

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ESMERALDA DEDAJ,

Plaintiff/Counter Defendant-  
Appellee,

v

TONI DEDAJ,

Defendant/Counter Plaintiff-  
Appellant.

UNPUBLISHED  
July 23, 2013

No. 306981  
St. Clair Circuit Court  
LC No. 10-001592-DM

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Before: WILDER, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce and also challenges uniform orders of child and spousal support. We affirm.

**I. BACKGROUND**

The parties were married on January 31, 2002 and divorced on October 24, 2011. They had two children during the marriage and owned and operated a restaurant named Tony's Food Paradise. Following a six day trial, the trial court determined that defendant was improperly retaining cash from the restaurant and that of the approximately \$900,000 defendant did not report, \$594,000 was subject to division. The trial court also determined that the restaurant was worth \$225,000, that the marital home was worth \$270,000, and that plaintiff was entitled to a share of both these assets. Ultimately, the trial court awarded defendant the business and marital home but ordered that plaintiff be paid a lump sum of \$500,000. The trial court also determined that the parties would be equally responsible for \$1,300 in credit card debt but found that there was no loan owed to defendant's parents for the purchase of the marital home. Further, the trial court awarded plaintiff rehabilitative spousal support in the amount of \$6,000 per month for a period of three years. The trial court also referred the matter back to the Friend of the Court for a determination of child support. This appeal followed.

**II. VALUATION OF BUSINESS AND HOME**

Defendant first argues that the trial court erred in determining the value of the business and the marital home. We disagree. We review a trial court's findings of fact for clear error. *Woodington v Shokoohi*, 288 Mich App 352, 366-367; 792 NW2d 63 (2010). "Findings of fact

are clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made.” *Id.*

When dividing property the “trial court must make specific findings of fact regarding the value of each disputed piece of marital property.” *Id.* at 364. The trial court must determine a value even if neither party provides persuasive evidence regarding the asset’s value. *Olson v Olson*, 256 Mich App 619, 628; 671 NW2d 64 (2003). If the trial court’s value of any given asset is within the range established by the evidence then there is no clear error. *Jansen v Jansen*, 205 Mich App 169, 171; 517 NW2d 275 (1994). The trial court is in the best position to judge the credibility of witnesses. *Fletcher v Fletcher*, 229 Mich App 19, 25; 581 NW2d 11 (1998). Therefore, we give deference to the trial court’s factual findings when the findings are based on witness credibility. *Johnson v Johnson*, 276 Mich App 1, 11; 739 NW2d 877 (2007); *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). Furthermore, we may not reverse if the trial court’s interpretation of the evidence is plausible. *Beason v Beason*, 435 Mich 791, 805; 460 NW2d 207 (1990).

Defendant argues that the trial court erred in determining that the restaurant was worth \$225,000. He testified that he paid \$30,000 for the restaurant. However, both the accountant and plaintiff testified that defendant bought the restaurant for \$90,000. A tax return also reflected a purchase price of \$90,000. Defendant testified that he had never tried to sell the restaurant and that he never had any offers on it. However, plaintiff testified that in 2009, she and defendant discussed the value of the business after a cook offered to buy the restaurant for \$200,000. Plaintiff also testified that defendant received a \$400,000 offer in March or April of 2010. There was also evidence that the restaurant was doing better each year and that defendant was underreporting income.

The trial court did not clearly err in determining that the business was worth \$225,000, which was substantially more than the amount defendant paid to purchase the restaurant. First, there was evidence that there were offers to purchase the business for \$200,000 and \$400,000. Second, the evidence that the restaurant was making substantially more than what was being reported and was doing better each year supported the trial court’s determination. Again, when the value of a marital asset is in dispute, the trial court must determine a value even if neither party provides persuasive evidence regarding the asset’s value, *Olson*, 256 Mich App at 628, and there will be no clear error as long as the trial court’s valuation is within the range established by the evidence, *Jansen*, 205 Mich App at 171. Accordingly, we find no error.

