

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

JANE L. PENMAN,	:	
Plaintiff	:	
	:	
v.	:	No. 97-20,763
	:	PACES NO. 223001818
JAMES F. BOWES,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the Exceptions filed by both parties to the Master's order of August 27, 2003.

Father's first exception relates to the Master's failure to award tax exemptions for the children. Father's petition for modification, filed on June 18, 2003, raises only the nurturing parent issue. Nor could the court find anywhere else in the record where the tax exemption issue was raised. Therefore, this exception will be denied.

Father's second exception relates to his request for modification of the arrearages based upon Mother's alleged failure to report material changes in circumstances. The transcript of January 2, 2003 clearly shows that Father withdrew this request, surmising that a modification review going back to the time of Mother's alleged failure would subject him to higher support under the new 1999 guidelines. Therefore, this exception will be denied.

Father's third exception relates to the Master's failure to include Mother's share of the 2002 tax refund and child tax credit refund she received. The additional \$400 per child Mother received in 2002 was an advance payment for the 2003 child credit, which was raised from \$600 to \$1000, effective for the 2003 tax year. Therefore, it is arguable whether this advance payment, although received in 2002, should be credited to Mother's 2002 income. Nonetheless, Mother's proportionate share of the 2002 tax refund she and her husband received should certainly have been added to her income.

However, if the court adds to Mother's income the tax refund attributable to her children with Mr. Bowes, and Mother's percentage of the tax refund attributable to her children with her current husband, the court would have to do the same for Father. We would do that by using Father's assessed income, calculating what tax refund he and his wife would have received, and assessing Father with his proportionate share of the refund. The court has performed the calculations and, depending upon the exact methodology used, it is likely Father's child support would actually increase, although insignificantly. Therefore, the court will decline to change the support order.

Father's fourth exception relates to the Master's failure to grant a continuance and/or an opportunity to seek legal counsel following his emotional breakdown during the testimony. The court could find no place in the record where such an emotional breakdown occurred.

Father's fifth exception relates to the Master's error in stating that he holds currently valid certificates of certification. While it is true those certificates have lapsed, this is a harmless error as Father's earning capacity was based upon his last employment, which was at the college level, and Father still clearly has the ability to be employed at that level.

Fathers' sixth exception relates to the Master's finding regarding the availability of Father's parents to provide childcare. This exception will be denied, as the Master merely reiterated what the testimony was regarding Father's parents. This testimony was: (1) Father's parents live one block from his residence, (2) Father testified his mother has a medical problem which causes her to become dizzy and fall, and (3) Father initially stated that his parents were never used previously for child care, but later admitted he had used them on occasion, while he was employed. The Master did not find Father's parents to be appropriate full-time caregivers, nor did the Master place much emphasis on this factor.

Father's exceptions #7, and #8 relate to the Master's acceptance of certain testimony without requiring documentation to back up the testimony. Father appears to believe that Pa.R.E. 1002, which corresponds to the common law "best evidence" rule, requires every assertion to be backed up by documentation. The rule, however, merely requires the document to be introduced when a litigant is attempting to prove the content of a writing. Clearly, the best evidence rule does not apply to the instances Father is complaining about, since Mother's testimony regarding hardship and working extra hours did not involve the content of a writing. The Master had the discretion to assess credibility and accept the testimony of Mother on these issues, and the court will not disturb the Master's credibility assessment.

Father's ninth exception relates to the Master's failure to require Mother to produce the e-mail she testified Father sent her, while allowing Mother to testify that the e-mail stated Father would not be seeing the parties' children until further notice. Because Mother's testimony was in regard to the content of a writing, this testimony arguably falls within Pa.R.E. 1002. However, Rule 1004 states the rule does not apply if, among other things, the writing is not closely related to a controlling issue. The court does not consider the e-mail to be closely related to the nurturing parent issue but even if we were to deem it so, the Master would have committed harmless error in admitting Mother's testimony, as Father admitted he has not seen the children since January 2003.

Father's tenth exception relates to the Master's acceptance of notes taken by domestic relations worker Scot Erb during a 1998 conference, without requiring Mr. Erb to testify. The notes, written on February 12, 1998, contained statements made by Father which support the Master's finding that Husband quit his job in order to avoid paying child support, and cast doubt upon his motivation to be a nurturing parent. The notes were hearsay, and while it appears they could have been properly introduced as business records, no adequate foundation was laid. Therefore, the Master erred in

admitting the notes and considering the contents. However, the court finds that to be harmless error, as there is no dispute Father quit his job, and there was other evidence to support the Master's finding regarding Husband's motivation to be considered a nurturing parent.

