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NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

JAN 31 2024

JOHN D. HADDEN
CLERK

IN RE THE MARRIAGE OF:

RYAN KNIGHT,

Petitioner/Appellee,

vs.

LINDSEY KNIGHT,

Respondent/Appellant.

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Case No. 120,069

APPEAL FROM THE DISTRICT COURT OF
GARFIELD COUNTY, OKLAHOMA

HONORABLE PAUL WOODWARD, DISTRICT JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Russell N. Singleton
Enid, Oklahoma — For Petitioner/Appellee

Eric N. Edwards
Enid, Oklahoma — For Respondent/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Lindsey Knight appeals various provisions of a divorce decree ordered by the district court in the dissolution of her marriage to Ryan Knight. On review, we affirm the court's decisions, with the exception of remanding with instructions to enter a support alimony arrearage of $1,450. We also remand for the entry of an order requiring that Ryan disclose his work schedule as soon as

it is practically known, in order that the dates he will exercise his visitation may be determined in advance.

I.

Ryan Knight filed an initial petition for dissolution of marriage and an application for temporary order in February 2020. The couple had been married for approximately ten years and had one minor child, M.K. Lindsey answered in August 2020 with her reply, counterclaim, and application for temporary order. The court held an initial hearing on temporary order provisions that same month, giving custody to Lindsey, visitation to Ryan, and ordered temporary support of $500 per month.

Counsel could not agree on journal entry, and, in October 2020, Ryan filed a motion to settle. The court set hearing on this motion to coincide with trial of the main issues. No written temporary order is contained in the record or shown on the docket sheet. The trial took place over three days, consisting of an initial hearing in January 2021 (of which there is no transcript) and hearings in March 2021 and April 2021. A fourth hearing was scheduled for May but was replaced by a written submission of closing arguments which are part of the record.

The briefs inform us that each party submitted a proposed decree to the court after trial, and that the trial court favored Ryan's proposed decree, but asked by letter for some changes to be made. None of these communications are part of the record, however. The court held status hearings on the parties' progress in reaching an acceptable decree on May 28 and June 15, but they were unable to agree. Ryan then filed a motion to settle journal entry on his proposed

decree. Lindsey filed a response contesting the insurance provisions of Ryan's proposal, its division of the marital home, its lack of a "proper contact order," its lack of a legal description of the family home,[1] and its award of alternating child tax credits beginning with Ryan in 2020. On December 12, 2021, the court issued a final decree. Lindsey now appeals various aspects of that judgment.

II.

A dissolution of marriage action is one of equitable cognizance in which the trial court has discretionary power when dividing the marital estate. *Teel v. Teel*, 1988 OK 151, 766 P.2d 994. Our standard of review for the issues raised by both appeals requires us to review all of the evidence presented to the trial court and to sustain the trial court's judgment unless the trial court abused its discretion or unless the court's findings were clearly against the weight of the evidence. *Hough v. Hough*, 2004 OK 45, 92 P.3d 695.

III.

A.

Lindsey first argues that the court erred in stating in the decree that both parents are "fit and proper parents to be awarded custody." R. 156. Lindsey makes it clear in her brief that she does not consider Ryan a fit parent.[2] Exactly what legal detriment Lindsey sufferers by this finding is not fully explained, however. Lindsey states that it may "promote an improper urge to claim that the

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[1] This was corrected in the final decree.

[2] During trial Lindsey agreed, however, that Ryan was a "good dad." Tr. (March 2, 2021), 94.

Gibbons test would not apply in a future motion to modify custody." The *Gibbons* test applies, however, in *all* applications to modify custody and requires the following:

> (a) that, since the making of the order sought to be modified, there has been a permanent, substantial and material change of conditions which directly affect the best interests of the minor child, and (b) that, as a result of such change in conditions, the minor child would be substantially better off, with respect to its temporal and its mental and moral welfare, if the requested change in custody be ordered.

Gibbons v. Gibbons, 1968 OK 77, ¶ 12, 442 P.2d 482, 485. It is not made inapplicable by any prior finding of parental fitness, and Lindsey would be free to argue the issue of Ryan's fitness as part of the "best interests" inquiry if such a material change takes place.

Lindsey further argues that the finding "serves no valid/legal purpose." *Brief-in-chief*, 14. These findings are commonly made as part of a decree involving children.[3] Although we find no authority that requires a court to find that a parent is "fit" or "unfit" in a divorce decree, we also find no principle of law restricting the court's ability to make such a finding. Similarly, we find no record sufficient to show that the court's decision that both parties were "fit and proper parents to be awarded custody" was arbitrary, without a legal basis, or clearly against the weight of the evidence.

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[3] *See e.g.*, *Johnson v. Wingert*, 2011 OK CIV APP 128, ¶ 3, 268 P.3d 145, 147 (temporary order gave mother primary residential custody and father standard visitation but recognized that "both parents are fit to have joint custody"); *Polson v. Boyd*, 2018 OK CIV APP 42, ¶ 5, 417 P.3d 1288, 1289; *Marriage of Bilyeu v. Bilyeu*, 2015 OK CIV APP 58, ¶ 16, 352 P.3d 56, 61.

