

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**ROBYN J. WELCH,  
Plaintiff**

**vs.**

**RICHARD E. JOHNSTON,  
Defendant**

**LISA E. JOHNSTON,  
Plaintiff**

**vs.**

**RICHARD E. JOHNSTON,  
Defendant**

**: DOMESTIC RELATIONS SECTION**

**:**

**: NO. 87-20,940**

**: PACSES NO. 469001957**

**:**

**: CIVIL ACTION**

**:**

**\*\*\*AND\*\*\***

**: DOMESTIC RELATIONS SECTION**

**:**

**: NO. 97-21,052**

**: PACSES NO. 910106545**

**:**

**: CIVIL ACTION**

**: CHILD SUPPORT**

**Date: September 30, 2005**

**OPINION**

This Order is entered in ruling upon the exceptions filed by Defendant/Father, Richard E. Johnston, (hereafter Mr. Johnston) to the Family Court Hearing Officers Support Order dated April 6, 2005 (filed April 8, 2005) modified by the Order of April 15, 2005 (filed April 21, 2005). Argument was held before this Court on August 15, 2005. The essence of the exceptions relate to the determination of the appropriate income of the parties in each case.

The Family Court Hearing Officer held hearings on December 21, 2004 and January 27, 2005. On the evidence submitted at those hearings it was determined that the net monthly earning capacity of Mr. Johnston was \$2,728.00. In his exceptions, Mr. Johnston argues that it was error for the Family Court Hearing Officer to utilize information obtained from the Commonwealth of Pennsylvania relating to average wages for entry level and experienced occupations for the year 2004 for those of his occupation, that is of an experienced painter,

which document was introduced at the hearing before the Family Court Hearing Officer by Lisa Johnston. Based upon that documentation and given the complete lack of credible information otherwise supplied to the Family Court Hearing Officer as outlined in her Order of April 6, 2005, a finding was made as to Mr. Johnston's net annual earning capacity was \$32,736.00 or a net monthly capacity of \$2,728.00.

Mr. Johnston also asserts in his exceptions that the net monthly income of Lisa Johnston, which was found to be \$1,832.29, does not accurately reflect her true earning capacity. He asserts Lisa Johnston is capable of making more money than she does as a secretary for Loyalsock Township School District, he also contended that she really does make more money than found by the Family Court Hearing Officer. The Family Court Hearing Officer relied upon a pay stub of Lisa Johnston's dated September 3, 2004 to determine her net monthly income. The bi-weekly pay stub disclosed a gross income to that date of \$20,053.64 with a net income of \$15,222.12.

As to Robyn Welch, Mr. Johnston also asserts that her average net monthly earning capacity of \$750.00 per month, being based on a minimum wage ability, is in error. The Family Court Hearing Officer found that in her employment as a veterinary assistant, Robyn Welch works 30-40 hours per week, working more in the summer than in winter, because of the demands of the business of her employer and earns \$7.00 per hour. In that employment, the Family Court Hearing Officer found that she had an average net income in the amount of \$8,308.73 based upon the W-2 for 2004 produced at the hearing, which had showed a gross income of \$10,470.24. Mr. Johnston asserts that since the Family Court Hearing Officer also found that there was no reason that the mother could not work on a full-time basis that she

should have been assessed a wage of at least \$7.00 per hour rather than minimum wage in order to determine her true earning capacity.

By agreement of all parties at the August 15, 2005 argument, the Court received as additional evidence the bank deposits of Mr. Johnston for his Omega bank account for the year 2004, and the 2004 income tax returns of all parties. A decision in this case was delayed until those returns could be produced. The returns having now been produced, they will be marked as exhibits, and will be filed of record with the Domestic Relations Office. The parties stipulated that the Court should consider the information contained in those returns to determine the exceptions.

Mr. Johnston's first exception as to the determination of his net earning capacity must be DENIED. Typically, it may be that the Court would not accept a Commonwealth of Pennsylvania average wage figure in order to determine a person's earning capacity. This would be especially true if the amount had not been introduced as evidence in the hearing. In this case, the average wage figure was entered into evidence. This Court finds that the Family Court Hearing Officer had very little else in the way of credible evidence, if anything, to significantly assist her in making a determination of Mr. Johnston's earning capacity. This was because of his inadequate records and the incredibility of the records he did produce. The bank statements and income tax return for 2004 now produced by Mr. Johnston do little to bolster his position or his credibility.

