**[Cite as *Sieber v. Sieber*, 2015-Ohio-2315.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

| | | |
|---|---|---|
| AMY M. SIEBER, | : | |
| | | CASE NOS. CA2014-05-106 |
| Plaintiff-Appellee/Cross-Appellant, | : | CA2014-05-114 |
| | : | O P I N I O N |
| - vs - | | 6/15/2015 |
| | : | |
| WILLIAM P. SIEBER, | : | |
| Defendant-Appellant/Cross-Appellee. | : | |

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR12-09-1083

John D. Smith Co., L.P.A., John D. Smith, Andrew P. Meier, 140 North Main Street, Suite B, Springboro, Ohio 45066, for appellee/cross-appellant

M. Lynn Lampe, Adam C. Gedling, 1248 Nilles Road, Suite 7, Fairfield, Ohio 45014, for appellant/cross-appellee

**HENDRICKSON, J.**

**{¶ 1}** Defendant-appellant/cross-appellee, William P. Sieber (Husband), and plaintiff-appellee/cross-appellant, Amy M. Sieber (Wife), both appeal a decision of the Butler County Court of Common Pleas, Domestic Relations Division, granting a divorce between them and dividing their property. Husband also appeals the trial court's denial of his motion to hold

Wife in contempt and to compel her to respond to discovery requests. For the reasons set forth below, we affirm the judgment of the trial court.

## I. FACTS AND PROCEDURAL HISTORY

**{¶ 2}** Husband and Wife were married on December 29, 1979, and two children were born issue of the marriage. The parties were married for 32 years before separating in December 2011. Wife filed a complaint for divorce in September 2012, and Husband counterclaimed for divorce in October 2012. At the time the parties commenced proceedings, both of their children were emancipated.

**{¶ 3}** Husband and Wife accrued over $4 million in assets during their marriage. They managed their finances well and lived a comfortable, upper-class lifestyle where they accumulated very little debt. Both Husband and Wife are well educated. In 1979, Husband obtained a Bachelor of Arts degree in accounting. A few years later, Husband obtained his Master of Business Administration, which was paid for by a former employer. In 1983, Wife obtained a Bachelor of Science and Pharmacy. In January 2012, Wife began pursuing her Doctorate of Pharmacy.

**{¶ 4}** Husband and Wife were both employed during the marriage and achieved great success in their personal careers. Wife has worked as a clinical pharmacist and as a staff pharmacist. Although Wife worked primarily part-time when the parties' two children were younger, wife returned to full-time work around 2000, when she began working as a branch manager and clinical operations specialist for Hemophilia Health Services. Wife currently serves as the director of pharmacy at the Lindner Center of Hope and has an average base salary of approximately $141,000 a year. Wife's base salary does not include her earnings from filling "remote-order verifications," a side-job that Wife previously performed for her employer which allowed her to earn an additional $20,000 a year. The "remote-order verification" program ended in 2013, and Wife no longer has the ability to earn this additional

income from her employer.

**{¶ 5}** Husband worked full-time during the course of the marriage, often traveling for his employment. After graduating college, Husband worked in an accounting firm. He later changed jobs and, in 1986, began working for two corporations, E.F. Bavis & Associates, Inc. (Bavis) and Fabacraft Company. Bavis and Fabacraft are closely-held S-corporations, with the majority of stock shares held in trust. The companies share common ownership and have an interdependent production and sales relationship. Fabacraft manufactures drive-thru systems. Its products are sold exclusively to Bavis, who then sells the drive-thru systems to the banking, pharmacy, and food-service industries. Husband currently serves as the chief-salesperson, president, and C.E.O. of Bavis and Fabacraft and works 60 or more hours a week. Husband also serves as a minority shareholder in the two corporations, owning a single share of stock in both Bavis and Fabacraft. Husband earns an average base salary of approximately $152,000 a year from his employment with Bavis and Fabacraft. Husband also receives yearly W-2 bonuses from both Bavis and Fabacraft, a 1099 director's bonus from Bavis, 1099 director's fees from both Bavis and Fabacraft, and yearly Schedule K-1s from both companies. Husband's W-2 bonus is based off the profitability of the two companies, and varies in amount each year. In 2008, Husband received a W-2 bonus of $429,476. However, in 2011, after Bavis lost a large customer account with Walgreens, his W-2 bonus dropped to $194,952. Husband's average 1099 bonus for the years 2008 to 2011 was approximately $127,000. His yearly 1099 director's fees total $30,000, which reflects a $15,000 payment from each company. Husband's Schedule K-1s vary from year-to-year, but any income or loss has been consistently reported on the parties' joint tax return.

**{¶ 6}** Husband and Wife lead active lifestyles, enjoying camping, boating, riding motorcycles, and other outdoor activities. Though both parties are relatively healthy, Husband does suffer from diverticulitis, heart disease, and knee problems. Husband has

already undergone one knee surgery and needs to have another knee surgery.

**{¶ 7}** Following their separation in December 2011, the parties were able to agree to an equitable division of most of their assets. The parties stipulated that for purposes of valuing their property, the "period of time during the marriage" would be defined as "being the date of marriage, December 29, 1979, until December 31, 2011." By agreement, Husband retained the marital home located in West Chester, Ohio, valued at $185,000. Wife used $100,000 of marital funds towards the purchase of a home in Liberty Township, Ohio, and took out a mortgage to fund the remainder of her home purchase. The parties also entered into joint stipulations as to the value and division of their automobiles, motorcycles, campers, and boat, their IRA accounts, and miscellaneous household items.

**{¶ 8}** As a result of the numerous stipulations entered into by the parties, there were limited issues before the trial court at the final hearing on the complaint and counterclaim for divorce, held on August 28, August 30, and September 10, 2013. Among the disputed matters before the trial court were the issues of (1) whether Husband's shareholder interests in Bavis and Fabacraft were marital assets or Husband's separate property and, if marital, the value of those assets, (2) the parties' 401(k) contributions for the years 2011 and 2012 and how any appreciation or depreciation of the marital portions of the 401(k) accounts should be divided, and (3) whether a spousal support award in favor of Wife was appropriate under the circumstances.

**{¶ 9}** At the final hearing, Husband and Wife both testified on their own behalf about their respective health, education, employment history, and current earning capacities. Husband spent a significant amount of time testifying about the financial losses Bavis and Fabacraft were experiencing due to the loss of their biggest customer, Walgreens. Husband explained that although Bavis continued to service existing Walgreen drive-thrus, Walgreens was no longer purchasing new drive-thru systems from Bavis. Husband testified that the loss

of the Walgreens account cut the corporations' revenues by about $10 million, and that, as of 2012, Bavis is struggling to earn a profit. Husband stated that due to the loss of the Walgreen's account, he had been working between 60 to 70 hours a week trying to find new business and he was no longer expecting to earn the large W-2 bonuses that he had received in the past. Husband also testified about his stock ownership in Bavis and Fabacraft, claiming that he had received one share of stock in each company in the early 1990s as a gift from Ed Bavis, the original majority shareholder.

**{¶ 10}** Husband then presented the testimony of two of his co-workers. Susan Overbeck, the secretary and treasurer for Bavis, testified about Bavis's and Fabacraft's bonus program and the companies' struggles due to the loss of the Walgreens account. Michael Brown, the vice-president of manufacturing for Fabacraft, testified about the manner in which he received stock ownership in Bavis in 2000.