Lindsey finally argues that the finding was contrary to a stipulation by the parties or a prior finding of the court. The stipulation was that custody would be awarded to Lindsey. Tr. (March 2, 2021), 7. This does not constitute a stipulation that Ryan was "unfit." The "prior finding of the court" was the temporary order that Lindsey be granted custody during the pendency of the divorce. It contains no finding of unfitness and cannot be interpreted as carrying one. Further, even if it did, such a finding could be overcome by evidence taken at trial. We find no error on this issue.[4]

B.

Lindsey's next proposition of error is that the visitation schedule set in the decree is "vague," "ambiguous," and places an "undue burden" on Lindsey, and hence constituted an abuse of discretion. *Brief-in-chief*, 14. The basic problem is that Ryan's work schedule is not fixed and often involves work in Alaska. As such, a standard, fixed visitation schedule would result in substantially less visitation than was actually ordered because Ryan would be unable to exercise his visitation on many occasions.

The court-ordered visitation schedule attempted to address this problem and states, in part, as follows:

> The non-custodial parent shall be entitled to visitation with the parties' minor child as follows:

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[4] Lindsey's reply brief is clear that she believes an award of sole custody carries an inherent finding that the other parent is not fit. Sole custody may be awarded, however, whenever the court finds it would be in the best interests of the child to do so. It is entirely possible for a parent to be "fit" but sole custody by another parent to be in the child's best interest.

1) WEEKS:

a) Every other weekend from Friday at 3:00 p.m. to Monday at 8:00 a.m.

2) HOLIDAY VISITATION:

a) Even Numbered Years:

i) **Easter**: 6:00 p.m. the day school lets out until 6:00 p.m. the day before school resumes.

ii) **July 4th**: 6:00 p.m. on July 3 until 6:00 p.m. July 5

iii) **Fall Break**: (State Teachers Meeting) 6:00 p.m. Wednesday through 6:00 p.m. Sunday

iv) **Christmas**: 6:00 p.m. on the last day of school through 2:00 p.m. Christmas day

b) Odd Numbered Years:

i) **Christmas:** 2:00 p.m. Christmas day through 6:00 p.m. the day before school resumes.

ii) **Spring Break**: 6:00 p.m. on the last day of school through 6:00 p.m. the day before school resumes.

iii) **Memorial Day**: 6:00 p.m. on Friday through 6:00 p.m. Monday.

iv) **Labor Day:** 6:00 p.m. Friday through 6:00 p.m. Monday

v) **Thanksgiving**: 6:00 p.m. the day school lets out until 6:00 p.m. the day before school resumes.

3) ADDITIONAL VISITATION PERIODS:

a) Mother's Day. The child will spend Mother's Day weekend with the MOTHER from 6:00 p.m. Friday through 6:00. p.m. Sunday each year.

b) Father's Day. The child will spend Father's Day weekend with the FATHER from 6:00 p.m. Friday through 6:00 p.m. Sunday.

c) After School. The non-custodial parent shall have the minor child every day after school until custodial parent is off of work.

4) SUMMER VISITATION:

a) All weeks that he is not working. In the event that Petitioner does not have a schedule that requires him to be away for periods of the summer, he shall have 1/2 of the summer. Unless the parties agree otherwise, the non-custodial's summer visitation shall begin at 6:00 p.m. on the first Sunday after school lets out and alternate weeks until 6:00 p.m. the last Sunday before school resumes.

5) RULES:

a) Right of First Refusal. In the event that either party cannot exercise the authorized time due to work, the other gets to provide care until that parent is off of work.

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e) Switching Weekends. In the event that weekend visitation should be impossible due to weather or other unforeseeable factors, all efforts will be made by the parties to switch weekends. This may result in each parent having two weekends back-to-back.

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f) Cancellation of Visitation. In the event that either party would be unable to exercise their weekend visitation period or a good portion of a holiday period, that party shall so advise the other immediately and advise the other of the problem as soon as possible, and switch weekends in accordance with Paragraph 5(d) above.

R. 168-71.

Lindsey argues that the summer visitation clause is ambiguous in that it allows Ryan summer visitation "[a]ll weeks that he is not working" *or* for "1/2 of the summer." *Id.* at 169. Lindsey is concerned that this clause could be interpreted as allowing Ryan the entire summer, rather than half the summer, if

"he is not working." We agree that this clause is poorly drafted; however, we find it clear that if Ryan is not working, he will have a contiguous half of the summer, and if he is working, he will get up to half of the summer in weekly summer blocks when he is available. Ryan admits as much in his answer, stating, "Contrary to Wife's understanding and argument, Husband only gets 1/2 the summer." *Answer Brief*, 8. We view this concession as resolving this issue. *First Fed. Sav. & Loan Ass'n, Chickasha, Okl. v. Nath*, 1992 OK 129, 839 P.2d 1336, 1342 ("[U]ncontroverted extra-record facts admitted in the briefs may be regarded as supplementing the appellate record."); *State ex rel. Oklahoma Firefighters Pension & Ret. Sys. v. City of Spencer*, 2009 OK 73, 237 P.3d 125, 129 (stating that a matter is moot "when the issue sought to be resolved is no longer part of a lively 'case or controversy' between antagonistic demands").

