

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SWR, : NO. 01-20,472
Petitioner :
: vs. :
: DOMESTIC RELATIONS SECTION
LR, :
Respondent : Exceptions

OPINION AND ORDER

Before the Court are cross-exceptions to the Family Court Order of May 1, 2002, in which Respondent was directed to pay spousal support to Petitioner. Argument on the exceptions was heard July 24, 2002.

The parties together raise five areas of concern: Respondent’s income, Petitioner’s earning capacity, treatment of the child’s Social Security Disability payment, the lack of a mortgage contribution and the requirement that Respondent contribute to the cost of Petitioner’s health insurance. These areas will be addressed seriatim.

With respect to Respondent’s income,¹ Petitioner contends the hearing officer erred in relying on the tax return instead of Respondent’s testimony and written statement, and Respondent contends the hearing officer erred in failing to further reduce the income as shown on the tax return by his vehicle repair expenses. As evidence of his income from the Sun-Gazette, Respondent presented both his 2001 federal income tax return and a handwritten summary of receipts and expenses for 2001 and the first 3.5 months of 2002. The tax return shows gross receipts of \$14,380 and expenses (car and truck expense and insurance) of

\$11,428, resulting in a net profit of \$2952. The hearing officer reduced this amount by \$552.98 for federal, state and local taxes, to arrive at a net monthly income of \$199.91. Respondent's written summary, however, showed a monthly net profit of \$949 in 2001² and he admitted on cross-examination that his written summary more accurately reflected his income than did his tax return. N.T., April 18, 2002, at 53. The Court thus agrees with Petitioner the tax return figure should not have been used. With respect to Respondent's contention the repair expenses should have been considered, the Court notes Respondent's summary does include repair expenses. As stated previously, the 2002 expenses appear to be consistent with those incurred in 2001, and there was no testimony to indicate that Respondent expected the 2002 expenses to vary significantly from the 2001 expense. Use of the 2001 figure as stated therefore appears appropriate.

According to Respondent's 2001 federal income tax return and his written summary, he paid \$287 federal income tax on all of his income, no state tax, and \$29.52 local tax. His total annual net income, exclusive of the Sun-Gazette income, was, therefore, \$19,939.³ This averages to \$1662 per month and the addition of \$949 per month results in a total monthly net income of \$2611.

¹ Respondent has income from three sources: Social Security Disability, a pension and employment with the Sun-Gazette. The alleged errors are addressed only to the Sun-Gazette income.

² While the summary for 2002 shows an average monthly net profit of only \$398, the repair expenses are nearly identical to those listed for 2001, but are averaged over only 3.5 months, rather than the entire year. The remainder of the figures appear consistent with those listed for 2001, and use of the 2001 average therefore appears appropriate.

³ \$1238 per month Social Security Disability plus \$450 per month pension, multiplied by twelve months, less the taxes noted.

With respect to Petitioner's earning capacity, Petitioner contends the hearing officer erred in assessing her an earning capacity higher than what she actually earns, and Respondent contends the error was in not assessing an earning capacity higher than what was assessed. Petitioner currently works for the American Rescue Workers at the Love Center in Jersey Shore as a cook, and earns \$6.00 per hour. She has a Bachelor's Degree in Biology and previously worked in a lab earning \$19,000 per year. She last worked in that field in 1992, and since then has not earned more than \$7.30 per hour. The hearing officer assessed her an earning capacity of \$9.00 per hour. Considering the evidence presented, the Court finds no error in such an assessment.⁴ While Respondent argues Petitioner should be assessed with a higher earning capacity, no evidence was presented to support such and the Court will therefore not disturb the earning capacity as assessed.⁵

With respect to the Social Security Disability payment received by the child, the Court notes the child is Petitioner's son from a prior marriage. He receives Social Security Disability of \$605 per month, based on Respondent's claim. The hearing officer considered the payment as additional income in Petitioner's household and deviated from the guidelines in awarding spousal support, by 25%. Petitioner contends there should have been no deviation and

⁴ It appears the hearing officer overestimated Petitioner's tax liability, however. At \$9.00 per hour, Petitioner would have an annual income of \$18,720. Using the same itemized deductions as shown on her 2001 tax return, and two exemptions, Petitioner's federal income tax liability is calculated at \$859. Social Security and medicare tax is calculated at \$1,432, and state and local income tax is calculated at \$711. Petitioner would thus have an annual net income of \$15,718, or a monthly net income of \$1310, rather than \$1248 as found by the hearing officer.

⁵ Respondent also argues Petitioner should be assessed with at least a \$19,000 earning capacity, if nothing else. As noted above, \$9.00 per hour does result in an annual gross income of \$18,720.

