

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

C.M.,	:	
Plaintiff	:	
	:	
v.	:	No. 95-20,251
	:	
T.M.,	:	
Defendant	:	

OPINION and ORDER

In this child support case, the parties agreed to have the court assign earning capacities for both parties, based upon the existing record made in Family Court before Family Court Hearing Officer Gerald Seevers, who has since retired.

As to Mother's income, Mother is thirty-nine years old. She graduated from high school and completed business school in 1986, with an associate degree in Executive Secretarial. She has a spotty work history, holding no employment for any serious length of time. Since January 2001 the only income she earned has been babysitting for two-to-three hours per day and cleaning on the weekends. The last full-time job she held was from April 1999 until April 2000, working at a gas station mini-market. It was there she earned the highest wage in her career: \$8.15 per hour. N.T. February 25, 2004, pp. 73, 79. Father offered the testimony of Ron Sholtis, a vocational and rehabilitation consultant, who testified that Mother has an earning capacity of \$20,140-\$31,530. The court found Mr. Sholtis' testimony and his report entirely unconvincing. We will set Mother's income at \$8.15 per hour, for forty hours per week, the rate of her most recent full-time employment, which was also her highest-paying job. After deducting taxes, her income will be set at \$1163.89 per month.

Regarding Father's income, the court has thoroughly reviewed the testimony and has considered the expert reports. The court finds the testimony and report of

William Boles minimally helpful, as it is highly speculative and he was not aware of the large amounts of money given to Father by his mother.

The court finds the testimony of defendant's expert, Leanne Plessinger, to be minimally helpful, as the gist of her testimony was that Father's principal payments on his real estate and his business loans should be taken into consideration when calculating his income for support purposes. The court does not agree, as the appellate courts have ruled that only the interest on such loans is deductible. To rule otherwise would permit individuals to increase their equity at the expense of their children.

The court finds James Armstrong's testimony to be the most helpful; however, our primary disagreement with his assessment is his adding back all depreciation claimed by Father. In accordance with appellate precedent, we will not permit Father to deduct depreciation on real estate, as that is merely a paper loss. However, we will permit Father to deduct depreciation for actual out-of-pocket expenses such as equipment purchases, since that represents real expenditures for items that have a limited life and must eventually be replaced. However, the court will not allow 179 depreciation deductions to be taken in one year, but will instead spread those deductions over a five-year period. As to Father's stock market losses in 2001 of \$139,556, the court will not consider those losses as impacting his income for child support purposes, especially as much of the money for those investments came from his mother.

The court also rejects Mr. Armstrong's assessment of \$20,000 for "debt forgiveness," as the money referred to was clearly gifts from Father's mother. The court further rejects Mr. Armstrong's assessment of \$60,000 for "gross profit increase," as there was no credible evidence that Father is hiding income. Furthermore, Mr. Armstrong's report did not take into consideration that the SubS corporation includes the construction business.

With these general remarks, the court's approach is to analyze Father's individual and Subchapter S Corporation tax returns for 2001 and 2002, and make a fair

determination of what amounts should be included as income for support purposes. We will then average his income for 2001 and 2002, to arrive at an earning capacity figure.

Following are the funds the court will include in Father's income.

2001

\$1415.00	Interest/Dividends
\$15,602.00	Rental Income
\$8201.00	Depreciation add-back for the rental properties, excluding \$129.00 for the refrigerator and \$52.00 for the air conditioner. (Father's return, Schedule E.)
-\$28,278.00	Sale of Business Property (Ordinary Gains and Losses--Improvements), from Form 4797 Part II of Father's personal income tax return.
\$28,245.00	Capital Gains and Losses from Schedule D, Part II of Father's personal income tax return. (Includes \$11,820 from Form 4797 Part I.)
\$33,104.00	SubS profit, from SubS tax return, line 21.
\$6,248.00	Income from Other Rental Activities, from SubS Schedule K.
\$19,200.00	Depreciation addback for the \$24,000 Section 179 expense, from SubS return, form 4562 Construction, Part 1. The court will allow Father to depreciate this purchase over five years, taking a depreciation deduction of \$4800 per year.
\$488.00	Addback for non-allowable depreciation deduction for real estate, from SubS 4562 Construction, Part II. [Other depreciation under Part Two appears to be legitimate equipment or other tangible item purchases.]
\$1,465.00	Addback for non-allowable depreciation deduction for real estate, from SubS 4562 Commercial Rental, Part II. [Other depreciation under Part Two appears to be legitimate equipment or other tangible item purchases.]
\$2667.00	Addback for amortization, from SubS return, Form 4562 Construction, Part VI. (See Federal Statement 1.)
-\$856.00	Pennsylvania income tax liability, from Father's 2001 PA tax return.
-\$292.00	Estimated local tax liability for earned income, based upon Father's 2001 PA tax return.

\$80,961.00 net income in 2001, or \$6746.75 per month.

2002

\$23,500	Wages
\$939.00	Interest/Dividends
\$24,891	Rental Income
\$4563	Depreciation add-back for the rental properties, from Schedule E of Father's return.
\$24,761.00	Long Term Capital Gains and Losses, from Father's return, Schedule D: Land #6, Maple Land--\$5,581 + Land—Bellevue Ave. #3--\$19,180. For the other four properties which Father sold to his mother for \$1, the court will not attribute any loss or gain, as the testimony established the transfer was made so that his mother would develop the properties, which would make the remaining properties more likely to sell. Moreover, given the substantial sums of money his mother gave to Father, this could indeed be considered a payback gift.
-\$79,808.00	Loss From Trade or Business, from SubS return, line 21.
\$32,231.00	Income from Other Rental Activities, SubS Schedule K.
\$30.00	Interest Income, SubS Schedule K.
\$13,377.34	Depreciation addback for non-allowable depreciation deduction from SubS form 4562, as follows: (1) -\$4800 for allowable yearly deduction regarding 2001 179 deduction (see above), (2) \$2666 for Amortization, Part VI, (3) \$900.34 adjustment to account for the real estate depreciation carried over from 2001, (3) \$1881 for nonresidential real property in Part III, line 15(i), (4) \$12,730 for Special Depreciation Allowance claimed of \$15,912 [the court will allow this to be deducted over five years, at \$3182 per year]. It is noted that Father did not take a \$24,000 Section 179 expense in 2002.
\$-658.00	Pennsylvania income tax liability. Father's return, Statement 1.
\$-235.00	Local tax liability. Father's return, Statement 1.
-\$1798.00	FICA & Medicare. Father's return, Statement 1.
<hr/>	
\$41,793.44	net income for the year 2002, or \$3482.79 per month.

The court will average the income figures for 2001 and 2002, to arrive at a net yearly income of \$61,377.22, or \$5114.77 per month.

This court is unclear as to the primary physical custody status of the children during the time period in question, which is October 1, 2004 through the present. Therefore, we are unable to calculate a child support figure, and we will assume the parties are able to do so from the earning capacity determination made in this opinion. Should the parties be unable to do so, either party may request a conference by sending a letter to the office of the undersigned.

ORDER

AND NOW, this _____ day of April, 2005, for the reasons stated in the foregoing opinion, Mother shall be assigned an earning capacity of \$1163.89 per month and Father shall be assigned an earning capacity of \$5144.77 per month.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Richard A. Gray
William Miele, Esq.
Denise Dieter, Esq.
Mark Taylor, Esq.
Gary Weber, Esq.