Lindsey also argues that the schedule is unduly burdensome in that it contains no notice provisions as to Ryan's work schedule. Coupled with the right of first refusal and visitation switching provisions, Lindsey argues that she will never know in advance when Ryan will be exercising visitation, and will be unable to plan any form of summer activities or trips or any predictable schedule for child M.K. This point is well taken. As such, we remand for the entry of an appropriate order requiring Ryan to disclose his work schedule and visitation plans as far in advance as practicable. We otherwise find that the visitation

schedule entered by the trial court is in the best interest of the child and not contrary to the weight of the evidence.[5]

C.

Lindsey argues that the court's child support order for $533.60 per month was contrary to law and against the clear weight of the advice. The court assigned a monthly income of $4,000 to Ryan. Lindsey argued that the court was statutorily required to impute at least $6,667 in monthly income by calculating "the average of the gross monthly income for the time actually employed during the previous three (3) years" pursuant to 43 O.S.2011, § 118B(C)(1)(b).[6]

The question here is not one of law. Although Lindsey interprets 43 O.S § 118B as mandating only one calculation method, § 118B provides several allowable methods and does not mandate one method over another. Lindsey's argument must therefore be that the court abused its discretion in not choosing her preferred method of a three-year average.

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[5] We note here the preface to the visitation schedule, which both parties are directed to review. It states: "The parties hereto shall attempt to work together to attain maximum parental contact between themselves and their minor child. *If the parties cannot agree as to what is reasonable visitation*, then the following shall be implemented without further Order of the Court." *Order*, 14 (emphasis added). That is, the visitation schedule set forth by the trial court *is a back-up plan*. The parties, in every instance are directed to act reasonably to determine an *agreed* visitation schedule that is in the best interest of the child. Further, paragraph (f) of the visitation schedule addresses Lindsey's concerns adequately as to any weekend or holiday visitation. It states: "Cancellation of Visitation. In the event that either party would be unable to exercise their weekend visitation period or a good portion of their holiday period, that party shall so advise the other immediately and advise the other of the problem *as soon as possible*, and switch weekends in accordance with Paragraph (d) above." Both parties are to act reasonably, with the child's interests in the forefront, when scheduling visitation. In nearly every instance, the sooner visitation can be scheduled, the better it is for all parties, including the minor child.

[6] Section (C)(1)(b) was revised in November 2021, after the hearing below, but prior to the entry of the final decree. Both parties appear to agree that application of the prior law is appropriate, and we will thus cite it here.

Discretion in choosing a method of calculating gross income allows the courts some flexibility to fashion orders that can fit the wide variety of situations that may arise in divorce cases. The law allows the court to impute income based on assessment of numerous factors including the average wages and hours worked in the parent's particular industry and geographic area; whether a parent has been determined by the court to be willfully or voluntarily underemployed or unemployed; the lifestyle of the parent including: ownership of valuable assets and resources that appears inappropriate or unreasonable for the income claimed by the parent; and any additional factors deemed relevant to the particular circumstances of the case. 43 O.S. 2011, §118B(C)(3).

Lindsey argues that the evidence required the court to find that Ryan was willfully or voluntarily underemployed because he was making substantially less in 2020 or 2021 than he was in prior years. We find that no such conclusion was compelled by the record before us. The year 2020 was an unusual one for many businesses, and indeed for the world at-large. Having reviewed the full record, we cannot find that the child support award was clearly contrary to the weight of the evidence or that the trial court abused its discretion in determining the parties' income.[7]

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[7] We are sympathetic to Lindsey's concern that Ryan's income may return to, or increase beyond, its pre-2020 level in the future, but the decree does not require Ryan to regularly disclose his income. However, the law already contains a mechanism whereby Lindsey can request a verification of income. *See* 43 O.S. §118I(D)(2). We thus reject Lindsey's argument that it was an abuse of discretion to not include such a clause here. Additionally, we note that the docket sheet for Garfield County Case FD-2020-63 shows that, in December 2022, Lindsey filed a motion to increase child support on the basis that Ryan's income *had* increased. In November 2023 the court granted an increase from $533.60

D.

The decree provides:

> The petitioner and respondent shall be allowed to claim the minor child as a dependent for income tax purposes in alternating years with the respondent claiming the child starting with the calendar year 2020 and the petitioner claiming the child starting with a calendar year 2021, so long as he is current on child support.

R. 164.[8]

Lindsey argues that this distribution constituted an abuse of discretion. Her argument appears to be that federal law prohibits the court's action here, and hence the court did not have the power to make such an allocation. She cites 26 U.S.C. § 152(e)(1)(B) as authority for this proposal. That section provides that if a child

> is in the custody of 1 or both of the child's parents for more than one-half of the calendar year, such child shall be treated as being the qualifying child or qualifying relative of the noncustodial parent for a calendar year if the requirements described in paragraph (2) or (3) are met.