Respondent contends the payment should have been added directly to Petitioner's income in calculating the spousal support, or in the alternative, the deviation should have been greater than 25%. The Court finds no authority in the guidelines for simply adding the SSD to Petitioner's income, but does agree with the hearing officer's consideration of such as "additional income in the household" under factors appropriate for deviation. Petitioner presented an expense statement,⁶ purporting to show the child's total monthly expenses, in which she listed a portion of her household expenses such as mortgage (including taxes and insurance) and utilities, as well as a portion of her automobile expense, and also expenses attributable only to the child such as food, clothing, etc. The expenses total \$722.69 per month.⁷ Petitioner receives \$45 per week, \$195 per month, in support from the child's father. Combined with the SSD, she thus has \$800 per month to meet the child's expenses. Since those expenses include \$428 of which a significant portion could be considered Petitioner's own expenses, however, that is, the mortgage, utilities and automobile expense,⁸ her own expenses are lowered by use of the SSD and a deviation is indeed appropriate. Further, the

⁶ While the hearing officer mistakenly referred to this statement as a list of Petitioner's expenses, even though the evidence clearly showed it was a list of the child's expenses, and although Petitioner took specific exception to this mistake, it does not appear to factor in to the result.

⁷ Although the hearing officer added \$150 per month for vacation expense to the written total of \$710.19 per month, thus finding total monthly expenses of \$860.19, it appears from the testimony that the correct figure for vacation is \$150 per year, or \$12.50 per month, resulting in a total monthly expense of \$722.69.

⁸ While the Court acknowledges the propriety of including a portion of the mortgage and other household expenses in the list of the child's expenses, it cannot be denied that this is somewhat of a fiction, for it cannot be said that without the child, Petitioner would not have any of the expense listed.

Court can find no error in the use of a 25% deviation and thus will apply the same percentage in recalculating the support. Considering Petitioner's earning capacity of \$1310 per month and Respondent's income of \$2611 per month, spousal support is calculated at \$520.40 per month. Applying a 25% deviation lowers the amount to \$390.30 per month.

With respect to the mortgage contribution, Petitioner contends the hearing officer erred in refusing to grant her request that Respondent contribute to a portion of the mortgage, taxes and insurance, pursuant to Rule 1910.16-6(e). In response to Petitioner's request, the hearing officer indicated that he was denying her request because she "has done little to mitigate her financial problems", stating specifically that she is working for a wage which is below her earning capacity and that she has not sought to collect more support from her child's father even though, in his opinion, she would be entitled to more. The Court agrees with Petitioner that neither reason justifies denying Petitioner's request. The assessment of an earning capacity eliminates any consideration that Petitioner is working for a lower wage, and the support she receives from her child's father is not relevant to her request for a mortgage contribution. Nevertheless, the Court does not believe that a contribution is appropriate in this case. Petitioner's total monthly income, including her income from employment (her earning capacity) and her spousal support and child support, but not including the SSD, is \$1895. Twenty-five percent of that is \$473. Her monthly mortgage payment, not including the portion attributable to the child and which is covered by the SSD, is \$545.⁹ One-half of the excess is \$36. Petitioner has, however, \$77 more in SSD and child support than she has expenses for the

⁹ Since the SSD of \$605 is 75.625% of the \$800 received by Petitioner for the child, the Court will eliminate 75.625% of the \$243 mortgage expense listed for the child, as covered by

child. Just as the SSD itself is considered extra income in the household, this combination SSD/child support is also considered extra income in the household, justifying denying Petitioner's request for contribution to her mortgage payment, the granting of which is discretionary in any event.

Finally, Respondent contends the hearing officer erred in requiring him to contribute to the cost of health insurance carried by Petitioner. Since this health insurance does not cover Respondent, the Court agrees. The directive that Respondent pay an additional amount toward health insurance will be vacated.

ORDER

AND NOW, this 29th day of July, 2002, for the foregoing reasons, the exceptions of both parties are granted in part and denied in part. The Order of May 1, 2002, is hereby modified to provide for a payment of spousal support of \$390.30 per month. The arrearage payment is increased to \$100.00 per month. The directives that Respondent pay \$31.00 per month toward the health insurance premium and that Petitioner continue to provide medical insurance coverage for Respondent are hereby vacated.

As modified herein, the Order of May 1, 2002, is hereby affirmed.

the SSD. The remaining \$59 will be added to the portion Petitioner allocated to herself, \$486 (the total mortgage payment being \$729), for a total payment to be considered of \$545.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Family Court
Domestic Relations Section
Janice Yaw, Esq.
William Miele, Esq.
Gary Weber, Esq.
Dana Jacques, Esq.
Hon. Dudley Anderson