

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

NO. 2016-CA-001162-MR

SHERRI MARLENE NOFFSINGER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE TRACI H. BRISLIN, JUDGE  
ACTION NO. 15-CI-00514

CHRISTOPHER HAYDEN NOFFSINGER

APPELLEE

OPINION  
AFFIRMING IN PART, AND  
VACATING IN PART, AND REMANDING

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BEFORE: ACREE AND LAMBERT, JUDGES; HENRY, SPECIAL JUDGE.<sup>1</sup>

ACREE, JUDGE: This is an appeal from the findings of facts and conclusions of law of the Fayette Family Court deciding several matters relative to the dissolution

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<sup>1</sup> Special Judge Henry concurred with this opinion prior to the expiration of his appointment on April 24, 2019. Release of the opinion was delayed by administrative handling.

of the marriage of Sherri and Hayden Noffsinger. Specifically, Sherri takes issue with the court's determinations involving Hayden's nonmarital interest in the marital residence, imputation of income to her and its effect on child support and maintenance, denial of maintenance, and the custody and timesharing arrangement of the parties' child. After review, we vacate in part and remand for the family court to enter findings consistent with this opinion regarding Hayden's nonmarital interest in the marital residence, but in all other respects, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Sherri and Hayden were married on April 22, 2003. They share one child, born February 9, 2007. The parties separated, and Hayden filed a petition for dissolution of the marriage on February 10, 2015. As Sherri and Hayden were unable to agree on several issues relating to Child and the division of their property, hearings were held on April 14, 2016, and May 19, 2016.

The parties agreed on the division of vehicles and various other items of personal property, tax refunds, and bank accounts. Nevertheless, the family court was tasked with deciding several remaining issues.

#### **Marital Residence**

The parties agreed that Hayden would retain and reside in the marital residence. But, the family court was asked to decide the value of the residence as well as Hayden's nonmarital interest, if any, in the property.

The marital residence is located at 1208 Brickhouse Lane and was purchased in December 2005 for \$264,900. This is the amount for which the PVA also had the property assessed. The residence was listed for sale for \$290,000, but no offers were made. The price was reduced to \$279,000, but still no offers were received. The parties then decided that Hayden would retain the residence. The court reviewed the documentation presented by the parties and valued the residence at \$272,500 for purposes of computing Sherri's marital interest.

Hayden asserted a nonmarital interest of 62% in the Brickhouse Lane property. Hayden previously owned a residence located at 1212 Aldridge Drive, which he purchased in July 1999, four years prior to the marriage. Hayden and Sherri lived there for two and one-half years after they were married. Of the profit from selling the Aldridge Lane property, \$16,790.67 was used as a down payment on the Brickhouse Drive property. The nonmarital interest asserted was based upon Hayden's four years of ownership (prior to the marriage) of the total six and one-half years of living on Aldridge Drive.

Hayden also provided documentation that he reduced the outstanding balance on the mortgage by \$8,726.56 during the pendency of this matter. The court gave Hayden credit for the full amount because Sherri made no showing of contribution to the marital debt, even the debts Sherri was previously ordered to pay prior to the final hearings.

Sherri claimed she withdrew \$12,995.10 from her retirement account to use toward the purchase of the property on Brickhouse Lane; however, she did not provide any supporting documentation. Accordingly, the court found this assertion to be unsupported by evidence.

The evidence demonstrated that \$236,618.77 was the outstanding balance of the mortgage on the residence, resulting in the total equity of \$35,881.23. Hayden was awarded 62% of this, or \$22,246.36, as his nonmarital interest. Additionally, he received full credit for the principle reduction of the mortgage of \$8,726.56. The \$4,908.31 remaining was divided equally, leaving Sherri with \$2,454.16 marital interest in the Brickhouse Lane property.

#### Custody and Child Support

In relation to the parties' minor child, the court awarded joint custody of Child to the parties with a 50/50 timesharing arrangement. The arrangement was in place for approximately one month prior to the first hearing and seemed to be working for everyone. The court heard testimony from several witnesses about the parents' relationships with Child. The court found Child to be well-cared for by both parents despite Sherri's accusations that Hayden abused Child. Sherri had previously filed an emergency protective order against Hayden on behalf of Child, which the court dismissed after an extensive hearing. The court noted that Child desired equal time with each parent. A guardian *ad litem* (GAL) had previously

been appointed and issued a report and recommendation of joint custody with 50/50 timesharing between Sherri and Hayden.