Here, the child is in the custody of one or both parents for more than one-half of the calendar year. Section 152(e)(1)(B) therefore states that a non-

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per month to $1,008.26 per month. The same and associated docket sheets indicate that, in April 2023, Lindsey filed Case No. 121,227, an original action in the Supreme Court seeking an order disqualifying Judge Woodward from the case and an order "vacat[ing] all prior orders" in this case and ordering a "new trial." The Supreme Court denied the writ in June 2023. The parties did not to inform this Court of these filings.

[8] The power to distribute future dependent tax deductions apparently arises from the inherent discretionary powers of a divorce court. *See Wilson v. Wilson,* 1991 OK CIV APP 79, ¶¶ 6-7, 831 P.2d 1, 2 (holding that the trial court has the power to make the allocation and discussing the general recognition of this power nationally).

custodial parent in the situation here may receive the child tax credit if the requirements described in paragraphs two or three are met.[9]

Lindsey cites *White v. Polson,* 2001 OK CIV APP 88, ¶ 11, 27 P.3d 488, 491, as stating a contrary rule, but it does not. Although paragraph eleven of *White* does state that "[t]he IRS Code presumes that the exemption for a dependent child will be taken by the custodial parent," the next paragraph of *White* is quite clear that "[n]evertheless, state trial courts retain their equitable power to award the dependent exemption to either parent regardless of § 152(e)." *Id.* ¶ 12.

Lindsey finally cites to an unidentified principle of *Decker v. Davis*, 2007 OK CIV APP 46, ¶ 17, 162 P.3d 956, 960. *Decker* held that it was an abuse of discretion to allow one party to take "all of the remaining tax exemptions for the child, except for one year." *Id.* That is essentially what Lindsey asks us to do here.

Lindsey next argues that federal law required all the child tax credits to be assigned to her because Ryan does not provide "over 50% of the support for this child." Lindsey proposes that there is a federal prohibition on a parent who pays less than half of a child's support claiming a child tax credit. This interpretation of § 152 is incorrect.

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[9] The paragraph two requirement is met when "the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year." Paragraph three deals with "pre-1985 instruments" and is not appliable here.

The phrase "one-half of such individual's own support" first arises in § 152(c)(1)(D), stating that a child *cannot be a dependent* if the child is providing "over one-half of their own support." The same phrase appears in § 152(d)(1)(C), discussing when a relative can be a "dependent." Section 152(d)(3) notes that a person can be a dependent if half of that person's support is received from multiple other persons, and §152(d)(5) allows combining support from more than one parent to meet the requirement that someone is providing more than one-half of the child's support. Even assuming (without deciding) that Lindsey's assessment of the support percentages is legally correct, nothing in § 152 prevents a parent who pays less than one-half of a child's support from receiving a properly assigned child tax credit. In total, we find no statutory or common law impediment to the court's distribution of the dependent child tax exemption.

Lindsey next argues that the distribution of the exemptions, even if legally allowable, was inequitable. This argument is barred, however, by the doctrine of invited error. The proposed decree Ryan submitted contained an alternating year child tax credit for each parent beginning with Ryan in 2020. Lindsey objected as follows:

> The Court awarded Petitioner the tax exemption for the child in 2020; However, Respondent had already filed her 2020 taxes and claimed the child. Petitioner should thus receive 2021 and odd years if he is current on child support obligations.

R. 146, ¶ 6.

Lindsey specifically requested to the court that Ryan should receive odd year child tax credits—a request the court heeded in the final decree. "A party on appeal in the Supreme Court will not be permitted to secure a reversal of a

judgment upon an error which he has invited and acquiesced in or assume a position inconsistent with that taken in the trial court." *Ferrell v. State ex rel. Dep't of Highways*, 1963 OK 261, ¶ 10, 387 P.2d 129, 132.

E.

Lindsey also argues that the court miscalculated Ryan's child support arrearage. Lindsey's brief states that "[a]n arrearage of $3,673.68 ... should be ordered, reduced to judgment and/or taken from Petitioner's share, if any, of funds held in the trust account of Respondent's counsel." This request is contradicted by the record Lindsey presented at trial, which is as follows.

On August 20, 2020, the court confirmed that temporary support of $500 a month and child support of $525.56 a month had been ordered starting in March 2020. Tr. (proceedings of August 20, 2020), 138-39. Lindsey's Exhibit 8, introduced at the March 2, 2021, hearing showed that Ryan had paid alimony and child support from September 2020 onwards but was in arrearage for March 2020 through August 2020. Exhibit 8 showed that Lindsey was owed $3,673.68 in child support and $3,500 in alimony. This exhibit was subsequently updated as Exhibit 8A at the April 12, 2021 hearing, apparently because Exhibit 8 failed to record the payments Ryan had made in March 2021. The adjusted amounts owed were $3,147.58 and $3,000 respectively.

