

WD82498

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

SHELBY ANN TORRES,

Respondent,

vs.

ALEJANDRO RAUL TORRES,

Appellant.

On Appeal from the Circuit Court of Jackson County
Honorable Susan E. Long, Associate Circuit Judge
Case No. 1716-FC03143

BRIEF OF THE RESPONDENT

JONATHAN STERNBERG, #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR RESPONDENT
SHELBY ANN TORRES

Table of Contents

Table of Authorities	5
Statement of Facts	7
A. Background.....	7
B. Assets and debts at issue	7
1. Husband’s business, Alex’s Plumbing	7
a. Use of marital assets and Wife’s labor in the business	8
i. Wife’s uncompensated labor.....	8
ii. Use of marital funds	10
iii. Use of the parties’ building	12
b. Husband’s statements about the business’s value.....	12
c. Business valuation	13
2. Marital home and mortgage.....	16
C. Trial court’s findings and division.....	16
Argument.....	18
Standard of Review as to All Points	18
Response to Appellant’s Points I and II: The trial court properly held that the increase in the value of Husband’s business since the parties’ marriage, \$384,695, was a marital asset subject to division.	19
Additional Standard of Review	19
A. Under § 452.330.2(5), R.S.Mo., when marital assets and a wife’s uncompensated labor are contributed to a husband’s otherwise pre-marital business and cause its value to increase during the marriage, that increase is a marital asset subject to division.	21

B. Husband contributed hundreds of thousands of dollars of marital funds to his business throughout the marriage, beginning one month after the marriage the business operated rent-free out of a building the parties purchased with marital funds, and Wife’s uncompensated work for the business was instrumental in its success, all making its \$384,695 increase in value since the marriage marital property subject to division.	24
1. Because no party asked the trial court to make findings of fact and conclusions of law on any issue, the only question is whether evidence viewed in a light most favorable to the trial court’s conclusion supported that conclusion.....	24
2. Beginning one month after the marriage, Alex’s Plumbing operated rent-free out of a marital building the parties purchased with marital funds.....	25
3. Husband admitted he transferred hundreds of thousands of dollars of marital funds to the business during the marriage.	26
4. Wife’s uncompensated work for the business was worth \$20,800 per year in salary and was instrumental in the business’s success, including obtaining its most lucrative contract.....	28
5. Under § 452.330.2(5), all of this made for sufficient evidence that the entirety of the \$384,695 increase in the value of Husband’s business during the marriage was a marital asset subject to division.....	29
C. The evidence also supports the trial court finding that the business was Husband’s alter-ego and declaring its increase in value marital property subject to division for that reason, too.....	33
Response to Appellant’s Point III: There were no prejudicial material inconsistencies in the trial court’s findings.	35
A. Husband’s third point is not preserved for review because he did not raise it in his motion to amend the judgment.	35

B. If Husband’s third point somehow is preserved, there are no material inconsistencies in the trial court’s finding that the marital value of the increase in Husband’s equity in his business is \$348,695.	36
Response to Appellant’s Point IV: The trial court properly considered the parties’ mortgage on the marital home in its division of the assets and debts, and its resulting decree that Husband pay Wife an equalization payment of \$302,300.50 was proper under the factors in § 452.330.1, R.S.Mo., and was neither inequitable nor unconscionable.	38
Additional Standard of Review	38
Conclusion	44
Certificate of Compliance	44
Certificate of Service.....	45

Table of Authorities

Cases

<i>Boudreau v. Benitz</i> , 827 S.W.2d 732 (Mo. App. 1998)	34
<i>Bridgeman v. Bridgeman</i> , 63 S.W.3d 686 (Mo. App. 2002)	24
<i>Courtney v. Courtney</i> , 550 S.W.3d 522 (Mo. App. 2017)	35
<i>Dieser v. St. Anthony’s Med. Ctr.</i> , 498 S.W.3d 419 (Mo. banc 2016)	20, 38
<i>Estate of Elder v. Estate of Pageler</i> , 564 S.W.3d 742 (Mo. App. 2018)	19
<i>Gendron v. Gendron</i> , 996 S.W.2d 668 (Mo. App. 1999)	38
<i>Glenn v. Glenn</i> , 930 S.W.2d 519 (Mo. App. 1996)	23, 30, 33
<i>Hancock v. Shook</i> , 100 S.W.3d 786 (Mo. banc 2003)	20, 38
<i>Hoffman v. Hoffman</i> , 676 S.W.2d 817 (Mo. banc 1984)	22, 30
<i>Houston v. Crider</i> , 317 S.W.3d 178 (Mo. App. 2001)	18
<i>In re J.M.</i> , 1 S.W.3d 599 (Mo. App. 1999)	24
<i>In re Marriage of Brown</i> , 310 S.W.3d 754 (Mo. App. 2010)	36
<i>In re Marriage of Hillis</i> , 313 S.W.3d 643 (Mo. banc 2010)	23, 31-33
<i>In re Marriage of Holden</i> , 81 S.W.3d 217 (Mo. App. 2002)	39-40
<i>In re Marriage of Looney</i> , 286 S.W.3d 832 (Mo. App. 2009)	21-22
<i>In re Marriage of Stephens</i> , 954 S.W.2d 672 (Mo. App. 1997)	20, 38
<i>In re Marriage of Woodson</i> , 92 S.W.3d 780 (Mo. banc 2003)	18
<i>Klaus v. Klaus</i> , 918 S.W.2d 407 (Mo. App. 1996)	20
<i>Klockow v. Klockow</i> , 979 S.W.2d 482 (Mo. App. 1998)	23, 30, 33
<i>McKown v. McKown</i> , 108 S.W.3d 180 (Mo. App. 2003)	22, 30
<i>Meservey v. Meservey</i> , 841 S.W.2d 240 (Mo. App. 1992)	30-32
<i>Mills v. Mills</i> , 939 S.W.2d 72 (Mo. App. 1997)	24, 33

<i>Morgan v. Ackerman</i> , 964 S.W.2d 865 (Mo. App. 1998)	34
<i>Moyers v. Lindenbusch</i> , 530 S.W.3d 646 (Mo. App. 2017)	36
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. banc 1976)	18
<i>Rhodus v. McKinley</i> , 16 S.W.3d 615 (Mo. App. 2000)	23, 30, 33
<i>Schroeder v. Schroder</i> , 59 S.W.3d 607 (Mo. App. 2001).....	40, 42
<i>TracFone Wireless, Inc. v. City of Springfield</i> , 557 S.W.3d 439 (Mo. App. 2018)	19
<i>Trimble v. Pracna</i> , 167 S.W.3d 706 (Mo. banc 2005)	18
<i>Watkins v. Watkins</i> , 924 S.W.2d 542 (Mo. App. 1996)	30-32
<i>Woodard v. Woodard</i> , 201 S.W.3d 557 (Mo. App. 2006)	40
Revised Statutes of Missouri	
§ 452.330.....	21-22, 25, 27, 29, 33, 38-41, 43
Missouri Supreme Court Rules	
Rule 73.01.....	19, 24, 33
Rule 78.07.....	35-36
Rule 84.06.....	19, 44
Rules of the Missouri Court of Appeals, Western District	
Rule 41.....	44

Statement of Facts

A. Background

After dating since 2006, Shelbie Torres (“Wife”) and Alejandro Torres (“Husband”) were married in October 2013 (D46 p. 2; Tr. 32, 36). They had three children together during the marriage, and Husband also adopted Wife’s daughter from a previous relationship (D46 p. 2).

