

MURIEL L. HYKES,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 96-21,082
	:	PACSES Case No. 529001794
KEVIN D. BAILEY,	:	DOMESTIC RELATIONS SECTION
	:	
Defendant	:	EXCEPTIONS

Date: June 25, 2003

OPINION AND ORDER

Before the Court are the Exceptions of Plaintiff Muriel L. Hykes (“Ms. Hykes”) filed January 17, 2003 to the Support Order dated December 19, 2002 of the Family Court Hearing Officer, Jocelyn B. Hartley, Esquire (“Master”). The Exceptions assert seven errors.

At argument Ms. Hykes primarily relied upon Exception Nos. 1 and 2, which assert that error was committed because the Master conducted the hearing after Ms. Hykes indicated a desire to have counsel present and after the Master failed to continue the hearing after Ms. Hykes had made a request for a continuance in order to allow her to obtain counsel. Exception Nos. 3, 4, 5 and 6 were not pursued during argument, however, they were not abandoned. Those Exceptions assert error was made in assessing Ms. Hykes an earning capacity of \$1,000 per month, an error in determining Defendant Kevin D. Bailey (“Mr. Bailey”) an earning capacity of \$4,512.51 per month, and in establishing the amount of credit in Mr. Bailey’s account. At argument it was noted that Exception No. 7 relating to medical expenses was being withdrawn.

In order to understand the situation in this case a brief historical perspective is necessary. The parties are the parents of five children (N.T. 12/17/2002, p. 5). They are all in

school and are aged as follows: Bren, 18, 12th Grade; Aubry, 17 (as of 4/12/2003), 11th Grade; Devon, 15 (as of 4/10/2003), 9th Grade; Curren, 13, 6th Grade; and, Aaron, 10, 4th Grade. (N.T., pp. 5, 17). In an earlier support proceeding Ms. Hykes attempted to be excused from having any responsibility to work or support the children and asserted she had no earning capacity on the basis of the Nurturing Parent Doctrine. In that proceeding, it was determined she held two bachelor's degrees but had not worked since 1980 and after considering the length of time she had been out of work and her experience in various fields, she was assessed an earning capacity of \$1,000 per month. *See*, Opinion of Honorable Nancy J. Butts, dated April 28, 1997. This finding was affirmed on appeal on July 1, 1998.

Upon petition of Ms. Hykes for modification of the support order filed November 4, 2002, an evidentiary hearing was held on December 17, 2002. Ms. Hykes' Petition contested the current support order of \$1,738.31 per month assessed against Mr. Bailey on the basis that his income had increased and that she should no longer be regarded as having an assigned earning capacity of \$1,000 per month.

At the outset of the hearing before the Master the following colloquy occurred:

THE MASTER: Now Ms. Hykes, you don't have an attorney today.

MS. HYKES: No.

THE MASTER: Let me explain to you how this works. I know you've been here before. You have the right to file exceptions if you find that I have—you feel I misstated the law or I have done something that is unfair. At that time, you can have an attorney review what I have said in the order and go up and talk with Judge Anderson or down and talk with Judge Smith. That will be an argument only and they will take what we have presented today, which is on tape. You don't really need to have an attorney here

with you today because you will have another, what we call bite of the apple in front of the Judge.

Now, do you wish to proceed without an attorney:

MS. HYKES: Is that the same thing as an appeal process?

THE MASTER: Yes, but it stays in this court. It doesn't go up to a higher court. It stays in this courthouse.

MS. HYKES: My experience with the appeal process hasn't been good.

THE MASTER: Well I thought you had a very nice appeal here. I read the exceptions order from several years ago.

MS. HYKES: No, it went against me.

THE MASTER: Well you may not have gotten all the things you wanted and that may never happen.

MS. HYKES: Well they assigned me an income and that's what I was fighting. And I never did get that overturned.

THE MASTER: And that will continue today because it has come down from a Judge upstairs. So I'm not going to change that.

MS. HYKES: Even if I have my tax returns that shows what I actually earned, what my actual earnings were?

THE MASTER: Are you working now?

MS. HYKES: Sort of. I work part-time.

