trial transcript shows that James' counsel repeatedly objected to Mr. Turner's testimony regarding the cause of the company's growth during that period of time and the extent of Kathleen's contribution to the growth. James claims that the magistrate based her determination of the passive nature of the company's appreciation primarily on Mr. Turner's testimony, which went beyond the scope of his report. Specifically, James asserts that because Mr. Turner's written report was submitted as a joint exhibit, there was "no need" for his testimony, and, further, that any opinion Mr. Turner offered as to Kathleen's active contribution to the growth of the company went beyond the opinions contained in his written report. James claims he was "substantially" prejudiced because the magistrate "placed great weight on Mr. Turner's testimony in concluding that the Wife did not actively contribute to the growth" of the company.

{¶38} James and the dissent rely on Loc.R. 26 of the Court of Common Pleas of Geauga County, which prohibits a non-party expert from testifying or providing "opinions on issues not raised in his report." James does not challenge the admission of this testimony on the basis of Mr. Turner's qualifications or that a proper foundation was laid for his testimony.

{¶39} At the outset, it is well-established that the trial court's authority to determine whether there has been compliance with its rules is great. *Pang v. Minch*, 53

Ohio St.3d 186, 194 (1990). It is also well-settled that the enforcement of local rules is a matter within the discretion of the court promulgating the rules, and a violation of a local rule is generally insufficient support for a reversal. *Dvorak v. Petronzio*, 11th Dist. No. 2007-G-2752, 2007-Ohio-4957, ¶30 and *Yoel v. Yoel*, 11th Dist. No. 2009-L-063, 2012-Ohio-643, ¶40.

{¶40} Our review of the expert's report indicates the scope of the report is broader than what James claims. The report's cover letter explained the scope of the report as follows:

{¶41} "The purpose of the valuation is to render an opinion as to the fair market value of Ms. Oliver-Iacampo's ownership interest in the Company and the appreciation of the share value during the marriage to be used in conjunction with domestic relations litigation of *Iacampo v. Oliver-Iacampo*."

{¶42} While not expressly setting forth an opinion in terms of active versus passive appreciation, the report does expressly address certain valuation factors that may aid the trier of fact in determining the nature of the appreciation, such as a "discount due to lack of control" found at page 21 of Mr. Turner's report. Mr. Turner opines at page 23, "we find that a 10 percent discount for lack of control is applicable in this valuation. This discount for lack of control reflects Ms. Oliver-Iacampo's non-majority ownership and limited control over decisions regarding the Company."

{¶43} The dissent correctly notes that the "discount he was referring to is the minority ownership discount used to arrive at a fair market value of the stock. The discount is due to the inability of the minority shareholder to control such things as election of a majority of directors, election of officers, etc."

{¶44} But we cannot agree with our colleague that "[t]his is totally unrelated to the issue of whether the entire company's appreciated value should be considered

active or passive as it relates to an individual shareholder," because in a closely held family business these indicia of lack of control of any or all aspects of the business are also indicia of either the active or passive nature of the appreciation of the share value. Simply put, while not determinative, these concepts are necessarily and inexorably intertwined.

{¶45} It is undisputed Kathleen's ownership interest of Oliver Printing before the marriage was her separate property. The only reason the expert was hired to value the company was to ultimately determine the value of James' share, *if any*, in the appreciation of the company during the marriage. Such a determination necessarily depends on whether the appreciation was active or passive. Therefore, it should not come as a surprise to James' counsel that the nature of the appreciation would be a part of the expert's investigation, and that his testimony in that regard would be offered at trial. His counsel should have reasonably anticipated that testimony from the expert would be elicited to support Kathleen's claim that she did not have a substantial management role, and therefore, the appreciation in the value of the company during the term of the marriage was passive rather than active.

{¶46} Furthermore, as the Eighth District observed in its consideration of an identical rule, "'[t]he primary purpose of Loc.R. 21 is to avoid prejudicial surprise resulting from noncompliance with the report requirement.' * * * To evaluate surprise: 'A court is not required to prohibit the witness testimony where there is no evidence appellant was prejudiced by the admission of the testimony. The determination of whether the testimony results in a surprise at trial is a matter left to the sound discretion of the trial court. In the absence of surprise, there is no abuse of discretion. This court has also found that when a complaining party knows the identity of the other party's expert, the subject of his expertise and the general nature of his testimony, a party

cannot complain that they are ambushed.'" (Citations omitted.) *Revilo Tyluka, LLC v. Simon Roofing & Sheet Metal Corp*., 193 Ohio App.3d 535, 2011-Ohio-1922, ¶48 (8th Dist.).

{¶47} James also does not explain how he was substantially prejudiced by the admission of this line of testimony, other than his conclusion that the trial court relied heavily on the opinion. We observe that his attorney was able to adroitly and extensively cross-examine Mr. Turner, both during trial and at his deposition held after trial due to the malfunctioning recording system. Thus, we do not find that the magistrate or the trial court abused their discretion in allowing the expert to testify about the cause of the growth of the company, including whether Kathleen played an active part, during the pertinent time period.

{¶48} Furthermore, the admission of the expert's testimony, even if in error, was harmless, because it was not the only evidence showing the passive nature of the appreciation of Kathleen's shares of the company. Both Gary, the former President of the company, and George, its present President, provided extensive testimony regarding the company's growth in sales and Kathleen's lack of contribution to it. Thus, even if the expert's testimony regarding the cause of the company's growth was not admissible, the court had sufficient evidence before it to determine the passive nature of the appreciation of her shares of the company.

Investment Accounts

{¶49} Under the first assignment of error, James also challenges the trial court's characterization of various investment accounts owned by Kathleen as separate property.

