

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

SHERRY L. HULL,	:	
Plaintiff	:	
	:	
v.	:	No. 04-20,530
	:	PACES NO. 417106366
JERRY L. HULL,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the Exceptions filed by both parties to the Master's order of August 10, 2004, awarding Wife spousal support.

Husband objects to the Master's use of Wife's actual income, rather than assigning her an earning capacity. Wife has been employed part-time at Sears for four years. She has attempted to find full-time work, but has not been successful. She works twenty-two to twenty-five hours each week, at \$8.48 per hour. Her last full-time employment was prior to 1990, when she worked for eighteen months as a waitress. She was unemployed from 1993 to 1998 due to medical problems.

Husband argues Wife is able to work full-time, and Wife freely admitted she is physically able to do so. Ordinarily, the court would assign her a full-time minimum wage earning capacity. However, that would put Wife at \$750 per month, whereas using her actual income results in an assessment of \$770.92 per month. Husband argues that the court should assess her full time at \$8.48 per hour. The court rejects that suggestion, as Wife is clearly paid that relatively high wage because of the part-time nature of the work, which brings no benefits. It would be unrealistic to expect Wife to earn that wage working full-time, given her work history. Therefore, the court will not disturb the Master's assessment of Wife's income.

Wife argues that Husband should be assessed an earning capacity rather than using Husband's actual earnings. She compares his situation to the plumber in Mink v.

Kozak/Yagel v. Yagel, Lyc. Co. #02-21,368 and #03-21,436. The essence of her argument is that Husband could be earning more money driving a truck for a company than running his own business. The court finds that Husband's situation is very much like the Husband in Council v. Council, Lyc. Co. #03-21,703. In that opinion we stated:

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.

Similarly, Husband in this case has been working as an independent truck driver for over twenty years—apparently with no opposition from Wife. Moreover, he is earning a reasonable amount of money for the profession he has chosen.

Regarding Husband's earnings, the Master used his 2003 income tax return, which shows a profit of \$1018.00. She added back in car and truck expenses of \$448, utilities of \$215, and travel expenses of \$680. Neither party has objected to these add-backs. Wife has objected, however, to the depreciation add-back figure. The Master took the total depreciation Husband claimed, and permitted Husband to take 1/3 of that amount each year. Neither party has objected to the three-year figure; however, Wife has argued that \$4908 of that amount should be added back into his income. This figure comes from Part III of his depreciation schedule, described as a "MACRA deduction for assets placed in service in tax years beginning before 2003." The \$4908 is clearly a figure which Husband had formerly chosen to expense out rather than deduct in the entire year; therefore, the court finds he is entitled to subtract this entire amount from his income, since it is an ongoing expense.¹

However, the Master made an error that neither party pointed out but the court feels compelled to correct. Although the Master meant to expense the \$29,569.00 over three years, she added back only 1/3 of the amount, or \$9,856.33, when actually she should have added back 2/3 of the amount, since Husband is only permitted to deduct 1/3 of the expense each year. Since the \$29,569.00 is reduced by \$4908, as stated above, the amount to expense is \$24,228, and the amount to be added back into Husband's income is therefore \$16,152.

Husband's annual income is thus calculated by including the following: profit of \$1018, and the following add-backs: car and truck expenses of \$448; utilities of \$215, travel expenses of \$680; Section 179 depreciation of \$16,152. From that amount is deducted \$4908, to arrive at \$13,605, or \$1133.75 per month. Spousal support is therefore calculated to be \$145.13 per month.

¹ As the court has no transcript, we must assume this was a permissible deduction. We also note that this figure was very close to that claimed under Part III in 2002.

ORDER

AND NOW, this _____ day of October, 2004, for the reasons stated in the foregoing opinion, it is hereby ordered as follows:

1. Husband's Exception is dismissed.
2. Mother's Exception #1 is granted, and it is ordered that spousal support shall be \$145.13 per month. Husband shall be responsible for 60% of Wife's unreimbursed medical expenses, and Wife shall be responsible for 40% of her unreimbursed medical expenses.
3. Mother's Exception #2 is dismissed.
4. In all other respects, the Master's order of April 7, 2004 is affirmed.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
Randi Dincher, Esq.
Bradley Hillman, Esq.
Domestic Relations (RW)
Family Court
Gary Weber, Esq.