[Cite as *Jones v. Jones*, 2003-Ohio-871.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81004

STEVEN JONES	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	AND
vs.	:	
	:	OPINION
NANCY JONES, ET AL.	:	
	:	
Defendants-Appellees	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	FEBRUARY 27, 2003
	:	
CHARACTER OF PROCEEDINGS	:	Civil appeal from Common Pleas Court – Domestic Relations Division Case No. D-262491
	:	
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellant: Kevin M. Ryan, Esq.
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For defendants-appellees: Alexandria M. Ruden, Esq.
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JOSEPH J. NAHRA, J.:

{¶1} Plaintiff-appellant Steven Jones ("husband"; d.o.b. July 20, 1956) appeals from the trial court's decree of divorce entered on February 2, 2002. For the reasons adduced below, we affirm.

{¶2} A review of the record on appeal indicates that husband and defendant-appellee Nancy Jones (formerly Nancy Pavlik; d.o.b. June 26, 1962; "wife") were married on December 13, 1985. Five children were born to the parties during the term of the marriage: (1) Jessica Jones, d.o.b. April 2, 1986; (2) Christopher Jones, d.o.b. May 25, 1989; (3) Ryan Jones, d.o.b. August 17, 1993; (4) Nicholas Jones, d.o.b. October 3, 1995; and, (5) Stacie Jones, d.o.b. December 4, 1997. It is not contested that the marriage endured until August 13, 1998, at which time husband filed the underlying complaint for divorce. Wife subsequently filed a counterclaim for divorce.

{¶3} The matter was heard before a trial court Magistrate commencing on June 11, 2001. On November 16, 2001, the Magistrate filed her decision with findings of fact and conclusions of law. Within this decision, the Magistrate found, in part, the following: (1) husband was a cabinet maker earning approximately $35,048 annually; (2) wife was employed as a part-time retail cashier earning $5.85 hourly, or $9,126 annually based on a thirty-hour work week; (3) the husband paid child support of $477.36 monthly for the two minor children living with wife; (4) the unreimbursed medical and dental expenses of the minor children be paid 79% by husband and 21% by wife; (5) the marital home was

valued at $102,000 and had $18,246 in total available equity after discounting the mortgage; (6) husband's union pension was valued at $19,134.11; and, (7) wife's Rooney Optical pension was valued at $829.09, and her Kmart pension was valued at $1,213; (8) marital debt totaled $15,121.60 [Dollar Bank, $232.76; student loan, $11,428; JC Penney, $3,460.84]. The Magistrate recommended that husband be awarded his pension and assume the Dollar Bank debt, and $6,751 of the student loan. The net award to husband thus was $12,150. The Magistrate recommended that wife be awarded the following items valued at $12,150: the marital home, her pensions, the JC Penney debt. Despite the husband being granted leave until December 28, 2001 to file objections to the Magistrate's decision, neither party filed any objections.

{¶4} On February 12, 2002, the trial court entered its judgment of divorce, adopting the Magistrate's decision in its entirety, including the findings of fact and conclusions of law.

{¶5} Husband filed his notice of appeal on March 12, 2002 from the February divorce decree.

{¶6} Three assignments of error, each alleging plain error, are presented for review. Prior to addressing these assignments, we note that Civ.R. 53(E)(3) provides in pertinent part:

{¶7} "(E) Decisions in referred matters. Unless specifically required by the order of reference, a magistrate is not required to prepare any report other than the magistrate's decision. Except as to those matters on which magistrates are permitted to

enter orders without judicial approval pursuant to division (C)(3) of this rule, all matters referred to magistrates shall be decided as follows:

{¶8} "***

{¶9} "(3) Objections.

{¶10}"(a) Time for filing. Within fourteen days of the filing of a magistrate's decision, a party may file written objections to the magistrate's decision. If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a request for findings of fact and conclusions of law under Civ.R. 52, the time for filing objections begins to run when the magistrate files a decision including findings of fact and conclusions of law.

{¶11}"(b) Form of objections. Objections shall be specific and state with particularity the grounds of objection. If the parties stipulate in writing that the magistrate's findings of fact shall be final, they may object only to errors of law in the magistrate's decision. Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available. *A party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law unless the party has objected to that finding or conclusion under this rule.*" (Emphasis added.)

