

THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

P.N.,	:	
Plaintiff	:	
	:	
v.	:	No. 99-20,062
	:	PACES NO. 079100637
D.N.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the Exceptions filed by both parties to the Master’s order of April 20, 2005.

The main issue in this case is Mother’s earning capacity. Mother is forty-one years old, and is in good health. The best paying full-time job she has ever held was with Divine Providence Hospital in the mid to late 1980’s, where she earned approximately \$15,000 per year. At that time, she had a certificate in surgical technology, which lapsed soon after her marriage to Father in 1987. During the marriage, she worked with Father at their business, Metzger & Neff Ice Service. After the parties’ separation she went to school to obtain a Bachelor of Arts Degree in Health and Physical Education, which she received from Lock Haven University in June 2001. The current order in this case, issued on August 23, 2001, assigns her an earning capacity of \$2,000.00 net per month, based upon a full-time teaching position paying \$30,000.00 per year.

Mother’s extensive efforts to obtain a full-time teaching position in the last four years are set forth in detail in the Master’s order. Despite these efforts, Mother never succeeded in obtaining a full-time position. Soon after graduation, she was hired as a substitute teacher for the East Lycoming School District. In the spring of 2002, she was hired as a long term substitute teacher in the Montoursville School District, to replace a teacher on maternity leave. That position lasted six weeks. In April 2002, she was hired as a part-time instructor of Fitness and Lifetime Sports for the

Pennsylvania College of Technology. She held this position for over two years. In the fall of 2003, Mother took graduate courses at Bloomsburg University, to make herself more marketable for a full-time position she learned would soon become available at Penn College. Unfortunately, she did not complete work for her degree by the time the position became available, and only applicants with a Master's Degree were interviewed for the position.

During the last four years, Mother applied for every teaching position she saw advertised in her field, within driving distance from her home. She also sent out resumes each year to school districts in the area, for a total of sixty to seventy mailings. She also applied for non-teaching positions at school districts, Penn College, Lock Haven University, Lycoming College, and Bucknell University. She also applied for other jobs in the community somehow related to her field, such as an occupational health sales representative for Susquehanna Health Systems, an orientation fitness director for the Williamsport YMCA, a recreation director at Roseview Court, a pharmacy data technician for Neighbor Care, a prevention program specialist for Valley Prevention Services, a sales representative for American Customer Care, and a health services safety coordinator for Lycoming County Red Cross.

In summation, Mother sent out dozens of resumes each year to local school districts. She applied for numerous advertised teaching positions, non-teaching professional positions, and non-professional positions. She has never turned down a job, has not been terminated from a position, and always worked as a substitute teacher when called on a day when she was not already working. Unfortunately, she never was hired for any of the full-time positions for which she applied.

In the spring of 2004, real estate broker Betty Steinbacher encouraged Mother to obtain her real estate license, which she did, in order to supplement her part-time income at Penn College.

She currently works full-time for Betty Steinbacher Realty. Her total commission for 2004 was \$2,465.55, and she had business expenses of \$900.00.

In 2002, her total income was \$8,155.00. In 2003, her total income was \$6,899.41. In 2004, she received a total of \$7468.31 from Pennsylvania College of Technology, in addition to real estate commissions of \$2,465.55. She has lived mostly on savings she obtained from the divorce settlement.

Mother has been assessed at \$30,000 since August 2001. Despite her low income and unsuccessful efforts to find employment, she did not petition for a modification of support until December 7, 2004. The Master declined to reduce her earning capacity, finding that her efforts to obtain a job have been inadequate to warrant a change in her earning capacity. The court disagrees. It is hard to imagine what more Mother could have done to obtain a full-time teaching position. Moreover, she has actively pursued a wide variety of related non-teaching jobs. It is simply unreasonable to continue to assess her with the salary of a teaching job she has not been able to obtain, and may never obtain.

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.

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; *Chance v. Chance*, 97-20,855; and *Cox v. Taggart*, Lyc. Co. No. 05-20,115. The facts of this case are unlike

any of the cases cited above, but are similar to the recent Superior Court case of *Novinger v. Smith*, 2005 Pa. Super. 278 (2005).

In *Novinger*, the Superior Court reversed a trial court's refusal to modify a child support order that was based upon a father's earning capacity assessment from a welding job he held from 1999 to 2000, earning \$40,000 per year. Although he was not qualified for the welding job, he obtained it through his brother-in-law, who "pulled some strings." Aside from that one year, he had worked as a carpenter/roofer all his life. Since losing the welding job four years ago, he has worked as a self-employed carpenter/roofer, earning approximately \$25,000 per year.

The Superior Court held that the determination as to the father's earning capacity should be made based upon his education, qualifications, training and what he could reasonably earn in today's market in similar positions in his field, rather than automatically continuing the earning capacity he was assessed at four years earlier. Since the trial court had made no finding as to whether the father mitigated his reduction in income, pursuant to *Ewing v. Ewing*, 843 A.2d 1282 (Pa. Super. 2004), the Superior Court remanded the matter for such a finding. The court noted that the father did not petition the court for a support reduction immediately after losing his welding job. Rather, he searched for additional welding jobs and when that proved unsuccessful, resorted to his prior, lifelong career as a carpenter. It was only after four years of self-employment that he petitioned for a modification of support.

Similarly, Mother waited over three years before petitioning for a modification. During those years she applied for all available teaching positions in her field, as well as related fields, she substitute taught, and she taught part-time at Penn College. The court finds Mother has not willfully failed to obtain appropriate employment; she has simply been unable to obtain such employment.

In light of her consistent failure to obtain a full-time position commensurate with her education, her decision to enter real estate full time is not unreasonable. If Mother wishes to pursue real estate, the court will honor that choice. Instead of using her actual earnings, however, we will assess her with the income earned by a full-time starting real estate agent, and remand the matter back to the Master for testimony on the earning capacity of a full-time starting real estate agent in this community.

Father has filed an exception based upon the Master's failure to credit him with \$2,124.00 in child support he overpaid. The overpayment arose after he obtained custody of one of the children, but continued to pay based upon Mother having custody of both children. Father could have petitioned for a modification as soon as the custody changed. Ironically, it Mother who ultimately reported the change to the Domestic Relations Office. Therefore, the court agrees with the Master that Father should not be awarded a credit.¹

O R D E R

AND NOW, this _____ day of October, 2005, for the reasons stated in the foregoing opinion, Mother's exception is granted and Father's exception is denied. The matter is remanded back to the Master for a determination of Mother's earning capacity as a starting full-time real estate agent in this community.

BY THE COURT,

Richard A. Gray, J.

¹ The court notes the parties had originally reached an agreement regarding support, which seemed equitable in light of all the circumstances of this case. The parties are encouraged to continue to attempt to reach a resolution pending the remand, and thus end their dispute and avoid further legal costs.