In March 2017, the parties separated, and a month later Wife sought a dissolution of marriage (D2; D46 p. 2). She said this was because she discovered Husband had been cheating on her (Tr. 38-39). After a trial in September 2018, the court entered its final amended judgment in December 2018, in which it established the children’s custody and support, awarded Wife maintenance, and divided the marital estate (D46 pp. 27, 33-36).

After the trial court denied Husband’s motion to amend the judgment, he timely appealed to this Court (D47; D48; D49). On appeal, husband does not challenge the custody, support, or maintenance awards, but only portions of the division of the marital estate.

B. Assets and debts at issue

1. Husband’s business, Alex’s Plumbing

Husband was self-employed in his own business, Alex’s Plumbing, which he said he started in 2005 as a sole proprietorship (Tr. 286, 295). Both parties said the business was reorganized into a limited liability company in May 2013, just before their marriage (Tr. 162, 295). Alex’s Plumbing was a single-member LLC, with Husband its only member (Tr. 27). At the time of

trial in September 2018, Husband continued to be employed as the owner of Alex's Plumbing, while Wife was unemployed (Tr. 33).

Wife said Alex's Plumbing primarily makes money performing water disconnects (Tr. 83). She said Husband would shut off water to houses for \$1,200 apiece (Tr. 84). She said he would work from 4:30 a.m. to 4:30 p.m. Monday through Friday doing so, and the business had permits to operate in this manner in both Kansas City, Missouri and Kansas City, Kansas (Tr. 83-85).

a. Use of marital assets and Wife's labor in the business

i. Wife's uncompensated labor

Wife said she began working for Alex's Plumbing in 2006 (Tr. 86). She made sure all its licenses were current (Tr. 86). In 2012 and 2013, she got the business an EIN, which is a federal tax identification number, because she was worried about it appearing that the business was committing fraud by using Husband's Social Security number on documents instead of an EIN (Tr. 86). She registered the business for bidding on minority jobs (Tr. 88). Sometime around 2016, she also got the business a Department of Transportation identification number because it was incurring weight tickets on its trucks amounting to \$2,000 at a time (Tr. 86-87). She ensured all of the business's insurance was paid on time (Tr. 87). She also would type what Husband told her to, including all the business's invoices and bids (Tr. 87).

Wife also said she was instrumental in getting Alex's Plumbing a contract from the City of Kansas City's "Keep Out of the Rain" program lasting seven years that was worth between \$4.5 million and \$5.5 million (Tr. 43). This contract made the business's income increase significantly (Tr. 166)

and enabled the parties to save \$20,000 per month for a period and to buy new cars in 2016, including a Suburban, a Corvette, and a Silverado (Tr. 41-43). Wife ensured the business had performance bonds in place for the contract, drafted and delivered to the City the business's 47-page-long bid in a precise format, and handled pay applications once the contract was awarded and the work begun (Tr. 87-88, 122).

Wife acknowledged most of her work was done in the parties' home office but said this is where Husband usually did his business, too (Tr. 88). She acknowledged she did not work in an office setting before her relationship with Husband, did not have a plumbing certificate, and did not assist Husband at any job sites (Tr. 164).

At the same time, Wife said Husband never compensated her at all for her work in the business (Tr. 213). She continued working for the business until August 2017, when Husband removed her from its emails (Tr. 165). After that, Husband hired someone else to do the work Wife had done, a full-time employee paid \$400 per week (Tr. 214).

Husband conceded he pays Wife's successor \$400 per week, the employee is full-time, and he did not compensate Wife, reasoning that she "was my wife" so "[s]he got to spend more than" the annual equivalent of \$400 per week (Tr. 326). He said Wife was compensated by being permitted to spend money freely and not working (Tr. 300). He also claimed Wife's work for the business was only 10-12 hours per week (Tr. 300, 377).

The trial court found that Wife "worked in the business with husband doing 'clerical work' 10-12 hours each week and that she was instrumental in

obtaining DOT tags and other licenses necessary to operate the business. Since the parties separation [Husband] has hired a full time employee to do the work previously done by [Wife]" (D46 pp. 17-18).

ii. Husband's use of marital funds in the business

While Wife admitted she never made any separate personal financial contributions of her own toward Alex's Plumbing (Tr. 167), she stated Husband used property they purchased during the marriage for his business (Tr. 112). Even Husband admitted that he used marital funds to fund the business (Tr. 321).

The parties had a savings account they shared, which had \$250,000 in it at the time of the dissolution (Tr. 60). Wife testified that Husband used that money to pay his business (Tr. 93; Exhibit 13). She said that at one point, for a four-month period the only income that was put into Alex's Plumbing was from the parties' shared savings account (Tr. 98). Wife said she did not know about or consent to these transfers (Tr. 98).

Husband admitted that when business was down, he would take money out of the parties' savings account and transfer it to Alex's Plumbing to pay bills and to keep the business afloat (Tr. 287). He said that "if there's no money in Alex's Plumbing account, I take it from this account. And I move it to Alex's Plumbing account to pay my bills. I've always done that, and I continue – that's how I run my business" (Tr. 287-88). When asked if he ever had any communication with Wife that in any way indicated she agreed to liquidating money from the parties' savings account to pay the business's

bills, he responded “It’s not hers; it’s mine,” and stated, “I don’t have to talk to anybody about how I run my business” (Tr. 321).

After the dissolution proceedings began, Wife discovered Husband had opened an account solely in his name and transferred most of the parties’ savings account to it, leaving only \$47,000 (Tr. 60). Wife did not discover this until Husband’s deposition (Tr. 103-04). At the time of trial, there was \$50,980 in the account, which was opened in June 2018 (Tr. 104; Exhibit 9).¹ Husband said there was \$33,092 in it (Tr. 376-77). Wife said Husband claimed the money in the account came from the sale of vehicles, which she disputed but said even if that were true she did not have any say in the sale of the vehicles (Tr. 105). Husband also did not pay child support during the dissolution and failed to make payments on her vehicle, and it was repossessed during the dissolution (Tr. 66-68).

The trial court found that Husband had dissipated the parties’ savings account in violation of both a court order and his own promise to a special master (D46 p. 22-24).² It found that this was done without Wife’s knowledge or consent (D46 pp. 23-24). It found that he took the savings and transferred them to his business account (D46 p. 24). It found that this was done while failing to pay either child support or Wife’s vehicle, which was repossessed (D46 pp. 25-26). It found that he intentionally and without Wife’s or the court’s knowledge squandered \$250,000 in marital assets (D46 p. 26).

¹ Husband omits this exhibit from the record.

² Husband omits the transcript of the special master hearing, Exhibit 130, from the record.

iii. Use of the parties' building

The parties also owned a building at 2625 East 9th Street in Kansas City that Husband testified Alex's Plumbing used "as an office and warehouse building" in which the company stored its equipment and material (Tr. 298). Wife testified that the building was purchased during the marriage with marital funds from the parties' joint savings account and was titled in both parties' names (Tr. 90). Husband agreed it was purchased during the marriage (Tr. 329). While Husband claimed that the building was an asset of the business, he never had listed it as a building for tax purposes on any business tax return (Tr. 331; Exhibit 20).³

The trial court found that this

building was purchased during the marriage and is a marital asset. [Husband] had placed [it] in his recently filed asset and debt form as a business asset. No evidence supports the building was ever considered a business asset. [Husband] did not include the real estate in his respective business tax forms nor did the business valuation expert include the building in his asset method of valuation of Alex's Plumbing, LLC.

