

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

RITA J. VANSANT, : NO. 93-20,301
Petitioner :
 :
VS :
 :
ROBERT E. VANSANT, :
Respondent :

OPINION AND ORDER

Before the Court are Petitioner's and Respondent's Exceptions to the Family Court Hearing Officer's Order dated August 5, 1999. A hearing on the Exceptions was held December 20, 1999. At the hearing, the parties agreed that the Court would decide their exceptions based solely on the review of the Family Court Hearing Officer's Order. Based on that review, the Court Grants Respondent's Exceptions in part, and Denies them in part. Additionally, the Court Grants Petitioner's Exceptions in part, and Denies them in part.

Both parties raise an Exception that the Respondent's net monthly income was incorrectly calculated. A review of the Hearing Officer's Order indicates that Respondent has 27 years of experience in home improvement. He had a business for some time in which he was a home improvement contractor. The business failed, and in July of 1999 he became employed as a laborer by Hannan Homes. The Hearing Officer determined the Respondent's income from that employment to be \$1383.50¹. The Hearing Officer also reviewed the Department of Labor and Industry figures for net incomes of carpenters in this area, and found that they can expect to earn \$1435.00 per month. The Hearing Officer assessed Respondent at an earning capacity of \$1435.00 per month.

¹ The Hearing Officer arrived at the figure by calculating \$10.00 per hour times 40 hours, then deducting 25% for applicable federal, state, and local taxes.

Respondent first argues that his monthly net income should be based on the amount that he makes, as opposed to being assessed an earning capacity. The amount of support to be awarded is based in large part upon the parties' monthly income. Monthly gross income is ordinarily based upon at least a six-month average of all of a party's income. Pa.R.Civ.P. 1910.16-2(a). An earning capacity may be assessed when a party has willfully failed to obtain appropriate employment. Pa.R.Civ.P. 1910.16-2(d)(4). Instantly, there is no language in the Family Court Hearing Officer's Order indicating that Respondent left his previous employment –his business-- without a legitimate reason. The Order provides that the Respondent's "business failed and he was forced to seek employment wherever he could find it" (FCHO 8/5/99 Order, p.3). Where there is no finding that the Respondent has willfully failed to obtain appropriate employment, the Court finds it is inappropriate to assess an earning capacity.² Respondent's Exception is therefore Granted.

As it appears that the Hearing Officer may have overestimated Respondent's tax liability the Court calculates it as follows: \$10.00 per hour times 40 hours times 52 weeks equals \$20,800.00.³ Respondent's federal income tax liability is calculated at \$332.00.⁴ Social Security and Medicare taxes are calculated at \$1591.00 per year, and State and Local taxes are calculated at \$790.00 per year. This yields a net yearly earnings of 18,087.00,

² The Court notes that even if it had been appropriate to establish an earning capacity in this case, the utilization of the Department and Industry Standards was not appropriate, as they were not a part of the record. See *Neece v. Ross, Lycoming County No 97-20,274, Opinion and Order of the Honorable Dudley N. Anderson dated 1/28/00.*

³ The Court notes that this does not account for overtime, however, the previous Order of the Honorable William S. Kieser, dated 1/13/95 noted that "the hours of overtime that are available in the favorable seasons of the year offset any inability to work year round in the business. . ."

⁴ This is based on Respondent showing itemized deductions of \$10,500 and 3 exemptions totaling \$8100.00 on his 1998 federal income tax return.

or a net monthly earning of \$1507.25. The Court finds this to be Respondent's accurate net monthly income.

The Petitioner argues that the Respondent's earning capacity has already been established in an Opinion by the Honorable William S. Kieser in 1995, and the income or earning capacity from that assessment cannot, therefore, be revisited. The Court finds the issue presented now is distinguishable from the issue presented to Judge Kieser in his 1995 Opinion. First, Judge Kieser's Order establishes an earning capacity for a business owner, as opposed to an employee. Second, Judge Kieser's Order is not establishing an earning capacity utilizing the factors in Rule 1910-16(d)(4),⁵ he is effectively establishing an *income* capacity. The Order indicates that the Court believed that Respondent was earning more than was showing on his federal income taxes, and that he was hiding income in his business. The Court therefore established an income for Respondent by delving into the workings of the business. Based on these distinctions, the Court would find that the doctrine of res judicata would not have applied. Since the circumstances surrounding Respondent's income have changed, it may be revisited.