Child support was also an issue. The court found it appropriate to deviate from the child support guidelines because of the equal timesharing arrangement. The court noted Hayden's income was \$8,450 per month, and it was not in dispute. Sherri's income, however, was in dispute, and the court determined that under the circumstances, it was appropriate to impute income to Sherri.

Sherri testified that her income was \$15.41 per hour and that she worked 25 to 35 hours per week. As a result, she claimed her monthly income ranged from \$1,669.42 to \$2,337.18. She further testified, and it was confirmed by her employer's testimony, that Sherri had the potential to earn commissions in the future at her job. Sherri's employer also testified that 40 hours of work per week was available to Sherri and had been for several months. There was evidence that Sherri's previous income doing similar work was almost \$40,000 annually. Sherri also made a representation on a residential lease application that her income was \$2,700 per month. The family court imputed income to Sherri of \$2,671. This amount was based on her current hourly wage of \$15.41 working 40 hours per week. The court also considered the representation that Sherri's income was likely to increase soon when she began to earn commissions.

In addition to the parties' incomes, the court noted that Hayden covered Child's health insurance through his employment for \$76 per month. Ultimately, the court set child support at \$386.65 per month payable by Hayden to Sherri. Hayden was responsible for 75.8% of Child's expenses and Sherri responsible for 24.2%.

### Maintenance

Sherri requested maintenance from Hayden. The court considered the parties' circumstances including incomes and employment, expenses, debts, and distribution of the marital estate in the context of KRS<sup>2</sup> 403.200.

The court noted Sherri's distribution of the marital estate was over \$100,000, or approximately half, and she was responsible for half of the marital debt. Her income was \$32,000 annually and her employment provided the potential soon to be earning commissions. Sherri provided the court with her expenses, and the court determined her reasonable and necessary expenses to be roughly \$2,000 per month. The court also considered that Sherri would be receiving monthly child support from Hayden of \$386.85. The court ultimately concluded that Sherri did not meet the statutory requisites which would entitle her to maintenance.

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

Guardian ad litem and Attorney fees

Upon appointment of the GAL, the court ordered that the parties would share the costs equally. Prior to the initiation of the final hearing, the GAL inquired as to whether a final report would be required, which would result in additional costs. Hayden would not agree to incurring additional costs because of the 50/50 timesharing arrangement; however, Sherri requested an additional report be completed to address new issues she claims had arisen. Hayden did not want to be responsible for the GAL's additional fees because he did not believe the additional report was necessary.

Because of the length of the proceedings coupled with the numerous issues the parties' situation presented, the court deemed the additional report of the GAL necessary for resolution of the relevant issues and ordered that the parties share the GAL costs equally.

The court further found each party was to be responsible for their respective attorney fees and costs despite Sherri's actions throughout the proceedings which unnecessarily increased the time and cost of the litigation.

Miscellaneous Other Issues

The family court ordered the transfer of a portion of Hayden's retirement account, \$70,367.66, to Sherri to equalize the distribution of the marital

estate. Also, there were numerous debts subject to division by the court. The court assigned \$12,404 as Sherri's responsibility and \$9,347 to Hayden.

The court entered its findings of fact, conclusions of law, and decree of dissolution on July 15, 2016. This appeal followed.

### **ANALYSIS**

Sherri first takes issue on appeal with the family court's determination of Hayden's nonmarital interest in the marital residence. She claims it was error for the court to award Hayden 62% of the total equity of Brickhouse Lane. Hayden acknowledges that the family court erred on this specific determination.