THE MASTER: Okay, we'll talk about that. Do you wish to proceed without an attorney today?

MS. HYKES: Yes.

THE MASTER: Ok. Will both Parties please raise your right hand.

Based upon the record of this exchange between Ms. Hykes and the Master, Ms. Hykes' assertion made at the time the Exceptions were argued that she had indicated a desire to have counsel present and that she had made a request for a continuance of the hearing must fail. The transcript makes it clear that she was told that the Exceptions process following the Master's proceeding would be argument only with the attorneys and the Judge discussing what had occurred at the Master's proceeding. It also makes clear that she understood the Exceptions argument would be the same as an appeal process. At no time did Ms. Hykes make any request for a continuance or counsel. Instead, after being posed the question as to whether she wished, ". . .to proceed without an attorney today?" she answered, "yes."¹

At argument, Ms. Hykes' counsel also asserted there were other parts of the transcript, which support the desire of Ms. Hykes to have had the hearing continued so she could have benefit of counsel and which demonstrate her anticipating she was going to get another evidentiary-type hearing, if she did not like the Master's decision. Those references referred to pages 3, 17, 22 and 44 of the transcript.

At the Exceptions argument, Ms. Hykes' counsel made much of the Master's statement that Ms. Hykes would have a second bite of the apple. This refers to the transcript at page 3 when the Master did state, ". . .you will have another, what we call bite of the apple in front of a Judge." Ms. Hykes was then asked whether she wanted to proceed without an attorney and she astutely asked if it was the same thing as the appeal process. The Master

¹ The only thing incorrect about the Master's statement relates to the unfortunate assignment of this matter to the undersigned rather than the more experienced Judge Anderson or Judge Smith.

replying in the affirmative received a response from Ms. Hykes that the appeal process had not been too good and she was not happy with it because she was assigned an income that she was fighting. She was then told directly by the Master in response “that,” referring to her assigned income, would be applied against her at this proceeding because it had come down from a “Judge upstairs.” (N.T. pp. 3-4). Despite this knowledge or perhaps in view of it, Ms. Hykes elected to proceed without counsel.

On page 17 of the transcript, a discussion between Ms. Hykes and the Master centered around Ms. Hykes’ health status in which she asserted she has rheumatoid arthritis and undiagnosed, undifferentiated, connective tissue disorder, including things like rheumatoid arthritis and lupus. She did not have any doctors’ reports to support this claim. She was asked subsequently, at page 19 of the transcript, by the Master if she had anything from a doctor saying she had these conditions and Ms. Hykes replied she could get something from Dr. Shenberger. The Master suggested that those documents should be supplied and then Ms. Hykes responded, “I’m trying to keep the insurance companies from knowing about it.” (N.T. 12/17/02, p. 19). The total context of this discussion makes it clear that, in fact, Ms. Hykes has no such medical proof that those conditions are disabling to her in any way. She clearly indicated her tests for the same had been negative and that she had no positive diagnosis (*See*, N.T. 12/17/02, pp. 17-19).

Overall, it is clear that even the presence of counsel would not have assisted her in making out an undiagnosed disability. In fact, as relates to her disability for which she was seeking to get assistance to go back to school, it became clear that her perceived disability may be based upon some psychological testing which has not yet occurred. (*See*, N.T. pp. 9,10). It

is also clear from this discussion about her disability and whether she would qualify for payments from the Office of Vocational Rehabilitation for further education, that Ms. Hykes recognized the techniques and procedures applicable to this type of hearing. This was demonstrated when she astutely indicated that if there would be a finding of a disability after receiving something from a physician that she remarked “well I can always file that then as a renewed – as a new circumstance, right?” (*See*, N.T. p. 10). By this statement and the context in which it was made, it is clear that Ms. Hykes recognized she did not have evidence of being physically unable to work from a medical standpoint at the December 17th evidentiary hearing. She would have been aware of this lack of evidence when the hearing started. This also may have played a part in her decision to proceed with the hearing without counsel. Ms. Hykes knew she would be able to file a new petition for modification if the circumstances as to her medical condition changed and she was able to obtain proof of those changed circumstances. In light of this, it is notable that Ms. Hykes did not request a hearing to submit additional documentation on her disability at the proceedings in front of the Master.

