

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

S.M.,	:	
Plaintiff	:	
	:	
v.	:	No. 04-21,119
	:	PACES NO. 994106702
J.M.,	:	
Defendant	:	

OPINION and ORDER

This case involves a dispute over earning capacity. The Master assessed Mother at her actual earnings of \$966.26 per month, rather than assigning her an earning capacity. Father argues she should be assigned a full-time earning capacity of \$10 per hour, which she earned at her last full-time job in 1993.

As we have no transcript, we rely on the Master's findings regarding the facts of the case. Those facts are as follows. Mother, who is thirty-one years old, graduated from Lycoming College in 1990 with a major in political economics. Prior to the parties' marriage, Mother worked full-time at a bank, earning \$10 per hour. Mother had a daughter to a previous relationship and when the parties married, they agreed she would not work outside the home, to permit her to stay at home with her daughter to another man, and subsequently with the children born of the marriage.

Mother was not employed from 1993 until 2002. In December of 2002, she began working for St. Mark's Lutheran Church, for 20-30 hours per week. Her position at the church is primarily secretarial, but she also does payroll taxes and routine bookkeeping. Father was not happy about her returning to work, as he wanted her to be home to care for the children, get them to school, and take them to their activities and appointments. The job, however, permits Mother a great deal of flexibility, and enables her to continue to care for the children in this regard. During the summer, when the children are not in school, they go to work with Mother.

Now that the parties have separated, Father wanted Mother to obtain a full-time job. Mother attempted to find a full-time job but could not find one with enough flexibility to permit her to continue to care for the children. She is the primary physical custodian of the parties' three children, ages 11, 9, and 6.

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; and Jennings v. Jennings, Lyc. Co. No. 04-20,906. 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.

Opinion, pp. 7-8. We further stated,

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.

Opinion, p. 8.

Of these cases, the following individuals were assessed their actual earnings rather than being given an earning capacity. First is the mother in Mink, a Registered Nurse working at a physician's office for many years, for thirty-two hours a week. She had recently been offered a full-time job working at a hospital, which paid \$20 per hour, but declined to take the position because it required her to work primarily during the 3:00 p.m. until 11:00 p.m. shift, as well as some weekends, some holidays, and overtime. She had never worked as a hospital nurse, and during the parties' marriage the parties agreed she should work at the lower-paying doctor office job in order for her to be available for the couple's two children. The mother had primary physical custody of the two children, and being available for the children continued to be the reason for choosing the lower-paying position. We declined to assess her with the hospital job salary because it would require a major lifestyle change that she had rejected for valid reasons. We also noted that "earning capacity" is not equivalent to the "top dollar" an individual is capable of earning. Rather, it is the amount an individual could earn under the circumstances, considering factors including his or her age, education, training, health, work experience, earnings history, and child care responsibilities. Rule 1910.16-2(d)(4). We held that Mother's employment was appropriate given her circumstances.

Council involved a husband who had been self-employed in appliance service for seventeen years. The wife wanted him to be assessed with a full-time wage as an appliance repairman. We declined to do that, based upon his long history at that employment, which he held during the parties' marriage, and the fact that the amount of money he was making was not unreasonable for the profession he had chosen.

Similarly, in Hull, the wife wanted the husband assessed an earning capacity as a truck driver for another company rather than an independent truck driver. Again, we declined to do this, noting that the husband had worked as an independent truck driver for over twenty years, apparently with no opposition from the wife. Moreover, he was earning a reasonable amount of money for the profession he had chosen.

Also in Hull, the wife was working twenty-two to twenty-five hours a week at Sears, earning \$8.48 per hour. Her last full-time employment was in 1990, where she worked for eighteen months as a waitress. She was unemployed from 1993 to 1998 due to medical problems. The husband wanted her to be assessed a full-time salary at \$8.48 per hour. We declined to do that, noting that the wife was a classic minimum wage earner, and was earning a higher hourly wage at Sears simply because of the part-time nature of the work, which brought no benefits. It would have been unrealistic to expect her to earn \$8.48 an hour full-time, given her work history. As her current income is higher than that of a full-time minimum wage job, the court assessed her at her actual earnings.

Similarly, Jennings v. Jennings, Lyc. Co. No. 04-20,906, involved a wife working at a school cafeteria 27.5 hours per week at \$9.89 per hour during the school year, and cleaning homes for an additional \$130 per month. We noted that it would be unrealistic to assess her full-time at \$9.89 per hour, since she too was a classic minimum-wage earner, and we therefore assessed her in a two-tiered manner: during the school year, she was assessed her actual earnings at the school plus \$130 per month; during the summer, she was assessed a full-time minimum wage job. We followed a similar method for the Mother in Murray v. Murray, Lyc. Co. No. 03-20,543, who worked thirty-five hours during the school year as a student aide, caring for a child in a wheelchair. We assessed her with an additional \$2250 per year, to account for three months of minimum wage employment during the summer.

The cases where the court assessed an earning capacity rather than actual earnings are Rafferty and Yagel. Rafferty involved a woman who had worked for two decades successfully running retail establishments selling crafts, craft supplies, and antiques along with her husband. At the time of the hearing, however, she was making little to no money selling crafts and antiques through consignment. The issue was not whether to assign her an earning capacity rather than her actual earnings. Instead, the

issue was what an appropriate earning capacity would be. The wife admitted she was qualified for a retail management position, and that she possessed the same skills as the husband, who had obtained a retail management position. Furthermore, the wife had never even applied for such a position. Therefore, the court could find no reason to disturb the Master's decision to assign her the income of an entry-level retail management position.