The court stated there was no evidence of a down payment on Aldridge Drive, no evidence of the reduction of debt thereon, and no evidence of appreciation of its value. The court also stated that if there had been such evidence, Hayden's nonmarital interest would likely increase. After determining the value of the Brickhouse Drive home to be \$272,500, the court calculated the total equity to be \$35,881.23 and awarded Hayden 62% of this amount (\$22,246.36). Sherri asserts, and Hayden agrees, this was error. Hayden is entitled to 62% as his nonmarital interest of the down payment from Aldridge Drive of \$16,790.67, which amounts to \$10,410.22. Accordingly, the family court's findings specifically relating to Hayden's nonmarital interest in the Brickhouse



Drive residence are vacated. The issue is remanded for the family court to enter findings consistent with this opinion.

Sherri next argues that the family court erred when it credited Hayden \$8,726.56 for the principal reduction on the Brickhouse Lane residence during the pendency of the action based solely on the fact he made the payments. Sherri contends the payments were made with marital funds and because the court's intent was to equalize the division of the property, Hayden should not get credit for the entire amount paid.

“As with division of marital property, the trial court's decisions regarding division of marital debt is reviewed for abuse of discretion.” *Macleon v. Middleton*, 419 S.W.3d 755, 773 (Ky. App. 2014) (citing *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001)). There is no presumption that marital debts must be divided equally or in the same proportions as the marital property. *Neidlinger*, 52 S.W.3d at 523 (citations omitted). The family court found that Sherri had made no showing of contribution to the marital debt on the home despite remaining in the residence during the relevant time. Further, the court noted that Sherri had been ordered to make payments on other marital debts, which she did not do. Such a determination is within the discretion of the family court, and Sherri has failed to convince this Court that an abuse of that discretion occurred.

In sum, of the \$35,881.23 total equity in the marital residence, Hayden is entitled to \$10,410.22 as well as \$8,726.56 for principal reduction payments. The remaining \$16,744.45 is marital property subject to division.

Sherri next argues the family court abused its discretion by imputing income to her and, consequently, the court's award of child support, denial of maintenance, and denial of Sherri's attorney's fees and apportionment of court costs must be set aside.

It is well-settled that in establishing or modifying child support, the family court "may impute income to a party it finds to be voluntarily unemployed or underemployed." *McKinney v. McKinney*, 257 S.W.3d 130, 134 (Ky. App. 2008). The legislature explained it as follows:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income. . . . Potential 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.

KRS 403.212(2)(d). "[I]f the court finds that earnings are reduced as a matter of choice and not for reasonable cause," KRS 403.212(2)(d) authorizes the family court to "attribute income to a parent up to his or her earning capacity." *Snow v. Snow*, 24 S.W.3d 668, 673 (Ky. App. 2000) (internal quotation marks and citation omitted). In so doing, however, the family court "must consider the totality of the

circumstances in deciding whether to impute income to a parent.” *Polley v. Allen*, 132 S.W.3d 223, 227 (Ky. App. 2004).

The issue of voluntary underemployment is a factual question for the family court to resolve. *Gossett v. Gossett*, 32 S.W.3d 109, 111 (Ky. App. 2000). Accordingly, this Court must defer to the family court’s findings of fact unless they are clearly erroneous; that is, not supported by substantial evidence. CR<sup>3</sup> 52.01.

Sherri testified that she was currently employed as a bookkeeper earning \$15.41 per hour, and she worked between 25 and 35 hours per week. Accordingly, she maintained that her monthly income range was \$1,669.42 to \$2,337.18. Sherri testified, and it was confirmed by her employer that she was on track to be earning commissions in the near future, but that it was not her current circumstance. Sherri argues she was not yet experiencing this potential income, but it was used to substantiate the award of child support and as a basis to deny her maintenance, attorney fees, and court costs for the GAL. We disagree.

The court did not impute this future potential income based upon commissions to Sherri as she claims. The amount imputed, \$2,671 per month, was based upon Sherri’s current hourly rate of \$15.41 working full-time at 40 hours per week, not her potential commissions. Sherri’s employer testified that full-time

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<sup>3</sup> Kentucky Rules of Civil Procedure.

work of 40 hours per week was available to Sherri should she choose to accept it; therefore, the court believed that Sherri was voluntarily underemployed. The court noted that this income was in line with Sherri's previous employment doing similar work in her current job. Sherri has not demonstrated that such findings are clearly erroneous.

