IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

C.E.C.,	:	
Plaintiff	:	
	:	
v.	:	No. 05-20,115
	:	PACES NO. 547107105
B.K.T.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the Exceptions filed by Father to the Master's order of April 8, 2005, awarding child support. Father's primary issue is the Master's assessment of his earning capacity. Father currently owns and operates a small business known as Kimble's Deli and Six Pack. He has been doing so for three years. Instead of basing his income assessment upon Father's actual earnings, the Master based it upon the current salary level of a position with Lycoming County as an environmental planner, which is $32,940.43. The Master's decision was based upon Father's degree in Environmental Planning and his former employment in that capacity in the Philadelphia area, at which he earned $74,000 per year.

The record is not entirely clear on Father's work history, but it appears Father graduated from Bloomsburg University with his planning degree and worked for a short period of time as a planning consultant in another location. At that point, which appears to be about 2001, he considered moving to Williamsport, his former home, and entered into serious discussions with an official in the county's Planning Department about employment there. Father then accepted an environmental planning consultant position

in the Philadelphia area, earning $74,000 per year. In August 2002, Father established his deli business in Williamsport.

The Master applied Rule 1910.16-2(d)(1), which states,

> Where a party voluntarily assumes a lower paying job, there generally will be no effect on the support obligation. A party will ordinarily not be relieved of a support obligation by voluntarily quitting work or by being fired for cause.

In construing this rule, the Pennsylvania Supreme Court has required that a party seeking modification after a voluntary reduction in income must show (1) that the change was not made for the purpose of avoiding child support, and (2) that reduction is warranted based upon the party's efforts to mitigate the lost income. Grimes v. Grimes, 596 A.2d 240 (Pa. 1991); Kersey v. Jefferson, 791 A.2d 419 (Pa. Super. 2002). This law also applies to cases where a parent is fired for cause. Ewing v. Ewing, 843 A.2d 1282 (Pa. Super. 2004).

The Master found Father had mitigated his lost income by acquiring his own business, and therefore did not assess him at $74,000 per year.[1] The Master found, however, that it was inappropriate to assess him at his current earnings based upon his education and work history. The court agrees that Father has mitigated his lost income and therefore should not be assessed at $74,000 per year. The question then becomes one of earning capacity versus actual earnings.

The applicable rule is 1910.16-2(d)(4), 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.

[1] Obviously, Father did not reduce his income for the purpose of avoiding child support, as the child had not yet been conceived when he left his job in Philadelphia.

This court has issued a number of opinions regarding how we will be analyzing the issue of earning capacity versus actual earnings. Mink v. Kozak/Yagel v. Yagel, Lyc. Co. #02-21,368 and #03-21,436; Rafferty v. Rafferty, Lyc. Co. #04-20,101; Counsil v. Counsil, Lyc. Co. #03-21,703; Hull v. Hull, Lyc. Co. #04-20,530; Jennings v. Jennings, Lyc. Co. No. 04-20,906; and Chance v. Chance, 97-20,855. In Mink/Yagel, 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.
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> Opinion, pp. 7-8. We further stated,
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> 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.
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> Opinion, p. 8.

Our conclusion was based upon an analysis on the three leading cases on earning capacity: Isralsky v. Isralsky, 824 A.2d 1178 (Pa. Super. 2003); Portugal v.

Portugal, 798 A.2d 246 (Pa. Super. 2002); and Dennis v. Whitney, 844 A.2d 1267 (Pa. Super. 2004).

Of the cases cited above, including those decided by this court, the case currently before us is most similar to Dennis, Counsil, and Hull. In Dennis, the father was assessed based upon his actual earnings operating a family farm rather than what he would be able to earn working as an Agricultural Engineer, even though he possessed a B.A. in Agricultural Engineering. In Counsil, this court assessed the husband based upon his actual earnings as an appliance service repairman, rather than assessing him at a full-time wage as an appliance repairman working for someone else. In Hull, the court assessed the husband based upon his actual earnings as an independent truck driver, rather than upon what he could earn working for a trucking company.

