

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

CYNTHIA LOU GROW,	:	
Appellee/Cross-appellant,	:	CASE NOS. CA2010-08-209
	:	CA2010-08-218
	:	CA2010-11-301
- vs -	:	
	:	<u>OPINION</u>
	:	4/16/2012
RICHARD DAVID GROW,	:	
Appellant/Cross-appellee.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
DOMESTIC RELATIONS DIVISION  
Case No. DR08-01-0008

Lawrence J. White, 2533 Far Hills Avenue, Dayton, Ohio 45419, for appellee/cross-appellant

John D. Smith, 140 N. Main Street, Suite B, Springboro, Ohio 45066, for appellant/cross-appellee

**HENDRICKSON, J.**

{¶ 1} Defendant-appellant, Richard David Grow (Husband), and plaintiff-appellee/cross-appellant, Cynthia Low Grow (Wife), both appeal a decision of the Butler County Court of Common Pleas, Division of Domestic Relations, granting a divorce between them and dividing their property. Husband also appeals the court's contempt finding against him. For the reasons discussed below, we affirm in part, reverse in part, and remand the cause to the trial court for further proceedings.

### ***Procedural History***

{¶ 2} On January 4, 2008, Wife filed her complaint for divorce and Husband later filed an answer and counterclaim. The trial court held a scheduling conference on March 5, 2008, and, pursuant to Butler County Loc.R. DR 30(B)(2)(b), set a valuation date of March 1, 2008. On April 8, 2009, Husband filed a motion to change the valuation date. That motion was denied from the bench on April 15, 2009.

{¶ 3} The trial commenced on January 29, 2009, and lasted a combined total of ten days over the course of nine and one-half months before concluding on November 13, 2009. The trial court subsequently rendered its decision on January 12, 2010. Both parties filed motions for clarification and reconsideration, and the trial court rendered its decision on the record June 10, 2010, resolving the issues raised by the parties. The trial court initially filed its Final Judgment Entry and Decree of Divorce on July 29, 2010, granting the parties a divorce and distributing their property between them. Husband timely appealed the trial court's decision raising five assignments of error. Wife cross-appealed, presenting two cross-assignments of error. On November 5, 2010, an Amended Final Judgment Entry and Decree of Divorce Nunc Pro Tunc to July 29, 2010, were filed to rectify clerical errors.

{¶ 4} On the same day as the court's first decree, Wife filed her July 29, 2010 motion for contempt regarding the sale of a marital asset. The trial court ultimately found Husband in contempt of court on October 7, 2010, for failing to pay Wife her half of the sale proceeds. Husband then filed his notice of appeal on the contempt entry and that appeal has been consolidated with the original appeal.<sup>1</sup>

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1. Case Nos. CA2010-08-209 and CA-2010-11-301 were consolidated by this court via an entry on February 10, 2011.

### ***Factual Background***

{¶ 5} The parties were married on February 29, 1992, and there were no children born of their marriage. This is a complex domestic relations case involving millions of dollars in assets and numerous financially intertwined businesses created both before and during the parties' marriage. Prior to the marriage, Husband became a partner of DEI, Inc. DEI is the prominent business in this case which primarily constructs upscale bank branch buildings and provides them with equipment and furnishings.

{¶ 6} The trial court held that Husband failed to establish the premarital value of DEI and found the marital value of this business to be \$4.3 million as of March 1, 2008. The trial court then ordered that this amount be reduced by 9.27 percent representing a third party's percentage of ownership in the company. After deducting the third party's fractional interest in DEI, the trial court divided the remaining balance of \$3,901,390 equally between Husband and Wife as marital property. Because Husband was awarded the entire interest in DEI, the court ordered him to pay Wife \$1,950,695 representing her one-half interest in the company.

{¶ 7} During the marriage, numerous entities were created by the parties pursuing a variety of business ventures.<sup>2</sup> First, Grow Family, LLC is the owner of the building in which DEI is headquartered. DEI pays rent to Grow Family for use of the building. The trial court determined Grow Family to be a marital asset having a value of \$1,513,000 and awarded the entire interest in the company to Husband. Husband was then ordered to pay Wife \$756,500 representing her marital one-half share of the value of the company.

{¶ 8} In determining Wife's interest in Grow Family, the trial court addressed an \$815,000 account receivable owed by another business created by the parties called Grow

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2. Although the parties created other companies during the marriage, we will only address those entities involved in their assignments of error in this appeal.

Union Center, LLC.<sup>3</sup> Grow Union Center was owned by both DEI and Grow Family and was the owner of a popular West Chester restaurant called "MESH." The trial court determined Grow Union Center to be a marital asset. Although MESH was sold pursuant to the trial court's order, the sale proceeds were insufficient to repay all of MESH's debts. The trial court specifically held that the \$815,000 account receivable in question would be included in the value of Grow Family, but that it would not require this debt to be repaid by either Grow Union Center or the parties due to the court's allocation of MESH's debt.<sup>4</sup> The trial court also found that Grow Family dba MESH owed a marital debt to National Millwork in the sum of \$140,000 and ordered both parties to be equally responsible for this debt. The trial court included the National Millwork debt when it calculated Wife's marital portion in Grow Family.