And in Yagel, the husband had been self-employed in the plumbing and heating business since 1989. Despite the long hours of work he put in, which sometimes exceeded sixty hours per week, his business was minimally profitable at best, with no prospect of the business becoming more profitable in the near future. Moreover, during the parties' marriage the husband's self-employment was a bone of contention, with wife insisting he was not making enough money to make it worthwhile. We assessed him with a full-time earning capacity working for a plumbing and heating business, as he was clearly not making a reasonable amount of money for the profession he had chosen, and the full-time work would not require a substantial lifestyle change; indeed, we noted it might be a welcome relief from the long hours he was currently working.

The common theme in all these cases is that when considering earning capacity, the court will determine not whether an individual is earning as much as he or she is theoretically capable of, but rather whether the individual is employed at a position that is commensurate with his or her abilities, and whether that employment is reasonable under the individual's particular circumstances.

Turning to the case before this court, the relevant considerations are as follows. During the bulk of the parties' marriage, from 1993 until December 31, 2002, Wife was not employed at all, but stayed home to care for the parties' children. When she obtained part-time employment on December 31, 2002, Husband objected, as he wanted Wife to continue to remain at home to take care of the children, get them to school, and take them to their activities and appointments. Fortunately, Wife's job affords her the

flexibility to continue to do all of these things, even to the extent of permitting her to take the children to her job when they are not in school.¹

Husband readily admits these facts. His argument, however, is that upon separation, the parties' financial circumstances changed, as they are now forced to maintain two households, rather than one. He argues that while he was agreeable to Wife's lower income during the marriage, now that both parties have additional expenses, it is unfair to assess Wife at her actual earnings, because it means he will have to bear the brunt of the financial hardship, paying more in child support and alimony pendente lite. It is simply unfair, he argues, to hold him to a commitment he made under entirely different circumstances. In addition, he points out there is currently a major difference in the children's circumstances: now all three of them are in school full time, with Alexander entering full-time kindergarten in the 2004-2005 school year.

Wife counters with the argument that Alexander's health problems require her to have employment that allows her maximum flexibility. She has tried and failed to find full-time work that would allow her this type of flexibility. Without a transcript, the court cannot question the Master's findings of fact on this issue, which are as follows:

The parties have a minor child with a heart problem and who needs to see a cardiologist a minimum of every six months and a pediatrician every two months. He needs a nebulizer occasionally and should he become sick, he needs to be home immediately. In order for Ms. Myers to work full-time, it would be necessary to hire a day care provider who would be cognizant of Alexander's needs and be available at short notice to pick him up from school if necessary and take him to physician's appointments.

Master's report, p. 7. When Alexander becomes ill in school, the school calls for Mother to immediately come and take him home. Mother has received such calls three times in the last three weeks. Master's Report, p. 4.

¹ Presumably, in 2002, she was able to take Alexander to her job each day she worked, as he was not in school at that time.

Unfortunately, we have no further information regarding how frequently Alexander is sent home from school, but we must assume it is often enough to cause a problem and require Mother to either have a job with maximum flexibility, or else to have another individual available to pick Alexander up at school and care for him. Father has offered to take over this responsibility from 1:00 p.m. each day, when he is off work, but clearly that does not cover the bulk of the time Alexander is in school.

We begin our analysis by recognizing that Husband wanted Wife to stay home with the children during the marriage, and even objected to her taking the job at St. Mark's church. We recognize, however, that two things have changed since that time: the parties have separated, and all three children are in school full time. The court would seriously consider assessing Mother at an appropriate full-time wage, were it not for the following two issues.

First, there is the issue of Alexander's health problems. Perhaps it is too early to make a determinative finding in this regard, as Alexander entered kindergarten in the fall of 2004 and the hearing was held on November 22, 2004. However, the record as provided to this court indicates that *someone* needs to be available to pick Alexander up from school at a moment's notice. Second, Mother's job permits the couple to get by with *no* child care expenses. This is a financial boon to the parties, particularly during the summer months, as Mother can take all three children to work with her.

Of the earning capacity cases cited above, this case is most similar to the nurse in Mink. Both women are working at jobs that are less than full-time

although they are capable of working full-time, both women are primary physical custodians, and for both women, working full-time would mean losing time with their children and hiring care providers. However, Mother differs from the nurse in two primary ways. First, the nurse was working more hours than Mother (32 as opposed to Mother's 20-30). Second, requiring the nurse to work at a hospital would have forced upon her a drastic lifestyle change, with evening hours, weekend work, and overtime. Here, requiring Mother to work full time would merely mean longer daytime hours. However, the parties would lose the flexibility they need for Alexander, and would presumably require them to hire an after-school and summer care provider, as well as someone to be "on-call" to pick Alexander up from school.

Were it not for Alexander's special needs, this court would have good cause to assign Mother a full-time earning capacity. As it is, we will decline to do so for the present, at least until Father can show that the need for availability is not as serious as Mother has made it out to be. We also note that Father's salary is large enough that even at the current rate of child support and APL, he should be able to live comfortably.²

In short, although we are certainly not prepared to continue to assign Mother at her actual earnings until all three children are eighteen, at this time we believe that Mother's employment is not unreasonable, given the particular circumstances of the case.

² Husband nets \$51,884 per year (\$4323.67 per month), excluding a yearly stock bonus, the amount of which was unknown at the time of the hearing.

ORDER

AND NOW, this _____ day of January, 2005, for the reasons stated in the foregoing opinion, Father's Exceptions are dismissed. Mother's exception regarding the tax exemption is granted, and it is hereby ordered that:

1. Neither party shall file an individual tax return claiming the dependency exemptions until the parties reach an agreement on the issue or until they receive an order of court regarding awarding the exemptions.
2. In all other respects, the Master's order of November 22, 2004 is affirmed.

BY THE COURT,

Richard A. Gray, J.

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