

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MLK, : NO. 01-20,208
Petitioner :
 :
vs. : DOMESTIC RELATIONS SECTION
 : Exceptions
MFK, :
Respondent :

OPINION AND ORDER

Before the Court are cross-exceptions to the Family Court Order dated July 15, 2002, in which Respondent was directed to pay child support to Petitioner and Petitioner was directed to pay alimony pendente lite to Respondent. Argument on the exceptions was heard September 4, 2002.

In his exceptions, Respondent contends the hearing officer erred in reviewing the Order retroactive to the initial Petition, in not calculating the alimony pendente lite correctly, in computing Petitioner's income, and in failing to award child care expense to Respondent. In her exceptions, Petitioner contends the hearing officer erred in failing to assess Respondent an earning capacity but instead basing his support obligation on only his unemployment compensation. These will be addressed seriatim.

With respect to the issue of retroactivity, the Court notes that by Order dated June 1, 2001, support was calculated based on Petitioner having a monthly net income of \$2,050 and Respondent having a monthly net income of \$4,883. At the hearing on June 13, 2002, which led to the Order of July 15, 2002, both parties presented their 2001 federal income tax returns. Petitioner's showed a monthly net income of \$2,217 and Respondent's showed a monthly net income of \$5,003. Because \$5,003 per month represented an increase over the previous \$4,883

used, Petitioner's counsel argued that Respondent had failed to report the increase and the matter should be reviewed retroactive to the initial Petition. Incredibly the hearing officer did indeed retroactively review the support obligation, even though there had been no change in circumstances, as Respondent had continued in the same employment and the increase appears to represent simply the fact that at the hearing in June 2001, the parties were slightly inaccurate in their estimate of their incomes. In fact, Petitioner's income increased by a higher percentage than did Respondent's! The Court thus agrees with Respondent that the matter should not have been reviewed retroactively and those portions of the Family Court Order doing so will be vacated.

With respect to the calculation of alimony pendente lite, again the Court agrees with Respondent that such was calculated incorrectly. According to Pa. R.C.P. Rule 1910.16-4(e), when alimony pendente lite is being paid to the non-custodial parent, the alimony pendente lite is calculated first and then the parties' incomes are recalculated and the new incomes used to calculate the non-custodial parent's child support obligation. Making these calculations results in an alimony pendente lite payment of \$302.47 per month and a child support payment of \$490.14 per month. An orthodontic expense contribution is also calculated at \$52.59 per month for a total offset payment from Respondent to Petitioner of \$240.26.

With respect to the issue of the calculation of Petitioner's income and failure to award Respondent a child care expense contribution, Respondent's counsel indicated at argument that both exceptions would be withdrawn if Respondent was not assessed an earning capacity over and above his unemployment compensation and if the Order was not reviewed retroactively. Since the Court agrees that no earning capacity is appropriate and that the Order should not have been reviewed retroactively, the Court deems the final two (2) exceptions filed by Respondent to have been withdrawn.

With respect to Petitioner's exception, her contention that the hearing officer erred in failing to assess Respondent an earning capacity over and above his unemployment compensation, the Court does not agree. According to the testimony presented, as noted in the Order of July 15, 2002, Respondent was employed by Lucent Technologies, under contract through the Kohl Group, as the project manager for Wireless Technology. When the contract

expired, Respondent was laid off. There is nothing of evidence to indicate that Respondent lost his employment through any fault of his own or that he has failed to obtain appropriate employment commensurate with his abilities. The Family Court Order notes that Respondent has applied for jobs but has not been offered employment and he has applied for his North Carolina real estate license and is interviewing with real estate firms in North Carolina. At argument, it was indicated to the Court that Respondent has indeed accepted employment as a real estate sales person. The Court finds no error in the hearing officer's failure to assess an earning capacity and notes that Petitioner always has the opportunity to ask for a review once Respondent begins working (of which fact she will be apprised when Respondent reports such pursuant to his duty to do so), or at such time as Petitioner believes Respondent reasonably should be working after having had a sufficient period of time in which to find employment.

ORDER

AND NOW, this 10th day of September, 2002, for the foregoing reasons, Petitioner's exceptions are hereby denied and Respondent's exceptions, not withdrawn, are hereby granted. The Order dated July 15, 2002 is hereby modified by vacating those portions of the Order which address the periods of time from March 28, 2001 through April 11, 2002 and by providing, effective June 13, 2002 for a payment of alimony pendente lite of \$302.47 per month, a payment of child support of \$490.14 per month, and an orthodontic expense contribution of \$52.59 per month. The Domestic Relations Section is directed to enter a modified wage attachment for an offset payment of \$240.26 per month.

As modified herein, the Order of July 15, 2002 is hereby affirmed.

By the Court,

Dudley N. Anderson, Judge