**{¶ 11}** Husband and Wife also presented expert testimony about the value of Husband's shareholder interest in Bavis and Fabacraft. Husband's single share of stock in Fabacraft gave him a 1.73 percent interest in the corporation, and his single share of stock in Bavis gave him a 1.37 percent interest in the corporation. Wife's expert, Alan C. Duvall, a certified public accountant and certified valuation analyst, valued Husband's shareholder interests in the two corporations using an asset-based methodology and a capitalization of earnings method (also called an "income method"). Duvall provided a combined value range for Husband's interests in the two corporations between $83,000 and $117,000. Husband's expert, Joseph Rippe, also a certified public accountant and certified valuation analyst, exclusively used an income-based approach in valuing Husband's interests. Rippe valued Husband's interests at $11,387 after finding that the loss of the Walgreen's account had a significant negative impact on the corporations' profitability.

**{¶ 12}** After considering the testimony and evidence presented at the final hearing, the

trial court issued a Decision and Order on October 16, 2013. As pertinent to the substantive issues on appeal, the trial court found that the shares of the Bavis and Fabacraft stock were not Husband's separate property, but rather marital property. The court adopted Duvall's valuation of the stocks, and found that the stocks were valued at $83,000. The court further found that certain payments made in 2012 to Husband's 401(k) account were accruals earned prior to December 31, 2011, and as such, constituted marital property. By agreement, the marital funds contained in the parties' 401(k) accounts as of December 31, 2011 were to be split equally. Any appreciation or depreciation for market fluctuations up to the December 31, 2011 valuation date were considered marital property and equally divisible. However, the trial court found that "any appreciation or depreciation after valuation date is not considered earned or accrued during the marriage" and was therefore not to be divided by the parties. Finally, the court found that a spousal support award was appropriate and ordered Husband to pay Wife $10 per year, plus "forty percent (40%) of any gross bonuses Husband receives, including but not limited to W-2, 1099, [and] K-1 bonus pay," for a period of 11 years.

**{¶ 13}** Both parties filed motions for clarification of the court's October 16, 2013 Decision and Order. Husband sought to have the court "clarify the definition of 'bonus' income, clarify the definition of 'receive,' and specifically detail exactly what type of income Husband must pay spousal support on." Wife sought clarification of the court's order regarding the division of the 401(k) accounts. A hearing on the parties' respective motions was held on November 7, 2013. Thereafter, on December 3, 2013, the trial court issued a decision denying Wife's motion for clarification but granting Husband's motion. With respect to the spousal support award, the trial court clarified that "Husband's W-2 bonus pay, 1099 bonus pay, 1099 director's fees from both Bavis and Fabacraft and Bavis/Fabacraft, and any K-1 shareholder distributions received are subject to the forty percent (40%) calculation. The

spousal support calculation shall not include ordinary interest, investment income, or dividend income."

**{¶ 14}** Thereafter, on April 15, 2014, the trial court entered its Final Judgment Entry and Decree of Divorce, which referenced and incorporated its October 16, 2013 Decision and Order and its December 3, 2013 Decision. Husband appealed, raising four assignments of error, and Wife cross-appealed, raising one assignment of error. For ease of discussion, Husband's assignments of error will be addressed out of order.

## II. ANALYSIS

### A. Classification of Stock as Marital Property

**{¶ 15}** Husband's Assignment of Error No. 2:

**{¶ 16}** THE TRIAL COURT'S FINDING THAT THE SHARES OF STOCK WERE MARITAL PROPERTY WAS AGAINST THE MANIFEST WEIGHT OF [THE] EVIDENCE AS THE SHARES OF STOCK WERE GIFTED SOLELY TO HUSBAND AND THUS WERE HUSBAND'S SEPARATE, NONMARITAL PROPERTY.

**{¶ 17}** In his second assignment of error, Husband argues that the trial court erred when it classified the Bavis and Fabacraft stock as marital property. Husband contends that the trial court correctly classified the shares of stock as "gifts," but then erred when it determined that the stocks were gifted to the marriage rather than gifted solely to him. Wife, however, contends that the trial court did not classify the shares of stock as "gifts" but rather found the stocks to be a form of compensation, which was correctly classified as marital property.

**{¶ 18}** In dividing property in a divorce proceeding, a trial court must first "determine what constitutes marital property and what constitutes separate property." *Grow v. Grow*, 12th Dist. Butler Nos. CA2010-08-209, CA2010-08-218, and CA2010-11-301, 2012-Ohio-1680, ¶ 11, quoting R.C. 3105.171(B). Marital property includes all real and personal

property that is currently owned by either or both of the spouses and that was acquired by either or both of the spouses during the marriage. R.C. 3105.171(A)(3)(a). Marital property "does not include any separate property." R.C. 3105.171(A)(3)(b). Separate property is defined by R.C. 3105.171(A)(6)(a) and encompasses "[a]ny gift of any real or personal property * * * that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse." R.C. 3105.171(A)(6)(a)(vii).

**{¶ 19}** "A trial court's classification of property as marital or separate must be supported by the manifest weight of the evidence." *Grow* at ¶ 11. The manifest weight of the evidence "concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" (Emphasis sic.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). "In a manifest weight analysis, the reviewing court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed." *Cooper v. Cooper*, 12th Dist. Clermont No. CA2013-02-017, 2013-Ohio-4433, ¶ 14, citing *Eastley* at ¶ 20. A reviewing court should be guided by the presumption in favor of the finder of fact, as the "trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony." *Zollar v. Zollar*, 12th Dist. Butler No. CA2008-03-065, 2009-Ohio-1008, ¶ 10. *See also Eastley* at ¶ 21.

**{¶ 20}** At the final hearing on the complaint and counterclaim for divorce, Husband attempted to establish through his own testimony and the testimony of his co-worker that Ed Bavis, the majority shareholder of Bavis and Fabacraft, gave him shares of the companies' stock as a gift. Husband testified that in December 1993, Ed Bavis walked into his office and

handed him one share of Bavis stock. In January 1994, Ed Bavis once again walked into Husband's office and, this time, handed Husband one share of Fabacraft's stock. Husband testified that he did not pay for the shares of stock and there were no conditions placed upon his ownership of the stock. Husband's co-worker, Brown, also testified that sometime in "early 2000," he was given one share of stock in Bavis and he paid nothing for the stock.

**{¶ 21}** After hearing the foregoing testimony, the trial court issued its decision finding that Husband "failed to show donative intent." Specifically, the trial court stated the following in its October 16, 2013 Decision and Order:

> There was no testimony as to the donor's intent. The stock was transferred during the marriage and in the course of Husband's employment.
>
> * * *
>
> Husband, seeking to have the shares of stock deemed separate property in this case, ha[d] the burden of proof on this issue. Wife [did] not have the burden to refute donor intent. Specifically, Husband needed to provide clear and convincing evidence to overcome the presumption that any gift to him was a gift to both Husband and Wife. This Court concludes Husband has failed to show donative intent. The competent and credible evidence supports the finding that the stock is marital property.

**{¶ 22}** We find that the trial court's decision classifying the Bavis and Fabacraft stock as marital property is supported by the manifest weight of the evidence. Husband failed to demonstrate by clear and convincing evidence that the stocks were given solely to him as a "gift."

