IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BAC,	:	NO. 00-21,386
Petitioner	:	
	:	
vs.	:	
	:	DOMESTIC RELATIONS SECTION
SSC,	:	
Respondent	:	Exceptions

OPINION AND ORDER

Before the Court are cross-exceptions to the Family Court Order of June 9, 2003, in which Respondent was directed to pay child support to Petitioner. Argument on the exceptions was heard July 30, 2003.

In her exceptions, Petitioner contends the hearing officer erred in not including a shareholder distribution in Respondent's income, in failing to require Respondent to produce his 2002 federal income tax return, and in failing to include Respondent's federal and state income tax refunds in his income. In his exceptions, Respondent contends the hearing officer erred in failing to deduct the full amount of the mortgage payment in calculating his income from a rental property, in adding back the depreciation in calculating his rental income, and in failing to consider the holiday schedule in determining whether he has custody of the child for at least 40% of the time. These will be addressed seriatim.

With respect to the shareholder distribution, Respondent's exhibit number 3, his 2001 PA Schedule RK-1, shows the distribution was a return of capital. The hearing officer did not err, therefore, in not including such in Respondent's income.

With respect to the tax return, Petitioner wishes to require Respondent to produce his 2002 federal income tax return once it is filed, and since the support obligation is based on

Petitioner's 2002 income, Petitioner's request is appropriate. Should the return show a significant increase in Respondent's income from 2001 to 2002, Petitioner may seek a retroactive modification of the support obligation provided for herein.

With respect to the federal and state income tax refunds, Respondent's counsel agreed that such should have been included in Respondent's income. Respondent received a federal refund of $1312 and a state refund of $289, for a total of $1601, which averages to $133.42 per month.[1]

With respect to the deduction of only the interest portion of the mortgage payment in calculating Respondent's rental income, Respondent contends that the full amount of the mortgage payment, that is, both interest and principal, should have been deducted. The Court does not agree. The principal payment is not an expense, but rather, similar to a savings account: it will be available to Respondent at such time as he chooses to sell the property, in the form of the increase in the equity. The principal is therefore not deductible from the rental income.

With respect to the depreciation, again, although such is properly deductible for purposes of calculating one's income tax, it is not a real expense which lowers one's income. Therefore, the hearing officer did not err in adding the depreciation back to the net rental profit shown on Respondent's tax return.

Finally, with respect to the hearing officer's failure to consider the parties' holiday schedule of custody, the hearing officer did note that Respondent had 142 overnights based on having 5 out of each 14 overnights during the school year and six weeks during the summer.

The holiday schedule was admittedly not considered. To reach the 40% level, Respondent would have to have 146 overnights, four more than he has based on the "regular" schedule. An examination of the parties' holiday schedule indicates that Respondent has an overnight at Easter during alternate years (1/2), an overnight for the Fourth of July during alternate years (1/2), four overnights at Thanksgiving during alternate years (4/2 = 2), and an overnight at Christmas each year (1), for a total of four overnights each year, when the time is averaged over a two year period. The Court realizes that this is the case only if all of these extra overnights would happen to fall on what would otherwise be Petitioner's time with the child, and recognizes that the probability of such happening is slim to none, and that Respondent probably has in actuality less than the required four overnights based on the schedule as written. The Court also recognizes, however, that the parties' agreement calls for alterations to the schedule as can be agreed upon and thinks the more just treatment of the instant situation, where the non-custodial parent's time is so close to the 40% level that the difference cannot be accurately measured, is to award the deviation provided for by the guidelines.

Considering Petitioner's income of $1800 per month, and Respondent's income of $3832 per month, and also deducting 10% from Respondent's proportionate share of the total obligation, the guidelines suggest a payment of $587.36 per month. His share of the childcare obligation (without considering a 10% deduction) is calculated at $54.43. The credit for the preschool payment is calculated at $47.94.

[1] While the 2001 refunds, received in 2002, are being used, it is assumed Respondent will receive in 2003,

ORDER

AND NOW, this 4th day of August, 2003, for the foregoing reasons, the exceptions are hereby granted in part and denied in part. Respondent's obligation is hereby modified as outlined herein, effective April 8, 2003. Respondent is directed to provide to Petitioner's counsel a copy of his 2002 federal income tax return and a copy of the 2002 federal corporate tax return within five days of filing same. Should the 2002 returns show a significant increase in Respondent's income from 2001 to 2002, Petitioner may seek a retroactive modification of the instant obligation.

As modified herein, the Order of June 9, 2003, is hereby affirmed.

BY THE COURT,

Dudley N. Anderson, Judge

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

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for tax year 2002, a similar amount, since his wages and rental income appear equal in both years.