(D46 p. 18).

b. Husband's statements about the business's value

Husband stated he believed the business had about \$45,000 in its accounts on the day he and Wife were married (Tr. 300). He said he believed the business was worth \$38,500 at the time of trial, a number he arrived at by looking at the assets and debts the business owned and determining the

³ Husband omits this exhibit from the record.

resulting equity (Tr. 284-85; Exhibit 104; Exhibit 110, p. 4).⁴ But later, he said he would sell the business to Wife for \$240,000 (Tr. 293).

Husband said the business had only a few “hard assets”, including a truck, trailer, excavator, attachments to the excavator, skid steer, and some materials (Tr. 293). He said the 2625 building the business used was appraised for \$115,000 (Tr. 298; Exhibit 131).⁵

Husband said the business had a checking account ending in 6319, which was converted in August 2017 to one ending in 3805 (Tr.312). But he admitted that since March 2018, he had stopped putting any income into that account (Tr. 317).

c. Business valuation

The trial court appointed Michael McLain, a business appraiser and certified public accountant who served as a business valuation expert in dissolution of marriage cases, to value Alex’s Plumbing (D46 p. 17; Tr. 12). He met with both parties and their attorneys and reviewed the business’s finances that the parties provided him with (Tr. 13).

Mr. McLain testified that Husband essentially kept no financial accounting of his business (Tr. 13). He said Husband collected 1099 forms that payors for services provided him and kept receipts, but that was it (Tr. 14). Wife said Husband would keep permits, bids, and other documents in his truck and then would bring them home in a big stack every six months or so, and then would store those papers in the home office (Tr. 88). Mr. McLain

⁴ Husband omits both of these exhibits from the record.

⁵ Husband omits this exhibit from the record.

said Husband did not have a bookkeeper, only a tax preparer at H&R Block who prepared his taxes (Tr. 14). Husband admitted this (Tr. 325).

Based on his review, Mr. McLain was able to conclude that in his professional opinion Alex's Plumbing is worth \$475,506 using a net asset approach or \$466,722 under a market approach (Tr. 16). He prepared a report to that end (Tr. 16; Exhibit 2). He said both valuations were based on the most recently reported tax year as of the time of trial, 2017, meaning his valuation was as of December 31, 2017 (Tr. 26, 28-29). He said that the most appropriate valuation approach in this case is "a combination of the guideline transaction approach using the revenue multiples, that includes the deposits, of 466,722, which is in line with the net asset value with inventory of 475,506 (Tr. 22-23).

Mr. McLain said he did not calculate a fair market value using an income-based approach because looking at the business's tax returns from the years 2014-2017, he did not believe that the net income Husband reported was reliable (Tr. 18). For example, he found that for 2017 the business's total deposits were \$99,000 higher than the revenue reported, and Husband did not provide an explanation for this (Tr. 18).

For the market value approach, Mr. McLain identified sales of businesses in the plumbing industry used a market value capped with a revenue multiple (Tr. 19). He said that the median multiple for those transactions was .4, and he applied that to Alex's Plumbing's reported revenue on its taxes (Tr. 19; Exhibit 2 p. 15). He said this resulted in a value

of \$466,722 because the revenue reported was \$711,005, which multiplied by .4 is \$466,722 (Tr. 19; Exhibit 2 p. 15).

For the asset approach, Mr. McLain figured the business's total assets and liabilities (Tr. 20). He said that unlike an income-based approach, he did not need to have several tax years available to him to calculate a market valuation using the net asset approach, because that approach is based on one specific date, unlike an income-based approach (Tr. 24).

Mr. McLain said there were two valuations, one with inventory and one without (Tr. 22). Mr. McLain said he estimated the business's inventory to be worth \$134,000 and the assets without inventory were \$341,506, which would make the total member's equity worth \$475,506 if the inventory is included as an asset (Tr. 22; Exhibit 2). But Mr. McLain testified that the "with inventory" valuation was more appropriate, because Husband listed his inventory as "supplies" on his tax returns but neither he nor his tax preparer gave Mr. McLain any explanation for this (Tr. 20-21; Exhibit 2).

Mr. McLain said he also used these approaches to determine the fair market value of the business as of the date of the parties' marriage in October 2013 (Tr. 23; Exhibit 2 pp. 16-17). His report concluded that it was worth \$117,757 as of then under the asset approach or \$78,225 under the market approach (Exhibit 2 pp. 16-17).

After reviewing Mr. McLain's findings, the trial court stated, "Mr. McLain indicated that he believed the Market Approach, Revenue Based on Deposits, \$466,722.00, to be the most appropriate valuation of Alex's Plumbing and this Court values the company at \$466,722.00" (D46 p. 22). It

also found “Mr. McLain also stated that based on documentation provided to him the value of Alex’s Plumbing as of 10/12/13, the date of the parties’ marriage, was \$117,757.00. This Court therefore finds that the marital value of Alex’s Plumbing is \$348,965.00. (\$466,722-\$117,757)” (D46 p. 22).

2. Marital home and mortgage

Wife and the children still resided in the parties’ marital home at the time of trial (Tr. 89, 119). Wife said the parties bought it in July 2014 for \$313,000 and she believed the fair market value at the time of trial in September 2018 was \$360,000 (Tr. 89). She said there was a mortgage on the property, and the most recent amount remaining owed on it was \$234,554 (Tr. 89).

The trial court found that the “parties own real estate (hereinafter referred to as “the marital home”) located at 3300 Trail Ridge Drive where the Petitioner and the minor children currently reside. The Court finds that the FMV of the marital home is \$360,000.00 and the lien on the home is \$234,554.00” (D46 p. 18).

C. Trial court’s findings and division

Before trial, no party requested the trial court make findings of fact or conclusions of law on any issue (D1 pp. 21-23).

In its judgment, the trial court divided the marital home and its debt to Wife, divided the marital value of Alex’s Plumbing to Husband, divided the squandered funds to Husband, and divided 2625 East Ninth Street to Husband (D46 pp. 28-29). It stated that “the assets valued pursuant to the business are marital and subject to division” and “[t]he valuation is included

in the property division to form the basis of [Husband]’s equitable division payment to” Wife (D46 p. 29).

The court stated that

[i]n consideration of the equitable division of the parties’ marital estate, the Court finds that to equalize the division of property set forth above [Husband] shall pay to [Wife] the sum of \$302,300.50. [Husband] shall pay [Wife] the sum of \$150,000.00 towards this obligation within 6 months (180 days) of this Judgment and the remaining \$152,300.50 required to satisfy this obligation shall be paid to [Wife] on or before November 30, 2019. Judgment interest is stayed on this judgment until the 180th day at which time interest shall accrue at the statutory judgment interest rate of 9%.

(D46 pp. 29-30). It further found “that the division of the above-stated assets and debts is fair and equitable under the circumstances and is not unconscionable” (D46 p. 30). It also awarded Wife \$5,000 in attorney fees (D46 p. 30).