**{¶ 23}** To establish an inter vivos gift, the following essential elements must be met: "(1) intent of the donor to make an immediate gift, (2) delivery of the property to the donee, and (3) acceptance of the gift by the donee." *Casper v. Casper*, 12th Dist. Warren Nos. CA2012-12-128 and CA2012-12-129, 2013-Ohio-4329, ¶ 12, citing *Bolles v. Toledo Trust Co.*, 132 Ohio St.2d 21 (1936), paragraph one of the syllabus. The donee has the burden of

showing by clear and convincing evidence that the donor intended an inter vivos gift. *Id.* "Clear and convincing evidence means that degree of proof that will provide in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Flynn v. Flynn*, 196 Ohio App.3d 93, 2011-Ohio-4714, ¶ 39 (12th Dist.).

**{¶ 24}** In the present case, though Husband and his co-worker both described occasions where Ed Bavis gave them shares of stock in Bavis and Fabacraft, neither man's testimony touched on the intent behind the transfer of stock. Both men described instances where stock was given to them while at work. Although Husband claims that the transfer of stock was intended as a gift made exclusively to him, he did not present any evidence outside of his own testimony to support his claim. While Husband's testimony "is not insufficient to prove intent as a matter of law, * * * the trial court is not required to believe it." *In re Estate of Kenney*, 2d Dist. Montgomery No. 13384, 1993 WL 169113, * 3 (May 13, 1993).

**{¶ 25}** Further, while Wife did not present evidence to contradict Husband's testimony regarding his characterization of the stocks as a gift made solely to him, evidence that tends to prove a fact does not necessarily become uncontested or uncontroverted merely because an opposing party does not present rebuttal evidence. *Kranz v. Kranz*, 12th Dist. Warren No. CA2008-04-054, 2009-Ohio-2451, ¶ 11. "[E]ven where the opposing party does not present evidence to rebut the proffered evidence, the trier of fact is still not required to accept such evidence as credible. * * * Instead, it is the role of the trier of fact to weigh the testimony and credibility of the witnesses, and to resolve any disputes of fact." *Id*. *See also Oliver v. Oliver*, 12th Dist. Butler No. CA2011-01-004, 2011-Ohio-6345, ¶ 9. Accordingly, given the meager and equivocal evidence before it, the trial court, as the trier of fact, was entitled to find that an inter vivos gift to husband alone had not occurred and that the stocks constituted marital property subject to property division. *Casper*, 2013-Ohio-4329 at ¶ 14. The record before us

supports the trial court's finding.

**{¶ 26}** Therefore, having determined that the trial court's decision classifying the Bavis and Fabacraft stock as marital property is supported by the manifest weight of the evidence, we overrule Husband's second assignment of error.

### B. Valuing Bavis and Fabacraft Stock

**{¶ 27}** Husband's Assignment of Error No. 3:

**{¶ 28}** THE TRIAL COURT'S FINDING OF [HUSBAND'S] OWNERSHIP INTEREST IN E.F. BAVIS AND FABACRAFT TO BE $83,000.00 WAS AN ABUSE OF DISCRETION AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN THIS VALUE WAS PROVIDED ORALLY BY [WIFE'S] EXPERT ON THE DAY OF TRIAL, [WIFE'S] EXPERT ACKNOWLEDGED THE VALUE IN HIS REPORT WAS INACCURATE, [WIFE'S] EXPERT FAILED TO GIVE ANY LACK OF CONTROL DISCOUNT ON LESS THAN TWO PERCENT OWNERSHIP INTEREST IN EACH COMPANY, AND THE TRIAL COURT RELIED ON A LIQUIDATION VALUE OF THE ENTIRE COMPANY WHEN [HUSBAND] HAS LESS THAN A [TWO PERCENT] INTEREST IN EACH COMPANY.

**{¶ 29}** In Husband's third assignment of error, he argues that the trial court erred by adopting Duvall's valuation and establishing Husband's ownership interest in Bavis and Fabacraft at $83,000. Husband first argues that Duvall's revised valuation should not have been admitted into evidence. He also argues that the trial court should not have adopted the valuation as Duvall (1) used a liquidation value in his valuation of the companies even though Husband, as a minority shareholder, could not force the companies to liquidate and (2) failed to apply a "lack of control" discount to his valuation even though Husband held only a single share of stock in each company. Husband asserts that Rippe's valuation should have been adopted by the trial court as it more accurately reflected the fair market value of the stock.

#### 1. Admission of Duvall's Valuation

**{¶ 30}** Prior to addressing Husband's argument that the court erred in valuing the Bavis and Fabacraft stock at $83,000, we address Husband's contention that the trial court erred in admitting Duvall's testimony. Although Husband does not dispute that Duvall was a qualified expert, Husband nonetheless argues that Duvall's testimony should not have been permitted because Duvall amended his valuation on the day of trial. Husband contends that because Duvall's revised valuation was not exchanged prior to trial, he was denied the opportunity to prepare for cross-examination.

**{¶ 31}** In the present case, the trial court set a deadline for all expert reports to be exchanged between the parties by August 2, 2013. The parties complied with this requirement and both Duvall's report and Rippe's report were exchanged. In his initial report, Duvall applied an asset based approach for determining the fair market value of Fabacraft and a capitalization of earnings method, or income method, for determining the fair market value of Bavis. Duvall originally valued Husband's interests in the two companies at $141,000. However, Duvall arrived at this value without knowledge that Fabacraft sold its products exclusively to Bavis. Once Duvall learned that Bavis was Fabacraft's only customer, he adjusted his valuation and provided a combined value for both companies between $83,000 and $117,000. Duvall testified about his adjusted valuation at the final hearing and Husband objected. The trial court overruled Husband's objections.

**{¶ 32}** The decision to admit or exclude relevant evidence rests within the sound discretion of the trial court. *Ohmer v. Renn-Ohmer*, 12th Dist. Butler No. CA2012-02-020, 2013-Ohio-330, ¶ 17. "An appellate court will not disturb evidentiary rulings absent an abuse of discretion that produced a material prejudice to the aggrieved party." *Id.* An abuse of discretion is more than an error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

**{¶ 33}** We find that the trial court did not abuse its discretion in allowing Duvall to testify at the final hearing about his revised valuation of Husband's shareholder interest in Bavis and Fabacraft. In determining that Duvall's revised valuation was admissible, the trial court stated the following:

> It is worth underscoring the arduous process involved in gaining access to company records. An Agreed Protective Order was entered May 21, 2013 after much contention between parties and counsel for [Bavis and Fabacraft]. Because of the companies' desire for protection, no documents were made available for copying or scanning. In fact, both experts were required to physically sit at headquarters and make notes from balance sheets and other company documents.
>
> * * *
>
> After Mr. Duvall became aware of the actual dependency between the two companies and losses of Fabacraft, [his] valuation was adjusted accordingly. He thereafter provided a combined value range between $83,000 to $117,000 (Exhibit 43). *Husband's criticism of making this adjustment for losses so late is pointless considering the difficulty in obtaining the necessary information at the outset. Any objection to its admissibility is overruled*.

(Emphasis added). Given Duvall's testimony that he did not learn of Fabacraft's sole dependency on Bavis until after he had drafted his preliminary valuation and the difficulty the parties had in obtaining information from Bavis and Fabacraft, we find no error in the trial court's decision to admit Duvall's revised valuation. Husband was not prejudiced by the admission of the revised valuation as he was given the opportunity to cross-examine Duvall about the valuation and the methodology Duvall used in arriving at the revised figures. Moreover, Husband was not prejudiced by the admission of the revised valuation as it resulted in a valuation that was more favorable to Husband. The revised valuation dropped the value of Husband's interests in the companies from $141,000 to as low as $83,000, a nearly $60,000 decrease in value.