Father's eleventh exception relates to the Master's failure to recognize the non-economic contribution Father is making to his second family by staying home with his children. The court finds no error, as the value of a parent staying at home is obvious and not in dispute. However, this is not a factor to be considered in applying the nurturing parent doctrine. Father further states that in failing to recognize his "job" as a nurturing parent, the Master is requiring him to take on a second job. In rejecting Father's nurturing parent request, however, the court is not requiring Father to be employed at all. We are merely requiring him to pay child support for the two children in Mother's primary physical custody, as most partial custodial parents must do, regardless of whether they have young children to later marriages.

Father's twelfth exception states the Master erred in emphasizing the childcare arrangements in place during the parties' marriage. This exception will be denied, as it is one of the factors a court must consider in applying the nurturing parent doctrine, and the court agrees that in this case the parties' previous child care practice deserves particular emphasis, in order to prevent prioritizing Father's second set of children, at the expense of his first two children.

Father's thirteenth exception states that the Master erred in casting suspicion upon Father's failure to raise his nurturing parent status earlier. Father argues the transcripts show he was "dissuaded from applying for nurturing parent status under duress imposed by the Master and the Domestic Relations Officer" The court can find no such instance of duress in the transcripts.

Father's fourteenth exception relates to the Master's emphasis upon the fact that Father has not seen the children who are the subjects of the support order since January

2003. Father claims the Master refused to permit him to present evidence on why he has not seen the children. The court does not find such a prohibition. Father had a full and fair opportunity to present evidence on all the relevant issues. Father's relationship with the children at issue was properly considered as evidence of his motivation in seeking nurturing parent status.

Father's fifteenth exception states the Master erred in citing two cases and failing to note that although nurturing parent status was rejected, the court did reduce the earning capacity of the party seeking that status. The court finds no error here. While the Master could have rejected Father's request to be considered a nurturing parent but reduced his earning capacity, the Master did not do so and the court agrees with the Master's decision in that regard.

Father's sixteenth exception relates to the Master's refusal to grant him nurturing parent status. The Master has correctly cited and analyzed the leading cases on this issue, as well as the Lycoming County cases. The Master has also correctly stated the factors to consider, and the court agrees with the Master's conclusion that it is inappropriate to relieve Father of his responsibility to financially support the two children at issue.

The cases in Lycoming County that granted nurturing parent status, namely Illes v. Illes, #98-20,477; Miksch v. Jones, #99-21,091; and Patetta v. Patetta, #02-21,473, were all cases in which the children to be nurtured were children of the parties' own marriage. Moreover, the parent granted nurturing parent status had been a stay-at-home parent during the marriage, as a result of a joint decision between the parties. And finally, in all three cases the nurturing parent's ex-spouse was a high-income earner. The facts of this case are very different.

To summarize the relevant facts, both Mother and Father worked during the time their children were young. There was never any discussion regarding one of the parents staying at home to nurture the children. Father worked as a professor of higher

education the entire time, and Mother worked also, in addition to attending school. The couple relied on third parties to care for their children. The children Father now wishes to nurture are the children born to himself and his current wife. At the time of the hearing, these children were six months old and four years old. Currently, they are eighteen months old and five years old. Father's parents live close by, and while they may be able to care for the children occasionally, they are not appropriate full-time caregivers due to their age and health. Eliminating Father's obligation to financially support the children born to himself and Mother would place an unfair burden upon Mother. In fact, this burden has already been placed upon her, due to Father's failure to pay support for an extensive period of time. As a result, Mother has had to work additional hours, resulting in decreased time with the children who are the subject of this order, as well as decreased time with the children born to herself and her current husband.

And finally, the Master found, and the evidence supported this finding, that Father's request to be deemed a nurturing parent was primarily motivated by his desire to be relieved of his obligation to pay child support. The Master found Father's testimony not credible, and the court will not disturb the Master's findings regarding credibility. We also note the Master believed Mother's testimony that Father stated to her he would quit his job before he would pay child support. Moreover, the fact that Father has not seen the two children subject to this order since January 2003 supports the conclusion that Father's motivation is based in large part upon a desire to escape his financial obligation to those children.