Argument

Standard of Review as to All Points

In a judge-trying case, the standard of review from *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976), applies. *In re Marriage of Woodson*, 92 S.W.3d 780, 785 (Mo. banc 2003). The trial court’s judgment will be affirmed “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy*, 536 S.W.2d at 32.

Substantial evidence is that which, if true, has probative force on the issues and from which the factfinder reasonably can decide the case. *Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. App. 2001). This Court will “view the evidence and the reasonable inferences drawn from the evidence in the light most favorable to the judgment, disregard all evidence and inferences contrary to the judgment, and defer to the trial court’s superior position to make credibility determinations.” *Id.*

“In reviewing the trial court’s decision, this Court is primarily concerned with the correctness of the trial court’s result, not the route taken by the trial court to reach that result.” *Trimble v. Pracna*, 167 S.W.3d 706, 716 (Mo. banc 2005). The judgment below “will be affirmed under any reasonable theory supported by the evidence” *Id.*

I. The trial court properly held that the increase in the value of Husband’s business since the parties’ marriage, \$384,695, was a marital asset subject to division.

(Response to Appellant’s Points I and II)

Additional Standard of Review

Husband’s first point argues that the judgment “misinterpret[ed] or misappli[ed] Missouri law” (Brief of the Appellant [“Aplt.Br.”] 11).⁶

A misapplication-of-the-law challenge presupposes that the trial court’s factual findings are correct. *Estate of Elder v. Estate of Pageler*, 564 S.W.3d 742, 748 (Mo. App. 2018). Instead, the question is whether the trial court properly applied the law to the facts it found. *Id.* “A challenge that the trial court erroneously applied the law ... is a separate and distinct challenge from a challenge that one or more factual underpinnings of the judgment are not supported by substantial evidence, or against the weight of the evidence.” *TracFone Wireless, Inc. v. City of Springfield*, 557 S.W.3d 439, 446 n.13 (Mo. App. 2018). Therefore, factual findings not challenged as against the weight of the evidence or lacking substantial evidence are unchallengeable in a point that argues misapplication of the law. *Id.* at 446-47.

Husband’s second point challenges the sufficiency of the evidence. But as no party here sought findings of fact or conclusions of law, “All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached.” Rule 73.01(c).

⁶ The page numbering of Husband’s brief violates Rule 84.06(a)(2), which requires “all pages, including the cover page,” to be “consecutively paginated using Arabic numbers.” Arabic numbers do not begin until his seventh page. Even then, they begin as “2”, not “1”.

Finally, “The trial court has considerable discretion in determining whether, as a result of marital services or labor, non-marital property has increased in value and whether this increase should be determined to be marital property.” *Klaus v. Klaus*, 918 S.W.2d 407, 409 (Mo. App. 1996). This Court “will not disturb the trial court’s decision on such matters without a clear showing of abuse of discretion.” *Id.*

Abuse of discretion is “[t]he most deferential standard of review” and “severely limits the power of the appellate court to reverse or otherwise alter the rulings of the lower court.” *In re Marriage of Stephens*, 954 S.W.2d 672, 678 (Mo. App. 1997). “An abuse of discretion occurs when the trial court’s ‘ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.’” *Dieser v. St. Anthony’s Med. Ctr.*, 498 S.W.3d 419, 436 (Mo. banc 2016) (citation omitted).

“If reasonable persons can differ as to the propriety of the trial court’s action, then it cannot be said that the trial court abused its discretion.” *Hancock v. Shook*, 100 S.W.3d 786, 794 (Mo. banc 2003).

* * *

In his first point, Husband argues that the trial court lacked power to consider the increase in his business’s value during the marriage as marital property subject to division because he began the business before the marriage and it and all its assets remained marital thereafter (Aplt.Br. 11, 13-25). In his second, he argues there was insufficient evidence support such a finding (Aplt.Br. 11, 26-28).

This is without merit. Husband fails to view the evidence in the light most favorable to the trial court's judgment. Viewing the evidence in the light most favorable to its judgment, there was ample evidence that from the very beginning of the marriage Husband contributed marital assets, including the business' main building, hundreds of thousands of dollars of marital funds, and Wife's labor as key instruments in his business, transmuting any increase in his equity in the business into marital property. Alternatively, there was ample evidence that the business was Husband's alter-ego, allowing its marital value to be divided, too.

This Court should affirm the trial court's judgment.

A. Under § 452.330.2(5), R.S.Mo., when marital assets and a wife's uncompensated labor are contributed to a husband's otherwise pre-marital business and cause its value to increase during the marriage, that increase is a marital asset subject to division.

Section 452.330, R.S.Mo., lays out how property is deemed marital or nonmarital in a dissolution of marriage proceeding:

All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation or dissolution of marriage is presumed to be marital property regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection 2 of this section.

(Emphasis added). So, this statute

creates a presumption that all property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation or dissolution is marital, regardless of whether title is held individually or jointly. This presumption can be overcome,

however, by showing that the property was acquired by one of the exceptions listed in § 452.330.2.

In re Marriage of Looney, 286 S.W.3d 832, 837 (Mo. App. 2009).

One of those excepted methods of acquisition described in § 452.330.2 is “[t]he increase in value of property acquired prior to the marriage ..., **unless marital assets including labor, have contributed to such increases** and then only to the extent of such contributions.” *Id.* at .2(5) (emphasis added). Section 452.330.2, read with its heading, states, “marital property’ means all property acquired by either spouse subsequent to the marriage *except*” these means. (Emphasis added).

So, when one spouse owns property before a marriage, but marital funds contributed to that property increase its value, that increase is “marital equity” subject to division. In *McKown v. McKown*, for example, the husband bought what became the marital residence before the marriage, but income acquired during the marriage – a marital asset – was used to pay the mortgage. 108 S.W.3d 180, 184-85 (Mo. App. 2003). The trial court figured out what that proportion was and awarded it to the wife as her “marital real estate equity.” *Id.* This Court affirmed:

Using the “source of funds” rule from [*Hoffman v. Hoffman*, 676 S.W.2d 817 (Mo. banc 1984)] in the present case, the key to the analysis is whether the property was wholly acquired prior to the marriage. 676 S.W.2d at 823. Property is considered “acquired” as it is paid for. *Id.* at 824. So, in this case, [the wife] is entitled to a marital interest in the property proportionate to the increase in value of the property as it was acquired through the use of marital funds.

Id. at 184.

Missouri courts have applied this principle many times to affirm divisions of the marital portion of one spouse's otherwise nonmarital business equity. It is well-established that if a husband owns an interest in a business before the marriage but during the marriage marital assets, including the wife's labor, are contributed to the business, the wife acquires an interest in the business as marital property, and the otherwise nonmarital increase in the business's value transmutes to marital property. *See, e.g.:*

- *In re Marriage of Hillis*, 313 S.W.3d 643, 645 (Mo. banc 2010) (where wife worked for husband's separate corporation, managed its day-to-day operations, and business's value increased from \$20,000 at beginning of marriage to \$450,000 at end, trial court properly found the increase was marital property subject to division and properly awarded wife \$100,000 of it);
- *Rhodus v. McKinley*, 16 S.W.3d 615, 618-19 (Mo. App. 2000) (where husband sold marital asset to pay off business's debt, trial court properly found that the corresponding increase in the business's value became marital property);
- *Klockow v. Klockow*, 979 S.W.2d 482, 488-89 (Mo. App. 1998) (where husband expended marital funds to support his premarital business during the marriage, the trial court properly held that the increase in the value of that business was marital property subject to division); and
- *Glenn v. Glenn*, 930 S.W.2d 519, 524-25 (Mo. App. 1996) (where wife contributed marital funds to husband's business, trial court properly found wife acquired marital interest in husband's business).