Lindsey had apparently sold marital property during the pendency of the divorce and disposed of part of the money received. Tr. (August 20, 2020), 138. The remaining funds were ordered placed in her counsel's trust account. Lindsey's counsel then suggested that the parties could "use the $7,000 [in the

trust fund] to get [Ryan] caught up" with back child support. Tr. (August 20, 2020),138. Lindsey's Exhibit 9A showed a check paid to her from the trust fund on January 1, 2021, for $9,118.96. The attached memo indicated that this included $3,673.68 in back child support and $3,500 in back alimony beginning from March 2020. *These are the exact amounts of the arrearages shown on Exhibit 8.* We are therefore entirely at a loss to understand why Lindsey asks us to order the same amount from the trust fund *again.* We reject any argument that Lindsey was still owed $3,673.68 in child support and $3,500 in alimony at the time this appeal was filed.

Lindsey does make another argument, albeit somewhat offhand, that "the trial court's math is uncertain, but it appears Petitioner was given credit for 100% of the funds held in trust, not 50% (same were marital funds)." The argument is essentially this. The parties evidently agreed that Lindsey could take a required portion of the funds in trust as payment for the delinquent support and delinquent temporary alimony. The money that was held in trust was, however, derived from the sale of jointly owned property. Only one-half of it therefore equitably belonged to Ryan. Lindsey's argument is that one half of the disbursement she received was therefore taken from her own funds.

The point is well taken—only $1,836.84 of the $3,673.68 removed for the trust account was Ryan's. The court appears to have recognized this problem, however, finding that Ryan still owed $1,135 in delinquent support, despite Lindsey receiving a full $3,673.68 from the trust fund. *Decree*, ¶ 13. Given that neither the court nor the parties provided any explanation how the figure of

$1,135.50 was derived, and it roughly matches our calculation of the proper amount based on the limited information we are provided,[10] we find no argument sufficient to show that the court abused its discretion in this matter.

F.

The district court ordered $12,000 in support alimony. *Id.* ¶ 12. It also found that Ryan's share of the marital home amounted to $82,500. In paragraph fifteen of the decree, the court then offset the $12,000 in support alimony, the $1,135 in back child support and a $17,535 imbalance in the retirement accounts Ryan owed to Lindsey against this $82,500 obligation, leaving Lindsey owing $49,750 as Ryan's share of the home.[11]

Lindsey cites *Greer v. Greer,* 1991 OK 26, 807 P.2d 791, as prohibiting this decision. Lindsey's brief-in-chief neither analyzes the case, nor cites any paragraph or page number. Her reply brief indicates that she relies on paragraph 13 of *Greer.* It states:

> Support alimony is not alimony in lieu of a division. Support alimony is exactly what its name implies, alimony for support and maintenance. Alimony in lieu of a division is given for satisfaction of a property division obligation. These are distinct obligations and the acceptance of one does not by implication waive the right to the other.

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[10] Ryan appears to have paid $1,836.84 against an actual arrearage of $3,147.58. This indicates to us that he may have owed $1,310.74 in back support, $175.74 more than the court awarded. We are not, however, privy to the court's calculations, and neither party saw fit to provide us with any other calculation of the correct arrearage or any cognizable argument or method by which the correct amount should be derived. As such we decline to disturb the court's decision.

[11] Post-appeal, the court granted Lindsey $10,000 in attorney fees, which were offset against this judgment, reducing it to $39,750. *See* docket sheet, Garfield County Case FD-2020-63.

The rule that support alimony and alimony in lieu of a property division are distinct obligations is clearly established.[12] This case, however, does not involve alimony given in lieu of property division. Rather, the equitable problem raised by Lindsey is this. Support alimony is transitional in nature and designed to "cushion the economic impact of post-marriage transition and a spouse's readjustment to gainful employment." *Ray v. Ray*, 2006 OK 30, ¶ 10, 136 P.3d 634. Lindsey argues that, if it is offset against other non-immediate debts, it cannot perform this function.

We find some validity in this argument. Lindsey's need for transitional support does not apparently disappear simply because her property debt is reduced. That said, we can offer little relief here except to find the trial court should not have made the offset, reinstate the $12,000 in alimony, and increase Ryan's $49,705 share of the home to $61,705. The decree, however, made the property settlement a lump sum judgment as of the day of the decree. Giving $12,000 in alimony to Lindsey but simultaneously increasing the *immediately recoverable* judgment by $12,000 confers no apparent advantage to Lindsey.[13] As such, we find the decision to be within the district court's discretion.

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[12] *See* 43 O.S. § 134 differentiating between the two and noting that, unlike support alimony, payments pertaining to a division of property are irrevocable and not subject to subsequent modification by the court.

[13] A possible result is that Lindsey would receive $12,000 in alimony, which would immediately be garnished by Ryan against the property debt. The result would be the same as the offset ordered by the court. In fact, in May 2022, Ryan filed garnishment against Lindsey seeking to recover this judgment. It was denied on hardship grounds. We cannot predict whether the result would be the same if Lindsey had just received $12,000 in lump sum alimony.

