

RENDERED: DECEMBER 21, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-001643-ME

JOHN J. O'HARA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE  
ACTION NO. 16-CI-01588

JOY O'HARA

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, D. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: John O'Hara appeals from a judgment of the Fayette Circuit Court dissolving his marriage to Joy O'Hara. He argues that the trial court abused its discretion by ordering him to pay child support and in assigning him most of the marital debt. Finding no abuse of discretion in either matter, we affirm.

John and Joy O'Hara were married in 1996 and separated on March 1, 2016. There were four children born during the marriage, and all four were still minors when the dissolution decree was entered. Before trial, the parties entered into stipulations and a separate partial settlement agreement. The remaining contested issues involved: (1) custody of the children; (2) child support; and (3) division of debts.

After conducting an evidentiary hearing, the trial court entered findings of fact and conclusions of law on August 2, 2017. The court entered a separate decree of dissolution on August 22. In pertinent part, the trial court granted the parties joint custody of the children based upon the equal timesharing schedule to which the parties had already agreed. With respect to child support, the court found that John had been voluntarily underemployed since 2014.

Based on John's employment and earnings history, the court imputed to him an annual income of \$5,000 per month, plus an additional \$2,300 per month based on the rent and free services that John receives by living in a house owned by his mother. The trial court noted that John's share of child support would be \$1,660 per month using the Child Support Guidelines. But after considering the equal timesharing, the court modified his obligation to \$1,000 per month.

Lastly, the trial court noted that the parties had incurred a substantial amount of debt. In addition to credit card and other debts, the parties incurred

federal and state tax liability for 2010-2015 with an approximate principal amount of \$110,000. The parties also incurred significant penalties and interest on this amount due to John's failure to file tax returns since 2009. The trial court assigned all of the tax and credit card debt to John, and while assigning Joy a lesser debt owed to her father.

Thereafter, John filed a motion for supplemental findings on each of these issues pursuant to CR<sup>1</sup> 52.02 and 52.04. John also moved to alter, amend or vacate the findings pursuant to CR 59.05. In response to John's motions, the trial court entered supplemental findings on October 2, 2017, detailing its prior conclusions on these issues. The trial court also denied John's CR 59.05 motion to alter, amend or vacate its prior conclusions. John now appeals from this judgment.

John primarily argues that the trial court abused its discretion in calculating child support. First, he argues that the imputation of a \$7,300 per month earning capacity was not supported by the evidence and was based on gender bias. KRS<sup>2</sup> 403.212(2)(d) allows a court to base child support on a parent's potential income if it determines that the parent is voluntarily unemployed or underemployed. A trial "court may find a parent to be voluntarily unemployed or

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<sup>1</sup> Kentucky Rules of Civil Procedure.

<sup>2</sup> Kentucky Revised Statutes.

underemployed without finding that the parent intended to avoid or reduce the child support obligation.” KRS 403.212(2)(d). The statute further specifies that “[p]otential income shall be determined based upon employment potential and probable earnings level based on the obligor’s or obligee’s recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.” The court may consider the totality of the circumstances in determining whether a parent is voluntarily unemployed or underemployed. *Polley v. Allen*, 132 S.W.3d 223, 226-27 (Ky. App. 2004).

The trial court’s determination of John’s earning capacity involves a finding of fact, which will not be disturbed unless clearly erroneous. CR 52.01. Due regard shall be given to the opportunity of the trial court to evaluate the weight of the evidence and the credibility of witnesses. *Id.* The trial court was responsible for deciding that question of fact based on the parties’ testimony and other evidence. *See also Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

John provided records that his average income from 2011–2014 was approximately \$4,700 per month. That average was brought down due to his unemployment beginning in 2014. His monthly income for the prior three years averaged just over \$5,000. The trial court was well within its discretion to consider John’s most recent work history in to determine his potential future income. *Keplinger v. Keplinger*, 839 S.W.2d 566, 569 (Ky. App. 1992).

Furthermore, John agreed that the value of the housing expenses which he receives by living in his mother's house should be imputed to him as income in addition to his earning capacity. *Stewart v. Burton*, 108 S.W.3d 647, 648 (Ky. App. 2003).

Nevertheless, John argues that the trial court improperly imputed an excess income to him out of a gender bias. He points to the trial court's comment that, "you are going to have to do what every dad does – overpay. Dads overpay. Dads hate paying. That's what dads do though they pay extravagantly." We agree with John that the trial court's comments were inappropriate. "Overpayment" implies that one party is paying more than his or her share of support. The child support guidelines require each party to pay their proportionate share of support, without consideration of gender. Suggesting that "Dads overpay" improperly implies otherwise.

However, the trial court subsequently clarified its remarks by noting that John has voluntarily chosen to remain unemployed. He has not even looked for employment since 2015. The court further noted that John could correct this situation by seeking appropriate employment. While a parent is ordinarily not required to work multiple jobs to meet a support obligation, we agree with the trial court's suggestion that John may have to do so to reach his prior earning capacity. Although we do not approve of the trial court's earlier comments, we find no

indication in the record that the trial court used an inappropriate standard to impute income to him.

Second, John argues that the trial court's modification of support based on the nearly equal timesharing violated *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007). In *Plattner*, this Court held that the period of time during which the children reside with each parent may be considered in determining child support, and a relatively equal division of physical custody may constitute valid grounds for deviating from the guidelines. *Id.* at 579. *See also Downey v. Rogers*, 847 S.W.2d 63, 65 (Ky. App. 1993). Furthermore, an award of any child support may amount to an abuse of discretion where the parties' earning capacities, timesharing, and responsibilities for day-to-day expenses are relatively equal. *Id.* at 580.

Based on the parties' equal timesharing and the similar earning capacities, John contends that their respective support obligations should cancel each other out, resulting in no support owed by either party. The trial court would have been within its discretion to deviate from the guidelines in the manner that John suggests. But contrary to John's argument, the trial court was not required to do so. *Downey*, 847 S.W.2d at 64-65. *See also McFelia v. McFelia*, 406 S.W.3d 838, 839-41 (Ky. 2013). Here, the trial court specifically found that, despite the nearly equal timesharing, Joy provides most the care for the children in addition to

her work responsibilities. Under the circumstances, we must conclude that the trial court made sufficient findings to warrant its deviation from the child support guidelines.

Finally, John argues that the trial court abused its discretion in its assignment of most of the marital debt to him. As with division of marital property, we review the trial court's decisions regarding division of marital debt for abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). Furthermore, there is no presumption that debts incurred during the marriage are marital. Rather, the party claiming that a debt is marital has the burden of proof. *Id.* In making this determination, the trial court should consider receipt of benefits, the extent of participation, whether the debt was incurred to purchase assets designated as marital property, whether the debt was necessary to provide for the maintenance and support of the family, and any economic circumstances bearing on the parties' respective abilities to assume the indebtedness. *Id.*

The majority of debt in this case involved the outstanding tax liability. The parties agreed that this was a marital debt. Consequently, the specific findings under *Neidlinger* were not required. The trial court found that John was responsible for incurring the debt due to his failures to file tax returns since 2009. During this period, Joy filed separate returns, and placed her tax refunds into the marital accounts. Based on Joy's lack of responsibility for incursion of the debt,

we cannot find that the trial court abused its discretion by assigning the debt entirely to John.

Accordingly, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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