{¶50} The parties were able to stipulate to the marital property portion of a pension fund ("Ohio Laborer's District Council and Contractor's Pension"), and a Lincoln

Financial account. They disputed whether any part of the Vanguard Wellington, Fidelity, and The American Funds accounts owned by Kathleen was marital property. The magistrate characterized these as her separate property. James claims these investment accounts were commingled with the marital property, and therefore, no longer traceable as separate property.

1. Traceability

{¶51} R.C. 3105.171 codifies the concept of traceability, or, the "source of funds" rule. *Frederick*, *supra*, at *28. That statute states:

{¶52} "The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." R.C. 3105.171(A)(6)(b).

{¶53} In other words, "[t]he act of commingling is no longer determinative. Instead, the traceability of separate property is the paramount concern. In enacting R.C. 3105.171, the General Assembly was codifying the view that if the right to hold separate property is to be meaningful, then the classification of property as marital or nonmarital must be determined by the source of contributions. Therefore, the only scenario by which transmutation may still occur under the current provisions of R.C. 3105.171 is a situation wherein a spouse is not able to trace his or her separate property." *Frederick* at *27-28 (internal citations omitted).

{¶54} Furthermore, "[t]he party attempting to prove that the asset is traceable separate property must establish such tracing by a preponderance of the evidence." *Debevec v. Debevec*, 11th Dist. No. 2002-P-0126, 2004-Ohio-2927, ¶17, quoting *Price v. Price*, 11th Dist. No. 2000-G-2320, 2002 Ohio App. LEXIS 240, *5 (Jan. 25, 2002).

2. Whether the Investment Accounts are Traceable

{¶55} Here, the evidence shows that, as a part of their estate planning, Kathleen's parents gave annual gifts, usually $10,000, to her and her brother. The parents established several mutual fund accounts into which these gifts were to be deposited. Some of the checks from the parents were written directly to the mutual fund companies, and some were deposited first in the Iacampos' joint bank account. In the latter case, Kathleen would then write checks to the mutual fund company for the amount of the gifts, not always immediately after receiving the gifts, however.

{¶56} Kathleen testified she and her brother receive an annual gift from their parents, and the gifting began before her marriage to James. She put the money in several mutual funds selected by her father. She would deposit the money from her parents to her bank account, and then write checks to the mutual fund companies. She testified she never deposited employment wages or salary she or James earned into these investments accounts.

{¶57} To trace the property, Kathleen offered Exhibit E, a 38-page documentation of the funds she received from her parents and subsequently deposited into the mutual fund accounts. The exhibit includes copies of checks received from Kathleen's parents and deposited into various accounts; the Iacampos' joint bank account statements showing the funds deposited and dispensed; and the mutual fund account statements showing the purchase of shares with the funds. We note that James objected only to the cover sheet of the exhibit, which is a summary of account transactions relating to the gifts; the remaining exhibit containing copies of checks and account statements was admitted without objection.

{¶58} Based on this record, therefore, we find the trial court properly determined that the funds from Kathleen's parents which were eventually deposited into various investment accounts are traceable, and therefore, separate property. The fact that the

funds were initially deposited in the parties' joint back account does not automatically destroy their identity as separate property. Based on our own review of Kathleen's documentation, we find she has presented a preponderance of evidence tracing the assets to separate property, pursuant to R.C. 3105.171(A)(6)(b). Therefore, the trial court did not abuse its discretion in regarding them as separate property.

Funds Borrowed from Wife's Parents

{¶59} The final issue raised under the first assignment of error concerns the funds Kathleen borrowed from her parents to pay for household expenses during the pendency of the divorce.

{¶60} In November 2007, the trial court issued a standard mutual restraining order. Consequently, as Kathleen's testified, Oliver Printing froze her dividend and bonus in the amount of $107,734. As a result, she borrowed a total of $115,000 from her parents to pay for various expenses, including their son's private school tuition, childcare, and mortgage and home equity line payments. Although no documents for the loan were submitted at trial, Kathleen testified that on two occasions she took out a loan from her parents, and that the Meyers & Roman law firm prepared the paperwork for the loan and also filed a lien at the County Recorder's office. James did not object to this testimony or present rebuttal evidence.

{¶61} Kathleen also introduced an exhibit, unchallenged by James, which listed $107,734 as the amount of dividend and bonus withheld by Oliver Printing, and $115,000 as the amount she borrowed from her parents to meet her expenses. She also itemized all the household, mortgage, medical, and tuition expenses totaling $101,835.51, paid with proceeds from the loan.

{¶62} Subtracting $107,734, which Kathleen is to receive once Oliver Printing releases the funds, from $115,000, the amount of the loan, the magistrate arrived at a

net debt of $7,266. The magistrate deemed it as a marital debt and assigned the debt to Kathleen, allowing her to use it to offset against her marital assets. Based on the unrebutted testimony and evidence introduced by Kathleen, we cannot say the magistrate abused her discretion in assigning the marital debt to Kathleen and allowing her to use it as a set off against her marital assets.

{¶63} For the foregoing reasons, we overrule the first assignment of error.

The Marital Home

{¶64} The second and third assignments of error concern the marital home, which Kathleen retained pursuant to the divorce decree. Under the second assignment of error, James complains that the trial court affirmed the magistrate's determination of the value of the marital home based on Kathleen's appraiser's valuation. He also challenges the court's decision regarding the home's negative equity. Under the third assignment of error, he contends the trial court should have ordered Kathleen to refinance or otherwise cause his name to be removed from the mortgage obligations on the home. We address these three issues in turn.

1. Valuation

{¶65} "Prior to making an equitable division of marital property, a trial court must determine the value of marital assets." *Flynn v. Flynn*, 196 Ohio App.3d 93, 2011-Ohio-4714, ¶10 (12th Dist.), citing *Donovan v. Donovan*, 110 Ohio App.3d 615, 620-621 (12th Dist.1996).

