

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

LYNDA L. SMITH,
Plaintiff

v.

GARY D. SMITH,
Defendant

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No. 01-21,272

OPINION AND ORDER

Both parties have filed Exceptions to the Master's order of November 13, 2002, which addresses Alimony Pendente Lite and counsel fees. Those Exceptions the court deems worthy of discussion are addressed in this opinion.

Both Husband and Wife contest the Master's determination that Husband should be assessed an \$800 per month earning capacity from the business he operates. Husband believes he should have been assessed what he actually earns, while Wife believes he should have been assessed an earning capacity exceeding \$800 per month.

Husband retired after working 36 years as an accountant for Textron. After retiring, he started his own tax preparation business. He works long hours and makes little money. This may seem absurd, but it is clear from the transcript that Husband is one of those workaholics who derives meaning in life from working. He does not want to spend his free time pursuing other interests. He wants to prepare taxes, and he has a perfect right to do that, whether he makes any money or not. Obviously, Husband is able to make a lot more money, but he is not obligated to do so and the court will not

assign him an earning capacity.¹ Instead, we will use the figures on his Exhibit No. 3, a Schedule “C” for the first nine months of 2002. That document shows a pre-tax income of \$561 per month, from which we will subtract 20% in taxes, to arrive at a business income of \$449 per month.

Husband also owns rental properties. In one of the properties, he allows an individual to live rent-free in a small efficiency apartment, in return for doing some work. Wife rightly points out that Husband should be assessed with the rental value of this unit. Husband testified the value is \$275 per month. Transcript, p. 56. The court would consider reducing this amount by the value of the work provided to Husband, but there was no testimony to that effect.

Husband also points out that Wife is living in one of his apartments rent-free, and has been living there for quite a while. Wife should therefore be assessed the rental value of this property, which is \$350. The court notes this will lower her APL far less than the actual value to her of living rent-free, and will be a financial incentive for Husband to continue to permit her to live there.

Husband next points out the Master did not assess Wife with a portion of the cost of the health insurance he provides on her behalf. The cost of Wife’s insurance is \$236 per month. Wife will be assessed her portion of this amount.

Regarding counsel fees, the court notes the Master denied counsel fees because Wife was receiving a free home to live in and free health insurance. Even though she has now been assessed these expenses, the court does not believe counsel fees are appropriate in this case.

¹ We note the Master did not appear to doubt the figures on the documents Husband submitted, nor did the Master suspect Husband had hidden assets from the business or was squirreling away money.

Husband's income is calculated to be \$2745 per month (\$1156 pension, \$540 IRA, \$600 rental properties, \$449 business profits). Wife's income is \$1459 per month (\$1109 earning capacity, \$350 rental value). APL is calculated to be \$514.40 per month. Wife's contribution to her health insurance is 35%, or \$82.60. APL is therefore lowered to \$432.

ORDER

AND NOW, this _____ day of April, 2003, the Exceptions are disposed of as follows: Wife's Exception #3 is granted; Husband's Exceptions #1, #3, #4, and #5 are granted. All remaining Exceptions are dismissed.

It is hereby ordered that Gary D. Smith shall pay to the Domestic Relations Office APL in the amount of \$432 per month, by the 10th day of each month. In all other respects, the Master's Order of November 13, 2002 is affirmed.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Clinton W. Smith
Domestic Relations
William Miele, Esq.
Joy McCoy, Esq.
Gerald Seevers, Esq.
Gary Weber, Esq.