

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

K.R.,	:	
Plaintiff	:	
	:	
v.	:	No. 04-20,101
	:	PACES NO. 053106173
D.R.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses Exceptions filed by Wife to the Master's order of April 5, 2004, awarding child support and spousal support.

Wife's exceptions relate to her earning capacity assessment. The Master assessed her at \$1500 per month, but unfortunately did not explain where this figure came from. The court can only surmise the Master believed Wife was capable of obtaining a position as a manager of some type of retail establishment, and that the Master accepted Husband's testimony that entry level managers at McDonald's earn between \$25,000 and \$27,500.

We begin with the analysis set forth in Mink v. Kozak/Yagel v. Yagel, Lyc. Co. #02-21,368 and #03-21,436, which addresses the issue of when an individual should be assessed at his or her earning capacity instead of actual earnings. That opinion states,

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.

Here, it would clearly be inappropriate to assess Wife at her actual earnings, as she is earning virtually nothing at all. She is placing her antiques and crafts on

consignment at two establishments, and looking into others. There is no prospect for Wife to earn any significant amount of money in the near future, and Wife clearly is not expecting to earn a living from the antique/craft business. Wife is not even requesting to be assessed at her actual earnings; she is requesting to be assessed a minimum wage earning capacity.

The question then becomes what is an appropriate earning capacity for Wife. She is forty-four years of age, and is in perfect health. She has a high school diploma and has taken two college courses. She has numerous skills with regard to antiques and crafts. Her primary marketable skill, however, is in retail store management. She and Husband worked together for twenty-three years at the craft store they operated at the Lycoming Mall, and the couple earned a good living from that store. Wife was fully active in managing the business. In 1996, the couple bought a building in Williamsport, phased out the craft store at the mall, and began another craft business in their new building. In 1997, Husband obtained a job managing a McDonald's store, and Wife ran the craft business herself. The business did not do well in the new location, so the couple sold the building and liquidated the business in December 2003.

Given Wife's long-term experience at successfully managing a retail establishment, the court cannot accept Wife's argument that she should be assessed a minimum wage job. Wife admitted she is qualified for a management position, but stated she did not want to take time away from her daughter, or to pay daycare expenses. N.T., p. 30. The court does not find this persuasive, however, because the child in her primary custody is seven years old, and attends first grade. Moreover, Wife worked managing the couple's business during the parties' marriage, when the couple's children were not yet in school, and the couple used daycare.

Husband testified that with regard to Wife's management skills, she has the same or better skills as he, along with the same educational background. Wife's testimony tended to confirm Husband's assessment of her abilities. Husband was able

to obtain a retail management position, and the court must conclude that with Wife's abilities and over twenty years' experience successfully managing a retail business, Wife is capable of obtaining the same type of position. The court also notes that such a position would be consistent with Wife's chosen lifestyle for the last two decades.

Counsel for Wife argues that a management position would require Wife to work at odd hours, which would hamper her responsibility as the primary custodial of her daughter. The court is not convinced that all such management positions require odd hours. Moreover, the court does not find this argument convincing, as Wife testified that she applied at Wegmans for a night shift job, "so [daughter] could be – sleepovers with her dad or with her older sister and then I could be there for her during the day, still do the consignment things, go to auctions." N.T., p. 27. Thus Wife herself was contemplating an "odd-hour" job, in part so that she could continue to dabble in the antique/craft business.

Wife's counsel also argues that Wife could not obtain a management position because she does not have computer skills, and knows little about taxes and insurance. There is no evidence such skills and knowledge are required for the type of management position being considered.

Wife's counsel further argues there is no evidence on the record that such jobs are available. While that is true, retail management positions are far from rare, given the number of retail establishments in the community. The primary problem with Wife's argument, however, is that Wife did not apply for any retail management positions. Should Wife apply for such jobs and fail to obtain one, the court could always determine at a later date that the assessed earning capacity is no longer appropriate.

In short, the court believes the record supports the earning capacity and conclusion established by the Master.

ORDER

AND NOW, this _____ day of September, 2004, for the reasons stated in the foregoing opinion, Wife's Exceptions are dismissed and the Master's order of April 5, 2004 is affirmed.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
Janice Yaw, Esq.
Christina Dinges, Esq.
Domestic Relations (MR)
Family Court
Gary Weber, Esq.