**2. Adoption of Duvall's Valuation**

**{¶ 34}** We further find that the trial court did not err in adopting Duvall's valuation establishing Husband's interest in Bavis and Fabacraft at $83,000. A trial court has broad discretion in determining the equitable division of property in a divorce proceeding. *Cherry v. Cherry*, 66 Ohio St.2d 348 (1981), paragraph two of the syllabus. "Prior to making an equitable division of marital property, a trial court must determine the value of marital assets." *Dollries v. Dollries*, 12th Dist. Butler Nos. CA2012-08-167 and CA2012-11-234, 2014-Ohio-1883, ¶ 10. "When valuing a marital asset, a trial court is neither required to use a particular valuation method nor precluded from using any method." *Gregory v. Kottman-Greggory*, 12th Dist. Madison Nos. CA2004-11-039 and CA2004-11-041, 2005-Ohio-6558, ¶ 15. *See also Foppe v. Foppe*, 12th Dist. Warren Nos. CA2008-10-128 and CA2009-02-022, 2009-Ohio-6926, ¶ 34. However, in determining the value of marital property, the trial court must have evidence before it to support the figure that it establishes. *Id.* at ¶ 35. "An appellate court will not reverse a trial court's decision regarding what figures it uses to determine an equitable division where the decision is supported by the manifest weight of the evidence." *Dollries* at ¶ 10. *See also Corwin v. Corwin*, 12th Dist. Warren Nos. CA2013-01-005 and CA2013-02-012, 2013-Ohio-3996, ¶ 40.

**{¶ 35}** In the present case, both Husband's expert and Wife's expert testified about the fair market value of Husband's interests in Bavis and Fabacraft as of December 31, 2011, the agreed valuation date. In determining fair market value, both experts focused on the price at which the stock would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Husband's expert chose to examine Bavis and Fabacraft as one entity, looking at the companies' historical earnings in an income-based approach, using a capitalized earnings method. Utilizing this methodology, Rippe looked at what a buyer of Husband's stock could expect as a return on his or her investment. In determining this

amount, Rippe considered the corporate structure of the businesses, Husband's minority interest in the companies, the loss of Walgreens as a customer, and the companies' loss of sales. Rippe painted a bleak picture for the future of Bavis and Fabacraft, testifying that he believed Bavis and Fabacraft would be out of business by 2015 or 2016 given the companies' steady decline in sales. Rippe determined that Husband's interest in both companies was valued at $ $17,698. Rippe then applied a 24.3 percent discount for lack of control and a 15 percent discount for lack of marketability, placing a final value of Husband's interest at $11,387. Rippe found such discounts necessary due to Husband's minority ownership and limited control over decisions regarding the companies.

**{¶ 36}** In valuing Husband's interests, Rippe expressly rejected an asset based approach, finding that any attempt to liquidate the businesses would be unsuccessful because of Husband's less than 2 percent interest in each company. He also testified that an asset based approach would bring "pennies on the dollar" at auction or liquidation.

**{¶ 37}** Wife's expert disagreed with Rippe about the best method for valuing Husband's interests in Bavis and Fabacraft. Duvall used an asset based evaluation in determining the fair market value of Fabacraft due to the liquidity of Fabacraft's assets. Fabacraft's fixed assets were adjusted for depreciation and its cash, accounts receivables, and inventory, totaling over $4 million, were offset against the company's minimal liabilities, which included payroll expenses and less than $14,000 in accounts payables. Duvall determined that Husband's 1.73 percent interest in Fabacraft was valued at $63,000, which reflected a 10 percent discount for lack of marketability.

**{¶ 38}** With respect to Husband's 1.37 percent interest in Bavis, Duvall initially used a capitalized earnings method in valuing Husband's interest at $78,000. Using this approach, Duvall examined the value of Bavis' operational assets by analyzing the earnings the company's assets generated. However, after learning that Fabacraft sells exclusively to

Bavis, Duvall adjusted his valuation of Bavis to reflect the impact the loss of Walgreen's business had had on the business. Specifically, Duvall testified as follows:

> Well, after, uh, I prepared my, I'll call it preliminary valuation, I got the results back from the deposition of [Husband] * * * and I saw mention of it * * * that perhaps all the sales of Fabacraft went to E.F. Bavis. I didn't know that. Fabacraft had some losses. So * * * based on this new information, assuming it's factual, all the sales of Fabacraft went to E.F. Bavis, if I then factored in the Bavis losses and treated it - - or in the Fabacraft losses, and treated it as part of Bavis losses, what would that do to the combined valuation of the two companies.

Factoring in the losses using a capitalization rate, Duvall testified that the value of Bavis drops $24,000, making Husband's interest in Bavis $54,000. Combining Husband's $54,000 interest in Bavis with Husband's $63,000 interest in Fabacraft, Duvall testified that Husband's interest could be valued as high as $117,000. Duvall then provided a combined value range for Husband's interests in the two companies between $83,000 and $117,000. The $83,000 figure was derived by looking at the equity, or net assets, for both companies. Under this approach, Husband's interest in Fabacraft remained valued at $63,000. Husband's interest in Bavis, however, decreased in value to $20,000, which reflected a 10 percent discount for lack of marketability, under this asset-based approach.[1]

**{¶ 39}** After hearing competing testimony about the value of Husband's interest in Bavis and Fabacraft, the trial court adopted Duvall's valuation of $83,000. In adopting this asset-based valuation, the court expressly stated its belief that Rippe had "exaggerated" the lack of control and lack of marketability discounts as well as the future outlook for the

1. Contrary to Husband's arguments on appeal, the record does not support Husband's contention that Duvall "double-dipped" in his calculations to arrive at his final value range of $83,000 to $117,000. Rather, as set forth above, Duvall explained his methodology for arriving at Fabacraft's value ($63,000) and then explained his methodology for arriving at Bavis' value (between $20,000 and $54,000). The $54,000 figure was derived using a capitalization of earnings method, or "income method." The $20,000 figure was derived after Duvall changed his valuation method from an income approach to an asset-based approach. Only after Husband's interests in the two companies were separately valued were the figures combined, for a final value range of $83,000 to $117,000. The trial court ultimately adopted the $83,000 value, which represents an asset-based valuation of both Fabacraft and Bavis.

companies' success. The trial court recognized the negative impact losing the Walgreen's account had on Fabacraft and Bavis, but did not believe Rippe's prediction that the companies would be out of business by 2015 or 2016. In rejecting Rippe's bleak outlook for the companies' future, the trial court stated the following:

> There is no doubt that the loss of Walgreen's for new business has had a significant negative impact. However, evidence shows Bavis does business across 21 states and other accounts have been acquired, i.e.: Pruitts Pharmacy, LCNB, other individual pharmacies, and the like. Furthermore, there are no assurances that the Walgreens account will never return. Bavis was established in 1957 and Husband joined the company in 198[6]. This is a mature company with an established, albeit narrow niche.