Lindsey also argues that the amount of support alimony awarded was so insufficient as to constitute an abuse of discretion. She argues that her monthly budget requires a net income of $3,213 a month while her net monthly income, including child support is only $1,931. She argues that this leaves a shortfall of $1,282 per month, which requires a support alimony award of $46,000 payable over three years.[14] Support alimony is not based solely on a demonstration of budgetary need, however.[15] Ability to pay is another factor.

Lindsey argues that Ryan's ability to pay $1,282 per month in support alimony is "likewise clear," citing her trial exhibits 1 through 4.[16] All we find clear from these exhibits is the significance of the central question of whether Ryan's net income is going to return to the approximately $72,000 a year he was earning early in 2020 or remain at the $34,000 level shown later in 2020. This makes all the difference.

Lindsey proposes that Ryan should pay $456 in child support, $77 in medical payments, and $1,533 in support alimony, for a total of $2,066 per month, $24,792 per year. Whether Ryan has the ability to pay this depends on

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[14] In comparison, the court found a need for only $500 a month in temporary spousal support as part of the temporary order.

[15] Support alimony is based upon a consideration of appropriate factors which include: demonstrated need during the post-matrimonial economic readjustment period; the parties' station in life; the length of the marriage and the ages of the parties; the earning capacity of each spouse; the parties' physical condition and financial means; the mode of living to which each spouse has become accustomed during the marriage; and evidence of a spouse's own income-producing capacity and the time necessary to make the transition for self-support. *Metcalf v. Metcalf*, 2020 OK 20, ¶ 21, 465 P.3d 1187, 1193.

[16] Exhibits 1-4 consist of approximately 90 pages of documents, including a tax return from 2017, Lindsey's own W2's from her work, a pay statement of Ryan's from October 2020 showing a net income of $2,839, and a bank statement of Ryan's account from August 2020 showing a payroll deposit of $6,062.

his actual income. With an income of $34,068, this would leave Ryan with only $9,276 to support himself and another child. With an income of $72,000 a year, however, he would be more able to make such payments and still provide for the needs of his other child. Hence, the *central issue* in both the child support and alimony calculation was *what Ryan's income was likely to be in the future.* We have addressed that issue above and found the trial court's order to be supported by sufficient evidence at the time it was made. Lindsey is free to file a request for modification pursuant to 43 O.S. §134(D) if she considers there are "substantial and continuing" changed circumstances. As such, we affirm the trial court's orders regarding support alimony.

G.

Lindsey next argues that the court found an incorrect arrearage of support alimony.

> Further, the arrearage amount ordered was incorrect. Respondent's Ex. 8 shows that Petitioner did not pay support alimony from March 2020 to August, 2020. The arrearage due through March, 2021 was $3,500. The funds held in trust were marital funds. Petitioner does not get a 100% set off for payments made from trust to Respondent.

Brief in-chief, 18.

This argument is initially confusing, in that the court did not calculate or order an alimony arrearage amount at all. The court simply ordered "spousal support of $12,000." Examining Lindsey's Exhibit 8, it appears that the issue is that the court also awarded $500 a month in temporary spousal support beginning in March 2020, but Ryan did not begin paying temporary support until September 2020, hence an arrearage had built up. The later submitted Exhibit

8(A) showed $3,000 on alimony owed. Lindsey's Exhibit 9(A) then shows that she received $3,100 from the Trust account in January 2021 on account of back alimony owed.

Lindsey's argument is the same "joint funds" argument she raised regarding the child support payments—that half of this $3,100 was actually paid by Lindsey, not, Ryan, and hence he still owes her back alimony. She appears correct—the $3,100 taken from joint funds should result in a credit of $1,550 to Ryan, not $3,100. Lindsey was owed $3,000 in back alimony, and Ryan has contributed $1,550. Ryan therefore still owes back alimony in the amount of $1,450.[17]

H.

The court made an equal division of the equity in the family home, finding that it had a market value of $165,000, awarding the home to Lindsey, and awarding Ryan $82,500 as his share. Although the remaining underlying facts here may be clear to the parties, neither brief makes a cogent attempt to explain the history of the involved property. Lindsey testified at trial as follows. The couple first lived in a house at 5414 Texaoma Drive, in Enid. According to Lindsey, this house was purchased by Lindsey's parents as a gift for her. Tr. (March 2, 2021), 122-23. We have no record as to how it was titled. In 2012, the couple discussed moving to another property, but apparently did not qualify for a mortgage. *Id.* at 123.

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[17] We find no record that the court included this arrearage in its post-decree $12,000 support alimony award.

