

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

EMB, : NO. 06-21,117
Petitioner : PACSES NO. 046108565
 :
vs. :
 : DOMESTIC RELATIONS SECTION
JAB, :
Respondent : Exceptions

.....

JAB, : NO. 06-21,538
Plaintiff :
vs. : CIVIL ACTION - LAW
 : IN DIVORCE
EMB, :
Defendant : Exceptions

OPINION AND ORDER

Before the Court are cross-exceptions to the Family Court Order of July 2, 2008. Argument on the exceptions was heard September 16, 2008.

Although Petitioner sought spousal support, as a divorce complaint had already been filed, as well as an answer thereto, the Family Court Hearing Officer endeavored to enter an award of alimony pendente lite. Finding that Petitioner's income exceeded that of Respondent, however, she declined to enter such an award but instead directed the payment of a mortgage contribution only. In his exceptions, Respondent contends the hearing officer erred in awarding a mortgage contribution, and in failing to include in Petitioner's income any overtime pay. In her exceptions, Petitioner contends the hearing officer erred in deducting a rental income loss from Respondent's income and in finding that the parties mutually agreed to separate. For ease of discussion, these issues will be addressed in reverse order.

First, with respect to the finding that the parties mutually agreed to separate, the Court agrees that such finding was made in error. While it appears the parties agreed to not contest Petitioner's entitlement to spousal support, N.T. June 30, 2008, at p. 11-12, Petitioner did not

agree that both parties mutually agreed to separate. *Id.* at p. 11. Therefore, although it does not appear to affect the instant Family Court Order, inasmuch as it may become an issue in further proceedings with respect to the divorce, the Court will strike that portion of the Family Court Order which refers to such an agreement.

Next, Petitioner contends the hearing officer erred in deducting from Respondent's total monthly income a loss he claimed on his tax return as a result of renting half the duplex in which he lives. Inasmuch as Respondent testified that he charges less than fair market value for the rental unit, the Court agrees that the loss should not have been deducted. According to Respondent's testimony, he could have charged \$2400 more annually. From his tax return it can be determined that he would have paid an additional \$375 in federal tax, for a net income of \$2025, which, offsetting the loss of \$1295, would have given him additional income of \$730, or about \$61 per month. Thus, his net income from all sources is calculated to be \$2903 per month.

With respect to the issue of Petitioner's overtime, as Respondent's counsel pointed out at argument, the letter from Petitioner's employer produced by Petitioner at the time of the hearing does not say that Petitioner's overtime occurred "only because of the departure of a fellow employee", as was found by the hearing officer. Actually, the letter explains that "[t]he first quarter of the new year *typically* requires Elaine to work extra hours namely, closing out the previous year and meeting all the tax reporting deadlines. However, this year *in addition to that ...*" Petitioner's Exhibit #2 (emphasis added). Further, an examination of the Earnings History Report provided to the Domestic Relations Office in connection with Petitioner's prior claim for child support in 2006, as well as Petitioner's 2007 tax return, both show overtime income in 2006 and 2007. Therefore, the Court agrees with Respondent that overtime income should have been included in Petitioner's total income.

The 2006 Earnings History Report shows 104.25 hours of overtime during a 26 week period, which averages to a little over 4 hours per week. That report also shows 401K deductions totaling about \$1400. As the 2008 paystub also covers 26 weeks and shows 401K deductions totaling about \$1400, in analyzing the 2007 tax return the Court will assume Petitioner had 401K deductions in 2007 of about \$2800, which, when added to the gross wages

shown on the return, would give her a total gross income in 2007 of \$50,872. Estimating her gross income from wages without overtime at \$42,640 (40 hr/wk x 52 weeks x \$20.50/hr) results in an estimated overtime amount of \$8,232. At \$30.75/hr (time and a half), Petitioner would have worked 267.7 hours of overtime, or 6.7 hours per week. In 2008, Petitioner's paystub shows overtime income of \$7428.97, indicating, at \$30.75/hour, that she worked 241.6 hours of overtime in the 26 week period covered, or 9.3 hours per week on the average. Considering that the 2006 figure represents the period from March through September, that the 2007 figure is an annual average and that the 2008 figure represents the period from January through June, and given Petitioner's employer's statement that Petitioner is required to work more overtime in the first quarter of the year, it seems appropriate to the Court to use the 2007 average overtime figure in calculating her current income. At \$30.75/hr, working 6.7 hr/wk provides Petitioner with \$206 gross income from overtime. In a 26 week period she would earn \$5,356. Adding that to the \$20,172 regular pay, \$788 vacation pay, and \$640 holiday pay shown on the June 27, 2008, paystub results in total gross income of \$26,956 for the 26 week period, or \$1036 per week. As the paystub shows that about 25% is withheld in taxes, Petitioner's net pay would be \$777.60 per week, or \$3370 per month. Adding the \$124 per month attributable to her tax refund, it is determined that Petitioner's total monthly net income is \$3,494.

Finally, with respect to Respondent's contention the hearing officer should not have awarded a mortgage contribution, inasmuch as Petitioner's monthly net income has been found to be \$3,494 and Respondent's monthly net income has been found to be \$2,903, the Court believes a mortgage contribution would not be equitable.

ORDER

AND NOW, this 18th day of September 2008, for the foregoing reasons, the exceptions filed by both parties are GRANTED. The Order of July 2, 2008, is hereby modified as follows:

1. The language "as they had both mutually agreed to separation" is hereby stricken from the third paragraph of the Order of July 2, 2008.

2. Numbered paragraphs 1, 2, 3 and 5 of the Order of July 2, 2008, are hereby vacated.¹ The request for a mortgage contribution is hereby dismissed.
3. The Domestic Relations Office is directed to vacate any wage attachment and to notify both counsel of the credit which results from the instant Order.
4. Said credit shall be applied by the Court and/or parties in equitable distribution.

As modified herein, the Order of July 2, 2008, is hereby affirmed.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Family Court
Domestic Relations Section (JM)
Christina Dinges, Esq.
Joy McCoy, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson

¹ Numbered Paragraph 4, which requires Petitioner to pay Court costs, shall remain in effect.