Ms. Hykes had given testimony on December 17, 2002 about her need to seek further education in order to qualify as a full-time teacher apparently on the basis that her degree in biology and psychology were not sufficient for her to obtain teaching work. (*See*, N.T. pp. 10-13). It is clear that an attorney at the hearing would not have assisted her in presenting her need for further education as a basis for a diminished earning capacity. This is because Ms. Hykes offered very inconsistent testimony as to what type of education she was going to pursue and when she was going to start. Ms. Hykes acknowledged that she had not registered for any courses nor enrolled in any school and was not going to be able to do so until

an indefinite time in the future. Therefore, the Master was correct in concluding the school situation should not be addressed in the support determination. (N.T., p. 13).

Also, counsel would not have been helpful to Ms. Hykes in establishing or developing the theory of nurturing parent of special needs children as a basis for reducing her earning capacity. As the Master noted, it has previously been litigated and determined in this case that the Nurturing Parent Doctrine does not apply to Mr. Hykes. Nevertheless, she continued to assert before the Master it should be applied. (N.T. pp. 42, 43). However, it is clear she had no facts to back up any suggested change in circumstance as would relate to the need for her to care for children rather than work to support them. Ms. Hykes asserted she would need to devote an unusual amount of time taking the children to doctors' appointments as the reason for her inability to work. (*See*, for example N.T., p. 38). She asserted that two appointments per week were necessary to meet the children's medical needs. It is also significant as to her waiver of counsel that Ms. Hykes also raised an objection as to being badgered in this testimony, indicating an awareness of how to object to questions. (*See*, N.T., p. 39). In any event, it was clear that when asked to give specifics, Ms. Hykes could not back up her claim of taking children to the doctors two times per week, every week of the year. In fact, she acknowledged that the weekly psychological visit for the child, Bren, had not occurred since September. (N.T., pp. 41, 42). Ms. Hykes also acknowledged that the doctor visits for Aubry were limited to five times in the past year, again, appropriately objecting when opposing counsel got argumentative on the point. (*See*, N.T., p. 42). Therefore, the Master appropriately concluded that the time Ms. Hykes spent taking the children to the doctors would

not be sufficient to offset her receiving an earning capacity assessment. (N.T., p. 43). An attorney's presence could not have changed the evidence or the result.

Surely it was clear the Master had sufficient testimony from which to base that Ms. Hykes had an earning capacity of \$1,000 per month, particularly given her acknowledged education and prior work history, all of which were made of record in the Master's proceeding. (*See*, among others, N.T., pp. 29, 30 and 37-38). The Master's determination was particularly appropriate as Ms. Hykes acknowledged as a substitute teacher she could make at least \$85 per day, but that she turned down several calls a week to sub. (N.T. 8, pp. 43-47). This type of work is such that it would have had minimal impact on Ms. Hykes' ability to parent her children, as they would be in school while she was working. Ms. Hykes also acknowledged she did volunteer work in the schools as a special education advocate. She also asserted that doing this volunteer work limited the amount of schools she could report to for substitute work. (*See*, N.T., pp. 43-47). Whether this limitation assertion is true is doubtful, but, even if it is so, Ms. Hykes cannot let such volunteer work interfere with her obligation to support her own children. She realized this and after being effectively cross-examined concerning her earning capacity, Ms. Hykes astutely sought to stipulate that she was going to be assigned an appropriate income capacity (presumably \$1,000 per month as stated by the Master). (*See*, N.T., pp. 47-48).

