

the parties' exceptions, the Plaintiff conceded the Defendant's first aforementioned exception; therefore, the Court's foregoing discussion will not address this issue.

Background

The parties were married in 1993. Shortly thereafter, in 1995, the Defendant's kidneys began to fail. Although initially able to continue working, the Defendant's health continued to deteriorate and, by March of 1997, he had ceased working, was undergoing daily dialysis, and was in need of a kidney donor. Because the Defendant's kidney problems were hereditary, his family members were not ideal donors; however, the Plaintiff was and, in July 1997, she donated a kidney to the Defendant. As a side effect of the surgery, the Plaintiff suffered, and continues to suffer from, an incisional hernia; the Defendant has since made a full recovery.

Prior to the 1997 surgery, Hope Enterprises, Inc. employed the Plaintiff as a caseworker, and, in October 1997, the Plaintiff attempted to return to work in this capacity, but the effects (mental and physical) and consequences (e.g. numerous doctor appointments) of the surgery led to her premature "retirement" in January 1998. Unable to work, the Plaintiff received disability income from late January 1998 through October 31, 2002 and Social Security Disability (hereinafter "SSD") benefits up through the present.

The parties separated on March 14, 2002; the Plaintiff filed for support that same day. On July 10, 2002, the Master denied the Plaintiff's request for spousal support because she had forced her husband out of the house when she acquired a Protection from Abuse Order against him. In his October 2002 Opinion and Order on the Plaintiff's Exceptions to the Master's July 10, 2002 denial of support, the Honorable Dudley Anderson found that, absent the Defendant's consent to entry of said Order, the Plaintiff would not likely have been able to meet the necessary requirements for the Court to enter a final order of protection (i.e. the Plaintiff would not have

been able to justify a finding of abuse necessary for the entry of a final order of protection). In December 2002, the parties entered into a stipulated order for alimony pendente lite (hereinafter “APL”) whereby the Defendant would pay the Plaintiff \$862.96 per month.

In September 2005, the Plaintiff sought a review of the stipulated Order stating, as basis for her request, that she is totally disabled and has medical bills, for which the Defendant should be responsible. After three days of hearings in mid 2006, the Master issued a lengthy support Order which, *inter alia*, increased the Defendant’s monthly APL payment to \$1,165.29 retroactive to September 26, 2005 (the date the Plaintiff filed for a modification of the previous stipulated APL order) and ordered the Defendant to pay \$100.00 per month on the arrears resulting from the retroactive effect of her decision. The Defendant promptly filed Exceptions on November 3, 2006 and the Plaintiff followed suit and filed her Cross Exceptions on November 6, 2006. After a hearing before this Honorable Court on December 18, 2006, the Court finds as follows.

Discussion

“The finding(s) of the Master are “only advisory and not in any way binding on the trial court.” *Goodman v. Goodman*, 375 Pa. Super. 504, 507, 544 A.2d 1033, 1035 (Pa. Super. Ct. 1988). Rather, it is the “sole province and the responsibility of the court to set an award of support” and even if the evidence before the Support Hearing Officer is adequate to support her recommendation, the trial court need not adopt it. *Id.*” *Ewing v. Ewing* 2004 Pa. Super 46, P13, 843 A.2d 1282, 1286 (Pa. Super. Ct. 2004). Here, the Court finds that the evidence before the Master clearly weighed in favor of the Defendant and that a majority of the Master’s Order must be reversed.

The evidence presented at the hearings does not support the Master's findings

The focus of the three-day hearing on the Plaintiff's September 2005 request for a review of APL was the Plaintiff's ability, or lack thereof, to acquire and maintain gainful employment. In support of her contention that she is entirely incapable of acquiring and maintaining gainful employment, the Plaintiff offered the testimony of, *inter alios*, three doctors (Dr. James Way [the Plaintiff's primary family physician], Dr. Stephen Yordy [family doctor whom the Plaintiff sought a second opinion from], and Dr. John Kelsey [the Plaintiff's psychologist]). In rebuttal, the Defendant offered the testimony of Eileen Bloom, a physical therapist who specializes in industrial rehabilitation, and video tapes of the Plaintiff's activities filmed by private investigator Scott Warner. The video tapes show the Plaintiff, between the months of May and September 2005, primarily at her river lot, acting and moving beyond the limitations she claims to suffer from and that which entitle her to disabled status (e.g. walking easily without a cane, lifting small children and coolers, walking up and down stairs one foot in front of the other, etc.).

All three doctors, and Ms. Bloom, testified, prior to viewing the video tapes, that, in their professional opinion, the Plaintiff was unable to acquire and maintain gainful employment due to her physical condition, mental instability, and/or the medications² she takes for her physical condition. After viewing the video tapes, all but one of the aforementioned witnesses revised their opinions regarding the Plaintiff's ability to work³. Dr. Way initially testified that the Plaintiff was entirely incapable of working; however, after viewing the video tapes, Dr. Way stated that the only impediment to the Plaintiff's employment status was the effect her pain medication has on her cognitive abilities. Dr. Yordy initially testified that after only seeing the

² The Plaintiff takes, every day, percocet for pain and a muscle relaxer for her back.

³ Because Dr. Kelsey is a psychologist, his assessment was primarily limited to the psychological condition of the Plaintiff as a result both her hernia and the medication as opposed to her alleged physical restraints.