**{¶ 40}** We find that the trial court's decision to adopt Duvall's valuation over Rippe's valuation is supported by the manifest weight of the evidence. When parties present substantially different valuations of an asset, the trial court is free to believe all, part, or none of any witnesses' testimony. *Huelskamp v. Huelskamp*, 185 Ohio App.3d 611, 2009-Ohio-6864, ¶ 27 (3d Dist.). Here, the trial court had before it credible evidence establishing the value of Husband's interest at $83,000. Although Husband contends that in adopting Duvall's valuation, the trial court failed to consider Husband's inability as a minority shareholder to force liquidation, we find no merit to Husband's argument. The trial court heard testimony about the difficulties in forcing a liquidation, but nonetheless agreed with Duvall's testimony that an asset-based approach for valuing the companies was appropriate given the companies' significant liquid assets, including Fabacraft's cash, accounts receivables and "inventory that becomes cash in three to four months." The trial court was in the best position to weigh the credibility of Duvall's and Rippe's competing testimony. *See Zollar*, 2009-Ohio-1008 at ¶ 10. We cannot say that the trial court clearly lost its way or created a manifest miscarriage of justice in finding Duvall's asset-based valuation credible.

**{¶ 41}** Additionally, although Husband contends the trial court erred in adopting

Duvall's valuation when the valuation failed to apply a lack of control discount, we find no merit to his argument. Duvall disagreed with Husband's expert's testimony that a 24.3 percent discount for lack of control was warranted due to Husband's minority ownership and limited control over the companies' decisions. Duvall testified that Husband has significant control over the company, stating "[W]e're not talking about a 2% investor in California who's outside the company and doesn't know what's going on. You know, we're talking about an insider who is running the company, who's in control of that company from a day-to-day standpoint and I just don't see the lack of control there." Duvall also testified that the lack of a noncompete agreement between Husband and Bavis and Fabacraft also suggested that a lack of control discount was unnecessary.

**{¶ 42}** The trial court agreed with Duvall's interpretation of Husband's influence and control over companies, stating the following:

> By his own testimony, Husband is not just a figurehead but the primary salesperson and key driving force behind the company's [sic] success. Furthermore, Husband has not been compelled to sign a noncompete agreement. In other words, it cannot be ignored that the majority shareholder(s) must consider the significant influence or control Husband exerts in the business.

The trial court, therefore, felt that a lack of control discount was not necessary. As there was competent and credible evidence supporting the trial court's decision not to apply a lack of control discount, we will not substitute our judgment for that of the trial court. *See Wingate v. Wingate*, 6th Dist. Lucas No. L-99-1018, 2001 WL 60721, * 6 (Jan. 26, 2001) (finding that the trial court did not err by refusing to apply a lack of control discount in valuing a wife's non-majority interest in a business); *Oatey v. Oatey*, 8th Dist. Cuyahoga Nos. 67809 and 67973, 1996 WL 200273, * 22 (Apr. 25, 1996); *Montisano v. Montisano*, 9th Dist. Summit No. 15915, 1993 WL 208324, * 1 (June 16, 1993).

**{¶ 43}** Accordingly, for the reasons set forth above, we overrule Husband's third

assignment of error. The record before us demonstrates that the trial court's decision to value Husband's interests in Fabacraft and Bavis at $83,000 is supported by the manifest weight of the evidence.

### C. Spousal Support Award

**{¶ 44}** Husband's Assignment of Error No. 1:

**{¶ 45}** THE TRIAL COURT ABUSED ITS DISCRETION BY ORDERING [HUSBAND] TO PAY [WIFE] 40% OF [HUSBAND'S] FUTURE BONUSES AS SPOUSAL SUPPORT FOR ELEVEN YEARS, AS THIS ORDER IS INAPPROPRIATE AND UNREASONABLE AND THE TRIAL COURT DID NOT CONSIDER [WIFE'S] NEED FOR SPOUSAL SUPPORT.

**{¶ 46}** In his first assignment of error, Husband argues that the trial court erred in awarding Wife spousal support. Husband first contends that a spousal support award is inappropriate as Wife failed to demonstrate her need for the award. Husband urges this court to abandon *Kedanis v. Kedanis*, 12th Dist. Butler No. CA2012-01-015, 2012-Ohio-3533, ¶ 18, and its progeny, in which we established that an award of spousal support shall not be based on an "overriding 'need' requirement [but] rather [on] a balanced review of the R.C. 3105.18(C)(1) factors." Instead, Husband would have this court hold that "need" is the key factor, under which all of the R.C. 3105.18(C)(1) factors fall, for determining whether a spousal support award is appropriate. Finally, Husband argues that even if a spousal support award was appropriate, the trial court abused its discretion in ordering him to pay Wife 40 percent of his gross bonuses as such an award resulted in a "double-dip" of his earnings from Bavis and Fabacraft.

#### 1. *Kedanis*—Need is but One Factor

**{¶ 47}** R.C. 3105.18 governs the award of spousal support. In *Kedanis*, this court examined R.C. 3105.18 and determined that our previous jurisprudence overemphasized the "need" of the payee spouse for a spousal support award. *Kedanis*, 2012-Ohio-3533, ¶ 18,

overruling *Carnahan v. Carnahan*, 118 Ohio App.3d 393 (12th Dist.1997). *See also Ornelas v. Ornelas*, 12th Dist. Warren No. CA2011-08-094, 2012-Ohio-4106, ¶ 42. We expressly overruled our prior precedent that "imposed an overriding 'need' requirement rather than a balanced review of the R.C. 3105.18(C)(1) factors in determining what is appropriate and reasonable * * * for the initial support award." *Kedanis* at ¶ 18. We held that "a trial court must consider each of the factors listed in R.C. 3105.18(C)(1)" and that "[n]eed is but one factor among many that the trial court may consider in awarding reasonable and appropriate spousal support." *Id*. at ¶ 19. We have repeatedly applied our holding in *Kedanis* to our review of spousal support awards. *See Ornelas*, 2012-Ohio-4106; *Casper*, 2013-Ohio-4329; *Wiener v. Wiener*, 12th Dist. Warren Nos. CA2012-09-085 and CA2012-09-087, 2013-Ohio-1849; *Dollries*, 2014-Ohio-1883; *Kreimer v. Kreimer*, 12th Dist. Butler No. CA2014-04-090, 2015-Ohio-1087.

**{¶ 48}** For the reasons set forth in *Kedanis*, we find no merit to Husband's argument that "need" is the key factor to be considered in a spousal support award. We decline Husband's invitation to revisit our holding in *Kedanis*, and we continue to hold that a spousal support award shall be based on the balanced review of the R.C. 3105.18(C)(1) factors.

### 2. Application of *Kedanis* and R.C. 3105.18

**{¶ 49}** According to R.C. 3105.18(C)(1),

> [i]n determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:
>
> (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;
>
> (b) The relative earning abilities of the parties;

> (c) The ages and the physical, mental, and emotional conditions of the parties;
>
> (d) The retirement benefits of the parties;
>
> (e) The duration of the marriage;
>
> (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
>
> (g) The standard of living of the parties established during the marriage;
>
> (h) The relative extent of education of the parties;
>
> (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
>
> (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
>
> (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
>
> (l) The tax consequences, for each party, of an award of spousal support;
>
> (m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
>
> (n) Any other factor that the court expressly finds to be relevant and equitable.

"A trial court has broad discretion to determine the proper amount and duration of spousal support based on the facts and circumstances of each case, and a trial court's award of spousal support will not be disturbed absent an abuse of discretion." *Kedanis* at ¶ 10. "[A] spousal support award that is a percentage of a payor spouse's income is not a per se abuse of the trial court's discretion." *Ornelas*, 2012-Ohio-41106 at ¶ 44.