Lindsey testified that her parents decide to help the couple purchase a new house and deeded property to Lindsey and Ryan with the intention that Lindsey and Ryan would be "getting a mortgage to pay the difference of what my house in Enid sold for as to what we paid for this house."[18] *Id.* at 124. Paraphrased, Lindsey's view was that the funds for the new home were to come from the sale of the previous home, plus money contributed by Lindsey's parents, and that there was an expectation that the money contributed by Lindsey's parents was a loan that would be repaid from funds the couple would receive when they got a mortgage on the new home.[19]

Lindsey testified that the couple did inquire about getting a mortgage but were told that their "financial stability" was insufficient. Because of this, they did not actually submit any loan application. Tr. (April 12, 2021), 125. Lindsey testified that, despite the lack of a mortgage or any written loan agreement, it was always her and Ryan's intent to "pay this money back." *Id.* at 126. When asked if "putting your name on this deed was an outright gift to the both of you" she replied that she considered it to be an "advance on her inheritance." *Id.*

At the April 12 trial, Lindsey testified that, in one year, her mother and father had given her checks totaling $26,000 and had given Ryan checks totaling

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[18] The record does not show if the house in Enid was sold or, if it was, what happened to the proceeds.

[19] Precisely how this arrangement was intended to work is not clear from the record. The theory appears to have been that Lindsey and Ryan could not qualify for a mortgage to purchase the property outright but might be able to obtain a mortgage against the property as record owners. Obtaining a mortgage based on this representation would have been problematical, however, given the later testimony under oath that the parties owed Lindsey's parents over $100,000 in unrecorded loans related to the property.

$26,000. The same payments were given to the couple the next year, making a total of $104,000 received. She testified that there was nothing on these checks indicating that they were a loan, and no written loan agreement. Tr. (April 12, 2021) at 21-22.

Lindsey's father testified that he had loaned at least $172,350.67 to the couple for things related to the home. *Id.* at 46. He agreed that there was no documentation of these loans but stated that he didn't see the need for it because Ryan had said he would pay him back. *Id.* at 46-47. On cross examination, he agreed that he had previously owned the land on which the home sits and had deeded the land "over to both of them," apparently before the home was built. *Id.* at 51.

Ryan's testimony was contrary on the key issues. He agreed that both parties' names were on the deed to the land.[20] He denied any agreement to take on or repay a loan from Lindsey's parents. Tr. (March 2, 2021), 23. He stated that no mortgage had been discussed, that nothing was owed on the property, and the no one had ever asked him to repay any money used to obtain the home until after the divorce was filed. *Id.* at 24-25. He denied that the money Lindsey's parents put towards the house was linked to a plan that the couple would later obtain a mortgage to repay Lindsey's parents. *Id.* at. 55. He admitted once making a mortgage application for $50,000 but testified that this was to

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[20] The home placed on this property was apparently made from prefabricated sections that were installed on a poured concrete pad. As such, Lindsey's counsel proposed that it was separate "titled" piece of property, rather than the property covered by the land deed. Ryan's counsel argued that it was a fixture on the land and covered by the deed. Tr. (March 2, 2021) at 83-84.

consolidate vehicle debt and to finance adding a porch to the house. *Id.* at 55-56. He testified that he had assisted in installing the concrete pad for the house. He repeatedly denied any loan or any agreement to repay the money given to him and Lindsey by her parents.

The law holds that two joint tenants each have a one-hundred percent undivided interest in a property. Upon the breakup of a marriage, however, one party sometimes argues that the court should ignore the joint tenancy and treat the home as either the separate property of one party, or property held in common with unequal shares.

Cases involving the creation of a joint tenancy in previously separate real estate are generally controlled by the rule of *Larman v. Larman,* 1999 OK 83, 991 P.2d 536, and *Smith v. Villareal,* 2012 OK 114, 298 P.3d 533. Another line of cases—typified by *Shackelton v. Sherrard,* 1963 OK 193, ¶ 9, 385 P.2d 898—analyzes situations where the purchased property is not previously owned by one party but is jointly acquired with allegedly unequal contributions.

Lindsey's brief first argues, however, that neither the rule of *Larman* nor *Shackelton* is applicable here. She cites *Neundorf v. Neundorf,* 2006 OK CIV APP 10, 131 P.3d 142, as applicable. *Neundorf* has no relevance, however. It discusses the question of what constituted "separate property" pursuant to an antenuptial agreement made in contemplation of marriage. No antenuptial agreement was alleged in this case.

She next cites *Dorn v. Heritage Tr. Co.*, 2001 OK CIV APP 64, 24 P.3d 886, for the principle that, contrary to *Larman*, property deeded to the parties jointly

does not constitute jointly acquired property. *Dorn* does not, however, contradict *Larman*. In *Dorn*, a wife argued that, when she and her husband transferred *joint property* by quitclaim deed to her revocable trust, it became her *separate property*. Not only is the transfer here the opposite of that in *Dorn*, but the *Dorn* court also rejected this argument. *Id.* ¶ 11.