{¶ 9} Husband created Grow James Island, LLC in order to assist his son in the purchase of a South Carolina restaurant called NECTAR. DEI loaned NECTAR nearly a million dollars to renovate and operate the business. With interest, the trial court found that the restaurant owed DEI \$1,167,843 by the time of the divorce. The court ordered NECTAR to be sold, with Husband retaining any proceeds. In the event the sale resulted in a loss, the trial court ordered DEI and Husband to be solely responsible for all outstanding liabilities of the business while holding Wife harmless therein.

{¶ 10} Finally, the parties created Grow 6200, LLC which was the owner of a limousine used to transport customers of both DEI and MESH. The limousine was sold as ordered by the court and the proceeds were to be divided equally between the parties. Since

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3. The record below identifies Grow Union Center as both "Grow Union Center" and "Grow Union Center dba MESH." However, based upon the record below, the restaurant MESH appears to be the only major asset of Grow Union Center.

4. In the event the sale proceeds do not pay all of MESH's outstanding liabilities, the trial court ordered the parties to be equally responsible for any unpaid balances on Grow Union Center's debts. The trial court specifically stated that this includes the debt owed by Grow Union Center dba MESH to DEI but it did not include the debt owed by Grow Union Center to Grow Family.

Husband failed to account to Wife for the sale proceeds within the time period set by the court, Husband was held in contempt.

### ***Standard of Review***

{¶ 11} Property division in a divorce proceeding is a two-step process that is subject to two different standards of review. *Boyer v. Boyer*, 12th Dist. Nos. CA2010-04-083, CA2010-05-109, 2011-Ohio-989, ¶ 6. Initially, pursuant to R.C. 3105.171(B), "the court shall \* \* \* determine what constitutes marital property and what constitutes separate property." A trial court's classification of property as marital or separate must be supported by the manifest weight of the evidence, and an appellate court will not reverse the trial court's classification if it is supported by competent and credible evidence. *Id.* at ¶ 8; *Zollar v. Zollar*, 12th Dist. No. CA2008-03-065, 2009-Ohio-1008, ¶ 10. In determining whether competent and credible evidence exists, "[a] reviewing court should be guided by a presumption that the findings of a trial court are correct, since 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." *Bey v. Bey*, 3rd Dist. No. 10-08-12, 2009-Ohio-300, ¶ 15, quoting *Barkley v. Barkley*, 119 Ohio App.3d 155, 159 (4th Dist.1997).

{¶ 12} After classifying the assets as separate or marital property, "the court shall disburse a spouse's separate property to that spouse" and divide the marital property equally, unless the court finds an equal division would be inequitable. R.C. 3105.171(C)(1); R.C. 3105.171(D). Pursuant to R.C. 3105.171(G), a trial court must indicate the basis for its division of marital property in sufficient detail to enable a reviewing court to determine whether the award is fair, equitable, and in accordance with the law. *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 97 (1988); *Davis v. Davis*, 7th Dist. No. 2000 CO 31, 2001 WL 1667852 (Dec. 26, 2001). In making these findings, the trial court must assign a value to all of the

marital property. *Spychalski v. Spychalski*, 80 Ohio App.3d 10 (6th Dist.1992); *Hruby v. Hruby*, 7th Dist. No. 93-C-9, 1997 WL 321608 (June 11, 1997); R.C. 3105.171(B).

{¶ 13} In addition, the trial court is given broad discretion in determining what constitutes an equitable division of property and will not be reversed absent an abuse of that discretion. *Boyer*, 2011-Ohio-989 at ¶ 9. A lower court may only be said to have abused its discretion when its judgment reflects an attitude that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 14} With these principles in mind, we address each of Husband's and Wife's arguments in turn.

{¶ 15} Assignment of Error No. 1:

{¶ 16} THE TRIAL COURT ERRED IN VALUING DEI, INC.

#### ***Premarital Value of DEI***

{¶ 17} "First Issue Presented for Review and Argument: The trial court erred in finding the DEI stock was marital and failing to assign a value to DEI at the time of the parties' marriage or at the very least, at the time of the merger."

{¶ 18} The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to show that the asset is separate property. *Peck v. Peck*, 96 Ohio App.3d 731, 734 (12th Dist.1994); *Balser-LeForge v. LeForge*, 12th Dist. No. 2002-12-047, 2003-Ohio-5878. More specifically, the burden to establish the premarital value of separate property is upon the party alleging it as nonmarital, and failure to do so will result in no value being assigned to the separate property in question. *Fisher v. Fisher*, 3rd Dist. No. 7-01-12, 2002-Ohio-1297.

{¶ 19} Based upon the record below, we find that there was competent and credible evidence establishing that DEI was Husband's separate property. Not only did Husband

testify that he acquired an interest in the business prior to the marriage, but Wife never challenged nor disputed this fact. Thus, the record clearly established by the preponderance of the evidence that Husband acquired his interest in DEI prior to the marriage.