**{¶ 50}** In holding that Husband should pay Wife $10 per year, plus 40 percent of any gross bonuses he receives from Bavis and Fabacraft for 11 years, the trial court specifically stated the following:

> This Court considered all the spousal support factors and finds that spousal support is appropriate and reasonable. Ohio Revised Code Section 3105.18(C). In making an award of spousal support, * * * [t]he factors of particular significance include the age of the parties, the lengthy 32 year marriage, the great disparity of income when considering bonus pay, Husband's employment with his company for over 25 years, Wife's evolving career and further education pursuits, the property division herein, Husband's retention of the marital home and Wife's new debt obligation of a mortgage, [and] the tax consequences for Husband and Wife.
>
> The parties have similar education and have both achieved great success in their careers. If Wife has any lost income production as a result [of] working part time when the [children] were young, it is inconsequential. In fact, the parties earn similar base salaries. * * * Husband argues that Wife is healthy and self-supportive and does not need spousal support. *However, need is but one of many factors this Court has diligently scrutinized*.
>
> * * *
>
> In the case at hand, Husband's disparate bonus pay cannot be ignored. The relative earning capacity of the parties is vastly unequal. * * *

(Emphasis added).

**{¶ 51}** Upon a thorough review of the record, we find that the trial court did not abuse its discretion in awarding Wife spousal support. The record reflects that the trial court considered the factors set forth in R.C. 3105.18(C)(1) as well as Wife's "need" for spousal support before fashioning its award. Although the parties have both obtained, or are in the process of obtaining, advanced degrees in their respective fields, and have obtained full-time employment that results in a substantially similar base pay of approximately $140,000 to $150,000 a year, Husband's significant yearly bonuses and stock distributions result in Husband having an increased earning ability. Husband has worked full-time with Bavis and

Fabacraft for over 25 years and has successfully been promoted throughout this time, serving as a salesperson, a manager, a director, an executive vice-president, and now as president and C.E.O. of the businesses. Wife, on the other hand, worked part-time when the parties' two children were born so that she could care for the children and the marital home. Although Wife has worked full-time at least since 2000, Wife's current position as a Director of Pharmacy does not include yearly bonuses or compensation beyond her annual base salary.

**{¶ 52}** Additionally, the record reflects that the parties' lived a comfortable and active lifestyle. During the course of their marriage, they traveled, went camping and boating, and enjoyed other outdoor activities. The parties were able to maintain a debt-free lifestyle during their 32-year marriage, paying cash for their vehicles and recreational activities. Wife now has a monthly mortgage obligation for her new home while Husband has retained the marital home mortgage free.

**{¶ 53}** Further, and contrary to Husband's arguments, the record demonstrates that the trial court considered the potential effects of Husband's health problems and the loss of the Walgreen's account on his income. The court specifically recognized that Husband suffered from some health issues, including diverticulitis, heart disease, and knee problems, but nonetheless determined that Husband was in "good general health." The court also recognized the loss of the Walgreen's account, stating that "the companies have seen a decline in revenue in recent years. Part of Husband's bonus pay is linked to the company's [sic] net profit. * * * For purposes of spousal support, a calculation based upon average past bonus and salary pay would be too speculative." With these considerations in mind, the court fashioned a percentage-based spousal support award and then expressly retained the jurisdiction to modify the award should the parties' circumstances change. Specifically, the decree of divorce states that

> [t]he [c]ourt retains jurisdiction over the issue of modification of the amount or term of spousal support; including the authority to reduce the amount to $0.00 or terminate the obligation upon the change of circumstances of a party, which includes but is not limited to, any increase or involuntary decrease in the parties' wages, salary, bonuses, living expenses or medical expenses.

Therefore, if Husband's health deteriorates and has an effect on his yearly income, or if Husband's yearly income involuntarily decreases due to lost business, Husband has the ability to seek a modification or termination of his support obligation.

**{¶ 54}** Accordingly, given the foregoing evidence and considerations by the trial court, we find that the court did not abuse its discretion ordering Husband to pay Wife $10 per year, plus 40 percent of any gross bonuses he receives from Bavis and Fabacraft for 11 years. In fashioning the spousal support award, the court considered Wife's need for the award as well as the factors set forth in R.C. 3105.18(C).

### 3. "Double-Dip" Theory Inapplicable

**{¶ 55}** Husband also contends that the trial court erred in ordering him to pay 40 percent of his gross bonuses to Wife because the trial court included his K-1 distributions within its definition of "gross bonuses." Husband asserts that the trial court erroneously "double-dipped" into the Bavis and Fabacraft stock by ordering him to pay 40 percent of his K-1 distributions to Wife when the court had already ordered him to pay Wife 50 percent of the value of the stock in the division of marital assets.

**{¶ 56}** In support of his argument, Husband cites to *Heller v. Heller*, 10th Dist. Franklin No. 07AP-871, 2008-Ohio-3296. In *Heller*, the Tenth District Court of Appeals explained that

> "[t]he 'double dip' refers to the double counting of a marital asset, once in the property division and again in the [spousal support] award. More specifically, *where a court uses a business owner's 'excess earnings'* to value the interest in the business and also fixes support on that spousal's total income (inclusive of the 'excess earnings' used to value the business), a 'double-dip' occurs." Vuotto, *Double Trouble* (2004), found at http://www.vuotto.com/new-jersey-divorce-articles/double-

> trouble.htm (last visited June 24, 2008). *"[U]tilizing the same stream of income that forms the basis of valuing a business when calculating [spousal support] provides the non-owning spouse with the benefit from the same stream of income twice*." *Id.*

(Emphasis added.) *Heller* at ¶ 20. There, a husband's interest in a company was valued using the income method (or capitalization of earnings method), which focused on the "present worth of the future benefits of ownership." *Id.* at ¶ 16. Essentially, husband's interest in the company was determined by looking at the "expectation of the future benefit stream," which included earnings and dividends. *Id.* at ¶ 18. After the value of the husband's interest was established, the value of the stock was split equally between the parties as a marital asset. *Id.* at ¶ 17-23. The trial court then ordered husband to pay wife 20 percent of future dividends from the company as spousal support. *Id.* at ¶ 19. The Tenth District found this spousal support award an abuse of discretion as the trial court had treated husband's share of the company's expected future profits as both an asset and as income for spousal support purposes. *Id.* at ¶ 23.

**{¶ 57}** Husband argues that the present case is similar to *Heller*. We disagree. Unlike in *Heller*, where the valuation of a company was established through an income method, the trial court adopted an asset-based valuation of Husband's interests in Bavis and Fabacraft. The trial court did not consider the future benefits or potential future income stream from the ownership. *See Heller*, ¶ 16-23. Rather, the court considered the present, fixed assets of the two companies, valued the businesses based on those assets, and divided the marital property using this valuation. The potential future K-1 earnings were not included in the asset-based valuation. The trial court, therefore, did not "double-dip" when it ordered Husband to pay wife 40 percent of his gross bonuses, including K-1 shareholder distributions. *See Bohme v. Bohme*, 2d Dist. Montgomery No. 26021, 2015-Ohio-339, ¶ 28 ("Surely, if the business value were arrived at by using one of the other two methods of valuation—the

market approach * * * or the asset approach—no one reasonably would assert that [husband's] income was counted twice"); *Gallo v. Gallo*, 10th Dist. Franklin No. 14AP-179, 2015-Ohio-982, ¶ 18 ("[I]f the marital asset is valued without specific reliance on a future income stream—say through a market-based or asset-based approach—then no double dipping occurs"); Morgan, *"Double Dipping": A Good Theory Gone Bad*, 25 J.Am.Acad.Matrim.Law 133, 142-145 (2012).