Plaintiff twice, he had determined that she was not capable of working; however, after viewing the video tapes, he stated that the Plaintiff presented herself as more restricted while in his office and that physically, in his opinion, she is likely capable of sedentary work but her pain medication ultimately prohibits her from acquiring and maintaining gainful employment. Lastly, Ms. Bloom testified that her ultimate assessment of the Plaintiff changed after viewing the video tapes; specifically, she stated that although she initially opined that the Plaintiff would not likely be able to acquire and maintain gainful employment based on the manner in which the Plaintiff presented herself and the results of the functional capacity assessment she conducted with the Plaintiff, that after viewing the Plaintiff's contradictory actions on the video tapes, that she now believes the Plaintiff to be capable of sedentary work.

In her October 20, 2006 Order, the Master thoroughly summarizes the testimony presented at the three days of hearings and then provides the following condensed rationale for her decision:

Two physicians have testified that Ms. Gordner is unable to work. Dr. Kelsey testified she is not psychologically well enough to work. The Master has reviewed the video tapes in their entirety, and finds nothing to indicate that Ms. Gordner can do more than sit, stand and walk short distances without a cane. The Master believes she was on high doses of medication . . . It is also clear to the Master that Ms. Gordner is unable to work even two hours per day on a routine and regular basis.

Order, p.54 (October 20, 2006).

Although the testimony of both the Plaintiff and her attorney was compelling, this Court cannot ignore the clear impact of the video tapes. Much of the Plaintiff's inability to function is self-reported. This Court finds that the video tapes significantly undermines the Plaintiff's credibility, and therefore, are convincing evidence of the Plaintiff's ability to acquire and maintain gainful sedentary employment.

The Master should have assessed the Plaintiff an earning capacity

Pennsylvania Rules of Civil Procedure No. 1910.16-2(d)(4) states that, “a party who willfully fails to obtain appropriate employment will be considered to have an income equal to the party's earning capacity.” “A person's earning capacity is defined not as an amount which the person could theoretically earn, but as that amount which the person could realistically earn under the circumstances, considering his or her age, health, mental and physical condition and training.” *Strawn v. Strawn*, 444 Pa. Super. 390, 395, 664 A.2d 129, 132 (Pa. Super. Ct. 1995); *Myers v. Myers*, 405 Pa. Super. 290, 297, 592 A.2d 339, 342 (Pa. Super. Ct. 1991).

In the instant case, the Plaintiff, although currently collecting SSD benefits, failed to provide sufficient uncontradicted medical evidence of her alleged inability to work at the Master’s hearing. Three doctors, presented by the Plaintiff, did testify that the medication taken by the Plaintiff impairs her cognitive function to the point of rendering her incapable of working; however, there was also testimony presented that there are alternative medications and/or alternatives to medication (surgery and pain management) that the Plaintiff has not explored or refuses to explore. Similar to a party who refuses to acquire and maintain gainful employment commensurate with his/her abilities, the Court will not permit the Plaintiff in the instant matter, in light of the doctors’ consensus that the only obstacle to her working is her current choice of pain management, to unilaterally obstruct her ability to provide some level of self-sustenance by acquiring and maintaining gainful employment commensurate with her abilities because she doggedly refuses to explore alternatives to the addictive pain narcotic she currently takes.

ORDER

AND NOW, this _____ day of January 2007, the Court hereby **ORDERS** and **DIRECTS** as follows:

1. the Court hereby **GRANTS** Defendant's exceptions one, two, three, four, and six and hereby **DENIES** the remainder of the Defendant's exceptions;
and
2. the Court hereby **DENIES** the Plaintiff's lone exception.

Accordingly, the Court hereby **REVERSES** the majority of the Master's October 20, 2006 Order and further **ORDERS** and **DIRECTS** as follows:

1. The Plaintiff shall be assessed net monthly earning capacity of \$750.00⁴, effective September 26, 2005 through December 31, 2006 and a net monthly earning of \$945.00⁵ effective January 1, 2007.
2. Accordingly, the Plaintiff's net monthly income from September 26, 2005 through December 31, 2006, plus her SSD benefits, equals a net monthly income of \$1,508.00 and, effective January 1, 2007, a net monthly income of \$1,703.00.
3. From September 26, 2005 through December 31, 2006, the Plaintiff's proportionate share of insurance costs is 29%; after January 1, 2007, the Plaintiff's proportionate share of insurance costs is 32%.
4. Based upon the Defendant's net monthly income of \$3,698.23 and the Plaintiff's net monthly income, from September 26, 2005 through

⁴ The Court arrived at this figure by assessing a minimum wage earning capacity and deducting the applicable taxes.

⁵ The Court arrived at this figure by assessing a minimum wage earning capacity and deducting the applicable taxes.

December 31, 2006, of \$1,508.00, there is \$2,190.23 available for APL, 40% of which equals \$876.10.

5. Based upon the Defendant's net monthly income of \$3,698.23 and the Plaintiff's net monthly income, after January 1, 2007, of \$1,703.00, there is \$1,995.23 available for APL, 40% of which equals \$798.10
6. Accordingly, the Defendant shall pay, by check or money order to PA SCUDU, P.O. Box 69110, Harrisburg, PA 17106-9110 for APL the sum of \$876.10 monthly effective *September 26, 2005* and continuing until December 31, 2006 and \$798.10 monthly effective January 1, 2007, until further Order of Court.
7. The Defendant shall pay \$100.00 monthly on this Order for any past due support due to the retroactive effect of this Order for any overdue support which has accrued prior to the entry of this Order.
8. All other aspects of the Master's Order shall remain in effect.

By the Court,

Nancy L. Butts, Judge

xc: Janice Ramin Yaw, Esq.
William J. Miele, Esq.
Family Court
Domestic Relations (MR)
Hon. Nancy L. Butts
Judges
Laura R. Burd, Esq. (Law Clerk)
Gary L. Weber, Esq. (Lycoming Reporter)