{¶ 20} Husband argues that as the sole owner of DEI, the premarital value of the stock should be distributed to him as separate property. It is Wife's contention that the DEI stock had no value prior to their marriage and therefore Husband should not receive any credit for his premarital interest.<sup>5</sup>

{¶ 21} The issue is not whether the premarital stock was separate, but whether that stock had any value at the time of the marriage such that it could be distributed separately. A trial court has broad discretion to make a determination as to the value of property. *Donovan v. Donovan*, 110 Ohio App.3d 615, 620-21 (12th Dist.1996). Therefore, a trial court's decision regarding property valuation will not be disturbed on appeal absent an abuse of discretion. *Id.*

{¶ 22} Husband testified that DEI began as a partnership, but that he became the sole owner when his partner, Walt Nuckols, opted to hand over his shares equaling one-half of DEI's outstanding stock in exchange for Husband forgiving \$200,000 he was owed in back commissions from the company. Because that exchange took place prior to the marriage, it is Husband's contention that the court should have determined a premarital value for DEI of at least \$400,000.<sup>6</sup> On cross-examination, however, Husband admitted that he had no premarital tax returns, bank statements, real estate deeds of ownership, actual cash value inventory list, or any other financial documents of DEI to help the court arrive at a positive

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5. The premarital value of Husband's interest in DEI is relevant as it relates to the distribution of his separate property to him and the determination as to the value of DEI's marital portion, if any.

6. Because Husband exchanged \$200,000 in back commissions for his partner's half of the outstanding shares, he reasons that this provides the basis for the trial court to find that Husband's remaining half of the outstanding shares of company stock is worth an equal amount.

cash value of the company prior to the marriage.

{¶ 23} Wife, on the other hand, testified that DEI's liabilities prior to the marriage were greater than its assets:

[WIFE]: It was a start-up company, no. I mean, we were in debt because we bought out - - and when I say, we, Richard and I helped him finance. We got the debt, we had to pay off debt to Walt Nuckols - - well, Walt Nuckols' debt that Richard assumed.

MR. WHITE: Okay. So did the debt exceed the assets?

[WIFE]: Yes.

{¶ 24} The trial court, having heard this conflicting evidence, found that there was not sufficient evidence to prove that DEI had any premarital value.<sup>7</sup> By finding that DEI did not have any premarital value, Husband was not entitled to any credit or separate distribution for his premarital interest in DEI. Based upon this finding, we find that the trial court was not unreasonable or arbitrary and therefore did not abuse its discretion in determining that there was insufficient evidence available to determine that DEI had any premarital value. The exchange of stock to pay off a liability of the company does not adequately represent the true cash value of the company because this is simply no indication as to the extent of the company's assets and liabilities at the time in order to determine whether or not the exchange of stock accurately represented the then cash value of the company.<sup>8</sup> Accordingly, Husband's first issue under the first assignment of error is without merit.

### ***Marital Value of DEI***

{¶ 25} "Second Issue Presented for Review and Argument: [Wife] failed to carry her burden to prove that any appreciation in value of DEI stock was marital, and further failed to

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7. The trial court's January 12, 2010 decision found that "the entire value is marital as there was insufficient evidence as to the premarital value."

8. Since the parties agreed below to a cash flow valuation for DEI, the same cash flow valuation would have been applied to determine Husband's premarital portion of his interest in DEI.



establish the value of any such appreciation."

{¶ 26} Husband's brief admits that "[t]he parties agree part of the value of DEI is marital. The parties also agree any appreciation in value due to their labor, monetary, or in-kind contributions is marital." Husband's argument is that Wife failed to carry her burden in proving the value of such appreciation. In turn, Wife argues that sufficient evidence was presented to prove that DEI had no value at the time of the parties' marriage, and therefore the entire value of DEI was marital. The trial court later adopted Wife's rationale in its decision.

{¶ 27} R.C. 3105.171(A)(3)(a)(i)-(iii) defines "marital property" as all real and personal property, as well as any interests in real or personal property, acquired by either or both of the spouses during their marriage. This definition further includes all income and appreciation on separate property that is due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage.

{¶ 28} The Ohio Supreme Court has examined the legal standards for determining when appreciation in separate property becomes marital property for purposes of property division in a divorce case under R.C. 3105.171. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 399, 1998-Ohio-403.

*Middendorf* provides a roadmap for trial courts to follow in determining when separate property's appreciation in value that occurs during the course of a marriage becomes marital property. First, the trial court must determine the value of the separate property as of the date of the parties' marriage. \* \* \* Second, the trial court must determine the separate property's value as of the marriage's termination date. The separate property's value on the date of the parties' marriage \* \* \* should be subtracted from its value at the marriage's termination date to determine the separate property's appreciation in value during the marriage.

Third, once the trial court has determined the separate property's appreciation in value during the marriage, the trial court must

determine whether the appreciation was "due to the labor, monetary, or in-kind contribution of either or both spouses that occurred during the marriage." R.C. 3105.171(A)(3)(a)(iii). If it was, the appreciation is marital property, *id.*, subject to the "equal unless inequitable" principle found in R.C. 3105.171(C). If it was not, the appreciation is separate property, pursuant to R.C. 3105.171(A)(6)(a)(iii), and must be disbursed to the spouse who owns it, pursuant to R.C. 3105.171(D).

*Hamilton v. Hamilton*, 12th Dist. Nos. CA2001-01-005 and CA2001-01-010, 2002-Ohio-2417,

¶ 43-44.

