

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

R. L. B.,	:	CIVIL ACTION -- LAW
Plaintiff	:	IN DIVORCE
	:	
v.	:	No. 02-20,983
	:	
F. B.,	:	
Defendant	:	

OPINION and ORDER

This opinion addresses the Exceptions filed by both parties to the Master's Report issued on June 9, 2006. The primary issue in dispute is Wife's earning capacity, which relates to alimony pendente lite, alimony, health insurance, and counsel fees.

The parties were married for thirty-two years. They separated in June 2002. Wife is fifty-eight and Husband is fifty-nine. Both have high school degrees, and Wife recently obtained certification as a Certified Nursing Assistant. Wife worked at numerous jobs throughout the marriage, including factory work, clerking in retail stores, secretarial positions, private care positions, and near the end of their marriage, as a nanny. From 1989 to 1998, Wife earned an average of \$14,342.40 per year. In 1997, she took a job as a nanny in New Jersey, earning \$10,273 for one year, during which time she worked five days a week and came home on the weekends. In 1999, she took a job as a nanny in New York, earning \$30,967 per year. In 2000, she earned \$38,150 per year as a nanny in New York. In 2002, she worked part of the year in Harrisburg as a private care-giver and part of the year at a nursing home, and earned \$8,250 that year. In 2003 and 2004 she worked as a nanny in New York, earning close to \$30,000 in 2003 and earning \$31,320 in 2004. In summary, during the years 1999, 2000, 2003, and 2004, Wife earned over \$30,000 per year.

On January 31, 2005, Wife left her job in New York and returned to the Williamsport area to care for her mother, F.W., who is currently eighty-two years old. Ms. Winner needed twenty-four hour care, suffering from Crohn's Disease, diabetes, and dementia. Wife's sister, K.T., asked Wife to return to the area, as Ms. Thompson could not care for Ms. Winner by herself and without Wife's help, Ms. Winner would have to be moved to a nursing home. Wife moved back to the area and lived with Ms. Winner. In June 2005, Wife began working at the Williamsport Home twenty hours a week, earning minimum wage. She completed CNA classes, and now works part time second shift three days a week, earning \$9.71 per hour. She is planning to go back to school to obtain her Registered Nurse Certification.

Husband earned an average of \$17,783.70 per year during the years 1989 and 1998. In September 1989 he began working for Little League Baseball, earning \$14,789. He has continued in that employment through the present time, now earning about \$28,000, with full benefits.

The Master assessed Wife at an earning capacity of \$20,196.80 per year, as a full-time CNA. Husband argues that Wife should be assessed at a \$30,000 earning capacity, as she earned that much during the years 1999, 2000, 2003, and 2004, and voluntarily left that position.

The pertinent rule on this issue is Rule 1910.16-2(d)(1), which states,

Where a party voluntarily assumes a lower paying job, there generally will be no effect on the support obligation. A party will ordinarily not be relieved of a support obligation by voluntarily quitting work or by being fired for cause.

In construing this rule, the Pennsylvania Supreme Court has required that a party seeking modification after a voluntary reduction in income must show

(1) that the change was not made for the purpose of avoiding child support, and
(2) that reduction is warranted based upon the party's efforts to mitigate the lost income. Grimes v. Grimes, 596 A.2d 240 (Pa. 1991); Kersey v. Jefferson, 791 A.2d 419 (Pa. Super. 2002).

To modify a support obligation based upon reduced income, a petitioner must first establish that the voluntary change in employment which resulted in a reduction of income was not made for the purpose of avoiding a child support obligation and secondly, that a reduction in support is warranted based upon petitioner's efforts to mitigate any income loss. Effectively, Appellant 'must present evidence as to why he or she voluntarily left the prior employment and also as to why the acceptance of a lower paying job was necessary.' . . .

Kersey v. Kersey, 791 A.2d 419 (Pa. Super. 2002). Although the rule applies to child support, the court believes it is instructive for other cases involving earning capacity, as well.

The court cannot fault Wife for returning to the Williamsport area to care for her ailing mother and prevent her institutionalization in a nursing home. In addition, Wife attempted to mitigate her income in the most reasonable manner—by working in the personal care industry, which she had done in the past, and by obtaining her CNA certification. The record is clear that Wife could not obtain a nanny job locally that paid anywhere close to the nanny jobs she held in the other areas. The high-paying nanny job Wife obtained in Chappaqua, New York, in a three-to-four million dollar home, is simply not available in the Williamsport area. In short, the nanny jobs Wife obtained were very uncharacteristic of Wife's earning capacity throughout the rest of the marriage, and the salary she earned at those jobs is not realistic for nanny jobs in the Williamsport area. Therefore, the court accepts the Master's conclusion that Wife's earning capacity should be set at \$20,196.80, as a full-time certified nursing assistant.

