

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

K.S.,	:	
Plaintiff	:	
	:	
v.	:	No. 03-20,950
	:	PACES NO. 772105633
T.P.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the Exceptions filed by both parties to the Master's orders of February 2, 2005 and April 12, 2005, awarding Mother child support and denying Mother contribution for birthing expenses.

Father's primary objection is the earning capacity assigned to him by the Master. Father is 27 years old, and has been running his own landscaping and lawn care business for ten years. He has never worked as an employee for anyone else. His landscaping business has never made a profit. His 2003 tax return shows a loss of \$9,598. As of November 20, 2004, his total deposits for the business was \$21,187.04 and total business expenses were \$14,057.84; he had removed \$5,766.59 from the business for his personal use. Father testified that the financial aspect of the business was staying the same, getting no better and no worse.

Since Father is making little to no profit in his business, Father must be assigned an earning capacity, as both parties agreed at the hearing. The Master assigned him an earning capacity of \$11.35 per hour, based upon the 2002 edition of the Center for Work Force Information and Analysis Statistics for Lycoming County. Father objects to the use of the statistics because they were never introduced into evidence, nor was the defendant given an opportunity to review them or challenge them. A review of the transcript confirms there was no mention of the statistics at the hearing.

Although the court recognizes the difficulty of assigning an earning capacity in a case like this, where the individual has no earning history, we cannot approve the practice of using such statistics—at least when they have not been introduced or even discussed at the hearing.¹ The court notes that Judge Anderson reached the same conclusion in Neece v. Ross, Lyc. Co. No. 97-20,274, p. 2 fn. 1,

In addition, the Court does agree with Respondent’s argument that in the instant matter, the Labor and Industry standards used by the hearing officer were not of record and, for that reason alone, should not have been considered. The Court does not address the appropriateness of considering such standards were they actually presented for introduction into evidence at the hearing.

See also Vansant v. Vansant, Lyc. No. 93-20,301, p. 2 fn. 2. We will not at this time address the appropriateness of the use of the statistics if introduced as evidence during the hearing, or if used by the Master as a discussion point from which to question an individual on earning capacity.

Since the Master’s decision was based upon the use of statistics that were not of record, we must remand the matter back for a hearing on Father’s earning capacity. The court finds no problem with the general idea of assigning Father a wage earned by individuals working locally in the landscaping business. However, the income must be derived based upon evidence introduced at the hearing.

We note that at the argument, when the court asked Father’s counsel for a proposal regarding an appropriate earning capacity, Father’s counsel had no suggestion, taking the position it was not his responsibility to suggest an earning capacity. The court does not agree. If Father was earning a reasonable living and Mother was requesting that the court assess him an earning capacity rather than his actual income, Mother would certainly have the responsibility to convince the court of her position. However, in a case such as this one, where Father is making no profit at his self-

¹ The court has considered, but rejected, the possibility of considering them a proper subject for judicial notice under Pa.R.E. 201, because statistics are notoriously subject to manipulation and distortion. Moreover, even Rule 201(e) permits the parties to be heard as to the propriety of taking judicial notice.

employment and has no other employment history, Father shares the responsibility of producing evidence to establish an earning capacity.

Father's other major exception relates to the Master's treatment of the income he receives from his father, G.P. The testimony established that G.P. has consistently given his son large amounts of money over the years for living expenses. In January 2004, G.P. set up a \$20,000 "loan" for his son, which he described as a line-of-credit out of which Father could draw money for expenses that were approved by G.P. The loan document states the money should be paid either in monthly payments or within twenty years. The Master found this money is not actually a loan, and can be fairly characterized as a gift. After reviewing the transcript, the court finds there is evidence supporting the Master's finding in this regard. Among other passages, the court notes the following testimony of G.P. regarding the "loan":

So in other words, I'm trying to help him right now, hoping that in all reality I see it back for my health care, okay. And that's why I did this and I've done this since Todd's been out of high school. I've lent Todd money so many times that I can't even count them. So are you asking me if I expect it back for real? No. It's a loan though. I'll put it that way.

N.T., p. 37. G.P. must approve the expenses for which Father wishes to use the money—another indication that the money is not a loan but a gift. N.T., pp. 31, 33.

The court also agrees with the Master's statement that although gifts are not income for support purposes, they can be used as a deviation factor under Rule 1910.16-5(b)(3), "other income in the household." However, the court has serious questions about the precise manner in which the Master deviated.

The Master calculated the amount of money Father had received from G.P. from January 2004 to the date of the hearing (\$14,127.73), averaged it to \$1,569.75 per month, and deviated upwards to arrive at the same amount of child support the guidelines would suggest for an earning capacity of \$1715.31 per month as a landscape supervisor, plus \$1,569.75 per month from gifts, for a total of \$3,285.06 per month.

The problem with this approach is G.P.'s testimony established that he gives his son money *because* his son is not making any profit in the landscaping business. G.P. hopes and desires that Father will some day build up the business to the extent it will become profitable. In the meantime, he is giving Father money for his living expenses so that most of the money Father earns can stay in the business. Therefore, the court finds it unfair for the Master to essentially assess Father an earning capacity based upon employment *plus* the money he currently receives from his Father. There is simply no evidence to support the conclusion that G.P. would be giving Father \$1,569.75 per month if Father were actually earning an income of \$1715.31 per month. However, the record after remand may support some type of upward deviation, given the history of gifts from G.P., depending upon what Father's earning capacity is determined to be.

Mother's exceptions relate to the denial of birthing expenses. The court agrees with the Master, that Judge Smith's order of November 26, 2003, dismissing this same exception, is controlling. Although we do not know the reason for the dismissal, in the interest of finality, we must honor the previous decision.

ORDER

AND NOW, this _____ day of June, 2005, for the reasons stated in the foregoing opinion, Father's exceptions #1, #3, #4, and #5 are granted and the remaining exceptions are dismissed. Mother's exceptions are dismissed. This matter is remanded back to Family Court for proceedings consistent with this opinion, namely the establishment of an earning capacity for Father. Both parties are hereby directed to be prepared to introduce evidence at the hearing regarding an earning capacity for Father. Such evidence shall not include testimony regarding the money Father receives from G.P., as that issue has been fully developed on the record.

BY THE COURT,

Richard A. Gray, J.

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