{¶66} "A trial court errs and abuses its discretion if it 'summarily arrives at a valuation of an asset or property * * * without a proper evidential predicate.'" *Ruble v. Ruble*, 12th Dist. No. CA 2010-09-019, 2011-Ohio-3350, ¶65, quoting *Carter v. Carter* 2d Dist. No. 2008 CA 54, 2009-Ohio-3637, ¶17. However, where there is sufficient

evidence to support the trial court's valuation, no abuse of discretion occurs. *McLeod*, *supra*, at ¶61.

{¶67} Furthermore, "[w]hen expert testimony is admitted into evidence regarding property valuation, the trial court may believe all of what the witness says, none of it or part of it." *Boyles v. Boyles*, 11th Dist. No. 2000-P-0072, 2001 Ohio App. LEXIS 4520, *11 (Oct. 5, 2001), quoting *Baker v. Baker*, 12th Dist. No. CA96-10-216, 1997 Ohio App LEXIS 1366, *3 (April 7, 1997).

{¶68} Finally, "[r]igid 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). "Our task on appeal is not to require the adoption of any particular method of valuation, but to determine whether, based on all the relevant fact and circumstances, the court abused its discretion in arriving at a value." *McLeod* at ¶61, quoting *James v. James*, 101 Ohio App.3d 668, 681 (1995).

{¶69} Both James and Kathleen retained appraisers to value the marital home, located on Ravenna Road in Newbury, which is an upscale and unique home constructed of quality materials. Both experts testified at great lengths regarding the comparable sales data they used to arrive at the value of the property.

a. Kathleen's Valuation

{¶70} Kathleen's appraiser prepared a report valuating the home at $700,000 as of November 2007. However, the market conditions declined significantly since then, due to the bank failures in September 2008. As a result, the appraiser updated her appraisal shortly before the date of trial, valuing the home at $620,000 as of December 15, 2008, using three comparable sales which occurred in the fall of 2008 in nearby communities. The appraiser testified extensively as to how the economic conditions affected the various segments of the real estate market during the relevant time period.

She also testified that the market was the lowest she has seen in her 30 years of experience appraising houses and that she did not foresee an upswing in the market in the near future.

b. James' Valuation

{¶71} James' appraiser also prepared a report, valuing the home at $695,000 as of September 2008. His appraiser used six comparable sales, two of them were the same comparables used in Kathleen's appraisal. However, although his appraiser agreed that the market declined significantly during the relevant time period, the adjustment he made to account for the declining market was much less than that made by Kathleen's appraiser. Furthermore, as the magistrate noted specifically, several of the comparable sales he utilized were "spec" homes. As Kathleen's expert testified, "spec" homes would typically command a higher price because they are brand new.

{¶72} The magistrate gave more credibility to Kathleen's appraiser, pointing out specifically that her December 2008 valuation made the necessary time adjustment from her original November 2007 report, utilizing more recent comparable sales. In contrast, James' appraiser's valuation was dated September 2008, even though both appraisers agreed that the market declined significantly during the last quarter of 2008. The magistrate also pointed to James' expert's use of unoccupied "spec" homes as comparables, which, as Kathleen's expert testified, commanded a higher price and therefore were not as reliable an indication of values.

{¶73} Based on the record, there is sufficient evidence to support the magistrate's determination that the marital home had a fair market value of $620,000. The magistrate was entitled to believe all, none, or part of the expert's testimony, and she explained why she believed Kathleen's expert's valuation over James' expert.

Therefore, the trial court did not abuse its discretion when it adopted the decision of the magistrate.

2. The Home's Negative Equity

{¶74} After valuing the home at $620,000, the magistrate deducted the mortgage owned on the home ($536,218.08) and an equity line of credit ($118,988.17) from that amount, and determined the home had a negative equity of $35,206.25.[2] The magistrate then set off the negative equity against the marital assets awarded to Kathleen in the property division.

{¶75} Under the second assignment of error, James complains the magistrate should have not found a negative equity and offset this against Kathleen's share of marital assets. James contends the existence of negative equity was highly speculative because Kathleen continued to reside in the home, and there was no evidence she intended to sell the property.

{¶76} There is no rule against using negative equity in a marital home as an offset. As in all property division matters, whether to award negative equity is within the trial court's discretion. *See Tokar v. Tokar*, 8th Dist. No. 89522, 2008-Ohio-6467, ¶18. James cites two cases to support his claim.

{¶77} In *Horvath v. Horvath*, 3rd Dist. No. 14-09-22, 2010-Ohio-316, the husband and wife incurred a significant amount of indebtedness. The wife filed for bankruptcy during the divorce, which resulted in discharge of certain debt. The primary issue was whether the trial court's distribution of debt was equitable. Among other allocations of debt, the trial court determined there would be zero equity in the marital home, even though the home had an actual negative equity of $18,008. The court of

2. After the couple separated in September 2007, James used a portion of the home equity line of credit for a down payment to purchase a house for himself. He was awarded that property in the divorce and it was not part of the appeal.

appeals, noting the trial court's broad discretion in allocating marital property and debt, found the division to be equitable under circumstances particular to that case.

{¶78} Similarly, in *Keating v. Keating*, 8th Dist. No. 90611, 2008-Ohio-5345, the magistrate decided not to factor into property division the negative equity in a marital property, again, based on the particular circumstances of the case. The court of appeals concluded the trial court did not abuse its discretion in refusing to assign negative equity to the husband when the trial court determined that such an assignment would be inequitable to the wife.

{¶79} Neither of these cases cited by James stands for the proposition that negative equity would be highly speculative if the spouse retaining the property does not intend to sell the property. Neither case mandates an attribution of zero equity under such circumstances. The second assignment of error is without merit.