**{¶ 58}** Husband's argument that the trial court erred in fashioning the spousal support award is without merit. Accordingly, for the reasons set forth above, Husband's first assignment of error is overruled.

**D. Motion to Compel and Motion for Contempt**

**{¶ 59}** Husband's Assignment of Error No. 4:

**{¶ 60}** THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ALLOW [HUSBAND] TO LITIGATE HIS MOTION TO COMPEL AND MOTION FOR CONTEMPT.

**{¶ 61}** In his fourth assignment of error, Husband argues that the trial court erred by failing to give him the opportunity to litigate his Motion for Contempt of Decree and Motion to Compel Discovery Answers, filed on June 19, 2013. He further contends that the "motions have never been resolved by the trial court." We disagree.

**{¶ 62}** In his motion for contempt and motion to compel discovery, Husband asserted that Wife failed to respond to discovery requests attached to his answer and counterclaim for divorce and failed to provide a list of all assets and liabilities in her name. Wife filed a memorandum in opposition to Husband's motions, claiming that Husband's motions were without merit as she had provided discovery responses, including a complete list of her assets and liabilities, on June 24, 2013. Husband's motions were set for a pretrial hearing on July 29, 2013. The trial court's Pre-Trial Conference Entry from July 29, 2013, did not mention Husband's motions, but set a final hearing on the complaint and counterclaim for

divorce for August 28, August 30, and September 10, 2013.

**{¶ 63}** During the course of the final hearing, Husband repeatedly raised the issue of Wife's failure to comply with discovery requests, especially as it related to retirement funds that accrued in 2011 but were not paid until 2012. At one point, Husband sought to elicit testimony from Wife about her alleged failure to comply with discovery requests and the following discussion was held:

> [HUSBAND'S ATTORNEY]: But you recognize that's an issue that you've raised in this case, is whether you receive some amount of accruals that your husband received in '11 but were paid in '12, that's an issue that you have raised in this case; do you agree with that?
>
> [WIFE]: Yes.
>
> [HUSBAND'S ATTORNEY]: But as we sit here today, other than your testimony, I don't think I have any - - we don't have any documentation, do we, from you of what your accruals were in '11, paid in '12?
>
> [WIFE'S ATTORNEY]: Objection. The question is how are you - - why are you not proving a negative. That's what the for [sic] of that question is. In other words, you see here that a subpoena was issued to her employer, all the discovery is done. It's not for the witness to say why a document doesn't exist to prove that she doesn't have something.
>
> THE COURT: Okay, sustained. You can rephrase.
>
> [HUSBAND'S ATTORNEY]: Ma'am, do you agree that I issued a subpoena for that information?
>
> [WIFE'S ATTORNEY]: Well, I'm gonna [sic] show my objection. It's not for the witness to interpret subpoenas and things of this nature.
>
> [HUSBAND'S ATTORNEY]: Ma'am, do you agree that we're here today and included on the docket sheet and included in motions I filed are motions to compel and motions for contempt for your failure to provide documentation?
>
> [WIFE'S ATTORNEY]: Same objection.
>
> THE COURT: Sustained.

[WIFE'S ATTORNEY]: That's not for a trial.

[HUSBAND'S ATTORNEY]: It's set today.

THE COURT: Okay. But let's ask her what she does have.

Although the trial court sustained an objection to the form of Husband's question regarding discovery attempts, the court did not preclude Husband from questioning Wife or any other witnesses about Wife's alleged failure to comply with discovery requests. In fact, the record demonstrates that both Husband and Wife were asked about Wife's efforts in complying with discovery requests. Further, the record reflects that Husband discussed Wife's alleged failure to comply with discovery requests within his written final argument. The record, therefore, does not support Husband's argument that he was denied the opportunity to be heard on his motions.

**{¶ 64}** Additionally, contrary to Husband's argument, the record demonstrates that Husband's motion for contempt and motion to compel were ruled on by the trial court. After the final hearing concluded, the trial court issued its October 16, 2013 Decision and Order, in which it specifically stated that "[a]ny other motions before this Court not specifically addressed are denied." The "other motions" referenced by the trial court included Husband's June 19, 2013 motion for contempt and motion to compel. The trial court, therefore, did not err by failing to rule on Husband's motions.

**{¶ 65}** In finding that the trial court did not err in the manner in which it considered and ruled on Husband's motions, we expressly reject Husband's argument that our holding in *Flynn v. Flynn*, 196 Ohio App.3d 93, 2011-Ohio-4714 (12th Dist.), dictates that we reverse the trial court's decision and remand the matter to the trial court for an additional, separate hearing on the motions. In *Flynn*, a husband and wife were in the midst of divorce proceedings when husband filed a motion for contempt alleging that wife was not abiding by

the terms of a shared-parenting agreement. *Id.* at ¶ 52. The motion was never served on wife. *Id.* Nonetheless, following a final hearing on the contested divorce, the trial court issued a decision which denied husband's motion for contempt. *Id.* Husband appealed the denial of his motion, and we reversed the trial court's decision. *Id*. at ¶ 53-55. We held that the trial court could not have considered husband's contempt motion as there was no proof of service of the motion on wife. *Id.* at ¶ 53. After examining the record, we noted that the trial court had not held a separate hearing on husband's motion nor made any mention of husband's motion at the final hearing on the contested divorce. *Id.* at ¶ 54. We "fail[ed] to see how the trial court could have ruled on [husband's] motion without first taking the matter into consideration based on testimony or evidence offered into the record," and we remanded the matter to the trial court to allow the parties the opportunity to properly litigate the issue. *Id.*

**{¶ 66}** The present case is distinguishable from *Flynn*. Unlike in *Flynn*, the record before us demonstrates that Husband's motion for contempt and motion to compel were properly served on Wife and Wife was given the opportunity to respond to the motions. Moreover, in the present case, Husband's motions were specifically mentioned at the final contested hearing, evidence was taken regarding Wife's compliance with discovery requests at the hearing, and the parties were given the chance to address Wife's compliance with discovery requests within their written, final arguments following the hearing.

**{¶ 67}** Accordingly, as the record demonstrates that Husband was provided with the opportunity to litigate his motion for contempt and motion to compel, Husband's fourth assignment of error is overruled.

### E. Retirement Accounts

**{¶ 68}** Wife's Cross-Assignment of Error No. 1:

**{¶ 69}** THE TRIAL COURT ERRED IN FAILING TO ORDER THAT EACH PARTY'S HALF OF THE OTHER'S 401(K) ACCOUNTS ARE SUBJECT TO MARKET FLUCTUATION (UP OR DOWN) FROM THE DATE OF THE VALUATION TO THE DATE OF ACTUAL DISTRIBUTION.

**{¶ 70}** In Wife's sole cross-assignment of error, she argues that the trial court erred in its division of the parties' 401(k) accounts. Specifically, Wife contends that the court erred when it held that any appreciation or depreciation on the parties' 401(k) accounts after the December 31, 2011 valuation date was not considered "earned or accrued during the marriage" and was therefore not subject to equal division. Wife contends that the trial court should have accounted for gains and losses from the valuation date to the date of segregation in its division of the accounts.

**{¶ 71}** Husband and Wife entered into stipulations regarding their retirement accounts, which consisted of IRA accounts and 401(k) accounts. With respect to the IRA accounts, the parties agreed that the "accounts shall be equally divided, plus or minus gains or losses, whereby, Husband receives 1/2 of the funds in the accounts as of the date of distribution and Wife receives 1/2 of the funds in the accounts as of the date of distribution." With respect to the 401(k) accounts, the parties agreed that Husband had a 401(k) account through Bavis and Wife had 401(k) accounts through Ascensus and Medco. As of December 31, 2011, the agreed valuation date, Wife's two accounts contained a combined total of $100,139 and Husband's contained $829,144.95.[2] The parties agreed that these funds constituted marital property to be divided equally. Husband, however, disputed whether any appreciation on the accounts was marital.