The family court found it appropriate to deviate from the child support guidelines in this case based upon the equal timesharing arrangement and each party's responsibility to provide for their minor child while in their respective care. The court considered Hayden's income of \$8,450 per month as well as the \$76 per month for the child's health insurance covered through his employment. The family court set the child support amount at \$386.85 per month to be paid from Hayden to Sherri. We find no error.

Additionally, the court did not err in its maintenance determination. The family court concluded that Sherri was not entitled to maintenance. The decision to award maintenance "has traditionally been delegated to the sound and broad discretion of the trial court[.]" *Barbarine v. Barbarine*, 925 S.W.2d 831, 832 (Ky. App. 1996). An abuse of discretion occurs when the family court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010). "[I]t is implicit in this statutory language [KRS 403.200] that a court may impute income to a

voluntarily unemployed or underemployed spouse to determine both the spouse's entitlement to maintenance and the amount and duration of maintenance.”

*McGregor v. McGregor*, 334 S.W.3d 113, 117 (Ky. App. 2011).

KRS 403.200 is the controlling statute governing maintenance awards; it requires the family court to engage in a two-step analysis prior to granting a party maintenance. First, the family court must determine whether the party seeking maintenance is entitled to it by ascertaining whether that party is able to meet his or her reasonable needs. KRS 403.200(1). Second, if the family court concludes maintenance is warranted, it must then establish the amount and duration of the maintenance award by considering several factors set forth in KRS 403.200(2).

First, according to KRS 403.200(1), the family court must ascertain whether the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
- (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

KRS 403.200(1)(a), (b). Both sections of the statute must be satisfied before the family court may award maintenance. *Atwood v. Atwood*, 643 S.W.2d 263, 265 (Ky. App. 1982).

Here, the family court found its distribution of assets gave Sherri roughly one-half of the net marital estate and one-half of the marital debts. The court found her earning capacity to be at least \$32,000, and explicitly stated that the amount did not include commissions. Again, the amount was based upon her current hourly rate working 40 hours per week. The court acknowledged that Sherri had the ability to earn commissions in the future as her testimony and that of her employer indicated. The court considered Sherri's monthly expenses and determined she had sufficient income to provide for her reasonable and necessary needs. The court additionally mentioned that Sherri would be receiving child support as well.

Sherri also takes issue with the family court's determination that she was not entitled to maintenance because she claims the court found she had the ability to meet her own needs without maintenance despite not knowing what her expenses were. We disagree. The accuracy of Sherri's situation was Sherri's responsibility. Any informational shortcoming under which the court may have been laboring is not the court's fault, but Sherri's.

Sherri testified that she had \$4,351 in monthly expenses; however, the court found Sherri either embellished her expenses or included non-existent expenses. The family court further determined that not all her expenses were reasonable nor necessary. For example, she included \$150 per month for a storage unit that was never rented, and costs for Child's private school which Child no longer attends. She also represented that she had an expense of \$283 per month for prescriptions; however, this amount was considerably larger than the amount she spent on prescriptions in previous months. Based on the evidence before it, the court determined Sherri's expenses were more reasonably estimated as approximately \$2,000 per month. Given Sherri's income and expenses, her distribution of the marital estate, and the fact that she had been able to meet her needs for several months prior to the hearing, the court determined she was not entitled to maintenance.

Lastly, regarding maintenance, Sherri argues the court did not consider the standard of living established during the marriage, nor the parties' significant income disparity. This has more to do with setting a maintenance amount under KRS 403.200(2). The court did not need to reach the analysis of that subsection.

The court explained in its ruling that "[a]lthough there is a disparity in the earnings of the respective parties, that fact in and of itself is not a sufficient

basis upon which to award maintenance to Sherri.” (R. 474-5). Still, despite the court’s finding that Sherri did not meet the statutory requisites to be entitled to maintenance under KRS 403.200(1), it nevertheless made findings in relation to the factors set forth in KRS 403.200(2). Specifically, “While the parties seemed to live a comfortable lifestyle, they spent almost everything they earned. The income that afforded the parties a comfortable lifestyle in one household cannot support the same lifestyle in two (2) households.” (R. 476).