3. Mortgage Obligations Secured by the Marital Home

{¶80} Under the third assignment of error, James claims the trial court should have ordered Kathleen to refinance or otherwise cause his name to be removed from the mortgage obligations on the home.

{¶81} The magistrate awarded the marital home to Kathleen, finding a negative equity of $35,206.25. In the divorce decree, the trial court ordered the following:

{¶82} "[T]he former marital residence * * * shall be the sole property of Kathleen A. Oliver-Iacampo, free and clear of any claim on part of James A. Iacampo. James Iacampo shall immediately execute a quitclaim deed transferring all his right, title, and interest to Kathleen A. Oliver-Iacampo * * *. Kathleen A. Oliver-Iacampo shall be solely liable for the first mortgage and home equity line secured by said property. Kathleen A. Oliver-Iacampo shall hold James A. Iacampo harmless and indemnify him from any liability in connection therewith."

{¶83} Contrary to James's assertion on appeal, the trial court expressly ordered Kathleen to hold him harmless on the mortgage obligations on the marital home. He claims the trial court should have gone a step further and ordered Kathleen to refinance the home, so that he could be completely "disentangled" from the prior joint property.

{¶84} The case upon which he relies, *Hoyt v. Hoyt*, 53 Ohio St.3d 177 (1990), however, involves the division of pension benefits. There, the court held that when considering an equitable distribution of pension benefits, "the trial court must apply its discretion based upon the circumstances of the case, the status of the parties, the nature, terms and conditions of the pension or retirement plan, and the reasonableness of the result; the trial court should attempt to preserve the pension or retirement asset in order that each party can procure the most benefit, and should attempt to disentangle the parties' economic partnership so as to create a conclusion and finality to their marriage." *Id*. at 179. James does not explain, and we fail to see, the relevance of that case to the instant issue.

{¶85} The third assignment of error is without merit.

Custodial Account, Royalty Proceeds, and Oliver Printing Bonus Checks

{¶86} Under the fourth assignment of error, James contends the trial court failed to properly characterize as marital assets the following assets: (1) Kathleen's bonus and distribution checks from Oliver Printing; (2) a custodial savings account in their child's name; and (3) gas well royalty proceeds. We address these in turn.

1. Bonus and Dividend from Oliver Printing

{¶87} James claims Kathleen's dividend and bonus from Oliver Printing withheld during the divorce proceedings should be considered marital property. Regarding this income, testimony from Kathleen's expert, Mr. Tuner, indicates that the bonus and dividend income was determined by a "family formula." Company President, George,

determines his compensation based on the sales commissions he earned and his service as the president of the company. Then the dividend and bonus of the rest of the family is calculated based upon what he earns, by way of a specific "family formula." Based on this evidence, the magistrate found Kathleen's bonus and dividend income is not predicated on her production or merit.

{¶88} Under R.C. 3105.171(A)(6)(a), "'separate property' means "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: * * * (iii) Passive income and appreciation acquired from separate property by one spouse during the marriage[.]" R.C. 3105.171(A)(4) defines passive income as "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse."

{¶89} Although the magistrate did not state specifically that the bonus and dividend income was nonmarital, she did find this income unrelated to Kathleen's "production or merit," thus, by implication, passive. Therefore, we find no abuse of discretion in not dividing these assets as part of the marital estate.

2. Custodial Savings Account

{¶90} The parties stipulated to a US Bank savings account which they established for their minor child, with Kathleen as the account custodian. James provided no testimony regarding the source of the funds. Kathleen testified that the account was solely funded by her dividend and bonus checks from Oliver Printing, and no earnings from their employment were deposited into the account. Kathleen's testimony was unrebutted.

{¶91} Both parties had withdrawn money from the account to pay for household expenses. The account balance as of December, 26, 2007 was $80,542.54, and

$45,817.40 as of January 25, 2008. It apparently had a balance of $2,008 at the time of trial.[3]

{¶92} James claims the funds withdrawn from the account by Kathleen should be treated as marital assets and considered as her part of marital property in the property division. This claim is without merit for two reasons. First, James admits "the parties frequently transferred funds in and out of this account as needed to satisfy marital expenses." Second, the account was funded by non-marital property. Therefore, we find no abuse of discretion in not charging the funds withheld from this account to Kathleen in the property division.

3. Gas Well Royalties

{¶93} The last issue under the fourth assignment of error concerns royalties from a gas well located on the marital property. James claims the funds should not have been treated as separate property.

{¶94} Kathleen testified she received the royalty checks, which were made out to both her and James, in the amount of approximately $4,500 for years 2007 and 2008. She deposited them in their bank account and used them to pay household expenses.

{¶95} Our review indicates the magistrate did not treat the royalties as separate property as James claims. Rather, the magistrate found them to be marital assets, which had been expended for household expenses. James' claim is not supported by evidence. The fourth assignment of error is without merit.

Distribution of Personal Property and the Global Property Division

{¶96} The fifth assignment of error concerns the distribution of the parties' personal property and the sixth concerns the equitableness of the overall property

3. An exhibit showing the balance of the account as of December 26, 2008 (Exh.10) is missing from the file. Kathleen testified the account had a balance of $2,008 at the time of trial in January 2009.

division. We find merit in James' claims under these two assignments regarding the trial court's disposition of the vehicles owned by the parties. For ease of discussion, we address the sixth assignment first.

Whether Distribution of Marital Assets was Inequitable

{¶97} Under the sixth assignment of error, James claims the marital property distribution made by the magistrate and adopted by the trial court was inequitable.