In summary, Father has an extensive work history. He was employed as a professor of higher education during the time of the parties' marriage, and there is no reason he could not obtain a similar position again. The children subject to this order did not have the benefit of a stay-at-home parent to nurture them, and to eliminate Father's child support responsibility to them would prioritize the children born to Father

and his current wife. It is unfair to force Mother to bear the entire financial responsibility for the children she and Father brought into the world, and unfair to those children. Father has chosen to bring two more children into the world, and he has a perfect right to do so. However, he cannot expect the court to eliminate his responsibility to his first two children because of that decision. Thus this case is most like Moore v. Urbina, Lycoming County #97-20,006, where the mother sought nurturing parent status to nurture an infant born to herself and her new husband. However, that mother had an extensive work history, the children subject to the support order never had the benefit of a nurturing parent, and the ex-spouse of the mother did not have a large income. That mother was denied nurturing parent status, and the court agrees with the Master's decision to deny Father's request, as well.

Father's seventeenth exception relates to the Master's characterization of Father's employment termination as voluntary. The court finds no error in this regard, as the Master's finding was accurate.

Father's eighteenth exception relates to the Master's establishment of an earning capacity rather than actual earnings for Father. The Master finds no error, as the Master properly rejected Father's request for nurturing parent status, and simply used Father's income from 1998, when he was a professor of higher education. Since Father provided no legitimate reason he could not obtain a similar teaching job, that income assessment was proper. In fact, that assessment was generous to Father, if anything.

Father's nineteenth exception states the Master erred in not finding that Mother's available financial resources were adequate to support the parties' children if Father were granted nurturing parent status. The Master believed the testimony of Mother that receiving no support from Father had caused her and her family hardship and had in fact caused her to work more than she normally would, resulting in less time spent with the parties' children as well as the two children from her current marriage.

The court will not disturb the Master's finding of credibility, as that finding is supported by the evidence.

Father's twentieth exception states the Master failed to consider the impact of Father's income assessment upon his present household. The court finds no error, as this issue is not a factor in determining the nurturing parent status.

Father's twenty-first exception states that the Master relied upon self-generated corroboration by the petitioner. This exception will be denied, for the same reason Exceptions #7 and #8 were denied.

Father's second twenty-first exception¹ states the Master erred in publishing the income and deductions of Father's wife. The Master did so because under the support guidelines he was required to determine whether Father would be entitled to a deviation because of the children in his second family, which he in fact was entitled to. Stating the calculations in the order was done so that both parties, as well as the court, could understand how this deviation was calculated and determine whether an error was made.

Father's twenty-second exception relates to the amount of arrearage payment set by the Master. Considering the extensive amount of arrearages, which is over \$11,000, and the fact that Father's earning capacity was set at his 1998 earnings, which should be greater now, the court finds no error.

Mother's first exception states the Master should have made the order effective the date Father filed his petition for modification. As Father's support was increased as a result of the order, this exception will be denied.

Mother's next exception relates to the amount of money the Master ordered as payment on the arrears. Given the large amount of arrearage, the court understands Mother's argument that it will be many years before the arrearage is eliminated at a

¹ Father incorrectly numbered his exceptions.

payment of \$100 per month. Nonetheless, given the entire circumstances of the case, the court considers that payment appropriate.

Mother's next exception states that the Master should have used a higher earning capacity for Father. This exception will be denied. As stated previously, the Master used Mr. Bowes' income figure based upon his last employment, which was a net monthly income of \$2,368.92 per month. The court realizes that using Father's 1998 income was generous to Father; however, in light of the totality of the circumstances the court considers that figure an appropriate one.

Mother's next exception states the Master erred in not assuring the record was complete as to Father's earning capacity. The Master based his earnings upon his 1998 earnings, when he was a professor of higher education. Clearly, Father is capable of teaching at the college level again, and therefore the court deems the Master's income assessment appropriate.

ORDER

AND NOW, this _____ day of September, 2004, for the reasons stated in the foregoing opinion, Father's Exceptions are dismissed, Mother's exceptions are dismissed, and the Master's order of August 27, 2003 is affirmed.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
Janice Yaw, Esq.
Patricia Bowman, Esq.
Domestic Relations (JJ)
Family Court
Gary Weber, Esq.