The court considered the relevant statutory measures in deciding whether to award Sherri maintenance; additionally, in its maintenance determination, the court did not improperly impute income to Sherri solely based on potential commissions. Therefore, the court did not err in determining Sherri was not entitled to maintenance.

Sherri does not make an argument in her brief specifically regarding the imputation of income to her and its effect on the division of attorney’s fees and court costs. “An appellant’s failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues. Consequently, the trial court’s determination of those issues not briefed upon appeal is ordinarily affirmed.” *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979) (citations omitted). We but briefly point out that because we found the family court did not



improperly impute income to Sherri, there is no error with the division of fees and court costs.

Sherri next contends that the family court's findings relating to the parties' minor child's best interests pursuant to KRS 403.270 were not supported by substantial evidence but were the product of the court's bias against Sherri. We are not persuaded.

Hayden requested visitation every other weekend and two nights per week with Child. Sherri disagreed and asked that Hayden be awarded every other weekend but only one overnight per week with Child. The GAL recommended joint custody with a 50/50 timesharing arrangement in her report. The court ultimately agreed with the recommendations of the GAL and ordered that joint custody with a 50/50 timesharing arrangement continue.

“[I]n the absence of an agreement between the parties, the trial court has considerable discretion to determine the living arrangements which will best serve the interests of the children.” *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). Joint custody entails shared decision-making and extensive parental involvement in the children's upbringing. *Id.* A timesharing arrangement must allow both parents as much involvement in their child's life as possible under the circumstances. *Id.*

Sherri asserts the court was aware of the “extensive evidence” she presented of abuse by Hayden against Child, but simply chose to ignore it in deciding to continue with the joint custody and 50/50 time-sharing arrangement. She further claims the opinion of the GAL was not based on the parties’ current circumstances.

The family court is in the best position to evaluate the testimony and weigh the evidence, and an appellate court may not substitute its own opinion for that of the family court. *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (citation omitted). The family court simply did not believe Sherri’s allegations against Hayden or any testimony similar thereto. This Court is not permitted to simply disregard a family court’s assessment of witness credibility. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986); CR 52.01 (“[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”). The trial court appears to have factored in to its credibility analysis, noting that Sherri previously made unsubstantiated allegations regarding the abuse issue in the past and that impaired her credibility with the court.<sup>4</sup> Furthermore, the court pointed out that if there were any truth to Sherri’s allegations she would be seeking more than just one day less per week for timesharing.

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<sup>4</sup> Sherri pursued two protection orders against Hayden within the past two years, but both were ultimately dismissed.

The GAL testified that Child seemed close to and bonded with Hayden, and that Child wished to have equal timesharing with both parents. Hayden and his mother testified about his relationship with Child. The family court found this testimony credible and believed Child was well-cared for by both parents. Moreover, we find nothing in the record indicating the court had personal biases against Sherri; not getting the desired result does not demonstrate bias of the court against a party.

Sherri's argument pertaining to the GAL also relates to her credibility with the family court. Our review of the record indicates the GAL filed a report on April 14, 2016, detailing the arrangement then in place. The hearing was held in this matter on April 14, 2016, and May 19, 2016. It appears the GAL report was timely and based upon the parties' then-current circumstances. Additionally, the GAL testified regarding her report. Sherri contends the GAL's opinion was contradicted by several other witnesses. Despite the lack of specificity in her argument, we observe that "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Because the family court's overall factual determinations regarding the child's best interest are not clearly erroneous, the custody award and timesharing arrangement must be affirmed.

Lastly, Sherri raises several new points in her reply brief, including: (1) the family court valued the marital residence improperly; (2) Hayden failed to meet his burden regarding his nonmarital interest in the marital residence; (3) the court abused its discretion when it failed to consider loans from Sherri's employer and her mother as marital debt; (4) even if the court did not abuse its discretion in imputing income to Sherri, the amount was miscalculated. "The reply brief is not a device for raising new issues which are essential to the success of the appeal." *Milby*, 580 S.W.2d at 728. Therefore, we decline to address these arguments.

### **CONCLUSION**

For these reasons, we vacate in part and remand for the family court to enter findings consistent with this opinion regarding Hayden's nonmarital interest in the marital residence. In all other respects, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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