{¶98} It is well settled that trial courts have "broad discretion to determine what property division is equitable in a divorce proceeding." *Cherry v. Cherry*, 66 Ohio St.2d 348 (1981), at paragraph two of the syllabus. As the courts have repeatedly emphasized, a domestic court is "given broad discretion to fashion a decree that is equitable under the facts and circumstances of each case." *Guziak v. Guziak*, 80 Ohio App.3d 805, 811 (9th Dist.1992). Thus, we will only reverse a trial court's property divisions and distributions if the trial court abused its discretion. *Crawford v. Crawford*, 11th Dist. No. 90-A-1555, 1991 Ohio App. LEXIS 6340, *5 (Dec. 31, 1991). "There is no presumption * * * that marital property be divided equally upon divorce; rather a potentially equal division should be the starting point of the trial court's analysis." *Cherry* at paragraph one of the syllabus.

{¶99} Here, the magistrate considered the following assets as marital property and divided them as follows:

ITEM	Husband	Wife
Ravenna Rd. Property		$ (35,206.25)
Pekin Rd. Property	$39,800.00	
Laborer's Pension	$54,482.00	
Lincoln Financial		$135,376.04
5/3 Bank Account	$ 2,150.00	
US Bank (7392)		$ 56.73
US Bank (6656)		$ 286.93
Net Debt owed parents		$ (7,266.00)

Harley Davidson [Road King]	$ 9,800.00	
Tractor and Attachment	$ 5,350.00	
Subtotal	$111,582.00	$ 93,242.91
From Husband to Wife to equalize	$ (9,169.54)	$ 9,169.54
Total	$102,412.46	$102,412.45

{¶100} Based on the distribution, the trial court ordered James to pay the sum of $9,169.54 to Kathleen to equalize the property division.

{¶101} James complains on appeal that the appreciation of Kathleen's 12.5 percent ownership of Oliver Printing, her bonus and dividend, her investments account, and the gas well royalties should have been included as marital property. He also challenges the magistrate's crediting Kathleen with negative equity in the marital home, as well as the characterization of the loan from Kathleen's parents as marital debt. We have already addressed each of these issues separately.

{¶102} We have not addressed, however, various vehicles owned by the parties, at issue in the property division as well as in the distribution of the parties' personal property.

The Vehicles

{¶103} Kathleen drove a Tahoe, and James drove a F250 truck. The magistrate considered these vehicles marital property and allowed them to retain their own vehicle.

{¶104} The couple also owned a Harley-Davison "Road King," a tractor with various attachments, and a 1976 Datsun. The magistrate similarly considered them as marital assets, and assigned a value of $9,800, $5,350, and $5,500, respectively.[4] These values are not challenged by James.

4. For the Harley-Davidson and the tractor, the magistrate used their fair market value based on the evidence introduced. For the 1976 Datsun, the magistrate noted its purchase price was $5,500, but no evidence was introduced regarding its fair market value.

{¶105} After the couple's separation, the Harley-Davidson and the tractor were in James' possession, while the Datsun was in Kathleen's possession.

{¶106} In the property division, the magistrate allocated the Harley-Davidson and tractor to James, assigning values of $9,800 and $5,350, respectively, to these items, considering them as martial assets received by James. Yet, the magistrate did not list the Datsun, currently in Kathleen's possession, as part of her marital assets. The following chart summarizes the status of the various vehicles:

Tahoe	Value unspecified	In Wife's possession	Awarded to Wife
F250 truck	Value unspecified	In Husband's possession	Awarded to Husband
Harley-Davidson (Road King)	$9,800	In Husband's possession	Allocated as Husband's share in marital property division
Tractor	$5,350	In Husband's possession	Allocated as Husband's share in martial property division
Datsun	$5,500	In Wife's possession	*Not* allocated as Wife's share in marital property division

{¶107} The failure to include the Datsun, currently in Kathleen's possession, as part of her marital assets, constituted an abuse of discretion. The magistrate should have assigned a value to this marital property, whether its purchase price of $5,500 or a reasonable value, and considered the amount as part of the marital property received by Kathleen. In other words, in the property division chart shown in ¶102, *supra*, the Datsun should be listed as Kathleen's share of marital assets, with a proper value assigned to it. Therefore, the sixth assignment of error has merit to this extent. Upon remand, the trial court is to properly include the Datsun as Kathleen's marital assets, and reduce, accordingly, the amount James is to pay to Kathleen to equalize the property division.

Distribution of Personal Property

{¶108} The fifth assignment of error concerns the distribution of the parties' personal property. James complains the magistrate found, in error, that the parties had divided the personal party by agreement, when in fact the distribution of their personal property remains disputed. He complains the parties did *not* agree on the division of the personal property, and the court should have ordered a distribution by lottery or sale of the property, the proceeds of which to be divided by the parties.[5]

{¶109} Our review of the magistrate's decision indicates the magistrate considered the exhibits submitting by each party and also inquired of each party regarding the division of their personal property. The magistrate found the couple had divided personal property, with the exception of several items that belonged to James but still remained in the marital home.

{¶110} The record reflects James submitted an exhibit containing a list of all the items that remained in the marital home in Kathleen's possession. It included an A/V system, furniture and furnishings for various rooms in the house, appliances, cookware and silverware, exercise equipments, and arcade games. Using the replacement cost method, he estimated the total value of personal property in Kathleen's possession to be $83,400. He also listed the items he took with him to his new residence, including exercise equipments, furniture, and miscellaneous household items, valuing them at $12,600.

{¶111} Kathleen's exhibit listed the items taken by James when they separated, including a computer, a grill, kitchen items, exercise equipments, a TV. However, her list also included: (1) the Harley Davidson "Road King," which she valued at $18,000,

5. R.C. 3105.171(J)(2) provides the trial court with the authority to order the sale of personal property to ensure the equitable division of property, with the proceeds from the sale to be applied as determined by the court.