Defendant also argues that the trial court erred in determining that the marital home was worth \$270,000. We disagree. Plaintiff and defendant purchased the home on June 30, 2009, for \$285,000. Gerald Rutkowski, who was qualified as an expert in real estate valuation, testified that he performed two appraisals on the marital home. In the first appraisal, conducted in February 2011, Rutkowski opined that the value of the home was between \$250,000 and \$255,000. The second appraisal occurred in June 2011, and Rutkowski valued the home at between \$245,000 and \$249,000. Rutkowski explained that he identified two houses in the area that had recently sold for \$325,000 and \$250,000, and that the differences between the higher-priced home and the marital home supported his opinion that the marital home was worth approximately \$79,000 less than the \$325,000 home. Rutkowski acknowledged that all the

adjustments he made were based on his subjective opinion, but further testified that the true cash value based on the state equalized value for the home for 2011 was \$288,200.

The trial court's determination that Rutkowski's adjustments were unreasonably high, causing his value estimates to be unreasonably low, was not clearly erroneous. A trial court is not required to accept the totality of an expert's testimony. *Pelton v Pelton*, 167 Mich App 22, 25-26; 421 NW2d 560 (1988). The trial court's determination was within the range established by the evidence because the trial court's \$270,000 valuation was between the various values Rutkowski referenced and it also was near the cash value based on the state equalized value. Accordingly, there was no clear error. See *Jansen*, 205 Mich App at 171.

### III. DIVISION OF PROPERTY

Next, defendant argues that the trial court erroneously determined that defendant had improperly retained \$594,000 from the business and that the trial court's division of property was therefore inequitable. We disagree. The trial court's findings of fact in a division of property are reviewed for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). If the findings of fact are not clearly erroneous, the award will be evaluated to determine if it was fair and equitable in light of the facts. *Id.* at 151-152. The ruling should be affirmed unless the reviewing court is convinced that the division was inequitable. *Id.*

At the outset, we acknowledge that defendant is correct that the trial court mismatched cash register tapes from January, February, and April 2010 to bank statements for the same months of 2009. However, this error is harmless. The trial court used the bank statements merely to indicate that cash deposits were low in comparison to what the register tapes indicated was being made on a daily basis. Regardless of whether the tapes and statements were from the same month, the evidence that defendant's business was doing the same or better was demonstrative of the fact that very little of the cash being received was being deposited into the bank account. Moreover, the trial court determined the amount defendant was taking by comparing the numbers from the cash register tapes to income tax returns. Also, defendant acknowledged that the business was doing better each year. The trial court found that the tapes examined were representative of defendant's business as a whole. The trial court provided a detailed explanation of how it determined that defendant had retained over \$500,000 in cash from the business, through an extrapolation from a six-month sample over an entire year:

Although the court did not examine every month represented in exhibit 24, the six months that were examined would be representative of the whole. In those six months the exhibits shows total gross sales in the amount of \$233,444 representing only 134 days in 2009. This figure alone is \$4,635 more than all the gross receipts reported on the 2009 tax return . . . for the entire year (\$228,809). The plaintiff testified that the restaurant is open every day except Christmas, Easter and maybe one more which would leave 228 business days unaccounted for in these figures. Thus only just over one third (37%) of gross sales is accounted for in the above figures and as noted even this exceeds the total sales reported on the tax return. Averaging the \$233,444 over the 134 days indicates a daily average of \$1742 and if this daily average is attributed to 362 days the yearly gross receipts for 2009 would be \$630,604 a figure much closer to the

plaintiff's estimate of \$500,000 in yearly gross receipts than that testified to by the defendant.

