

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

J.C.,	:	
Plaintiff	:	
	:	
v.	:	No. 03-21,703
	:	
C.C.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses Exceptions filed by Wife to the Master’s order of April 13, 2004, denying Wife’s request for alimony pendente lite. The issue before the court is whether Husband’s income assessment should be based upon his actual earnings, or upon an earning capacity.

Several family law practitioners have expressed frustration at inconsistency in decisions involving this frequently-arising issue. In an attempt to provide guidance to all concerned, this court has recently issued two opinions thoroughly discussing the matter: Mink v. Kozak/Yagel v. Yagel, Lyc. Co. #02-21,368 and #03-21,436, and Rafferty v. Rafferty, Lyc. Co. #04-20,101. In Mink, we set forth the basic analysis to be applied:

In conclusion, the court’s approach to cases involving earning capacity versus earnings, where no recent employment termination exists, will involve an examination of the individual’s age, education, training, health, work experience, earnings history, and child care responsibilities. In addition, the court will consider the party’s employment situation during the marriage, if relevant. We will also consider whether assessing a higher earning capacity would entail a change of lifestyle and if so, the individual’s reasons for rejecting that lifestyle. We will further consider whether the party is earning a reasonable amount of money for the specific profession he or she has chosen. And finally, the court will consider the actual availability of the higher-paying job at issue.

Opinion, pp. 7-8. We further stated,

In analyzing such cases, the court will not assume that “earning capacity” means the greatest amount of money a person is theoretically capable of earning. Almost everyone is capable of earning more money,

if forced to do so. Rather, the court will examine whether an individual is reasonably employed at an appropriate position, commensurate with his or her abilities, and whether that employment is reasonable under the individual's particular circumstances. Ordinarily, the court will be reluctant to dictate to anyone how he or she should be employed. However, the court will not base support on actual earnings when such earnings are clearly less than an individual could reasonably earn. When it is clear an individual is not working up to her or her capacity, the court will not hesitate to apply an earning capacity that is appropriate, utilizing the factors set forth above.

Opinion, p. 8.

In the case before this court, Husband has been self-employed, in "appliance service," which appears to consist primarily of repairing appliances, since 1987. He also works as a subcontractor for Shearer Appliance at an average salary of \$8.00 per hour, earning a total of \$11,000 in 2003. He also removes Freon gas from Lycoming County appliances and Clinton County appliances, and then sells the Freon to Remtec. His total income for 2003 was \$24,400.36, and his net yearly income is \$12,240.00, yielding a net income of \$846.00 per month.

Wife claims Husband should have been assessed a full-time income as an appliance repairman, claiming Husband's situation is similar to the husband in Yagel. The facts concerning Mr. Yagel, as set forth in that opinion, are as follows:

In the case of Yagel v. Yagel, an alimony pendente lite case, Husband has been self-employed as the owner/operator of a plumbing and heating business since 1989. Although his gross receipts in 2002 were \$35,227.02, his expenses exceeded his income and his 2002 tax return showed a loss of \$9668. Even adding back expenses which normally would not be excluded from income, such as depreciation, the business was minimally profitable, at best. Gross receipts for the year 2003 were \$37,785.23. Husband had not yet filed his tax return at the time of the hearing, but his testimony indicated the business was no more profitable in 2003 than in 2002. During the parties' marriage, Husband's self-employment was a bone of contention. Husband has had some recent health problems, but there was no competent medical evidence that Husband could not work for someone else in the plumbing or heating business. In fact, Husband testified that he currently works about sixty hours a week.

Opinion at p. 2. We acknowledge some superficial similarities between Husband and Mr. Yagel. The primary relevant similarities are that each man runs his

own business, neither presented a good reason why he chose to work for himself rather than another, and working for another would not require a lifestyle change. However, in other, more important respects, the two cases are very different.

The most significant distinguishing factor is the profitability of the businesses. Mr. Yagel's business was barely profitable. His expenses vastly exceeded his income, and even after some expenses were added back into his income, the business was minimally profitable, at best. There was no indication the business would become more profitable in the future. We therefore concluded,

the court deems it inappropriate to base Husband's income assessment upon a business which is minimally profitable, when there appears to be no reason why he could not work for a local plumbing/heating company. Husband is not making a reasonable amount of money for the specific profession he has chosen, even considering his decision for self-employment.

Opinion at p. 7.

By contrast, in the case before the court Husband's business cannot be deemed minimally profitable. His yearly gross receipts totaled \$24,400.36, with a net income of \$12,240.00. While this is not a highly profitable business, neither can the court say it is an unreasonable amount of money for the profession he has chosen. In short, it is not the type of case in which the court can justify telling an individual he ought to give up what he is doing and find another job. The court had no qualms about reaching this conclusion with Mr. Yagel, give the large number of hours he worked and the meager profit he made.

Another distinguishing factor is that Mr. Yagel's employment was a long-time bone of contention during the parties' marriage, whereas here there is no indication Wife ever objected to Husband's method of income earning. Therefore, the court is less sympathetic to her assertion, post-separation, that Husband should find a regular job after seventeen years of self-employment.

Regarding the Rafferty case, that involved a woman who had worked for two decades successfully running retail establishments selling crafts, craft supplies, and antiques. At the time of the hearing, she was making little to no money selling crafts and antiques through consignment. The issue was not whether to assign her an earning capacity rather than use her actual earnings. Rather, the issue was what an appropriate earning capacity would be. The wife admitted she was qualified for a retail management position, and also admitted she possesses the same skills as the husband, who had obtained a retail management position. Furthermore, the wife had never applied but been turned down for such a position. Therefore, the court could find no reason to disturb the Master's decision to assign the wife the income of an entry-level retail management position.

What makes Rafferty different from the case before the court is that in Rafferty, the wife was not currently working at a position similar to one she held in her recent past, and which she had held for a long period of time. She was making little to no money at all, selling items by consignment. By contrast, Husband in this case has been self-employed in his present manner since 1987. Moreover, the work he is doing appears to be commensurate with his experience and abilities, and is reasonably profitable.

We also note there is no indication Husband is not putting in a full work week, failing to solicit or accept business, or turning down work at Shearer Appliance. Rather, it appears he has diligently been performing a variety of income-earning activities, which he juggles quite well and which yield a reasonable income. For these reasons, the court will not disturb the Master's decision to base Husband's income on his actual earnings, a conclusion entirely consistent with the court's previous opinions.

ORDER

AND NOW, this _____ day of October, 2004, for the reasons stated in the foregoing opinion, Wife's exceptions are dismissed and the Master's order of April 13, 2004 is affirmed.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
Janice Yaw, Esq.
Marc Drier, Esq.
Family Court
Gary Weber, Esq.