(2) the tractor, which she valued at $12,000, and (3) the F250 truck, which she valued at $10,000. Including the value of the vehicles, she estimated the personal property in James' possession at $62,250. She also listed several items James brought into the marriage still remaining in the home, including a bed, metal cabinet, and certain dishes and plates, which he possessed before the couple's marriage.

{¶112} After James testified regarding his lists of items in each party's possession, the magistrate asked James if the parties had divided their personal property. The following colloquy occurred:

{¶113} "Q. Is that a complete listing of all the items that are in your possession or in Miss Iacampo's possession?

{¶114} "A. I'm sure it's not, no. This is stuff that I could remember off the top of my head.

{¶115} "* * *

{¶116} "A. It's been * * * almost a year-and-a-half since I have been in this house * * *.

{¶117} "THE MAGISTRATE: Excuse me. Have the two of you tried to divide up your stuff?

{¶118} "THE WITNESS: I have made numerous requests to get the balance of my personal – I still have clothes in this house. I've made numerous requests and it has not been – it hasn't worked out obviously."

{¶119} Kathleen testified that other than several items listed in her exhibit as belonging to James (a bed, metal cabinet, and certain dishes he brought into the marriage), there were no items currently in the home that belong to James.

{¶120} Based on these exhibits and the testimony by the parties, the magistrate found that the parties had retained the personal property each desired and that the

personal property and household furnishings currently in each party's possession are "approximately equal."

{¶121} The magistrate's finding of equal value of items in each party's possession is not supported by the evidence. Kathleen's itemization of personal property in James' possession includes the Harley-Davison "Road King" ($18,000), tractor ($12,000), and the F250 truck ($10,000). The Harley-Davison and tractor are double-counted, because they are *already* included by the magistrate in the property division as marital assets received by James, valued, without objection, at $9,800 and $5,350, respectively. Regarding the F250 truck James drove, valued by Kathleen at $10,000, he was awarded the vehicle, just as Kathleen was awarded the Tahoe she drove. James did not include the value of the Tahoe as part of personal property under Kathleen's possession in his list, and therefore, Kathleen should not have included the F250 in her list of personal property under James' possession. None of the vehicles should be included in the personal property distribution, because the magistrate *already* accounted for them in the global property division. *See* global property division chart in ¶102, *infra*, and the vehicles chart in ¶108, *infra*.

{¶122} When the Harley-Davidson, the tractor, and the truck are properly removed from Kathleen's list of personal property in James' possession, the total value of James' personal property is significantly reduced from $62,250 to $22,250.

{¶123} Therefore, although James' own testimony appears to suggest that he had taken the bulk of the personal property belonging to him – only personal items such clothing remained to be retrieved from the home – the discrepancy between $83,400 (the value assigned by James to the items remaining in Kathleen's possession), and $22,255 (the value assigned by Kathleen to the items in James's possession after the removal of the vehicles), is simply too great to support the magistrate's finding that the

parties had equally divided their personal property. Thus, we find an abuse of discretion in the magistrate's determination regarding the division of the parties' personal property, and therefore, the trial court should not have adopted that determination. The fifth assignment of error is with merit.

Spousal Support

{¶124} Under the seventh assignment of error, James claims the trial court erred in not awarding him spousal support.

{¶125} To determine whether spousal support is appropriate and reasonable, the trial court is required, under R.C. 3105.18(C)(1), to consider all of the following factors: "(1) the income of the parties; (2) the earning abilities of the parties; (3) the ages and health of the parties; (4) the parties' retirement benefits; (5) the duration of the marriage; (6) the appropriateness of the parties to seek employment outside the home; (7) the marital standard of living; (8) the education of the parties; (9) the assets and liabilities of the parties; (10) the contribution of either party to the other's education; (11) the cost of education of the party seeking support; (12) the tax consequences of a spousal support award; (13) the lost income that results from the parties' marital responsibilities; and (14) any other factor the court deems relevant." *McLeod* at ¶92-94, citing *Davis v. Davis*, 11th Dist. No. 98-P-0122, 2000 Ohio App. LEXIS 1443 (Mar. 31, 2000). *See also Pearlstein v. Pearlstein*, 11th Dist. No. 2008-G-2837, 2009-Ohio-2191. "A trial court has broad discretion to examine all the evidence before it determines whether an award of spousal support is appropriate." *Pearlstein* at ¶160, quoting *Cooper* at ¶8, citing *Holcomb v. Holcomb*, 44 Ohio St.3d 128, 130 (1989). "A decision regarding spousal support will not be disturbed on appeal absent an abuse of that discretion." *Id*., quoting *Cooper* at ¶8.

{¶126} Regarding the duration of the marriage, the parties were married May 11, 2000 and separated in September 2007. James filed for divorce on October 19, 2007 and the trial took place on January 22, 2009. The magistrate found the duration of the marriage to be "for a relatively short time," to be exact, eight years and nine months.

{¶127} At the time the parties separated, James was employed by Independent Excavating, earning $80,000 in 2006, and $74,153 in 2007. At the time of trial, he was employed by Mr. Excavator, earning $77,500 in 2008. The parties stipulated James' annual income to be $80,000 for child support purposes. As for Kathleen, she receives a base salary of $120,000, plus dividend and bonuses. In 2006, her total income was $308,667; in 2007, $319.709. In 2008, her $199,709 in bonus was subject to the temporary restraining order. During their marriage, the parties enjoyed a high standard of living, thanks to Kathleen's salary and bonus/dividend income.

{¶128} After they separated, Kathleen was the residential parent, while James had parenting time on alternating weekends and holidays. Since their separation, Kathleen has paid all child-related expenses, including his private school tuition, summer camp, and child care. She has also paid all expenses related to the marital home, including the mortgage, taxes, and general upkeep of the residence. James did not contribute to marital or child-related expenses. He withdrew $46,100 from the home equity line of credit, between May 2007 and September 2007, to pay for his expenses, including $35,000 to pay for a down payment for his residence on Perkin Road.