{¶ 29} In applying the *Middendorf* "roadmap" to the case at bar, we find, based upon the record below, that the value of DEI as of the date of marriage was zero. This is based upon the trial court's finding that Husband failed to establish a value for his premarital interest in the company. As we noted above, the burden to establish the premarital value of separate property is upon the party alleging it as nonmarital, and failure to do so will result in no value being assigned to the separate property in question. *Fisher*, 3rd Dist. No. 7-01-12, 2002-Ohio-1297.

{¶ 30} Next, the trial court determined that DEI's valuation for purposes of division of property was \$4.3 million as of March 1, 2008. The trial court reduced this amount by the interest owned by a third party and ultimately ordered Husband to pay Wife the sum of \$1,950,695 for her net one-half interest in the company.

{¶ 31} Finally, we agree with the trial court's finding that DEI's appreciation in value was due in part to Wife's labor, monetary or in-kind contribution. There was ample evidence presented to prove that both parties contributed to the appreciation in DEI's value following their marriage, including Wife's roles in sales and as a company Vice President. The trial court noted that the parties had a good working relationship where Wife came from a background in banking and Husband is a skilled businessman. Given this evidence and Husband's acknowledgment of Wife's extensive contributions to the company, it was within

the trial court's discretion to find that a substantial amount of the appreciation in the company's value was due to Wife's active participation and was therefore marital property.

{¶ 32} Since (1) Husband failed to establish the value of his premarital portion of DEI; (2) the trial court found the business was worth \$4.3 million as of March 1, 2008, for purposes of property division; and (3) it was determined that Wife provided substantial labor, monetary or in-kind contribution, we find that the trial court's determination that the entire value of DEI was marital was not an abuse of discretion. The fact that Husband failed to establish the value of his premarital interest in DEI does not automatically convert DEI to a marital asset. Instead, the trial court was bound to follow the *Middendorf* three-step analysis above in determining what portion of the appreciation of DEI during the marriage was marital property. While the trial court failed to indicate that it applied the proper analysis, it nevertheless came to the right conclusion, and we therefore affirm the trial court.

{¶ 33} Accordingly, Husband's second issue under the first assignment of error is without merit.

#### ***Valuation Date***

{¶ 34} "Third Issue Presented for Review and Argument: Even if the trial court did not err in finding that the entire value of DEI was marital, it still erred in valuing DEI because it improperly relied upon a local rule, rather than the applicable statute, for purposes of determining a date of valuation instead of equitably addressing the financial reality surrounding the collapse of the banking and construction industries and the undisputed evidence of its direct and negative impact on the value of DEI after the date of valuation but before the trial began."

{¶ 35} Loc.R. DR 30(B)(2)(b), which is found under the subsection titled "Scheduling Conferences," sets forth the procedure through which the trial court's valuation date is

established. Under this rule, "[t]he valuation date of marital property shall be the date of the scheduling conference unless a party, at least seven (7) days prior to the scheduling conference, files a motion to establish an alternative date." This court has held, however, that nothing in this rule precludes the trial court from using a different valuation date when equity so requires. *Homme v. Homme*, 12th Dist. No. CA2010-04-093, 2010-Ohio-6080, ¶156.

{¶ 36} The trial court set a valuation date of March 1, 2008. Just over a year later and during the pendency of this action, Husband moved to change the valuation date arguing that the selected valuation date fails to take into consideration the banking collapse that occurred. Wife countered that extensive testimony in relation to the banking collapse was offered at trial, and that the economic crisis was considered in the trial court's valuation of DEI at \$4.3 million.<sup>9</sup>

{¶ 37} There was substantial evidence presented at trial regarding the negative effects on DEI resulting from the banking collapse that occurred in the fall of 2008. The trial court permitted such testimony over the objection of Wife, but then denied Husband's request for a new valuation date.

{¶ 38} Husband's expert, Doug Michel, offered significant testimony regarding the effect of the nation's economic crisis on DEI:

MR. SMITH: And so based- -did I request that you look at the issue of what the actual results of 2008 were compared to the projections that had been utilized in the original report?

MR. MICHEL: Yes.

MR. SMITH: And tell- -tell the Judge, why is that relevant to you as an evaluator?

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9. Upon Husband's motion for a change of valuation date, Wife argued that to require her to present evidence of a new valuation would prove to be both time and cost prohibitive. The trial court denied Husband's motion, but indicated that it would take economic conditions into consideration when rendering its decision.

MR. MICHEL: It's relevant, again, because there is- -there is change going on in this valuation. And as we start with the March 1st date, it's clear that the economy is changing. Given the economic crisis that occurred in the fall, it's important to note that this company is not performing as the historical results would seem to indicate.

MR. SMITH: And when you received year end data for 2008, did the company even perform based on the projections that had been made, uh, for your initial report?

MR. MICHEL: No, they did not meet their projections.

**{¶ 39}** Mr. Michel testified that the valuation of DEI would have been lower following the economic decline because a different cash flow multiple would have to be utilized in the valuation due to changes in risk factors since March 1, 2008. He further testified that under a modified valuation that took this collapse into account, the value of DEI was decreased to \$1,497,100, down significantly from his prior valuation of \$4.3 million.