The Family Court Hearing Officer found that Mr. Johnston was a self-employed experienced painter who did not have much in the way of business records. It was noted however in the finding of fact made that he testified to having lower gross receipts than shown

on the Schedule C's of his 2002 and 2003 tax return, which amounts were \$38,333.00 and \$35,570.00 respectively. He acknowledged he had two checking accounts and that the money deposited in those accounts came solely from his business. All of his business income, however, was not deposited into those accounts. Mr. Johnston further acknowledged that based upon his monthly expenditures in 2004, he would have had a net income of \$25,440.00 that year, an amount significantly in excess of his net income shown on his 2002 and 2003 tax returns. Those returns indicated adjusted gross incomes of \$12,890.00 and \$22,182.00 respectively.

Although given the unusual opportunity to provide additional evidence at the exceptions hearing, the documents submitted by Mr. Johnston do not help his case. For instance, this Court did not receive statements from two banks but only from the Sun Bank/Omega Bank. There were no Horizon Federal Credit Union documents provided. In 2004, the total deposited into the Omega bank account is \$24,216.54. Keeping in mind that Mr. Johnston could not even estimate his gross receipts for 2004 as of January 27, 2005 (when the case was heard before the Family Court Hearing Officer) and could not advise how he was going to produce records for his accountant to calculate his tax returns, this \$24,000.00 figure is suspiciously close to the gross income shown on his 2004 income tax return Schedule C of \$24,230.00. Mr. Johnston testified at the exception hearing that good painting weather existed in 2004. As a result, he had a particularly good year for working. Despite this, his \$30,903.00 gross receipts shown on the 2004 Schedule C is less than his "remembered" gross receipts in 2002 of \$70,000.00 and of \$50,000.00 in 2003. It is also less than the amounts actually shown as gross receipts on his Schedule C forms for those 2 years (\$38,333.00 and \$35,570.00).

When confronted with this lack of information and the spending information that Mr. Johnston acknowledged, the Family Court Hearing Officer was justified in relying upon the Pennsylvania experienced painter average wage figure of \$40,920.00. Further justification for the use of this figure is found from the acknowledgment by Mr. Johnston that he had expendable income in 2004 of \$25,440.00, an average monthly expenditure of \$2,120.00. The \$40,920.00 annual average wage is equal to a net monthly earning capacity of \$2,728.00. Mr. Johnston has been found to be less than credible but his expendable income acknowledged for 2004 supports the finding that his earning capacity is equivalent to the state average.

Mr. Johnston's argument that there is no evidence whether the document reflects union or non-union wages, or, whether it is geographically sensitive to wages earned by painters in this area may affect the weight to be given the evidence but does not make the figure inadmissible. The evidence of record establishes \$40,920.00 as the "statewide average" for experienced painters. No contrary evidence has been offered. Nor has there been any credible evidence introduced which would establish Mr. Johnston has any less earning capacity.

The Court believes that taking all things into consideration including Mr. Johnston's experience and his spending, the Pennsylvania statewide average wage sufficiently supports the determination that he has a net monthly earning capacity of \$2,728.00 is accurate and appropriate. If anything, his earning capacity may be significantly higher if in fact his gross receipts of \$70,000.00 is a realistic figure. Finally, the Court notes that there is no reason in evidence why Mr. Johnston could not produce business records that would accurately show the jobs he worked, the number of days he worked at them, and the monies received from those jobs. His failure to produce such evidence raises an inference that if he were to produce these

records they would be unfavorable to him.

The Court, however, finds that as to Mr. Johnston's contentions that the incomes of Lisa Johnston and Robyn Welch exceed the amounts found by the Family Court Hearing Officer must be GRANTED, based upon the information provided to this court in their respective 2004 income tax returns.