{¶129} At the time of the trial, Kathleen was 42 and James was 47. Both are college educated. The magistrate found no physical or mental conditions that would impair either party's earning ability. Neither party lost income capacity due to their marital responsibilities. Neither had contributed to the other's education or earning

ability. James has supported himself since they separated, and continues to be able to do so. Both have retirement benefits available to them through their employment.

{¶130} Based on these findings, the magistrate determined that, despite the income disparity between the parties, it is not appropriate or reasonable for Kathleen to pay James spousal support. The trial court adopted that decision.

{¶131} On appeal, James complains the magistrate considered factors not listed in R.C. 3105.18 and ignored factors required by the statute. This claim is not borne out by our review.

{¶132} The magistrate's detailed findings of fact regarding spousal support, while not specifically referencing R.C. 3105.18, amply demonstrate that the magistrate considered all pertinent factors outlined in Section (C)(1)(a)-(n), and provided sufficient detail to enable us to conduct a meaningful review. *See Kaechele v. Kaechele*, 35 Ohio St.3d 93, 97 (1988). Applying the correct "appropriate and reasonable" standard, the magistrate considered the parties' incomes, earning abilities, education, ages, health, available retirement benefits, and assets and liabilities, as well as the duration of the marriage, the marital standard of living, the contribution of either party to the other's education, and whether there was lost income resulting from the parties' marital responsibilities.

{¶133} Only the disparity of the parties' income weighs in James' favor; thus, we find the magistrate properly exercised her broad discretion in examining other pertinent factors enumerated by the statute and determining that an award of spousal support would be inappropriate and unreasonable under the circumstances of this case, especially given the relatively short duration of the marriage. Consequently, we refuse to disturb the trial court's decision not to award spousal support.

Child Support

{¶134} Under the eighth assignment of error, James complains this case warrants a deviation from the child support guideline and the trial court should have ordered the appropriate deviation.

{¶135} The record reflects the parties stipulated to the following amount regarding Kathleen's income in 2006, 2007, and 2008:

	2006	2007	2008
Base salary	$120,000	$120,000	$120,000
K-1 (dividend)	$126,501	$158,436	
Bonus	(unspecified)	(unspecified)	$199,709
Gross earnings	$308,667	$319.709	$319,709

{¶136} James's income was stipulated as follows:

	2006	2007	2008
Salary	$80,573	$74,153	$59,712 (Mar. to Dec.)[6]

{¶137} The magistrate stated in her decision that the parties had stipulated to incomes for child support purposes: $80,000 for James and $120,000 for Kathleen. After noting Kathleen's employment-related child care expenses of $10,000, the magistrate ordered James to pay child support pursuant to the standard guideline in the amount of $778.61 per month.

{¶138} James objected to the income used by the magistrate and the trial court agreed with his contention, after reviewing the income stipulation by the parties. The trial court decided that the child support should be calculated based on Kathleen's annual income of $320,000, and James' income of $80,000. Based on Kathleen's $320,000 income, the trial court recalculated James' child support obligation and

6. For 2008, James was unemployed until March 10, 2008, and he received $4,310 in unemployment compensation. He began working for Mr. Excavator since March 10, 2008, earning the wages of $40 per hour. Between March 10, 2008 and December 10, 2008, he earned $59,712.

reduced it to $379.95 per month, retroactive to October 19, 2007, the date James filed for divorce.

{¶139} On appeal, James contends the trial court should not have employed the standard guideline in this case and should have ordered a deviation because of the great disparity in the incomes of the parties and because of his existing child support obligation of $9,180 per year from his first marriage.

{¶140} The trial court may deviate from a child support calculation where the guideline amount is unjust or inappropriate and not in the best interest of the child. R.C. 3119.22. "Absent an abuse of discretion, a trial court's decision on whether or not to deviate from the child support guidelines will not be reversed." *Kitchen v. Kitchen*, 12th Dist. No. CA2006-01-013, 2006-Ohio-6542, ¶10.

{¶141} Here, the trial court increased Kathleen's income from $120,000 to $320,000, taking into account her additional earnings from Oliver Printing, and this significantly reduced James' child support obligations. Our review of the court's child support worksheet also indicates the court factored into its calculation James' support obligations in the amount of $9,180 for his other children. However, the trial court found there were no other factors to justify any further deviation. Based on this record, we do not find an abuse of discretion in the court's determination and refuse to reverse the trial court's decision.

{¶142} James also challenges the trial court's decision ordering the child support obligation to commence on October 19, 2007. James claims that during the pendency of the divorce the court's temporary orders did not provide for child support, and therefore, the court cannot now make the child support retroactive to that date. He does not cite any authority to support this claim.

{¶143} The evidence shows that after the parties separated, their child lived with Kathleen, staying with James on alternating weekends and holidays. Kathleen paid for nearly all of the child's expenses, including his private school tuition, summer camp, child care, and clothing. Based on this evidence, we find no error in ordering child support during the duration of the divorce proceedings.

Attorney Fees

{¶144} Under the ninth assignment of error, James claims the trial court should have awarded him reasonable attorney fees.

{¶145} R.C. 3105.73, effective April 27, 2005, currently governs the standard for an award of attorney fees in divorce proceedings, replacing former R.C. 3105.18(H). R.C. 3105.73 states:

{¶146} "In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate." R.C. 3105.53(A).

{¶147} "A decision regarding an award of attorney fees is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *Pearlstein* at ¶153, quoting *Ohlemacher v. Ohlemacher*, 9th Dist. No. 04CA008488, 2005-Ohio-474, ¶39.

