

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

<b>K.M.,</b>	:	
<b>Petitioner/Plaintiff</b>	:	
	:	
<b>v.</b>	:	<b>No. 04-21,365</b>
	:	<b>PACSES No. 042107037</b>
<b>R.M.,</b>	:	<b>DOMESTIC RELATIONS SECTION</b>
<b>Respondent/Defendant</b>	:	

**OPINION AND ORDER**

Before this Honorable Court, is the Petitioner/Plaintiff's February 2, 2006 Exceptions filed to the Family Court Hearing Officer's Order of February 1, 2006. She asserts that the Family Court Hearing Officer committed the following five errors: (1) the Master should have dismissed the Respondent/Defendant's petition for modification because there was no material and substantial change in his circumstances warranting a modification; (2) the Master should not have considered the testimony of Dr. James W. Redka regarding the Respondent/Defendant's ability to maintain employment because Dr. Redka is not a vocational expert; (3) the Master, because Dr. Redka is not an expert in vocation assessment, should have stricken Dr. Redka's testimony; (4) the Master should have assigned at least a part-time earning capacity to the Respondent/Defendant; and (5) the Master should have ordered the Respondent/Defendant to contribute to the children's tuition or, in the alternative, should not have added the tuition reduction into the Petitioner's income.

***Background***

The parties are the parents of three minor children. All three children attend the Williamsport Christian School where the Petitioner/Plaintiff is employed part-time as a preschool teacher. The Respondent/Defendant is currently unemployed but receives a \$2,830.00

monthly annuity as a result of a burn accident he sustained in the summer of 1998. The Respondent/Defendant's annuity increases yearly at a rate of 3%; he will receive the annuity for the remainder of this life whether or not he later becomes employed.

In December 2004, the Petitioner/Plaintiff filed for alimony pendente lite and child support. The Master's initial support order in this matter, dated February 14, 2005, directed the Respondent/Defendant to pay the Petitioner/Plaintiff \$1,924.57 support per month (\$1,288.99 of which was for child support and \$635.58 of which was for alimony pendente lite). The Master's Order arrived at these figures after assessing the Petitioner/Plaintiff<sup>1</sup> and the Respondent/Defendant monthly earning capacities of \$648.21 and \$4,055.81 respectively.

The Respondent/Defendant filed exceptions to the Master's February 14, 2005 Order alleging that the Master erred by not assessing the Petitioner/Plaintiff a higher earning capacity because, as the Respondent/Defendant claims, she is capable of working full-time. The Respondent/Defendant also alleged that the Master erred by assessing him an earning capacity because his injuries prevent him from working. On July 15, 2005, the Honorable Richard A. Gray dismissed the Respondent/Defendant's exceptions filed to the Master's February 14, 2005 Order stating that, because the parties' children receive, by virtue of their mother's employment, a discounted tuition, the Master was reasonable in her assessed earning capacity based on the Petitioner/Plaintiff's part-time employment salary. The Court went on to state that, the Master's assessed earning capacity as to the Respondent/Defendant was not in error because, based on the court record, the Respondent/Defendant failed to present sufficient medical evidence of his

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<sup>1</sup> Because the Petitioner/Plaintiff is a school teacher, she only draws an income for ten of the twelve months of the year; therefore, the Master assessed an earning capacity to the Petitioner/Plaintiff for the entire year based on the income she draws during the school year.

alleged inability to work and it appears that he voluntarily quit his job in lieu of receiving his monthly annuity payments.

In October 2005, Judge Gray found the Respondent/Defendant in contempt for failing to pay his child support. Although Domestic Relations attached the Respondent/Defendant's annuity to satisfy his support obligations, because the obligation was more than 55% of his income, the attachment only provided the Petitioner/Plaintiff with \$1,596.68 monthly support leaving the Respondent/Defendant's arrearages total, as of October 19, 2006, at \$7,184.87. As a result of the Court's finding of contempt, the Court sentenced the Respondent/Defendant to serve a period of incarceration of three (3) months in Lycoming County Prison with the option of purging himself of that sentence by paying the sum of \$800.00 on or before December 1, 2005, or providing the Court with clear and convincing evidence of his inability to work. On or about November 8, 2005, the Respondent/Defendant provided a letter from Dr. James W. Redka satisfying Judge Gray's October 2005 Order; consequently, the purge payment was removed.

On December 5, 2005, the Respondent/Defendant filed a request for modification of his support obligations. On January 27, 2006, the Master issued an Order modifying the Respondent/Defendant's support obligations as follows:

The Respondent/Defendant's monthly income, accounting for the 3% annual increase in his annuity, is \$2,914.90. The Petitioner/Plaintiff's monthly earning capacity is \$1,128.00 (\$648.00 income derived from her teaching salary plus the \$480.00 tuition reduction the parties' children receive by virtue of the Petitioner/Plaintiff's employment at the school). The parties' combined monthly income is \$4,042.90 leaving a total monthly support obligation of \$1,3390.00. The Respondent/Defendant's 72.1% share of that monthly obligation is \$965.42 plus his monthly alimony pendente lite obligation of \$246.30 resulting in a total monthly support

obligation of \$1,211.72 effective December 5, 2005 continuing through January 26, 2006; thereafter, under the new support guidelines, the Respondent/Defendant's monthly support obligation decreases to \$1,189.14. Finally, the Master ordered the Respondent/Defendant to pay \$150.00 per month for past due support.

On February 2, 2006, the Petitioner/Plaintiff filed the instant exceptions to the Master's January 27, 2006 Order; an April 17, 2006 hearing was held on said exceptions.

***Discussion***

“A petition for modification . . . of an existing support order shall specifically aver the material and substantial change in circumstances upon which the petition is based.” Pa.R.C.P. No. 1910.19(a). A child reaching the age of majority or substantial increases or decreases in income are examples of “material and substantial changes in circumstances” on which to base a petition to modify an existing support order.

Here, the Respondent/Defendant's December 5, 2005 Petition for Modification of an Existing Support Order merely references the medical evidence he provided to Judge Gray on or about November 8, 2005 in order to remove the purge payment from his contempt sentence; the Respondent/Defendant's Petition does not allege any material and substantial change in circumstances since the Master issued her initial February 14, 2005 support order. In fact, the medical evidence presented on or about November 8, 2005, and at the January 31, 2005 hearing on the Respondent/Defendant's Petition, indicate that his medical condition has remained unchanged since his burn accident in 1998. Having failed to provide the Master with evidence of a material and substantial change in circumstances, the Respondent/Defendant's Petition should have been dismissed.

Lastly, the Master's January 27, 2006 Order incorrectly analogizes the children's tuition reduction to personal perquisites from employment like automobile and entertainment expenses. The children's tuition reduction is a perquisite that benefits both parties. Judge Gray recognized this fact in his Order of July 15, 2006 in which he found it reasonable to not include the tuition reduction in the Petitioner/Plaintiff's income; this Court agrees with Judge Gray's decision.

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of May 2006, for the reasons set forth above, it is **ORDERED** and **DIRECTED** that the Exceptions filed by the Petitioner/Plaintiff to the Family Court's Order of February 1, 2006 are **GRANTED** thereby **VACATING** the Master's Order of February 1, 2006. It is further **ORDERED** and **DIRECTED** that the Master's Order of February 14, 2005 is hereby **REINSTATED**.

By the Court,

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Nancy L. Butts, Judge

cc: Elinor Marsalisi, Esq.  
R.M.  
Family Court  
Domestic Relations (MR)  
Hon. Nancy L. Butts  
Judges  
Gary L. Weber, Esq.  
Laura R. Burd, Law Clerk