

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

L.M.,	:	
Plaintiff	:	
	:	
v.	:	No. 02-21,368
	:	PACES NO. 674106106
M.K.,	:	
Defendant	:	
	:	
R.Y.,	:	
Plaintiff	:	
	:	
v.	:	No. 03-21,436
	:	
K.Y.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the question of when, for purposes of calculating support and alimony pendente lite, an individual's income will be based upon an earning capacity rather than actual earnings. As both the above-captioned cases involve this question, the court has combined them in an attempt to more fully address the issue and offer guidance regarding how such cases will be decided.

Factual Issues

In the case of L.M. v. M.K., a child support case, Mother is a Registered Nurse, who works at a physician's office four days a week. She has been employed at that position for two and one-half years, and worked at a different physician's office prior to that. She earns \$13.18 per hour, working thirty-two hours each week. In November 2003, Mother was offered a job working at a hospital, which paid \$20 per hour. Mother declined to take the position because it required her to work primarily during the 3:00

p.m. until 11:00 p.m. shift, as well as some weekends, some holidays, and overtime. Mother has never worked as a hospital nurse, and during the parties' marriage the parties agreed Mother should work at the lower-paying doctor office job in order for her to be home with the couple's two children. Mother has primary physical custody of the children, and being available for the children continues to be the reason for choosing the lower-paying position. Husband argues she should be assessed the \$20 per hour wage she could earn working at the hospital.

In the case of R.Y. v. K.Y., 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.

Discussion

The law on earning capacity was recently summarized by the Superior Court in Woskob v. Woskob, 843 A.2d 1247, 1251 (Pa. Super. 2004):

A person's support obligation is determined primarily by the parties' financial resources and earning capacity. Although a person's actual earnings usually reflect his earning capacity, where there is divergence, the obligation is determined more by earning capacity than actual earnings. Earning capacity is defined as the amount that a person realistically could earn under the circumstances, considering his age, health, mental and physical condition, training, and earnings history.

In both the cases currently before the court, one party has argued that the other party's actual earnings do not reflect his or her actual earning capacity. The applicable rule is Rule 1910.16-2(d)(4) applies, which states,

Ordinarily, a party who willfully fails to obtain appropriate employment will be considered to have an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity.

The court notes that a similar, but different, situation arises when a party leaves employment, either voluntarily or involuntarily. In that event, Rule 1910.16-2(d)(1) applies, along with applicable caselaw. *See Grimes v. Grimes*, 596 A.2d 240 (Pa. 1991); *Kersey v. Jefferson*, 791 A.2d 419 (Pa. Super. 2002). Since neither of the cases currently before the court entails an employment change, that issue will not be addressed in this opinion.

The Superior Court has recently issued three opinions involving the question of when a party should be assessed an earning capacity rather than actual earnings, where no recent job termination exists. In *Isralsky v. Isralsky*, 824 A.2d 1178 (Pa. Super. 2003), the Superior Court affirmed the trial court's decision to base a mother's income upon her actual earnings of \$14,400 per year at a less than full-time job where she had been a stay-at-home mother during the parties' marriage and was currently the sole custodian of the parties' children, with the father exercising virtually no partial custody time whatsoever. Next, in *Portugal v. Portugal*, 798 A.2d 246 (Pa. Super. 2002), the Superior Court affirmed the trial court's decision to base a mother's monthly income on her earning capacity rather than the actual income generated by running her own veterinary clinic. The parties had stipulated that the mother would earn \$55,000 per year if she worked as an associate veterinarian at an established clinic, instead of the \$25,000 she earns as a sole proprietor. And finally, in *Dennis v. Whitney*, 844 A.2d 1267 (Pa. Super. 2004), the Superior Court affirmed the trial court's decision to base a

father's income assessment upon his actual earnings operating the family farm rather than working as an Agricultural Engineer, even though the father possessed a B.A. in Agricultural Engineering.

While these cases seem irreconcilable at first glance, the one point they all have in common is that the Superior Court affirmed the decision of the trial court. This does not appear to be a coincidence. Rather, it indicates that under the abuse of discretion standard of review, the appellate court will normally leave earning capacity decisions to the trial court, provided there is evidence to support the trial court's determination. Indeed, the Superior Court has repeatedly stated that appellate courts are becoming more reluctant to substitute themselves as "super-support courts." Weiser, supra, at 288; Isralsky, supra, at 1190.

Moreover, upon a closer examination, the cases can be reconciled based upon important factual differences. The result in Isralsky appears to be based almost entirely upon the mother's responsibilities as the sole caretaker of the parties' three children. The trial court found that the mother, who had previously been a stay-at-home mom, was working to her full capacity based upon her childcare responsibilities. This is one of the factors set forth in Rule 1910.16-2(d)(4), and the trial court found it to be a dominant factor in the case, which it had the discretion to do.

The cases of Portugal and Dennis are somewhat more difficult to reconcile. In both cases, the party at issue had been employed at his or her present job for a number of years, yet in Portugal the court assigned a higher earning capacity and in Dennis the court did not. The factual distinctions justifying these different results are as follows.

First, there was apparently no dispute that the mother in Portugal would be able to obtain an associate veterinary position, whereas the farmer in Dennis sufficiently established to the court's satisfaction that no agricultural engineering jobs were available in his area.

Secondly, the farmer in Dennis had been running the family farm since approximately nine years prior to the birth of the child to whom he owed support, and had never worked as an agricultural engineer. In fact, he obtained his agricultural degree merely to learn how to run the family farm more efficiently. While it is not clear from the opinion, it appears the mother in Portugal worked as an associate veterinarian previously, although she had been running her own clinic for the last three years. Therefore, the Portugal case actually is subject to the stricter review applicable under the “voluntarily termination” analysis.¹

Additionally, changing jobs from a farmer to an agricultural engineer requires a change of profession, whereas changing from a sole practitioner veterinarian to an associate veterinarian does not.