{¶148} Here, the magistrate found that, because of complicated issues involving the valuation of Kathleen's ownership of the family business, tracing of separate property, and real estate appraisal, both parties incurred significant legal fees. Kathleen

incurred over $43,300 and James incurred over $31,275. Tracking the statutory language from former R.C. 3105.18(H),[7] the magistrate stated both parties adequately protected their rights and neither party was prevented from fully litigating the issues. The magistrate decided each party should pay his or her own attorney fees and costs associated with litigating the divorce. The trial court adopted the decision.

{¶149} James is correct that the magistrate's finding tracked the language of the former statute. However, we still review the court's decision under an abuse of discretion standard. The new statute enumerates factors that the trial court *may* consider, but permits the court to consider any factors it deems appropriate. Because a trial court enjoys broad discretion in the award of attorney fees in divorce proceedings, we decline to second-guess its decision. *See Welty v. Welty*, 11th Dist. Nos. 2007-A-0013 and 2007-A-0015, 2007-Ohio-5217, ¶37 ("a trial court has broad discretion in the award of attorney fees"); *Bates v. Bates*, 11th Dist. No. 2000-A-0058, 2001 Ohio App. LEXIS 5428, *13 (Dec. 7, 2001); *Birath v. Birath*, 53 Ohio App.3d 31 (10th Dist. 1988).

{¶150} The ninth assignment of error is without merit.

{¶151} The judgment of the Geauga County Common Pleas Court, Division of Domestic Relations, is affirmed in part and reversed in apart, and the matter is remanded for further proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

---

7. R.C. 3105.18(H) provides: "In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings * * * if it determines that the other party has the ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney fees."

_____

TIMOTHY P. CANNON, P.J., concurs in part, dissents in part with Concurring/Dissenting Opinion.

{¶152} I respectfully concur in part and dissent in part from the opinion of the majority.

{¶153} I would reverse and remand to the trial court, in addition to the reasons set forth by the majority, to re-litigate the issue of whether the appreciation of Kathleen's interest in Oliver Printing was active or passive.

{¶154} There are two important, but very distinct, issues with regard to Kathleen's ownership interest in Oliver Printing: (1) the appreciated value of Oliver Printing during the marriage and (2) the classification of the appreciated value as passive or active. If the appreciation was considered to be passive, it is not a marital asset subject to division.

{¶155} The expert obtained by Kathleen submitted a report to which the parties stipulated. The purpose of the valuation, as defined in the expert's letter of December 1, 2008, was to "render an opinion as to the fair market value of Ms. Oliver-Iacampo's ownership interest in the Company and the appreciation of the share value during the time of the marriage." The letter further states: "The conclusion of value and summary report ('report') are to be used for this purpose and thus our report is not intended to be used for any other purpose."

{¶156} Even though both parties stipulated to the expert's conclusions regarding the appreciated value, the expert was called to testify at trial. During direct examination of this expert, counsel for appellee, over objection, questioned the expert on factors that

should be used in determining whether appreciation in the value of the business is active or passive. For example, the expert testified what and who contributed to the appreciation of the business during the years of the parties' marriage. Opposing counsel, however, could not have anticipated such expert testimony from reading the expert's report. This testimony required an entirely different set of qualifications and information beyond valuation of the business. It is a separate issue altogether. The majority contends this additional opinion testimony should have come as no surprise to appellant due to the inclusion in the expert report about a discount for lack of control. The discount he was referring to is the minority ownership discount used to arrive at a fair market value of the stock. The discount is due to the inability of the minority shareholder to control such things as election of a majority of directors, election of officers, etc. This is totally unrelated to the issue of whether the entire company's appreciated value should be considered active or passive as it relates to an individual shareholder. There are countless examples of small, closely-held businesses with silent majority owners who have little or no involvement with the growth of the company. The analysis of who is *responsible* for the appreciation in value of the company is, in fact, unrelated to what that appreciated value happens to be.

{¶157} The reasons for requiring an expert to include in his or her report all relevant facts upon which his or her testimony is based are obvious. It enables opposing counsel, if so desired, to conduct a discovery deposition to cross-examine the expert on those points. It also enables the opposing party the opportunity to obtain an expert witness to contradict the expert and/or support a contrary position. Further, it allows opposing counsel to adequately prepare for cross-examination at trial. This is especially true when the opinion is on such a critical and disputed issue.

{¶158} Because there was no opinion or facts that support any testimony about the active or passive nature of the appreciation in his report, opposing counsel had no reason to conduct a discovery deposition on this point or seek an independent expert opinion to contradict the expert's conclusions. This put appellant's counsel at a distinct disadvantage with respect to the most critical aspect of the litigation. The disadvantage was so significant that it cannot be said that appellant received a fair hearing.

{¶159} An opinion on whether appreciation is active or passive is not something a lay person would be able to give. If an expert is going to give such an opinion, it should be in their report. The ruling from this court should be clear and unequivocal: if an expert report does not give an opinion on a specific ultimate issue, testimony regarding that issue by the expert should not be permitted.

{¶160} I disagree with the majority that allowing such expert testimony was harmless. I do agree there was significant other testimony with respect to Kathleen's duties and obligations at Oliver Printing, but it is impossible to determine the weight given by the trial court magistrate and/or the trial court judge to the expert testimony of whether the appreciation was passive or active. In addition, the concern I have with calling it harmless is that it leaves open the door for litigators who may believe it to be advantageous to actually withhold critical opinions for trial. We do not know if that occurred in this case, but we do know two things: (1) the active versus passive nature of the appreciation was perhaps the most critical issue in this case, and (2) counsel for appellee and the expert witness seemed prepared for direct examination on the issue, despite having never before disclosed the opinion or the underlying facts in support. While the withholding of the information may have been unintentional in this case, it nevertheless *was* withheld, and placed appellant at a distinct disadvantage.