2. As of December 31, 2011, Husband's 401(k) account contained only $802,943. However, the trial court found that $26,201.95 paid into the account in 2012 was attributable to 2011, as the additional funds constituted "accrued profit sharing due to Husband by Bavis as of December 31, 2011 but paid to Husband in 2012." Husband has not challenged the trial court's classification of the additional $26,201.95 as marital property on appeal.

**{¶ 72}** At the final hearing Husband testified that he and Wife had previously attempted to enter into an agreement to resolve the issue of the division of their retirement accounts. Husband, believing that Wife had agreed to an equal division of the 401(k) accounts as of the December 31, 2011 value, moved the funds Wife was expected to receive out of various stock investments and into a stable value fund.[3] Husband testified that by moving Wife's share of his 401(k) into the stable value fund, he essentially converted Wife's portion of the funds into cash so that Wife would not lose the funds as a result of his investment decisions. Husband explained that his counsel notified Wife that her funds were in a stable investment account and that she could begin investing the funds in any manner she saw fit. However, Wife never directed him to invest the funds in a different manner and the funds remain in the stable value fund. Husband then testified that the portion of his 401(k) account that had remained in various stock investments had appreciated in value. Husband testified he did not believe Wife was entitled to any of the appreciation.

**{¶ 73}** After hearing evidence on the issue, the trial court ultimately held that "[a]ny appreciation or depreciation for market fluctuations up to the valuation date is considered marital property. *However, any appreciation or depreciation after [the] valuation date is not considered earned or accrued during the marriage*." (Emphasis added.) Wife sought clarification of the court's holding, and the court issued a decision on December 3, 2013 stating:

> The Court considered the extensive evidence presented at trial

3. At the final hearing, Husband introduced into evidence "Exhibit T," which consisted of a November 28, 2012 Facsimile Transmission sent by Husband's attorney to Wife's attorney. In the body of the transmission, Husband's attorney requested that Wife's attorney "markup changes" that he felt were necessary to a proposed agreed entry. Also included in Exhibit T were portions of a proposed stipulation involving the 401(k) accounts. The proposed stipulation, which was initially signed by Wife and her attorney but was later expressly revoked by Wife, provided that "Husband shall retain, free and clear any claim of Wife, his Bavis 401(k). Wife shall retain, free and clear of any claim of Husband, her Ascensus 401(k) and Medco 401(k). * * * Husband shall transfer $314,207 from his Bavis 401(k) by Qualified Domestic Relations Order, Division of Property Order, or other necessary instrument." Though no QDRO, Division of Property Order, or other "necessary instrument" was ever filed in the case, Husband nonetheless transferred a portion of his 401(k) into a stable value fund.

> and maintains that any appreciation or depreciation (including passive) after valuation date shall not be subject to the QDRO order. Considering all the circumstances, the Court acknowledges that *although not precisely equal, the division is fair and equitable*.

(Emphasis added).

**{¶ 74}** As previously stated, in dividing property in a divorce proceeding, a court must first determine what constitutes marital property and what constitutes separate property. *Grow*, 2012-Ohio-1680, ¶ 11, citing R.C. 3105.171(B). After classifying the property as marital or separate, the court must then disburse a spouse's separate property to that spouse and divide the marital property equally. *Cooper*, 2013-Ohio-4433 at ¶ 15, citing R.C. 3105.171(C)(1) and (D). "However, if the court finds that equal division would be inequitable, then the court must divide the property in a manner it determines is equitable." *Id.*, citing R.C. 3105.171(C)(1). A trial court is given broad discretion in fashioning a property division and will not be reversed absent an abuse of discretion. *Id.*

**{¶ 75}** With respect to retirement accounts, there is no controlling legal authority directing that any appreciation or depreciation in an account value between the date of judgement and the date of disbursement be shared equally between the spouses or, alternatively, directing that the benefit or loss go exclusively to the account-holder spouse. Rather, the issue is left to the discretion of the trial court. *See, e.g., Cwik v. Cwik*, 1st Dist. Hamilton No. C-090843, 2011-Ohio-463, ¶ 72-76.

**{¶ 76}** In *Cwik*, a husband and wife "stipulated that the date of valuation of assets and liabilities of the marriage was August 27, 2007, the date of separation." *Id.* at ¶ 74. In dividing retirement benefits, the trial court ordered that the benefit plans "be divided by a Qualified Domestic Relations order into 'two equal portions as of April 8, 2009.'" *Id.* at ¶ 75. During the 20 months that had elapsed between the parties' separation and the April 2009 final hearing to resolve property issues, the value of the accounts had dropped due to market

conditions. *Id.* Husband challenged the division of the retirement benefits on appeal. *Id.* at ¶ 73. The First District Court of Appeals upheld the trial court's use of the date of the final hearing, rather than the agreed date of valuation, for purposes of dividing the asset. *Id.* at ¶ 76. The First District determined that the husband "ha[d] not demonstrated that the trial court's valuation was inequitable, and thus he ha[d] not demonstrated an abuse of discretion." *Id.*

**{¶ 77}** Having reviewed the record in the present case, we find that the trial court did not abuse its discretion in holding that any appreciation or depreciation on the 401(k) accounts after the date of valuation is not marital property subject to equal division. The trial court was entitled to use the agreed date of the valuation for purposes of dividing the 401(k) accounts and to find that any appreciation or depreciation after that date was the sole property of the account-holder spouse. *See Brown v. Brown*, 5th Dist. Fairfield No. 08-CA-64, 2009-Ohio-3832, ¶ 55-66. Pursuant to the trial court's holding, Wife, as the account holder, retained any appreciation (or suffered any loss) in her remaining half of the Medco 401(k) and Ascensus 401(k) accounts. Similarly, Husband, as the account-holder, retained any appreciation (or suffered any loss) in his remaining half of the Bavis 401(k) account. While we may have divided the 401(k) accounts in a different manner, we cannot substitute our judgment for that of the trial court. *Hogan v. Hogan*, 12th Dist. Warren Nos. CA2007-12-137 and CA2007-12-141, 2008-Ohio-6571, ¶ 38. Given the circumstances of this case, we agree with the trial court that such a division is fair and equitable.

**{¶ 78}** In affirming the trial court's decision, we reject Wife's argument that the trial court was required to provide additional findings of fact under R.C. 3105.171(G) to support its division of the 401(k) accounts. Here, the trial court addressed the 401(k) accounts on three separate instances—first, in its October 16, 2013 Decision and Order following the final hearing, then in its December 3, 2013 Decision on Wife's Motion for Clarification, and, finally,

in its April 15, 2014 Final Judgment and Decree of Divorce. Within these three decisions, the trial court provided sufficient findings to support its division of the assets.

**{¶ 79}** Wife's cross-assignment of error is, therefore, overruled.

## III. CONCLUSION

**{¶ 80}** For the reasons set forth above, the trial court's judgment awarding spousal support, dividing marital assets, and denying Husband's motion for contempt and motion to compel discovery is affirmed.

**{¶ 81}** Judgment affirmed.

PIPER, P.J., and M. POWELL, J., concur.