{¶12}Having failed to present any objections to the Magistrate's decision, husband waives error on appeal which could have been raised by timely objection. Civ.R. 53(E)(3)(b); *Asad v. Asad* (Cuyahoga, 1999), 131 Ohio App.3d 654, 656, 723 N.E.2d 203. Despite waiver, the recent trend has been to recognize plain error analysis in civil cases involving a lack of objections to a magistrate's decision. As recently stated in *In re Lemon*, Stark App. No. 2002 CA 00098, 2002-Ohio-6263, at ¶29:

{¶13}"We note that authority exists in Ohio law for the proposition that appellant's failure to object to the magistrate's decision does not bar appellate review of 'plain error.' See *R.G. Real Estate Holding, Inc. v. Wagner* (April 24, 1998), Montgomery App. No. 16737, 1998 Ohio App. LEXIS 1733; *Timbercreek Village Apts. v. Myles* (May 28, 1999), Montgomery App. No. 17422, 1999 Ohio App. LEXIS 2385. See also *Tormaschy v. Weiss* (July 6, 2000), Richland App. No. 00 CA01, 2000 Ohio App. LEXIS 3118. The doctrine of plain error is limited to exceptionally rare cases in which the error, left unobjected to at the trial court, 'rises to the level of challenging the legitimacy of the underlying judicial process itself.' See *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 1997 Ohio 401, 679 N.E.2d 1099."

{¶14}Also, see, *Brown v. Zurich U.S.* (Franklin, 2002), 150 Ohio App.3d 105, 2002-Ohio-6099, at ¶25-28, 779 N.E.2d 822; *Dean-Kitts v. Dean*, Greene App. No. 2002CA18, 2002-Ohio-5590, at ¶12-

13; *Messer v. Messer*, Darke App. No. 1570, 2002-Ohio-4196, at ¶20-23; Cf. *Muzechuk v. Muzechuk*, Tuscarawas App. No. 2001 AP 090089, 2002-Ohio-2527, at ¶51.

{¶15}The first assignment of error states: "The trial court's division of marital debt constitutes plain, reversible error."

{¶16}A trial court is vested with broad discretion in equitably assessing and dividing marital property and its decision will not be reversed absent an abuse of that discretion. See *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355; *Berish v. Berish* (1982), 69 Ohio St.2d 318; *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131; *Braylock v. Braylock* (Dec. 23, 1999), Cuyahoga App. No. 75459; R.C. 3105.11 and .171. An abuse of discretion connotes more than an error of law or judgment; it implies that the court acted in an unreasonable, arbitrary or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, a division of marital property need not be equal in order to be considered equitable. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93.

{¶17}Within this assignment, appellant takes issue with three specific items of debt division, namely: (1) a Huntington Bank VISA account; (2) a Citibank/AT&T Mastercard account; and, (3) a Great Lakes Higher Education student loan.

{¶18}The Huntington Bank VISA had a balance of $5,345.56, according to the March 16, 2001 bank statement. The Citibank/AT&T

Mastercard had a balance of $5,665.78, according to a collection letter dated May 31, 2001. The evidence presented before the Magistrate was conflicting with regard to the use of these credit cards. Husband admitted wife never signed for either the Huntington or Citibank/AT&T cards and that he used $1,000 from the Huntington account to retain legal counsel for himself. Husband took a cash advance of $3,000 on the Huntington account to be used for a family vacation, but no vacation occurred. Husband further testified that he transferred the Huntington account balance to the Citibank/AT&T in 1999, and then incurred more debt on the Huntington account. Husband could not provide a balance on these two accounts as of the date the parties separated in the summer of 1998. Wife testified that she had no knowledge of this credit card debt. The Magistrate found that these two credit card debts were not marital debts and that no evidence was presented to show the balance of the debts as of the date of the parties' separation. The Magistrate recommended that the party who incurred these two debts, husband, pay for the credit card debts. Based on this conflicting evidence, we cannot conclude that the trial court abused its discretion in the division of this credit card debt, and plain error does not apply.

{¶19}The student loan had a balance of $11,428.01 as of May 31, 2001. This loan was taken by the wife during the term of the marriage so that she could attend a local business college and improve her employment skills. By completing this schooling, wife

did obtain employment at a higher rate of pay, thereby benefitting the family unit. Also, the evidence indicates that some of the student loan money was spent on items of care for family members, again directly benefitting the family unit. From this the Magistrate found that the student loan was a marital debt and recommended that each party pay a portion of that student loan balance. We find no abuse of discretion in the trial court's division of the student loan debt. Therefore, plain error does not apply.