Most importantly, however, it appears the mother veterinarian presented no compelling reasons why she wanted to run her own clinic rather than work for another veterinarian. By contrast, the farmer in Dennis presented specific, and rather compelling, reasons why he chose to run the family farm rather than work as an agricultural engineer.

And finally, requiring a farmer to become an agricultural engineer would force upon him a major change in lifestyle. By contrast, requiring a sole proprietor veterinarian to work as an associate veterinarian would require no such change in lifestyle.

Turning to the two cases before the court, the court finds the following facts to be important. In the case of L.M. v. M.K., Mother has never worked as a hospital nurse. She has been employed at her present job for several years. Before that, she worked for another physician. During the parties’ marriage, both parents agreed she would work for a physician, in order to avoid the undesirable schedule of a hospital

¹ See Rule 1910.16-2(d)(1); Kersey v. Jefferson, 791 A.2d 419 (Pa. Super. 2002); Grimes v. Grimes, 596 A.2d 240 (Pa. 1991).

nurse and permit her to be home with the children. Now that the parties have separated, Father wants to assess her with a hospital nurse's income. Mother is still the primary caretaker of the parties' children, and in addition has another child with her present husband. Although working as a hospital nurse would not require Mother to change professions, it would entail a lifestyle change different from the one Mother has chosen. Working in a hospital is very different from working in a physician's office, and Mother has indicated her preference, with good reasons to back it up. Chief among her reasons is the hospital nurse work schedule, which would require her to work evenings, weekends, and overtime. She would therefore not be available for her children during much of the time they are out of school.

Although it is possible for Mother to make more money by working at a hospital, and indeed such a job was recently offered to her, the court will not assess Mother at a higher earning capacity. The court does not believe "earning capacity" is equivalent to the top dollar an individual is capable of earning. Rather, it is the amount an individual could earn under the circumstances, considering factors including his or her age, education, training, health, work experience, earnings history, and child care responsibilities. *See* Rule 1910.16-2(d)(4) and Woskob, *supra*, at 1251. The court finds Mother's employment is appropriate given her circumstances, and therefore will not disturb the Master's decision to base her income assessment upon actual earnings.

In the case of R.Y. v. K.Y., the court considers the following facts to be significant. Although Husband has operated his own business for thirteen years, it was a bone of contention during the marriage, with Wife complaining that he was not making sufficient money to make it worthwhile. The record shows the business is minimally profitable, despite the long hours Husband sometimes works. There is no indication the business will become more profitable in the future. Husband's health concerns do not account for the poor profits; rather it appears that while Husband may be a good plumber, he is a bad businessman. Additionally, the evidence does not

indicate Husband would be unable to obtain full time employment in the plumbing/heating business, nor that his health problems would prevent him from working full-time.

Perhaps most importantly, Husband did not present any reasons why he preferred running his own business as opposed to working for someone else. The transcript is devoid of any statements by Husband regarding his personal preference for self-employment or any other justification of his choice to be self-employed. Moreover, requiring Husband to be employed by another business would not require much of a lifestyle change. Indeed, in light of Husband's testimony that he is currently working sixty hours per week, a forty-hour work week for a plumbing/heating company could well be a relief for Husband.

In short, 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. Unlike the mother in L.M. v. M.K., Husband has presented no good reason why he chooses to work for himself rather than an employer. Also unlike the mother in L.M. v. M.K., Husband is not making a reasonable amount of money for the specific profession he has chosen, even considering his decision for self-employment. For these reasons, the court will not disturb the Master's decision to assess him with an earning capacity.

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.²

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 his or her capacity, the court will not hesitate to apply an earning capacity that is appropriate, utilizing the factors set forth above.

² Of course, other factors may be considered when relevant to the particular facts of each case.

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

L.M.,	:	
Plaintiff	:	
	:	
v.	:	No. 02-21,368
	:	PACES NO. 674106106
M.K.,	:	
Defendant	:	

ORDER

AND NOW, this _____ day of July, 2004, for the reasons stated in the foregoing opinion, Father's Exceptions #3 and #4, relating to Mother's earning capacity, are dismissed. Exception #1, regarding Father's income tax refund, is granted because the actual amount received was \$3825. Exception #2, regarding Mother's net monthly income, is granted because her paystub is based upon ten weeks rather than twelve weeks. It is hereby ordered as follows:

1. Based upon Father's net monthly income of \$3974.95 and Mother's net monthly income of \$1705.50, Father's basic child support obligation is \$1030.80 per month. After deducting Mother's obligation of \$19.05 for health insurance, Father's monthly obligation is \$1011.75 per month.
2. Father's child care obligation is \$315.90 per month.
3. Father shall be responsible for 69.98% and Mother shall be responsible for 30.02% of all reasonably necessary medical services and supplies, including, but not limited to, surgical, dental, optical and orthodontic services incurred on behalf of the children which are unreimbursed by insurance or Medicaid within thirty days of proof of such paid expense presented by one party to the other.
4. In all other respects, the Master's order of March 26, 2004 is affirmed.

BY THE COURT,

Richard A. Gray, J.

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

R.Y.,	:	
Plaintiff	:	
	:	
v.	:	No. 03-21,436
	:	
K.Y.,	:	
Defendant	:	

ORDER

AND NOW, this _____ day of July, 2004, for the reasons stated in the foregoing opinion, the exception filed by the plaintiff to the Master's order of January 2, 2004 is dismissed.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
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