

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JERRY DANIEL ABBOTT,
Appellant,

v.

DEBORAH ABBOTT,
Appellee.

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CASE NO. 2D00-5340

Opinion filed October 16, 2002.

Appeal from the Circuit Court for Polk County;
Judith J. Flanders, Judge.

Michael P. McDaniel of C. Ray McDaniel, P.A.,
Bartow, for Appellant.

John A. Naser, Lakeland, for Appellee.

BLUE, Chief Judge.

Jerry Daniel Abbott, the former husband, appeals the final judgment dissolving his twenty-three-year marriage to Deborah Abbott, the former wife. He argues that the trial court erred by imputing income to him, setting alimony, and

distributing a \$12,000 debt without sufficient evidence that it was a marital liability. We reverse.

After almost twenty-one years of marriage that produced three children, the parties separated in September 1997. The Former Husband testified that he had earned from \$20,000 to \$27,000 per year throughout the marriage. He worked as a truck driver and attempted several small business ventures. In early 1997, the Former Husband began driving trucks with a new company. In 1997 and 1998, he earned approximately \$44,000 per year. In 1999, he earned almost \$27,000, and he expected to earn a similar amount in 2000. The Former Husband testified that he increased his earnings in 1997 and 1998 by working around the clock, which was not legally permissible due to regulations restricting the number of hours per day that a trucker is allowed to drive. He increased his earnings at that time because he had multiple households to support when the children moved out of the family home, apparently due to conflicts with their mother.

Since February 1999, the Former Husband has worked with a new codriver, who became his girlfriend. According to the testimony, when two people drive as a team, the truck's earnings are split 50-50. The pay is apportioned by the trucking company, not by the whim of the driver. The Former Husband added a codriver because he was concerned about his health, a concern that the Former Wife was able to partially validate. The Former Husband testified that there are advantages to driving as a team because teams go first when the freight is slow and teams make more money because they can run longer hours and are paid more per mile. He also testified, however, that he and his girlfriend are driving illegally because she should drive only

with the Former Husband's supervision, and this supervision time counts as part of the hours he can legally operate on the road.

The trial court awarded the Former Wife \$950 a month in permanent alimony based on the following findings:

Wife is presently earning at or near her potential earnings capacity, with a net income of \$1,036.00 per month. . . . Husband is well able to earn at least \$40,000.00 annually. There is no reasonable basis for Husband to share his compensation for hours and miles driven with his co-driver. Husband's co-driver is not licensed to drive without supervision.

The problem is that the Former Husband has not legally earned an income of \$40,000. In Seitz v. Seitz, 471 So. 2d 612, 614 (Fla. 3d DCA 1985), the Third District cited with approval two out-of-state cases standing for the proposition that a court should not speculate on or consider illegal earnings in setting alimony. As the Supreme Court of Nebraska reasoned:

We are not prepared to hold that precarious gains from immoral and prohibited occupations are evidence of any earning capacity at all The court, even in awarding alimony . . . , will hardly go so far as to speculate upon a future income from a . . . career of vice and criminality, and adopt as a basis of its decree a division of the anticipated spoils of inequity.

King v. King, 113 N.W. 538, 539 (Neb. 1907); see also Moore v. Moore, 181 A.2d 714, 715 (Pa. Super. Ct. 1962) ("It is against public policy to base a court order of support upon the assumption that the defendant will violate the law in order to acquire the necessary funds to pay it."). Because the undisputed evidence shows that the trial court imputed a level of income to the Former Husband that he had reached only by operating his truck illegally, we reverse on this point. See also Haas v. Haas, 552 So. 2d 221, 224

(Fla. 2d DCA 1989) (reversing alimony because it appeared “that the trial court may have imputed income based upon a party’s prior extraordinary efforts rather than upon the best efforts which reasonably should be expected over an extended time”). Where the only evidence showed that the Former Husband had earned a salary in the range of \$20,000 to \$27,000 during the marriage and was currently earning a salary in this range, we conclude that the trial court erred by imputing to him an income of \$40,000. See DeSanto v. DeSanto, 621 So. 2d 560 (Fla. 2d DCA 1993) (reversing alimony, child support, and award of attorney’s fees when trial court’s determination of husband’s ability to pay was not supported by substantial, competent evidence). On remand, the trial court should impute only a level of income to the Former Husband that he can earn by working legally.

The Former Husband also challenges the evidentiary support for the trial court’s equitable distribution of a \$12,000 debt allegedly owed to the Former Wife’s parents. The final judgment assigned this debt to the Former Wife. There was no testimony offered regarding this debt, and the record contains no evidence of when this debt was incurred. It was listed, in a lesser amount, on the Former Wife’s first financial affidavit with a parenthetical note stating “Dr. Cook.” She placed it in the Former Husband’s column. Subsequently, the total sum was listed on her amended financial affidavit, but she placed the entire debt in her column of liabilities and omitted the parenthetical explanation.

The Former Wife testified that her parents helped her financially after the parties separated, and the trial court gave her credit for a special equity in the parties’ marital residence equal to the amount she said her parents spent on the house. She

also testified that when she worked at a previous job, she took her money and began seeing a counselor who referred her to Dr. Cook. There is no testimony that her parents paid for Dr. Cook's services. The Former Wife argues that the evidence was sufficient to establish this debt because it was listed on the financial affidavits. Because it appears that the debt may have been incurred after the parties separated, the record does not support the classification of this debt as a marital liability. See Nieboer v. Nieboer, 816 So. 2d 1259 (Fla. 2d DCA 2002). The trial court should address this debt on remand.

Reversed and remanded.

DAVIS and COVINGTON, JJ., Concur.