In fact, Ms. Hykes appearing without counsel has an appearance of being intentional, since no doubt counsel would have been more forthcoming than Ms. Hykes concerning the reality of her income situation. For instance, initially Ms. Hykes refused or suggested she could not furnish complete tax returns, although she knew the requirement to

bring them. (See, N.T., pp. 20, 21). Subsequently, she submitted the entire tax return and objected to it being given to Mr. Bailey unless she got a copy of his in return. (See, N.T., p. 23 and Plaintiff's Exhibit No. 1). This tax return for Ms. Hykes is of interest in itself concerning the matter of her having ability to work. It shows she received as a substitute schoolteacher a grand total of \$602.50. This would approximate seven days of work for the year. Surely, that is an unrealistically low amount of work, even if called only once every two weeks. In reviewing the entire transcript, it does not appear Ms. Hykes ever demonstrated or attempted to testify exactly how many days she was actually called to work as a sub. At one day per week substituting, she would be able to report to work the equivalent of 36 days or 5 times the amount she did. Also, as contrasted to this rather meager sum from substitute teaching, she supplied a W-2 form showing she made \$232.79 as a movie extra for a few days of work. This substantially undermines Ms. Hykes' credibility as to her assertion of not being able to work as a substitute teacher or otherwise during the school year due to her parenting responsibilities. It is common knowledge the movie extra work occurred during the summer when her children would not have been in school, yet she could avoid motherly duties to take part in this "fun" work for a Little League Baseball film.

Ms. Hykes, through counsel, has submitted to the Court the case of *Gephart v. Gephart*, 764 A.2d 613 (Pa. Super. 2000), for the proposition that statements made by the Master at the beginning of the hearing supported remanding this case to the Master for a full and complete evidentiary hearing. *Gephart* does stand for the proposition that even though a party appears before a master *pro se* the master must be mindful of the children's rights being adequately protected and must see that an appropriate record is made regarding relevant factors

relating to earning capacity. Under *Gephart*, it is clear that the master always has a duty to inquire into those relevant factors in order to make a fair award. Here, that is exactly what the Master did. The record shows a full and complete inquiry by the Master as to Ms. Hykes' earning capacity in pages 4 through 37. Thereafter, there was appropriate cross-examination by opposing counsel. (N.T. pp. 37-50). Throughout, it appears Ms. Hykes adequately represented herself, may have intentionally been vague in coming forward with information concerning her earnings and ability to work, and objected appropriately to various inquiries, whether made by the Master or opposing counsel.

Thereafter, the Master received in-depth testimony concerning Mr. Bailey's income and other relevant factors concerning his obligation to pay child support. Throughout, Ms. Hykes posed objections and also posed significant cross-examination to Mr. Bailey. (*See*, N.T. pp. 76-89). Ms. Hykes also made significant arguments on issues relating to Mr. Bailey's income, particularly matters concerning deduction of farm expenses and depreciation. (N.T., pp. 76-77). Ms. Hykes also questioned about missing income items and the lack of Mr. Bailey making efforts to rent out an available rental property. (N.T., pp. 78-80). She also questioned Mr. Bailey's hiding of assets in the children's trust. (N.T., pp. 80-83). The efforts by Ms. Hykes resulted in the Master having a full and complete record upon which to base the child support determination.

It is doubtful that Ms. Hykes would have benefited from the assistance of counsel in presenting her case. The assistance of counsel would not have been able to develop the information concerning these assertions because it became clear at the hearing there was a lack of factual basis to support the assertions, particularly as would relate to her pursuing

further education, her physical disability, and the need to take the children to doctors' appointments. The fact is Ms. Hykes knowingly went forward with the hearing, which had been scheduled for several weeks in advance, without the assistance of counsel and knowing she did not have information to support several of her assertions.

Finally, Exception No. 6, which asserts the Master erred in determining the credit given Mr. Bailey, must also be denied. There is no evidence of record to show that the Master, through use of the PACSES system, incorrectly calculated the deduction credit, which was based upon the information provided through the Domestic Relations Office.

Accordingly, the Exceptions must be denied, given the complete factual record in front of the Master, the Master's well-reasoned decision concerning the assessment of an earning capacity to Ms. Hykes, and the actual determination of Mr. Bailey's income, there is no abuse of discretion, there is no error of law. The record fully supports the Master's determination.

ORDER

The Exceptions filed by Plaintiff on January 17, 2003, are hereby DENIED.
The Order of the Family Court Hearing Officer of December 19, 2002 is hereby
CONFIRMED.

BY THE COURT,

William S. Kieser, Judge

cc: Joy R. McCoy, Esquire
Rita Alexyn, Esquire
Domestic Relations
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)