Lindsey next cites *Davis v. Nat'l Bank of Tulsa*, 1960 OK 151, 353 P.2d 482 and *Matter of Estate of Stinchcomb*, 1983 OK 120, 674 P.2d 26 as applicable. These cases concern gifts of personal property, not the effect of placing real estate in joint tenancy. As such, they have no effect on the rule of *Larman* or *Shackleton*. Lindsey finally cites *Chapman v. Chapman*, 1980 OK CIV APP 27, 614 P.2d 90 as applicable. We find no applicability of the rule of *Chapman* here.[21]

Lindsey does finally address *Larman* but does not address its key holding. *Larman* holds that where one spouse already owns separate real estate, and then transfers this separate property into joint tenancy without consideration or contribution from the other spouse, the property interest created is presumed to be a gift. *Larman* held that a spouse can overcome this presumption of a gift by a clear "collateral purpose" for the transfer, demonstrating a lack of donative

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[21] *Chapman v. Chapman*, 1980 OK CIV APP 27, 614 P.2d 90, is a somewhat bizarre outlier in which a two-judge majority agreed that, because a couple had lived off the husband's assets during marriage,

> one could conclude the man invested his life's savings in what he hoped would be a long term relationship—an investment that vanished when the woman filed for a divorce. It seems to us the man is sufficiently penalized by having to forego any return on his investment—and even restoration of the investment itself.

Id. ¶ 9. The court found that any sort of property settlement would "exacerbate this inequity." *Id.* We find it unsurprising that *Chapman* has not been cited by any published case in the ensuing forty-three years, and we decline to follow it here.

intent sufficient to overcome the gift presumption. *Larman*, ¶ 7. Likewise, *Shackleton* holds that "[w]here two spouses have acquired property in joint tenancy while cohabiting ... it is ordinarily immaterial how much money [either spouse] has actually contributed to the purchase of the property involved because a gift from one to the other is presumed." *Id.*, ¶ 9. "Absent any fraud or special agreement, where [a spouse] knowingly agrees and consents to the conveyance being made to themselves as joint tenants, either is estopped to deny the tenancy of the other." *Id.*

Although *Shackleton* and *Larman* are based in slightly different scenarios, the rule is essentially the same under either case. A gift is presumed, and the burden is on the party claiming separate property to show a convincing collateral purpose or side agreement that negates the presumption of a gift. Lindsey claimed either there was no gift because everything the couple was given was a loan, or there was a collateral purpose of making it easier to obtain a mortgage.

There was no documentary evidence or testimony of uninterested parties to bolster these claims, however. The only substantive evidence was the testimony of the parties as to their intent. This testimony was diametrically opposed. As such, this was largely a matter of which account the trial court found more credible.

In a matter of purely equitable cognizance, it is for the trial court to determine the credibility of the witnesses, and the weight and value to be given their testimony. *Ewing v. Trawick*, 1953 OK 113, ¶ 22, 256 P.2d 182, 186. The trial court acts as the sole judge of the witnesses' credibility and the weight to be

given their testimony and evidence. *Morgan v. Morgan*, 2019 OK CIV APP 5, ¶ 53, 438 P.3d 837, 848; *Brown v. Brown*, 1993 OK CIV APP 142, ¶ 3, 867 P.2d 477, 479; *Beale v. Beale,* 2003 OK CIV APP 90, ¶ 6, 78 P.3d 973, 975. We find nothing inherently incredible in either of the parties' accounts here. As such, it was left to the discretion of the trial court to determine which was credible, and we affirm its determination that the property was jointly held.

Lindsey finally argues that, even if the underlying land is joint property, the home was built after this acquisition, and its ownership should be considered as a separate question. Lindsey argues that the "enhanced value" to the property caused by erecting the home belongs to her parents, not to her and Ryan. Even if we accept that the home is a separate item of property from the underlying real estate, however, there is also a presumption of a gift "where a parent pays the purchase price and legal title to property is conveyed to the child." *Boatright v. Perkins*, 1995 OK 34, ¶ 9, 894 P.2d 1091, 1094. The court had the discretion to judge the witnesses' credibility and the weight to be given their testimony and evidence on this issue. We find no error in its use of that discretion. As such, the court's decision is affirmed.[22]

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[22] Lindsey's petition also raises the following issues, paraphrased here but numbered as in the petition: (10) the trial court abused its discretion in the distribution of marital debt; (12) the trial court abused its discretion in refusing to include specific language allowing Lindsey to "control the rural county water meter/contact relating to her home;" (16) the trial court abused its discretion in "admitting evidence offered by petitioner over objection" and failing to admit evidence offered by respondent; and (17) the trial court abused its discretion by failing to give written findings on the record prior to issuing the decree. We find no substantive attempt to brief these issues. To the extent that issues are not briefed, they are considered waived. *Rouse v. Oklahoma Merit Protection Comm'n*, 2015 OK 7, fn. 2, 345 P.3d 366; *Johnson v. Ford Motor Co., 2002 OK 24*, fn.2, 45 P.3d 86; *Burrows v. Burrows*, 1994 OK 129, ¶ 3, 886 P.2d 984.

IV.

We affirm the challenged decisions of the court regarding the finding that both parents were "fit," the amount of child support and alimony awarded pursuant to the current record, the distribution of the child tax credit, and the disposition of the marital home. We reverse the determination that there was no alimony arrearage and remand with instructions to enter an arrearage of $1,450. We further remand for the entry of an order requiring that Ryan disclose his work schedule as soon as it is practically known, in order that the dates he will exercise his visitation may be determined in as far in advance as practicable.

HUBER, PJ., and HIXON, J., concur.

January 31, 2024