B. Husband contributed hundreds of thousands of dollars of marital funds to his business throughout the marriage, beginning one month after the marriage the business operated rent-free out of a building the parties purchased with marital funds, and Wife’s uncompensated work for the business was instrumental in its success, all making its \$384,695 increase in value since the marriage marital property subject to division.

1. Because no party asked the trial court to make findings of fact and conclusions of law on any issue, the only question is whether evidence viewed in a light most favorable to the trial court’s conclusion supported that conclusion.

Husband faults the trial court for not making specific findings why it held the increase in the value of Alex’s Plumbing during the marriage was marital property (Aplt.Br. 20). But he did not request findings of fact or conclusions of law below at all, let alone on this specific issue (D1 pp. 21-23).

Therefore, under Rule 73.01(c), this Court must consider this issue “as having been found in accordance with the result reached.” Rule 73.01(c). This means the trial court is “presumed to have believed the testimony and evidence consistent with its decree.” *Mills v. Mills*, 939 S.W.2d 72, 75 (Mo. App. 1997). The only question now is whether the evidence viewed in the light most favorable to the trial court’s judgment supports its conclusion. *Id.*

While Husband couches his first point in terms of “misapplication of the law” and his second in terms of “sufficiency of the evidence,”⁷ what he

⁷ Husband includes in the record on appeal only a handful of the dozens of exhibits admitted at trial. This dooms Husband’s argument that substantial evidence did not support the judgment. *Bridgeman v. Bridgeman*, 63 S.W.3d 686, 692 (Mo. App. 2002). Any “exhibits admitted into evidence at trial” that “are not filed on appeal ... are presumed to support the trial court’s findings.” *In re J.M.*, 1 S.W.3d 599, 600 (Mo. App. 1999).

really is arguing is that there was insufficient evidence that under § 452.330.2(5), marital assets including Wife's labor contributed to that increase so as to make it marital.

Husband's argument fails to view the evidence in the light most favorable to the trial court's judgment, taking all evidence and inferences in favor of the judgment's conclusion as true and disregarding all contrary. So viewed, there was ample evidence that marital assets contributed to the increase in the business's value so as to make that increase marital property.

2. Beginning one month after the marriage, Alex's Plumbing operated rent-free out of a marital building the parties purchased with marital funds.

Husband's argument that the increase in the value of Alex's Plumbing during the marriage was not marital property focuses solely on Wife's work for the business (Aplt.Br. 17-19). He argues that "Wife's clerical work for the business" does not suffice to make the increase marital because "[a]ccording to the judgment, Wife worked 10-12 hours per week for the business and Husband hired a full time employee to cover that work after the parties separated. That is the sum total of Wife's evidence on this" (Aplt.Br. 20).

This fails the standard of review. To begin with, Husband ignores all the evidence – including his own admissions – of his contribution of marital assets throughout the marriage to the business.

First, Husband ignores that in November 2013, only one month after the marriage, the parties purchased a building using marital funds that Husband admitted Alex's Plumbing used as its "office and warehouse building" where it stored its equipment and material (Tr. 90, 298, 329). The

building was purchased during the marriage with marital funds from a joint savings account the parties had and was titled in both parties' names (Tr. 90). It was worth \$115,000 (Tr. 298; Exhibit 131).

Husband gave no evidence that Alex's Plumbing ever paid the parties rent for its use of the building. Indeed, at trial he even tried to claim that the building belonged to the business, even though he never had listed it on any business tax return (Tr. 331; Exhibit 20).

That means that the parties contributed a piece of marital real estate worth \$115,000, bought from marital assets, for the business to use rent-free from the very beginning of the marriage through the time of trial. Viewing the evidence in the light most favorable to the trial court's judgment, taking all evidence and inferences in its favor as true and disregarding all contrary, this was a contribution of marital assets to the increase in the value of the business – the \$115,000 or corresponding rent that it otherwise would have paid for the building, making that portion of the increase marital. § 452.330.2(5). Notably, the trial court divided the building to Husband (D46 pp. 28-29). (And Wife testified Husband regularly used other property they purchased during the marriage for his business, too (Tr. 112). This included the parties' home office, where Husband usually did his business, too, but for which there was no evidence the business ever paid the parties rent (Tr. 88))

3. Husband admitted he transferred hundreds of thousands of dollars of marital funds to the business during the marriage.

Second, Husband ignores his admission that throughout the marriage, he used the parties' marital joint savings account as the business's piggy bank to fund Alex's Plumbing (Tr. 287, 321). He admitted that when

business was down, he would take money out of the parties' savings account and transfer it to Alex's Plumbing to pay business bills and to keep the business afloat (Tr. 287). He stated flat-out that "if there's no money in Alex's Plumbing account, I take it from this account. And I move it to Alex's Plumbing account to pay my bills. **I've always done that, and I continue – that's how I run my business**" (Tr. 287-88) (emphasis added).

When asked, if he ever had any communication with the Wife that in any way indicated she agreed to liquidating money from the parties' savings account to pay the business's bills, he responded "**It's not hers; it's mine,**" and stated, "I don't have to talk to anybody about how I run my business" (Tr. 321) (emphasis added). This is untrue. The parties' savings account was both of their money, held in both names, and so was marital property. § 452.330.2. Husband therefore admitted that throughout the marriage – "always", in his words – he took money from the parties' joint savings account and moved it to Alex's Plumbing to pay his bills.

A reasonable inference is that this amounted to hundreds of thousands of dollars throughout the marriage. Notably, Husband did not keep any actual financial accountings of his business (Tr. 13). But during trial, it came to light that he had taken the parties' \$250,000 savings account and contributed all but some \$50,000 of it to his business (Tr. 60, 93; Exhibit 13). Given that Husband testified his was something he "always" did throughout the marriage and given his failure to keep real accounting of his business, it is reasonable to infer he similarly transferred hundreds of thousands of dollars of the parties' money to the business during the marriage.

4. Wife's uncompensated work for the business was worth \$20,800 per year in salary and was instrumental in the business's success, including obtaining its most lucrative contract.

Finally, Husband heavily downplays the evidence of Wife's work – her “instrumental” work, in the trial court's words (D46 pp. 17-18) – for the business. He says all Wife can show is that she “worked 10-12 hours per week for the business and Husband hired a full time employee to cover that work after the parties separated” (Aplt.Br. 20). That is untrue.

Wife worked for Alex's Plumbing for years, beginning in 2006, long before the October 2013 marriage (Tr. 86). She ensured all its licenses were current (Tr. 86). She got the business an EIN because she noticed it otherwise appeared the business was committing fraud by using Husband's Social Security number on documents instead (Tr. 86). She registered the business for bidding on minority jobs (Tr. 88). She got the business a Department of Transportation identification number to avoid it incurring tickets costing \$2,000 apiece (Tr. 86-87). She ensured the insurance was paid on time (Tr. 87). She prepared all the business's invoice and bids (Tr. 87).