While the trial court believed it was looking at only 2009 data, in reality some of the data was from 2010. But this error did not affect the overall soundness of the trial court's finding. The evidence showed that from November 2009 through May 2010, the business was having daily operational gross receipts of \$1,973.67.<sup>1</sup> Extrapolating this amount over both 2009 and 2010, gross receipts from the business totaled approximately \$714,468.70 per year.<sup>2</sup> But the tax records show that the business only reported \$228,809 in gross receipts for 2009, and only \$257,855 in gross receipts were reported for 2010. Thus, the evidence established that the gross receipts were under-reported in excess of \$450,000 per year, closely matching the trial court's finding that there was approximately \$900,000 in unreported income from those two years combined. Therefore, we conclude that, irrespective of the trial court's inadvertent belief that some of the data from 2010 had been generated in 2009, the trial court's ultimate finding was supported by the evidence and was not clearly erroneous.

Because the trial court's findings were not clearly erroneous, the award must be reviewed to determine if it was equitable in light of the facts of this case. *Id.* The trial court acknowledged that the division was not equal, but the division does not have to be a mathematical 50/50 split as long as it is equitable. *Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008). The trial court explained,

The court recognizes that this is not an equal division of the marital estate however the division is equitable considering the comparative difference in the parties' standard of living resulting from this divorce. The defendant is capable of continuing a business which has proven immensely profitable and netting income at close to a half million dollars per year and the plaintiff is currently earning about \$330 per week in gross income. . . .

Defendant does not assert reasons why the division was inequitable, other than maintaining that the calculations were mathematically incorrect. However, because the trial court's calculations were not clearly erroneous, defendant fails to establish the division was inequitable.

#### IV. SPOUSAL SUPPORT

Defendant next argues that the trial court erred in awarding spousal support. The purpose of spousal support is to balance the income and needs of the parties while not impoverishing

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<sup>1</sup> This number is derived from taking the total receipts over this period (\$363,155.36) and dividing by the number of days there were records for (184), resulting in \$1973.67 per day of gross receipts.

<sup>2</sup> The average gross receipts per day amount of \$1973.67, multiplied by the number of days open per year of 362, equals \$714,468.70.

either party. *Id.* at 726. To be just and reasonable, the award should be based on the facts and circumstances of the case. *Id.* The trial court should consider the following factors:

“(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties’ ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties’ health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party’s fault in causing the divorce, (13) the effect of cohabitation on a party’s financial status, and (14) general principles of equity.” [*Id.* at 726-727, quoting *Olson*, 256 Mich App at 631.]

The trial court must make specific findings of fact on the factors that are relevant to its decision. *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010).

Defendant asserts that the trial court’s findings on the spousal support factors were not supported by the evidence.<sup>3</sup> We disagree. A trial court’s determination in regards to spousal support is reviewed for an abuse of discretion. *Woodington*, 288 Mich App at 355. “An abuse of discretion occurs when the trial court’s decision falls outside the range of reasonable and principled outcomes.” *Id.* (citation omitted). However, the trial court’s findings of fact are reviewed for clear error. *Id.* If the factual findings are not clearly erroneous, the award will be evaluated to see if it was fair and equitable in light of the facts, or was an abuse of discretion. *Id.* A trial court’s award of spousal support should be affirmed unless “this Court is left with the firm conviction that the division was inequitable.” *Id.* at 355-356 (quotation marks and citation omitted).

Defendant claims that the trial court erred in determining that the spousal support factors weighed in favor of spousal support. Defendant challenges the trial court’s findings on each factor. However, defendant’s arguments are either based on credibility determinations or the fact that the trial court found defendant was retaining cash from the business. As previously noted, this Court is to give deference to the trial court’s factual findings when the findings are based on witness credibility, *Johnson*, 276 Mich App at 11, and the trial court did not clearly err in finding that defendant retained unreported cash from the business. Therefore, defendant’s challenge to the award of spousal support fails.

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<sup>3</sup> Defendant also makes arguments based on events that have occurred post-judgment. We decline to consider this evidence because it was not before the trial court at the time of the decision. See *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009). Additionally, for this issue, defendant referenced in his statement of questions presented his assertion that spousal support should not have been awarded, let alone considered, because it was “not at issue in this trial.” However, defendant never addresses this position in the argument section in his brief. Accordingly, that particular issue is abandoned on appeal, and we do not consider it. *DeGeorge v Warheit*, 276 Mich App 587, 595-596; 741 NW2d 384 (2007).