**{¶ 40}** Ned Compton, the President of DEI, testified at the April 17, 2009 hearing that sales were off by over 50 percent following the economic crisis. He stated that while sales projections for 2008 ranged from \$46 million to \$85 million and resulted in actual sales of \$39 million, 2009 projections were lowered significantly, to a range of \$19-\$29 million. He further testified that this decline in sales forced the company to lay off 18-20 of DEI's approximately 70 employees. At the hearing on June 1, 2009, Compton related that sales for the year to that point were approximately \$9 million. He then stated that sales during the same time period the year before were between \$28 and \$29 million. Finally, Husband himself testified that the current business climate was the worst he had experienced since the company was founded.

**{¶ 41}** It is clear from the evidence that the March 1, 2008 valuation date did not reflect the significant downturn in business suffered by DEI following the banking collapse in the second half of 2008. Even though the trial court informed the parties that it would take

into consideration "economic conditions" in determining the value of DEI, it is readily apparent from the record that it did not do so. If there is ever a time and case justifying an alternative valuation date, certainly it is here and now based up on the facts and evidence presented below. Therefore, we find that the trial court abused its discretion in failing to grant Husband's request for an alternate valuation date where equity so required.

{¶ 42} Accordingly, Husband's third issue under the first assignment of error is well-taken.

### ***Stock Repurchase***

{¶ 43} "Fourth Issue Presented for Review and Argument: The trial court erred by failing to consider an unpaid debt of \$153,000 for stock surrendered by [Husband's] son when valuing DEI."

{¶ 44} Husband argues that a \$153,000 debt owed to his son Scott under a stock retirement agreement should be considered in the valuation of DEI. Wife argues that Husband, rather than DEI, takes personal ownership of these shares of stock upon repurchase, and therefore the trial court was correct in disregarding this alleged debt.

{¶ 45} At the June 4, 2009 hearing, Wife acknowledged that Husband's son, Scott Grow, is due payment for his shares of stock under a stock retirement plan:

MR. SMITH: But you agree that the children are entitled to be paid for their stock, all of them?

[WIFE]: When you say, entitled?

MR. SMITH: Under these agreements, they're entitled to be paid for the stock.

[WIFE]: Under the agreements.

MR. SMITH: Yes?

[WIFE]: Yes.

MR. SMITH: Okay. So -and is it your understanding it's the company that's obligated to buy back their stock?

[WIFE]: Yes.

{¶ 46} Having acknowledged DEI's obligation to buy back Scott Grow's stock, Wife attempts to argue that this debt need not be considered because Husband takes personal ownership of the stock once the repurchase takes place. Given that the entire value of DEI has been deemed marital and therefore ordered to be equally divided between Husband and Wife, it is irrelevant whether Husband takes personal ownership of the stock. If this debt were ignored, Wife would receive half the marital value of DEI while Husband's half would be diminished by the legal obligation under the stock retirement agreement with his son.

{¶ 47} The record shows that DEI has paid Scott Grow \$30,600 of the \$153,000 total he is owed. DEI is therefore obligated to pay Scott Grow an additional \$122,400 that the trial court failed to consider in valuing and equitably dividing DEI, Inc. Accordingly, Husband's fourth issue under the first assignment of error is meritorius.

{¶ 48} In summation, Husband's first assignment of error is well-taken and sustained to the extent the trial court erred by denying Husband's motion for an alternate valuation date with respect to DEI, and by failing to consider the balance of the Scott Grow stock redemption in computing the value of DEI. Upon remand, the trial court is to select a date which accounts for the impact of the 2008 economic downturn and the Scott Grow stock redemption in determining the value of DEI.

{¶ 49} Assignment of Error No.2:

{¶ 50} THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE [WIFE] HAD AN ADDITIONAL \$80,000 IN CASH ON HER SIDE OF THE BALANCE SHEET EVEN THOUGH [WIFE] ACKNOWLEDGED ON MULTIPLE OCCASIONS THAT SHE HAD \$440,000 IN CASH RATHER THAN \$360,000.

{¶ 51} Husband argues that the trial court acknowledged and distributed only \$360,000 from the Two Poles, LLC bank account, despite Wife's admission that the account contained \$440,000 at the time of the parties' separation.<sup>10</sup>

{¶ 52} At the June 4, 2009 hearing, Wife testified as to the amount of money in the account on the date of their separation:

MR. SMITH: Okay. It started- -I think you testified on direct yesterday approximately had \$440,000 in it when it started?

[WIFE]: \$440,000 composed the- -the loan from Richard Grow was to as well.

MR. SMITH: Well, it's either \$440,000 or it wasn't when it started.

[WIFE]: It was \$300- -something from- -\$360,000 from the close of the house, \$359,000.

MR. SMITH: Plus \$75,000?

[WIFE]: Correct.

\* \* \*

MR. SMITH: So Mrs. Grow, we have, um- -when- -when this case- -when the two of you separated, let's just use 10/07, we agreed there was \$440,000 in an account, right?

[WIFE]: That is correct.

{¶ 53} In addition, at the hearing on the same date, Wife's counsel stipulated to the \$440,000 number:

MR. WHITE: You Honor, actually- -we've actually stipulated to the \$440,000 number so- -and it's entirely in our column. \* \* \* We've actually acknowledged the entire \$440,000.