Wife was equally instrumental in getting Alex's Plumbing the “Keep Out of the Rain” contract, its most lucrative contract, worth between \$4.5 million and \$5.5 million over seven years (Tr. 43). It was this that made the business's income increase significantly (Tr. 166) and enabled the parties to save \$20,000 per month for a period and to buy new luxury vehicles (Tr. 41-43). Wife ensured the business had performance bonds in place for the contract, drafted and delivered to the City the business's 47-page-long bid in

a precise format, and handled pay applications once the contract was awarded and the work begun (Tr. 87-88, 122).

Therefore, it was a reasonable inference that Wife's work for the business was instrumental in it obtaining the success it did, particularly from the Keep Out of the Rain contract, which Husband testified continued even at the time of trial (Tr. 325). Without Wife's work, Alex's Plumbing would be an unlicensed, unbonded, uninsured, disorganized mess, and without its lucrative municipal contract worth upwards of \$5 million.

Moreover, Husband never compensated Wife for her work in the business at all (Tr. 213). And while Wife only had to spend 10-12 hours per week working for the business to achieve her level of success, after the separation Husband was forced to hire a full-time employee who is being paid \$400 per week or \$20,800 per year (Tr. 214, 326). So, it is a reasonable inference from the evidence that besides her key to the business's success, Wife's unpaid labor itself was worth \$20,800 per year – or \$83,200 over the four years of marriage.

5. Under § 452.330.2(5), all of this made for sufficient evidence that the entirety of the \$384,695 increase in the value of Husband's business during the marriage was a marital asset subject to division.

Therefore, under § 452.330.2(5), there was ample evidence that the entirety of the \$384,695 increase in the value of Husband's business since the date of the marriage was marital property because it was entirely the product of the contribution of marital assets to the business. The parties contributed the use of a \$115,000 building rent-free, hundreds of thousands of dollars of marital savings, and Wife's hard work worth at least \$83,000 in salary and

hundreds of thousands more in keeping the business ship-shape and getting it work, including its most lucrative contract. Husband's argument otherwise, which ignores all of this and depends instead on contrary evidence and inferences, is without merit.

Because Husband concentrates solely on Wife's work for the business, his argument primarily depends on *Meservey v. Meservey*, 841 S.W.2d 240, 245-46 (Mo. App. 1992), and *Watkins v. Watkins*, 924 S.W.2d 542, 545 (Mo. App. 1996), for authority, as those decisions dealt only with a claim that one spouse's work for the other's business entitled the spouse to the increase in the business's value during the marriage. That is, under these authorities, "a marital 'interest' in separate property can require proof that a spouse contributed substantial services toward the property which led to an increased value of that property" *McKown*, 108 S.W.3d at 184 (citing *Meservey*, 841 S.W.2d at 246).

But as this Court noted in *McKown*, even the Court in *Meservey* held that proving a contribution of substantial services "is not needed ... when 'the marital partners sacrifice marital funds ... in acquiring the increase.'" 180 S.W.3d at 184 (quoting *Meservey*, 841 S.W.2d at 246). Under *Meservey* and *Watkins*, only if "the increase in value of the property was ... due ... only to 'general economic conditions'" unaffected by the other spouse or marital property is it not marital. *Id.* (quoting *Hoffman*, 646 S.W.2d at 824).

Here, as with the mortgage in *McKown*, the business's debt in *Rhodus*, and the business's operations in *Klockow* and *Glenn*, the parties directly contributed marital assets to Husband's business: a rent-free building to use

for its operations and hundreds of thousands of dollars from the parties' savings account. *Meservey* and *Watkins*, which do not concern direct contributions of assets, are inapposite.

Moreover, even under *Meservey* and *Watkins*, as the Supreme Court more recently applied in *Hillis*, Wife's contributions to the business were sufficient to make the increase in Husband's business's value marital property. The factors Wife had to show in order to make her contributions to the business count toward making the increase in its value marital are: "(1) a contribution of substantial services; (2) a direct correlation between those services and the increase in value; (3) the amount of the increase in value; (4) performance of the services during the marriage; and (5) the value of the services, the lack of compensation, or inadequate compensation." *Hillis*, 313 S.W.3d at 645.

In *Hillis*, the husband owned 100% of a funeral home corporation since before the marriage, which the parties agreed generally was his separate, non-marital property. *Id.* at 645. The wife worked at the funeral home, conducted its business, participated in refinancing its debt, managed the office, made capital improvements, and introduced new products, and received some compensation for all this but which the trial court found was inadequate. *Id.* at 644-45. The trial court held that the business's increase in value was marital property and even awarded \$100,000 of that increase to the wife. *Id.*

The husband appealed, and the Supreme Court affirmed. *Id.* "All of Wife's contributions were factors that resulted in an increase in the value of

the funeral home from between \$0 and \$20,000 at the beginning of the marriage to between \$450,000 and \$600,000 at the end of the marriage.” *Id.* at 645. Viewing the evidence in the light most favorable to the trial court’s judgment, the wife had contributed substantial services to the corporation during the marriage, there was a direct correlation between those services and the increase in the corporation’s value, there was evidence of the amount of the increase in value, and the wife’s compensation had been inadequate. *Id.* That was enough. *Id.*

The same is true here. While Alex’s Plumbing was not as detailed a business as the funeral home in *Hillis*, Wife’s contributions were just as important. She ensured the business was licensed, insured, bonded, able to bid, billing and receiving income, and properly run, and was instrumental in obtaining its most lucrative contract. This is in direct contrast to *Meservey* and *Watkins*, in which the non-owner spouses’ contributions were meager or nonexistent. *See Meservey*, 841 S.W.2d at 246 (wife’s only contributions to family farm were taking meals to workers, feeding livestock, moving farm machinery, and helping locate parts for repairs); *Watkins*, 924 S.W.2d at 545 (no evidence that husband contributed to funeral home business; husband only argued the wife’s salary she paid herself was inadequate, which was insufficient to prove the increase in the business was marital).

It is a reasonable inference from the evidence that besides the parties’ contribution of the building and the marital funds to the business, as in *Hillis* the business’s increase in value during the marriage also was attributable to Wife’s efforts. Viewing the evidence in the light most favorable to the trial

court's judgment, Wife had contributed substantial services to the corporation during the marriage, there was a direct correlation between those services and the increase in the corporation's value, there was evidence of the amount of the increase in value, and Wife's compensation – \$0 – was inadequate.

Under § 452.330.2(5), there was sufficient evidence that marital assets contributed to Husband's business made its entire increase during the marriage marital property subject to division. As in *Hillis*, *Rhodus*, *Klockow*, and *Glenn*, this Court should affirm the trial court's judgment.

C. The evidence also supports the trial court finding that the business was Husband's alter-ego and declaring its increase in value marital property subject to division for that reason, too.

Husband concedes that the trial court might have found that Alex's Plumbing was his alter-ego as an alternative basis for concluding that its increase in value was marital property (Aplt.Br. 22-23). But he argues this does not matter because "[t]he trial court's extensive judgment makes no such findings in this case" (Aplt.Br. 23).

Again, this fails the standard of review. Neither party asked the trial court to make findings on whether or not the business was his alter-ego, so it did not have to. Rule 73.01(a). Therefore, under Rule 73.01(c), this Court must consider this issue "as having been found in accordance with the result reached." Rule 73.01(c). The only question is whether the evidence viewed in a light most favorable to the judgment would support such a finding. *Mills*, 939 S.W.2d at 75.