## V. CHILD SUPPORT

Next, defendant argues that the trial court's decisions regarding child support were an abuse of discretion. We disagree. The trial court's findings of fact underlying a child support award are reviewed for clear error. *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). The trial court's discretionary rulings, including determinations regarding whether to impute income, are reviewed for an abuse of discretion. *Id.* However, whether the trial court acted within the child support guidelines is reviewed de novo. *Malone v Malone*, 279 Mich App 280, 284; 761 NW2d 102 (2008).

The primary purpose of child support is to ensure the child is provided for. *LME v ARS*, 261 Mich App 273, 288; 680 NW2d 902 (2004). Child support should not be utilized as a punishment or to victimize either parent. *Id.* The trial court has discretion in the amount to award as child support, and “[t]he court’s exercise of that discretion is presumed to be correct.” *Milligan v Milligan*, 197 Mich App 665, 667; 496 NW2d 394 (1992). “The party appealing a support order bears the burden of showing an abuse of discretion.” *Id.*

When awarding child support the trial court must adhere to the formula as determined by the Friend of the Court (FOC). *Stallworth v Stallworth*, 275 Mich App 282, 283; 738 NW2d 264 (2007). “Thus, a trial court must presumptively follow the Michigan Child Support Formula (MCSF). If the court deviates, it must make an adequate record regarding the mandatory statutory criteria for doing so.” *Id.* at 284. The first step in determining the amount of child support is to determine the incomes of the parties. *Carlson*, 293 Mich App at 205.

Defendant argues that the trial court erred in determining the income of the parties. Defendant focuses on the fact that plaintiff works part-time and maintains that she voluntarily left her full-time employment. However, plaintiff testified that she would have been fired from her full-time job even if she had not voluntarily left because her employer learned of her past criminal history. She also testified that she was trying to further her education and care for the children. Defendant cites no case law that indicates that a person must forego education and child care to work full time. Thus, the trial court did not clearly err in determining that plaintiff’s income was to be based on \$15 per hour at 22 hours per week. The trial court also did not clearly err in determining that defendant’s income was \$432,935 based on evidence that he was retaining unreported cash from the restaurant.

After the trial court properly determined the income of the parties, it correctly remanded to the FOC for a determination based on the child support formula. See *Stallworth*, 275 Mich App at 283. Defendant argues that the trial court then “rubber stamped” the FOC recommendation without making any determinations on its own. However, the trial court only has to justify the child support award if it is *departing* from the FOC recommendation. *Id.* at 284. Thus, the trial court did not err by adopting the FOC recommendation.

Defendant also argues that the trial court failed “to opine that Defendant/Appellant should receive a credit” for his previous payments of \$910 per month in interim support from the time the complaint was filed. However, this assertion is not true because the child support order indicated, “Defendant/Payer shall receive credit for support paid directly to Plaintiff by the Defendant since the filing of the divorce complaint.” Therefore, contrary to defendant’s claim

here, the trial court did order that any amounts paid since the filing of the complaint were to be credited to defendant.

Defendant further argues that the trial court erred in making the child support award retroactive. MCL 552.603b provides the following:

If an individual who is required by the court to report his or her income to the court or the office of the friend of the court knowingly and intentionally fails to report, refuses to report, or *knowingly misrepresents that income*, after notice and an opportunity for a hearing, the court may retroactively correct the amount of support. [Emphasis added.]

Defendant was aware that child support was an issue at trial. As a result, he had notice that he would need to provide income information to the trial court. But the trial court determined that defendant knowingly misrepresented his income. Therefore, the trial court was justified in awarding retroactive support.

#### VI. REQUEST FOR NEW JUDGE

Finally, defendant argues that on remand the case should be assigned to a new judge. However, we need not address this issue because there are no errors requiring remand.

Affirmed. Plaintiff, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder  
/s/ Patrick M. Meter  
/s/ Elizabeth L. Gleicher