{¶ 54} We find that the trial court abused its discretion in failing to recognize that Wife stipulated to the \$440,000 in the Two Poles account at the time of the parties'

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10. This bank account was originally intended for a restaurant venture in Florida that never came to fruition.



separation. Therefore, the additional \$80,000 not included by the trial court should also have been divided between the parties. Accordingly, Husband's second assignment of error is sustained.

{¶ 55} Assignment of Error No. 3:

{¶ 56} THE TRIAL COURT ERRED IN INCLUDING A RECEIVABLE IN THE VALUE OF A PIECE OF COMMERCIAL REAL ESTATE EVEN THOUGH IT DID NOT ORDER EITHER PARTY TO PAY THE DEBT.

{¶ 57} Grow Family, LLC, a marital asset, was valued at \$1.5 million. This figure specifically included an account receivable of \$815,000 owed by Grow Union Centre, LLC. As stated earlier, Grow Union Centre owned the restaurant MESH, which was a marital asset with substantial debt.

{¶ 58} In its decision dated July 29, 2010, the trial court held that, "the receivable of \$815,000 as of March 1, 2008, from Grow Union Center, LLC is specifically included in the value heretofore stated but the Court also held that Grow Union Center, LLC (MESH) does not owe said debt and neither party is responsible for half of said debt per the allocation of the 'MESH debt' below." In the same decision, the court later acknowledged that MESH had since been sold and that the proceeds from the sale were insufficient to pay the outstanding liabilities of Grow Union Center. The court then held that any unpaid balances of said debts were to be shared equally, but specifically *excluded* the \$815,000 debt Grow Union Center owed to Grow Family. Husband argues that if the trial court is not going to order Grow Union Center to pay its debt to Grow Family, then it cannot include that receivable in the value of Grow Family. We agree.

{¶ 59} Wife's expert testified as to the negative effect that non-payment of this debt would have on the valuation of Grow Family:

MR. HOCHWALT: If Mesh went under, then that debt would be  
- -

MR. SMITH: Worthless.

MR. HOCHWALT: Worthless, just like General Motors.

MR. SMITH: And that would reduce the value of that entity,  
Grow Family?

MR. HOCHWALT: That would reduce the value of that entity.

**{¶ 60}** The trial court included the \$815,000 receivable in the value of Grow Family, thus causing Husband to owe Wife an additional amount from the value of Grow Family. At the same time, the court held that it would not require that the \$815,000 actually be paid by anyone.

**{¶ 61}** Wife argues that the \$815,000 debt is not a real debt. She argues that because Husband has retained ownership of DEI and Grow Union Center, he is both the debtor and creditor to the transaction, and can therefore forgive the debt with no effect. We would find this argument persuasive if not for the fact that the receivable was included in the value of Grow Family. We find that it is clearly inequitable to require Husband to divide an entity equally when that company derives a large portion of its value from a receivable that will not be collected. If the debt is not going to be repaid, then it cannot be included in the value of Grow Family.<sup>11</sup> Therefore, we find that the trial court abused its discretion by including a receivable in the value of Grow Family while simultaneously ordering that neither party will be required to pay that debt.

**{¶ 62}** Accordingly, Husband's third assignment of error is sustained. Upon remand, the trial court must decide whether to include the \$815,000 account receivable and order the

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11. It reasons that either the receivable may be included in the value of Grow Family and the debt is ordered to be paid equally by both parties, or the receivable is not included and neither party is required to pay anything. The net result of either method would be the same.

parties to equally pay that debt or exclude the account receivable from the value of Grow Family and hold neither party responsible for its payment.

**{¶ 63}** Assignment of Error No.4:

**{¶ 64}** THE TRIAL COURT ERRED IN REQUIRING [HUSBAND] AND DEI TO PAY FOR ALL ONGOING DEBTS AND EXPENSES OF A RESTAURANT IN SOUTH CAROLINA, OWNED BY GROW JAMES ISLAND, LLC.<sup>12</sup>

**{¶ 65}** Grow James Island, LLC ("NECTAR") was loaned nearly a million dollars from DEI in order to begin operations. As a result, Grow James Island owed an outstanding debt to DEI, Inc. in the amount of \$1,167,843. The trial court ordered "NECTAR restaurant to be sold and any proceeds realized to be retained by husband. All outstanding liabilities of the business are to be paid by DEI, Inc. and Richard Grow." Husband argues that the debt owed to DEI was owed equally by both parties, and should thus be included in the offset.

**{¶ 66}** Husband's expert testified that he utilized a cash-flow based valuation of DEI rather than an asset-based approach. As a result, the value of any debts owed by related-party entities, including NECTAR, were not included in the valuation of DEI. This was the valuation method that was introduced by Husband's expert and was subsequently accepted by Wife.

**{¶ 67}** Husband's expert testified as follows:

MR. WHITE: I believe you just said you didn't use the loans receivable or the stock investments in your valuation for DEI and you gave your reasons for it, correct?

MR. MICHEL: Correct.