All three of these cases involved individuals who had worked at their current position prior to the time of the parties' separation and/or the birth of the child for which support was sought. In all three cases, imposing an earning capacity sought by the other party would have required a lifestyle change, and this court was simply not prepared to require such a change, so long as the individual was earning a reasonable amount for the profession he or she had chosen.

By contrast, in Yagel, this court assessed the husband with a full-time earning capacity working for a plumbing and heating business because although he had run his own such business for fifteen years, and often worked sixty hours per week, it was minimally profitable, at best, with no prospect of becoming more profitable in the future. Moreover, his self-employment had been a bone of contention throughout the marriage.

In the case before this court, applying the analysis set forth in Yagel and cited above, it is true Father has an environmental planning degree and that he has a short history of working in that area. His decision to return to Lycoming County and operate a deli, however, was a decision based upon clear lifestyle preferences. N.T., p. 27-28.

Specifically, he had a "passion" to operate his own business, and he rejected the high cost of living in the Philadelphia area. He returned to his home town and established his own business, in which his brother assists him. Furthermore, he made the decision to start his own business well before the birth of the child at issue, which occurred in January 2005—indeed, well before that child's conception and presumably, before becoming intimate with Mother. Moreover, there is no evidence Father would be able to obtain a planning position with Lycoming County at this point, or even that such a position is available. And finally, although like many small businesses Father's deli was initially not profitable, it is now turning a profit. A fair assessment of Father's income establishes to the satisfaction of this court that Father's current earnings are not unreasonable.

The court has reviewed Father's 2004 tax return, and calculates his yearly income as follows. Profit from his business is valued at $5708 ($1348 reported profit, $1305 added back for depreciation, $3055 added back for amortization). Rents are valued as $881 ($7900 minus $4815 interest, minus $544 repairs, minus $1660 property taxes). Income taxes are: $373.59 ($190 federal, $160 Pennsylvania, $23.59 local). Interest income is $2577, ordinary dividends are $616, qualified dividends are $485, capital gains are $3151. To this the court will add $3600 per year for the benefit Father derives for the car expenses paid by the business, N.T. p. 34 and $2184 per year for the benefit Father derives from food paid for by the business, N.T., p. 36. Father's total yearly income is $18,828.41 per year, or $1569.03 per month.

In short, Father made a lifestyle choice to operate his own business before the child at issue was conceived. He started the business three years ago, has worked very hard to develop it, and has built it to the point it is profitable and has a promising future. In light of these circumstances, the court finds it inappropriate to assess him with an earning capacity of an environmental planning job he does not want and is not available based upon the record.

Father has also raised the issue of a credit. This exception will be granted, and the court will order a credit due to him of $350. N.T., p. 47.

Mother has also filed exceptions, the first of which has been withdrawn. Mother's second exception relates to child care expenses. As the transcript does not support her position that she incurs an additional $10 per week in child care, the court will order that to be handled administratively, if Mother provides an appropriate affidavit establishing that expense.

O R D E R

AND NOW, this _____ day of August, 2005, for the reasons stated in the foregoing opinion, Father's Exceptions #1-8 and #11 are granted and Father's Exceptions #9 and #10 are granted in part. Mother's Exceptions #1 has been withdrawn, and Mother's Exception #2 is granted. It is further ordered that:

1. Child support is set at $343.58 per month.
2. Child care expense contribution is set at $45.33 per month.
3. Health Insurance contribution is set at $35.60 per month.
4. Unreimbursed medical expenses are: 51.28% to Father, 48.72% to Mother.
5. Father shall receive a credit of $350.00
6. Should Mother provide an affidavit regarding an additional child care expense of $10 per week, the Domestic Relations Office is authorized to issue an administrative order incorporating the change, and making it retroactive to February 4, 2005.
7. In all other respects, the Master's order of April 8, 2005 is affirmed.

BY THE COURT,

_____
Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
Mark Taylor, Esq.
Eleanor Marsalisi, Esq.
Domestic Relations (SF)
Family Court
Gary Weber, Esq.