Respondent's second Exception alleges that the Hearing Officer erred in assessing him an earning capacity of \$1435.00 for the time period between the filing of the petition (April 29, 1999) to the date that he became employed by Hannan Homes (July, 1999). Respondent argues that during that time period, his business was failing, and he had no income. The Family Court Hearing Officer's Order indicates that the current Order was effective August 3, 1999, the date of the hearing. Therefore, it appears that Respondent

⁵ Rule 1910.16-2(d)(4) provides that "age, education, training, health, work experience, earnings history and child care are factors which shall be considered in determining earning capacity."

was responsible under the previous Order of support for the dates in question^{6, 7} up to the date of the hearing. Instantly, the Court finds that it was proper to assess an income to Respondent for those three months even though he had no earnings, see *Rule 1910.16-2(d)(2)* (no adjustments in support will be made for normal fluctuations in earnings.)

Respondent's third Exception alleges the Hearing Officer erred in assessing any of the tax refund to him. Respondent argues that the tax return indicates that he was self-employed and did not pay taxes to the federal government. He could not, therefore, have received a refund. Instantly, the Court finds that it was inappropriate for the Hearing Officer to have included the tax refund in Respondent's income, as they were already factored into his actual tax obligation in arriving at his net income.⁸ See *1910.16-2(a) Note*.

Respondent's last Exception alleges that the Hearing Officer erred in not making two child support calculations. Respondent argues that one calculation should have utilized his net monthly income from the time that his business failed to the time that he received his present employment. The second calculation should have utilized Respondent's net monthly income from his present employment. As the Court has found that the Hearing Officer correctly assessed an income to Respondent during the three months that he was not working, the Court denies this Exception.

Petitioner's first Exception alleges that the Hearing Officer erred in his determination that Respondent's rental properties incurred a loss. Petitioner argues that Respondent testified at the Hearing that the rental properties were "the only things keeping

⁶ The Respondent's earning capacity in the previous order was established as \$1,700.00.

⁷ The issue of whether the current Order should have been retroactive to the date of the filing of the petition will be addressed in Petitioner's fourth exception.

⁸ The tax refund should be utilized when calculating a party's net income using pay stubs. In that circumstance, it is evidence that a party is over withholding.

him in groceries.” Petitioner alleges that Respondent testified that he makes approximately \$350.00 after expenses on those properties. Instantly, the Court notes that the Hearing Officer does not mention the rental properties when determining Respondent’s earnings. The Hearing Officer simply states in his discussion of whether to apply a deviation that the federal tax return indicates that the rental properties incurred a loss. The only other evidence available for the Court to consider is Respondent’s income tax return. The tax return shows the rent received less insurance, taxes, mortgage and utilities have yielded a loss on the properties.⁹ With no other evidence to consider, the Court must deny this Exception.

Petitioner argues in her last Exception that the Hearing Officer erred in making the effective date the date of the Order, as opposed to the date of the Petition. Under Rule 1910.17(a), an order of support shall be effective from the date of the filing of the complaint unless the order specifies otherwise. Although the Order specifies that the effective date was the date of the hearing, the Court finds no reason for a deviation from the Rule. The Court therefore finds that the Order should be effective from the date of the Respondent’s Petition. Petitioner’s Exception is therefore Granted.

ORDER

AND NOW, this ____ day of March, 2000, based on the foregoing Opinion, Respondent Exceptions are Granted in part and Denied in part, and Petitioner’s Exceptions are Granted in part and Denied in part. Based upon Respondent’s net monthly income of \$1507.25 and Petitioner’s net monthly income of 1670.63, the total income of the parties

⁹ The Court finds no extraneous deductions tending to indicate that Respondent is exaggerating his expenses with regard to the lots.

would be \$3,177.88. The present Child Support Guidelines for two minor children call for a base child support obligation of \$989.00 plus 11.89% above \$3,175.00. Subtracting \$3175.00 from \$3,177.88, results in a difference of \$2.88. Multiplying that difference times 11.89% results in an additional child support obligation of .34. Adding that figure to the base amount of \$989.00 results in a total support obligation of \$989.34.

Respondent is responsible for his proportionate share of that support obligation. His share is determined by dividing his net monthly income of \$1507.25 by the total income of \$3177.88. Respondent's proportionate share is determined to be 47.43%. Multiplying the total child support obligation of 989.34 times 47.43%, results in a child support obligation of \$469.24.

This Order shall be effective the date of the filing of Respondent's Petition.

In regard to unreimbursed medical expenses, Respondent shall be responsible for 47% of all such expenses, and Petitioner shall be responsible for 53% of all such expenses.

By The Court,

Nancy L. Butts, Judge

cc: Scott T. Williams, Esquire
Christina Dinges, Esquire
Brenda L. Hausammann, DRO
Family Court; Law Clerk; Judges
Gary Weber, Esquire
Honorable Nancy L. Butts