There was sufficient evidence from which the trial court could find that Alex's Plumbing was Husband's alter-ego. Under Rule 73.01(c), this Court

must presume that the trial court made that finding, too, and for this reason declared also declared the increase in the value of Alex's Plumbing to be his separate, non-marital property.

“[U]nder the alter ego or instrumentality rule, when a corporation comes under the domination of a person such as to have it become a mere instrument of that person, and is really indistinct from the person controlling it, then the corporate form will be disregarded, if to retain it would result in injustice.” *Morgan v. Ackerman*, 964 S.W.2d 865, 870 (Mo. App. 1998). This is true when one spouse owns 100% of a closely held corporation, makes all corporate decisions, and transfers funds freely between the corporation and his personal accounts to pay personal expenses and the corporation, and vice-versa. *Id.* (citing *Boudreau v. Benitz*, 827 S.W.2d 732, 734 (Mo. App. 1998)).

Here, Husband was Alex's Plumbing's sole member and controlled it and all of its corporate decisions (Tr. 27). He kept no books (Tr. 13). He decided who to hire and fire. Indeed, he was emphatic that it was “his” business and he could do whatever he wanted with it, defending his use of marital funds to keep the business afloat without telling Wife by saying “It's not hers; it's mine,” and stated, “**I don't have to talk to anybody about how I run my business**” (Tr. 321) (emphasis added).

Alex's Plumbing was indistinct from Husband. As in *Morgan* and *Boudreau*, viewing the evidence in the light most favorable to the judgment, taking all evidence and inferences in its favor as true and disregarding all contrary, the court properly could find that Husband's business was his alter ego. This Court should affirm the trial court's judgment for this reason, too.

II. There were no prejudicial material inconsistencies in the trial court's findings.

(Response to Appellant's Point III)

In his third point, the argument over which comprises less than two pages and cites hardly any authority, Husband argues that findings in the trial court's judgment "contain material inconsistencies that prevent adequate review" (Aplt.Br. 12, 29-30). He says this is because while the trial court accepted Mr. McLain's valuation of the business using the market approach as being \$348,695, it once called this an "asset approach" in a chart and found that these assets "are marital and subject to division" (Aplt.Br. 30).

A. Husband's third point is not preserved for review because he did not raise it in his motion to amend the judgment.

This is without merit. First, this argument is not preserved for review because he never brought it to the trial court's attention in his motion to amend the judgment. Husband seems to agree he did not raise this issue below, but cites *Courtney v. Courtney*, 550 S.W.3d 522, 527 (Mo. App. 2017), for the proposition that "[w]hether a dissolution judgment contains inconsistent findings that render appellate review impossible is a legal question this Court reviews in the first instance" (Aplt.Br. 29). While the Court in *Courtney* did review whether findings in a judgment were inconsistent, it did not state that this claim did not have to be preserved for appeal. *Id.*

Rule 78.07(c) provides that "In all cases, allegations of error relating to the form or language of the judgment ... must be raised in a motion to amend the judgment in order to be preserved for appellate review." So, while generally, "in cases tried without a jury" no post-judgment motion is

“necessary to preserve any matter for appellate review,” the one exception is as “provided in Rule 78.07(c).” Rule 78.07(b).

It is well-established that this includes a claim that the trial court made inconsistent findings, which must be included in a motion to amend the judgment to be preserved for appeal. *See Moyers v. Lindenbusch*, 530 S.W.3d 646, 650 n.4 (Mo. App. 2017) (issue of “potentially inconsistent language” in parenting plan was not preserved for appeal where the appellant “did not file a motion to amend the judgment” and so “the issue [was] not properly before this Court”); *In re Marriage of Brown*, 310 S.W.3d 754, 757 (Mo. App. 2010) (“allegations that the [trial] court ... made internally inconsistent findings” were “not preserved for appeal” where the appellant did not include the allegation “in a Rule 78.07(c) motion to amend the judgment”).

Here, while Husband filed a motion to amend the judgment, he did not make any argument in it that any of the trial court’s findings were internally inconsistent (D47). Indeed, he accepted that the trial court found the “that the marital value of Alex’s Plumbing is ‘\$348,695’” (D47 p. 8). Therefore, Husband’s argument made for the first time on appeal that there were any inconsistencies in the trial court’s findings is not preserved. The Court should deny it for this reason alone.

B. If Husband’s third point somehow is preserved, there are no material inconsistencies in the trial court’s finding that the marital value of the increase in Husband’s equity in his business is \$348,695.

Even if it were preserved, Husband’s argument would be without merit. Mr. McLain gave two valuations for the business today: \$475,506 using a net asset approach or \$466,722 under a market approach (Tr. 16). He said that

the most appropriate valuation approach in this case is “a combination of the guideline transaction approach using the revenue multiples, that includes the deposits, of 466,722” (Tr. 22-23). He also concluded that the business was worth \$117,757 as of the date of the marriage under the asset approach or \$78,225 under the market approach (Exhibit 2 pp. 16-17). The trial court found “that the marital value of Alex’s Plumbing is \$348,965.00” by accepting the market approach value for the present and the asset approach value for the time of the marriage and subtracting one from the other: “(\$466,722-\$117,757)” (D46 p. 22).

That the trial court once later called this same \$348,695 number an “asset approach” valuation in a chart (D46 p. 27) is at most a clerical error, and hardly material. Husband does not explain how this is a material inconsistency (Aplt.Br. 30), nor could he given that the trial court plainly explained how it arrived at the \$348,695 number (D46 pp. 22-23).

Similarly, that the trial court stated that “the assets valued pursuant to the business are marital and subject to division. The valuation is included in the property division to form the basis of [Husband’s] equitable division payment” to Wife (Doc. 46, p. 29) is not an inconsistency either, let alone a material one. The trial court plainly stated that “the marital value of Alex’s Plumbing is \$348,695” (D46 p. 22). That it later stated this valuation was “marital and subject to division” and was “included in the property division” was consistent with its earlier finding about what the “marital value” was.

The Court should affirm the trial court’s judgment.

III. The trial court properly considered the parties' mortgage on the marital home in its division of the assets and debts, and its resulting decree that Husband pay Wife an equalization payment of \$302,300.50 was proper under the factors in § 452.330.1, R.S.Mo., and was neither inequitable nor unconscionable.

(Response to Appellant's Point IV)

Additional Standard of Review

This Court only will interfere with a trial court's division of property if it "is so 'heavily and unduly weighted in favor of one party as to amount to an abuse of discretion.'" *Gendron v. Gendron*, 996 S.W.2d 668, 670 (Mo. App. 1999) (citation omitted).

Abuse of discretion is "[t]he most deferential standard of review" and "severely limits the power of the appellate court to reverse or otherwise alter the rulings of the lower court." *Stephens*, 954 S.W.2d at 678. "An abuse of discretion occurs when the trial court's 'ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.'" *Dieser*, 498 S.W.3d at 436 (citation omitted).

"If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Hancock*, 100 S.W.3d at 794.

* * *

In his fourth point, the argument over which comprises barely more than a page and cites almost no authority, Husband argues that the trial court should not have ordered him to pay Wife \$302,300.50 because to reach

this amount the court failed to subtract the mortgage on the marital home from the net value of the marital estate (Aplt.Br. 12, 31-32).