MR. WHITE: Therefore, your value for this company does not at all depend upon whether DEI recovers that \$2.9 million in

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12. While Husband's assignment of error references ongoing expenses, his argument fails to discuss any specific expenses he was erroneously ordered to pay. Therefore, we do not address any issues regarding the ongoing expenses of Grow James Island.

accounts receivable or doesn't, does it?

MR. MICHEL: It does not. Our value was based upon the cash flow generated from the business.

\* \* \*

MR. WHITE: Okay. So then the value of the company- - if I just take your valuation and I line item through loans receivable and stock investments, your value of this company does not change, does it?

MR. MICHEL: No, because those items are not additive to the value.

**{¶ 68}** Based on the valuation method that was utilized by Husband's expert and agreed to by Wife, we cannot find that the trial court abused its discretion in ordering Husband to pay the debt owed from NECTAR to DEI. This is because the debt owed from NECTAR to DEI was not included in the value of DEI. If Wife were required to pay one-half of this debt, then that debt must also be added into the value of DEI. While doing so would resolve this issue, it would prove to be an effort in futility as any increase in value of DEI would simply be divided between Husband and Wife, resulting in the same outcome as the current distribution of property.

**{¶ 69}** Accordingly, Husband's fourth assignment of error is overruled.

**{¶ 70}** Assignment of Error No.5:

**{¶ 71}** THE TRIAL COURT ERRED IN FINDING [HUSBAND] IN CONTEMPT FOR NOT PAYING [WIFE] HER ½ SHARE OF THE PROCEEDS FROM THE SALE OF A LIMOUSINE WHERE THERE WERE NO PROCEEDS TO DIVIDE.

**{¶ 72}** The record indicates that a limousine owned by Grow 6200, LLC, was sold in 2010 for \$34,000, with a remaining lien in the amount of \$22,609.85, leaving \$11,390.15 in proceeds. Husband argues that installment payments made by DEI on the vehicle should offset the proceeds of the sale of the limousine. Husband further argues that there were no

proceeds from the sale of the limousine because there was a debt owed from Grow 6200 to DEI that was incurred when Grow 6200 borrowed the money to purchase the vehicle. Husband therefore contends that the trial court improperly held him in contempt for failure to pay Wife one-half the proceeds of the sale of the limousine.

{¶ 73} In reviewing a trial court' finding of contempt, an appellate court will not reverse such a finding absent an abuse of discretion. *Edwards v. Edwards*, 12th Dist. No. CA2006-04-044, 2007-Ohio-123.

{¶ 74} At the hearing on January 29, 2009, Husband testified as follows:

MR. WHITE: And how much money was advanced by DEI to Grow 6200 in 2007?

[HUSBAND]: I believe we paid cash for it of about \$100,000, and then borrowed, and I can't tell you where- -what those amounts are at this point in time.

{¶ 75} Husband did not, however, provide any further evidence, such as a promissory note or loan document, indicating DEI was a creditor of Grow 6200. In its October 7, 2010 decision, the trial court found that "the order for division of proceeds from sale of the limousine were clear. No separate debt owed to DEI was identified as being part of the debt obligation on the limo until post decree." Furthermore, any debt or equity resulting from money loaned by DEI (a marital asset) to Grow 6200 (a marital asset) would be shared equally between the parties.

{¶ 76} The trial court did not act arbitrarily or unreasonably in finding that DEI was not owed a debt for an alleged loan to purchase a limousine nor for the installment payments that were made thereafter. Therefore, we find the trial court did not abuse its discretion in finding Husband in contempt for failing to pay Wife half the proceeds of the sale of the limousine.

{¶ 77} Accordingly, Husband's fifth assignment of error is overruled.

{¶ 78} Cross-Assignment of Error No. 1:

{¶ 79} THE TRIAL COURT'S PROPERTY DIVISION WAS UNREASONABLE, ARBITRARY AND RESULTED IN AN INEQUITABLE DISTRIBUTION OF THE MARITAL ASSETS.

***MESH Debt***

{¶ 80} "First Issue Presented for Review and Argument: The trial court's order that [Wife] pay half of the MESH debt contributed to an inequitable division of marital property."

{¶ 81} Wife argues that related party debts, like that between MESH and DEI, result in a windfall to Husband if ordered to be paid equally by both parties. Her argument is based upon the fact that the trial court awarded Husband the entire interest in DEI, thus he assumes the role of both creditor and debtor. Therefore, she argues that she should not be responsible for one-half the debt of MESH to DEI, as Husband can simply forgive his portion of the same debt.

{¶ 82} Based on our reasoning under Husband's third and fourth assignments of error, and the valuation method utilized by Husband's expert and accepted by Wife, we find that the trial court abused its discretion in ordering Wife to pay one-half of the debt owed from MESH to DEI when that debt was not included in the value of DEI.

{¶ 83} Accordingly, Wife's first issue under the first cross-assignment of error is well-taken.

***Proceeds of NECTAR***

{¶ 84} "Second Issue Presented for Review and Argument The trial court's order that [Husband] be permitted to retain the proceeds of the sale of NECTAR restaurant contributed to an inequitable division of marital property."

{¶ 85} Wife states that the sale of NECTAR resulted in proceeds of \$225,000. She

further argues that the only debt owed by NECTAR was a \$750,000 debt to DEI. Once again she argues that this related party debt results in a windfall to Husband as both the debtor and creditor. She therefore argues it was a \$975,000 windfall to Husband.