The 2004 Income Tax Return of Lisa Johnston discloses an adjusted gross income of \$26,381.00. The Family Court Hearing Officer's decision was based upon the September 3<sup>rd</sup> pay stub being the 18<sup>th</sup> bi-weekly pay. If that were so, assuming an equal pay rate for Ms. Johnston the expected gross income from wages would have been \$28,965.00 ( $\$20,053.00 \div 18$  pays x 26 annual pays). There is no evidence of record which supplies an explanation for this discrepancy. There may be several, including that Ms. Johnston's wage rate varied throughout the years or perhaps Ms. Johnston did not work a full 26 pay periods. Regardless, there is no evidence that the net monthly earning capacity of Lisa Johnston would be any less than the \$1,832.29 found by the Family Court Hearing Officer.

The 2004 tax return, however, supplies evidence Ms. Johnston's actual net income exceeds that amount. This evidence consists of page 2 of her return indicating Ms. Johnston received an income tax refund of \$4,236.00.

The amount of the refund averages \$353.00 per month. When this amount is added to the net monthly income as found by the Family Court Hearing Officer results in Lisa Johnston having an average net monthly income of \$2,185.29.

There being nothing else on the record that would justify a modification of the finding otherwise found by the Family Court Hearing Officer as to Lisa Johnston, it is hereby directed

that she be assessed a monthly net earning capacity of \$2,185.29.

Robyn Welch's income as found by the Family Court Hearing Officer, must also be augmented by her 2004 income tax refund. If assigned a net monthly earning capacity based solely on an assumed minimum wage figure of \$750.00 per month as Ms. Welch was given by the Family Court Hearing Officer, her annual net income would be \$9,000.00. Her 2004 income tax return shows actual wages of \$10,470.00. This is consistent with the W-2 document given to the Family Court Hearing Officer in January 2005. The tax return, however, discloses that rather than paying any income taxes on those wages, Robyn Welch received a refund of \$3,466.00 or \$288.00 per month. This amount must be added to her actual net monthly income of \$692.39 as found by the Master. Accordingly, Ms. Welch actually has an average net monthly income of \$928.39. This obviously exceeds the minimum wage earning capacity of \$750.00 a month assigned by the Family Court Hearing Officer.

Even though Ms. Welch is physically capable of employment on a full-time basis as a practical matter, she does not have that capability. The only testimony of record supports a finding that in her field of work she does not have more hours available than she works. There is nothing on the record to show that she declines work. Her gross income of \$10,470.00 divided by \$7.00 per hour verifies that she averages 28.76 hours for 52 weeks. A work week of less than 40 hours is now commonplace, at least in our community. It is also common knowledge that there are very few minimum wage jobs, which actually pay for a 40-hour week, 52 weeks per year. While it often may be appropriate for purposes of calculating child support to assign an assumed minimum wage earning capacity based on a 40-hour work week, 52 weeks a year to a person who chooses to not work or can not find work it is not appropriate to

do so to Ms. Welch. It is not logical nor realistic to attribute an earning capacity of a 40-hour work week to an individual in Ms. Welch's situation. She has found available work in her chosen field of employment. She is paid a meaningful amount above minimum wage. She works when work is available at nearly  $\frac{3}{4}$  of full-time and maintains employment in keeping with her abilities. The evidence demonstrates Ms. Welch has pursued her realistic employment opportunities in good faith to support herself and her child. It would be extremely difficult for Ms. Welch to maintain her current suitable job and still have the ability to schedule 10-12 hours of work at a part-time minimum wage job. Accordingly, the Court believes the actual wages Robyn Welch has earned plus the income tax refund is an accurate reflection of Ms. Welch's average monthly net earning capacity, which is set at \$920.39 per month.

**ORDER**

This matter is hereby REMANDED to the Family Court Hearing Officer to enter an appropriate Order as to support based upon the average net monthly earning capacities assigned to each of the parties: Richard E. Johnston, \$2,728.00; Lisa E. Johnston, \$2,185.29; Robyn J. Welch, \$920.39. Otherwise the prior orders of the Family Court Hearing dated April 6, 2005 as modified April 15, 2005 are affirmed.

BY THE COURT,

William S. Kieser, Judge

cc: Domestic Relations Section  
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