This, too, is without merit. Husband's argument is based solely on a chart the trial court provided midway through its judgment. He presumes that the trial court intended to give each party 50% of the net value of the marital estate and that by not subtracting the \$234,544 mortgage from the net value of the estate on that chart, the trial court erred in calculating the equalization payment. But this ignores that the trial court then specifically laid out, paragraph-by-paragraph, exactly what it was finding and concluding each piece of property was worth and to whom it was being given, and then ordered Husband to make an equalization payment of \$302,300.50 that it found was not inequitable or unconscionable (D46 pp. 28-30).

The trial court was not required to split the net marital estate 50/50, and while it may have considered doing so in its chart it plainly elected not to in the end in its full written findings. Viewing the evidence in the light most favorable to the trial court's judgment, that it awarded Wife a greater percentage of the marital estate than it did Husband was appropriate under the circumstances and was not an abuse of discretion. And this is especially true considering Husband brought this alleged error to the trial court's attention (D47 p. 12) but "after careful consideration" it denied his motion (D48).

Section 452.330.1, R.S.Mo., requires that the trial court "divide the marital property in such proportions as the court deems just" This only means the division must be "equitable." *In re Marriage of Holden*, 81 S.W.3d

217, 225 (Mo. App. 2002). To determine the appropriate division, the trial court considers these factors:

- (1) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children;
- (2) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
- (3) The value of the nonmarital property set apart to each spouse;
- (4) The conduct of the parties during the marriage; and
- (5) Custodial arrangements for minor children.

§ 452.330.1.

This means that a 50/50 split is not required and, per these factors, one party can be awarded a greater percentage of the marital estate than the other. *See, e.g., Woodard v. Woodard*, 201 S.W.3d 557, 561-62 (Mo. App. 2006) (affirming 60/40 split); *Schroeder v. Schroder*, 59 S.W.3d 607, 610-11 (Mo. App. 2001) (affirming 66/34 split). “The division of marital property does not have to be equal, but need only be ‘fair and equitable given the circumstances of the case’”, and “[t]hat one party is awarded a higher percentage of marital assets does not per se constitute an abuse of the trial court’s discretion.” *Id.* at 610 (citations omitted).

Here, with the net marital estate being \$833,001 (D46 p. 27) and Wife receiving an equalization payment of \$302,300.50 plus \$231,477 in net property, totaling \$533,777.50, this means that Wife received about 64% of the marital estate and Husband received about 36% (\$533,777.50 divided by 833,001 equals about 64.05%). As no parties requested findings of fact or

conclusions of law, this Court presumes the trial court made all findings necessary to reach this determination, and the only question is whether the evidence viewed in a light most favorable to its judgment would support that, too. *Supra* at pp. 24-25.

Here, viewing the evidence in the light most favorable to the trial court's judgment, a 64/36 split in favor of Wife was fair and equitable under the circumstances per the § 452.330.1 factors:

- **The economic circumstances of each spouse at the time the division of property is to become effective.** Wife was in worse economic circumstances, being unemployed (Tr. 33), whereas Husband continued to own and operate Alex's Plumbing, which continued on its lucrative contract from the City of Kansas City (Tr. 329).
- **The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker.** While Wife had contributed to grow Alex's Plumbing, she had primarily been a stay-at-home homemaker. This enabled Husband to work at his business and earn money while Wife raised the parties' children.
- **The value of the nonmarital property set apart to each spouse.** Husband's lucrative business was set aside to him, whereas Wife received no nonmarital property of any value (D46 pp. 28-30).
- **The conduct of the parties during the marriage.** Husband committed misconduct during the marriage. The dissolution was precipitated because he had committed infidelity (Tr. 38-39). The trial

court found he had dissipated the parties' savings account in violation of both a court order and his own promise to a special master, all without Wife's or the court's knowledge or consent (D46 pp. 23-24). He did this while failing to pay either child support or Wife's vehicle, which was repossessed as a result (D46 pp. 25-26). He intentionally and without Wife's or the court's knowledge squandered \$250,000 in marital assets (D46 p. 26).

- **Custodial arrangements for minor children.** While the parties have joint legal and joint physical custody of the children, Wife's address is the children's for mailing and educational purposes, with Father only having parenting time Wednesdays, every other weekend, 14 days in the summer, and alternating holidays (D46 pp. 8, 11).

Therefore, the trial court did not abuse its discretion in ordering Husband to pay Wife an equalization payment that made the division of the marital estate 64/36 in Wife's favor. *Schroeder*, 59 S.W.3d at 610. It "does not make the distribution of the marital property so 'heavily and unduly weighted in favor of one party'" *Id.* (citation omitted).

Husband's argument otherwise ignores \$452,330.1 and instead rests entirely on his self-serving interpretation of the chart in the trial court's judgment. But besides that chart, the trial court separately made detailed findings as to which party each of the pieces of property at issue should be awarded, what the value of that property was, including both the value of the marital home and the mortgage on it (D46 pp. 18, 28-30). Then, after making those findings, it ordered that

[i]n consideration of the equitable division of the parties' marital estate, the Court finds that to equalize the division of property set forth above [Husband] shall pay to [Wife] the sum of \$302,300.50. [Husband] shall pay [Wife] the sum of \$150,000.00 towards this obligation within 6 months (180 days) of this Judgment and the remaining \$152,300.50 required to satisfy this obligation shall be paid to [Wife] on or before November 30, 2019. Judgment interest is stayed on this judgment until the 180th day at which time interest shall accrue at the statutory judgment interest rate of 9%.

(D46 pp. 29-30) (emphasis added). It then expressly found “that the division of the above-stated assets and debts is fair and equitable under the circumstances and is not unconscionable” (D46 p. 30).

Accordingly, regardless of whatever it noted on the chart, it clearly was ordering that Husband pay Wife \$302,300.50 and that this was fair and equitable and not unconscionable. This Court must presume that it therefore intended to divide the marital estate 64/36 in Wife's favor. Indeed, this presumption is compounded that by when Husband brought his alleged “math error” to the trial court's attention in his post-judgment motion (D47 p. 12), the court “after careful consideration” denied his motion (D48).

The only question is whether the evidence viewed in a light most favorable to the trial court's judgment supported the court ultimately deciding on this 64/36 division of the marital estate. Under § 452.330.1's factors, taking all evidence and inferences in favor of this determination as true and disregarding all contrary, there plainly was ample support for it. Moreover, Husband does not argue otherwise, even as an alternative.

The division of the marital estate was fair, equitable, and a proper exercise of the trial court's discretion. This Court should affirm its judgment.

Conclusion

The Court should affirm the trial court's judgment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR RESPONDENT
SHELBIE TORRES

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 41, as this brief contains 10,059 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on November 12, 2019, I filed a true and accurate Adobe PDF copy of this brief of the respondent via the Court's electronic filing system, which notified the following of that filing:

Mr. Anthony W. Bonuchi
Bonuchi Law, LLC
601 Walnut Street, Suite 300
Kansas City, Missouri 64106
Telephone: (816) 944-3232
Facsimile: (816) 944-3233
anthony@bonuchilaw.com

Counsel for Appellant
Alejandro Torres

/s/Jonathan Sternberg
Attorney