{¶20}The first assignment of error is overruled.

{¶21}The second assignment of error states: "The trial court committed plain error and abused its discretion by awarding the marital residence and appellant's equity interest to the appellee rather than ordering a buy-out of the appellee's interest by appellant as requested by the parties."

{¶22}Considering the overall equal division of the marital property between the parties, particularly where the value of the husband's pension nearly equaled the equity in the marital home, we cannot conclude that the trial court abused its discretion in setting off the value of these items within the property award. Also, we cannot conclude that the court abused its discretion in awarding the marital home to the wife where the court, based on the contentious history between the parties, sought to disentangle the parties from one another's affairs as rapidly as possible while aiming to preserve the value within the marital assets for

the party who would receive that property in the award. Accordingly, plain error is not demonstrated.

{¶23}The second assignment of error is overruled.

{¶24}The third assignment of error states: "The trial court committed plain error by failing to impute appellant's (sic.) income at the rate of at least eight dollars an hour and based on a forty-hour work week."

{¶25}The use of "appellant" with reference to income is an obvious typographical error. It is appellee's income which is at issue in this assignment.

{¶26}In *Hissa v. Hissa* (Nov. 21, 2002), Cuyahoga App. Nos. 79994 and 79996, 2002-Ohio-6313, at ¶33-34, this court stated the following:

{¶27}" In *Badovick v. Badovick* (1998), 128 Ohio App.3d 18, 23, 713 N.E.2d 1066, we stated:

{¶28}"'In cases where the court is asked to impute income, it must follow a two-step process. First, the lower court must find that a party is voluntarily unemployed or underemployed before it can impute any income to that party. Second, once a party is found to be voluntarily unemployed or underemployed, the potential income to be imputed to that party must be determined in accordance with the considerations listed in R.C. 3113.215(A)(5)(a). *Leonard v. Erwin* (1996), 111 Ohio App.3d 413, 417, 676 N.E.2d 552; *Madden v. Madden* (Oct. 30, 1997), Cuyahoga

App. No. 71302, 1997 Ohio App. LEXIS 4809. Before computing child support, the court must determine the income levels of the respective parents. If a parent is underemployed or unemployed, the court must consider 'potential income;' that is, income that the parent would have earned if he or she had been 'fully employed.' R.C. 3113.215(A)(5)(a). That amount is to be determined by (1) the parent's employment potential and probable earnings based on the parent's recent work history, (2) job qualifications, and (3) the prevailing job opportunities and salary levels in the community in which the parent resides. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 616 N.E.2d 218.

{¶29}Whether a parent is 'voluntarily underemployed' within the meaning of R.C. 3113.215(A)(5), and the amount of 'potential income' to be imputed to a child support obligor, are matters to be determined by the trial court based upon the facts and circumstances of each case. The determination will not be disturbed on appeal absent an abuse of discretion. Id. at 110; *Marsh v. Marsh* (1995), 105 Ohio App.3d 747, 750, 664 N.E.2d 1353. We have held that the factors set forth in *Rock* are mandatory -- the court's failure to consider all three factors will constitute an abuse of discretion. See *Dixon v. Dixon* (Mar. 9, 1995), Cuyahoga App. No. 66997, 1995 Ohio App. LEXIS 882.'"

{¶30}In the present case, the evidence indicated that, although wife had a degree from Sawyer Business College and had been employed on a part-time basis for up to eight dollars hourly

during the marriage, wife's recent part-time employment was considerably less at not even six dollars hourly. Furthermore, wife's testimony, which was unrebutted, indicated that employment opportunities wife had been seeking in Alliance, Ohio, where wife lived, were scarce, inferring that potential income in that job market was limited. Based on this information, we cannot conclude that the court abused its discretion in not imputing income to the wife of eight dollars hourly at full-time work status. Accordingly, plain error is not demonstrated.

{¶31} The third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court – Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JOSEPH J. NAHRA*
JUDGE

ANNE L. KILBANE, P.J., AND

DIANE KARPINSKI, J., CONCUR.

(*SITTING BY ASSIGNMENT: Judge Joseph J. Nahra, Retired, of the Eighth District Court of Appeals).

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).