{¶ 86} As discussed in Husband's fourth assignment of error, the \$750,000 debt owed from NECTAR to DEI was not included in DEI's valuation and therefore it would be inequitable to require Wife to pay one-half of that debt. As such, any proceeds from the sale of NECTAR, a marital asset, must be divided between the parties. Because that debt was not included in the value of DEI, we find that the trial court abused its discretion in failing to order that any proceeds from the sale of NECTAR were to be divided equitably between the parties.

{¶ 87} Accordingly, Wife's second issue under the first cross-assignment of error is sustained.

#### ***National Millwork Debt***

{¶ 88} "Third Issue Presented for Review and Argument: The trial court's order that the parties pay the National Millwork debt contributed to an inequitable division of marital property."

{¶ 89} In Wife's reply to Husband's response on this issue, she "agrees to pay one half the debt to National Millwork that he was actually paid by [Husband] for the debt owed to him [Wife] agrees to work out an accord and satisfaction for one-half of the national millwork debt individually." [sic.]

{¶ 90} In light of the apparent resolution of this issue, Wife's third issue under the first cross-assignment of error is rendered moot.

{¶ 91} Based upon the foregoing, Wife's first cross-assignment of error is sustained to the extent the trial court abused its discretion by ordering Wife to pay one-half of MESH's

debt to DEI, any by failing to divide the NECTAR sale proceeds between the parties.

{¶ 92} Cross-Assignment of Error No. 2:

{¶ 93} THE TRIAL COURT ARBITRARILY OMITTED MARITAL ASSETS FROM THE PARTIES' PROPERTY DIVISION, INEQUITABLY INCREASING [HUSBAND'S] SHARE AND DIMINISHING [WIFE'S] SHARE OF THE MARITAL PROPERTY.

***Husband's Personal Bank Account***

{¶ 94} "First Issue Presented for Review and Argument: The trial court arbitrarily omitted unaccounted-for deposits to [Husband's] personal bank account from the property division."

{¶ 95} The trial court ordered that any bank accounts held in the joint names of Husband and Wife were to be divided equally. Any bank accounts held in the parties sole names, however, were to remain the property of the owner, free and clear of any interest of the other party.

{¶ 96} Wife argues that there is \$214,000 worth of unaccounted for deposits in Husband's personal bank account. The record indicates that significant portions of these moneys were given to Wife, and that other portions of it were used to pay marital debts. In addition, Wife references a "deposit" of \$156,207 in order to reach the \$214,000 number, but this "deposit" was actually listed as a current balance on the account. Therefore, we find that the trial court did not err in failing to include these deposits from Husband's personal bank account in the division of property.

{¶ 97} Accordingly, Wife's first issue under the second cross-assignment of error is without merit.

***Promissory Note***

{¶ 98} "Second Issue Presented for Review and Argument: The trial court



disregarded and failed to divide a \$75,000 marital asset consisting of a promissory note to Randy Lugenbeal."

{¶ 99} Wife claims that a \$75,000 loan was made to her son, Randy Lugenbeal, for the Two Poles restaurant venture. She therefore argues that as a receivable, this loan is a marital asset to be divided between the parties. Husband argues that this \$75,000 was a part of the \$440,000 in the Two Poles account at the time of their separation that should be divided between the parties.

{¶ 100} In our disposition of Husband's second assignment of error we found that Wife admitted that the Two Poles account contained a total of \$440,000 at the time of the parties' separation and should therefore have been divided between the parties as a marital asset. The \$75,000 Wife references in this assignment of error was included in that \$440,000.

{¶ 101} Accordingly, in light our disposition of Husband's second assignment of error, we find Wife's second issue under the second cross-assignment of error not well-taken.

### ***Financial Misconduct***

{¶ 102} "Third Issue Presented for Review and Argument: The trial court failed to account for [Husband's] dissipation of marital assets resulting from his extensive gambling debts and failed to provide [Wife] with a corresponding increase in her share of the marital property."

{¶ 103} In determining whether an equal division of marital assets would be inequitable, "a court may consider whether one party has engaged in financial misconduct." *Emery-Smith*, 190 Ohio App.3d 335, 2010-Ohio-5302 at ¶ 50 (11th Dist.). R.C. 3105.171(E)(3) provides that "if a spouse has engaged in financial misconduct, including but not limited to the dissipation, destruction, concealment, or fraudulent disposition of assets,

the court may compensate the offended spouse with a distributive award or with a greater award of marital property. The burden of proving financial misconduct is on the complaining party." *Id.*

**{¶ 104}** The record indicates Wife was not only aware of Husband's gambling, but in fact participated in these trips on many occasions. Therefore, we cannot find that the trial court abused its discretion in failing to find that Husband committed financial misconduct through his gambling losses.

**{¶ 105}** Accordingly, Wife's third issue is without merit and her second cross-assignment of error is overruled.

**{¶ 106}** For the reasons set forth above, the trial court's judgment pertaining to the division of marital property is affirmed in part and reversed in part, and this cause is remanded for further proceedings consistent with this opinion.

POWELL, P.J., and RINGLAND, J., concur.