However, by leaving her job as a nanny, Wife experienced a drastic reduction in income. It is not entirely equitable for Husband to bear the burden of supporting Wife after she voluntarily left her lucrative position, especially in light of Husband's

relatively low salary. We also note the irony in the fact that Wife would not quit her job to be with her husband and save her marriage, but she readily quit to help care for her mother.

Moreover, the case before this court primarily involves the issue of alimony, which is very different from spousal support or alimony pendente lite. As stated by the Superior Court,

The purpose of alimony is not to reward one party and to punish the other, but rather to ensure that the reasonable needs of the person who is unable to support himself or herself through appropriate employment, are met. In determining the nature, amount, duration and manner of payment of alimony, the court must consider all relevant factors, including those prescribe for at 23 Pa. C.S.A. §3701, Alimony, (b) Relevant Factors (1)-(17). Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay.

Isralsky v. Isralsky, 824 A.2d 1178, 1188 (Pa. Super. 2003) (citations omitted).

“Alimony following divorce is a *secondary remedy* and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill.”

Nemoto v. Nemoto, 620 A.2d 1216, 1219 (Pa. Super. 1993).

The parties' work history shows that Husband typically earned more than Wife until 1999, when she took her first out-of-state nanny job. At that time, Wife's earnings were greater than Husband's. Wife points out that she had no benefits with her employment, and was only able to continue working as a nanny because she was covered under Husband's insurance. Husband points out that he objected to Wife working out of state, and that her doing so brought about the demise of the marriage.

At the present time, Wife is capable of working full time and earning \$20,196.80 per year. If she did so, she would earn benefits. This salary would be sufficient to support Wife, albeit not in the manner established by the parties during the past few years. However, that reduction was brought about by Wife herself, in her decision to

quit her high-paying job. In addition, Wife plans to obtain her Registered Nurse certification, which would give her a much higher earning capacity.

The Master awarded alimony due to the length of the marriage (almost 34 years), and the disparity in the parties' income. The court agrees that alimony is due. The court also believes the Master has appropriately discussed the alimony factors. The long marriage is obviously a key factor; however, the wife's persistence in working out of state caused the break-up of the marriage. Furthermore, both spouses are reaching retirement years and at this point, their earning capacity is not vastly different. Wife has received half of Husband's pensions, which will reach payout status sometime in the not-too-distant future. For these reasons, the court does not believe it is equitable to require Husband to pay alimony beyond Wife's sixty-second birthday, when she will be eligible for social security. Therefore, alimony will be terminated after the March 2010 payment.

The court will also grant Wife alimony pendente lite effective January 6, 2006, when Wife filed a counterclaim for alimony pendente lite. Eleven months of alimony pendente lite at \$250 per month, offset by Wife's obligation of \$113.00 per month for health insurance, totals \$1507. This shall further be offset by Wife's unpaid obligation of \$178 for the last two months of 2005, for a total payment from Husband to Wife of \$1329.

Regarding counsel fees, the court does not believe counsel fees are warranted in this case.

ORDER

AND NOW, this _____ day of November, 2006, after argument, Husband's Exceptions #1 and #5 are granted and the remaining exceptions are dismissed. Wife's Exception #1 is granted and it is ordered as follows.

1. R.B. shall take the clothes tree to Roan's Auction House for auction. The parties shall share equally the proceeds from the sale.
2. R.B. shall pay alimony in the amount of \$250 per month, with the final payment being March 2010.
3. R.B. shall pay \$1329.00 to F.B. for alimony pendente lite from January 2006. This amount shall be paid within ninety days of the date of this order.
4. F.B. shall pay to the Prothonotary of Lycoming County the sum of \$219.00 for transcript costs within thirty days of the final order.
5. No attorney fees shall be awarded.

BY THE COURT,

Richard A. Gray, J.

cc: Dana Jacques, Esq., Law Clerk
Janice Yaw, Esq.
Joy McCoy, Esq.
Family Court
Gary Weber, Esq.