

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

AIMEE MAIDEN,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-L-076
RONALD MAIDEN, III,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 08 DR 000751.

Judgment: Affirmed.

Aimee Maiden, pro se, 1231 Oakwood Trail, Painesville, OH 44077 (Plaintiff-Appellee).

Edward L. Joseph, 2403 St. Clair Avenue, Cleveland, OH 44114 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Ronald Maiden III, appeals the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, affirming the magistrate’s decision to average his income over a four-year period to determine spousal and child support, as well as property and debt division. For the following reasons, we affirm the judgment of the trial court.

{¶2} Appellant and appellee were married in 1995 and had three children born during the marriage, all of whom are currently minors.

{¶3} Appellee filed for divorce in 2008. In October 2009, a hearing was held before the magistrate. We note that appellant failed to provide this court with the entire record on appeal. In fact, appellant only submitted that portion of the hearing regarding his financial status. From the record presented on appeal, the following relevant testimony was adduced.

{¶4} With the exception of December 2008 through May 2009, appellant had been employed full-time during the marriage. Since 2002, appellant has primarily been employed in the automobile sales industry. From 2002 through 2008, appellant worked at Rick Case Honda, and from May 2009 through August 2009, appellant worked at Sunnyside Nissan. Thereafter, appellant was employed at Jay Honda. Appellant's gross income in 2008 was approximately \$95,000; approximately \$70,000 to \$80,000 in 2007; and approximately \$80,000 in 2006. In 2009, appellant received unemployment compensation in the amount of \$492 per week from mid-January 2009 until becoming employed in May 2009. While employed at Sunnyside Nissan, appellant earned approximately \$675 per week. From August 2009 until October 2009, appellant earned approximately \$2,500. Income was not presented at the hearing for appellant's prior years of employment.

{¶5} As this court does not have a transcript of the proceedings relating to the income of appellee, we presume the accuracy of the following, as stated in the magistrate's decision:

{¶6} “[Appellee] is employed approximately 20 hours per week at All Around Gymnastics at a rate of \$12.00 per hour. This would result in weekly gross income of \$240.00. [Appellee] is also employed 15 hours at Heisley Fitness Center at \$8.00 per hour which would be \$120.00 income per week. Over a 52 week period \$360.00 per week would generate annual gross income of \$18,720.00.”

{¶7} For spousal and child support purposes, the magistrate determined appellant’s salary as \$68,042. In rendering this decision, the magistrate stated the following:

{¶8} “It is determined the reasonable period of years to average income is 2006 through 2009. Utilizing \$22,169.00 for 2009, \$95,000.00 for 2008, \$75,000.00 for 2007 and \$80,000.00 for 2006 results in total income for the four years of \$277,169.00. Dividing this amount by 4 results in average income for the period of \$68,042.00.”

{¶9} Appellant was therefore ordered to pay child support in the sum of \$381.00 per month per child and spousal support in the sum of \$700.00 per month, effective January 1, 2010, for a period of 51 months. The trial court retained jurisdiction to modify spousal support due to the potential change in income of the parties.

{¶10} The magistrate also considered appellant’s salary to determine the parties’ share of uncovered medical expenses and allocation of debt payments. Appellant was ordered to pay 70% of any expenses not covered for medical, dental, optical, psychological, orthodontia, counseling, or related expenses for the children. Any deficiency owed related to the first mortgage of the marital home and any other mortgages or lines of credit related to the foreclosure of the marital residence was ordered to be paid 75% by appellant and 25% by appellee.

{¶11} Appellant filed an objection to the magistrate's decision. Appellant argued that the magistrate erred in averaging his income for the years 2006, 2007, 2008, and 2009. In an April 27, 2010 judgment entry, the trial court overruled appellant's objection and adopted the decision of the magistrate.

{¶12} Appellant filed a motion to stay with this court requesting his child support, spousal support, children's medical expenses, and arrearages stayed upon the disposition of the appeal. This court stayed appellant's monthly arrearage payment of \$375.98, upon his filing of a supersedeas bond.

{¶13} On appeal, appellant presents the following assigned error for our review:

{¶14} "The trial court committed prejudicial error in its determination that the appellant's income should be income averaged for the past four years absent any evidence to show that appellant was either intentionally underemployed, unemployed or working to less than his full capabilities."

{¶15} Appellant maintains that pursuant to R.C. 3119.01(C)(11), the trial court must first make a finding that he was either voluntarily unemployed or voluntarily underemployed, yet there is no evidence in the record to substantiate this finding. Again, appellant has not provided this court with the entire record of the proceedings, and, therefore, our review is limited to the record before us. Appellant argues that the court was obligated under law to utilize only his current annual income of \$22,000, consisting of approximately \$13,000 in income and \$8,000 in unemployment benefits.

{¶16} Appellant argues that the trial court erred in imputing income to him. Contrary to appellant's argument, the trial court did not impute income. Instead, the trial court averaged appellant's salary over a four-year period from 2006 through 2009. In

his decision, the magistrate cited R.C. 3119.05(H), which provides: “[w]hen the court or agency calculates gross income, the court or agency, when appropriate, may average income over a reasonable period of years.” Averaging one’s income is utilized when a party’s income is “unpredictable or inconsistent.” *Scott G.F. v. Nancy N.W.*, 6th Dist. No. H-04-015, 2005-Ohio-2750, at ¶46.

{¶17} “[I]ncome averaging is appropriate when gross income varies due to circumstances and factors beyond the parent’s control, no matter what the source may be. It is no more “fair” to penalize a parent and order much higher child support after an uncommonly good financial year, than it would be to penalize the child for a parent’s temporary decline in income.” *In re Kohlhorst*, 3d Dist. No. 2-06-09, 2006-Ohio-6481, at ¶15, quoting *Scott G.F. v. Nancy N.W.*, supra, at ¶47.

{¶18} It is evident from the magistrate’s decision that he acknowledged that appellant’s income was unpredictable and inconsistent. The magistrate stated:

{¶19} “[Appellant] has been employed in various aspects of the sale of cars since 2002. This employment primarily relates to sales and [appellant’s] duties have included acting as a sales manager, sales person and other duties related to sales. [Appellant’s] compensation over the years is a relatively complicated mix of draws, commissions and additional compensation primarily based on the success of the dealership and the individual sales by [appellant]. Due to the nature of the compensation and market fluctuations it is determined [appellant’s] income will be averaged over a reasonable period of years to meet the requirements and purpose of the statute.”

{¶20} The magistrate then determined the reasonable period of years to average income was from 2006 through 2009. The magistrate utilized the following figures, which are undisputed: \$22,169 for 2009; \$95,000 for 2008; \$75,000 for 2007; and \$80,000 for 2006.

{¶21} The trial court adopted the magistrate's recommendations in their entirety and further stated: "[i]n that [appellant] has been employed in the same line of work for nine years, averaging [appellant's] income was the most reasonable and equitable method to calculate [his] gross income for support purposes."

{¶22} R.C. 3119.05(H) expressly allows a trial court, when determining the income of a party, to use his or her average income over a reasonable time period. Further, in a case such as this, when a party's income is unpredictable, we cannot say that the application of R.C. 3119.05(H) was an abuse of discretion. Based on the facts and circumstances of the instant case, the trial court, in exercising its discretion, found it appropriate to average appellant's income as permitted by R.C. 3119.05(H). We cannot say the trial court failed "to exercise sound, reasonable and legal-decision making." *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶23} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is hereby affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.