

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JLW,		: NO. 99-20,871
	Plaintiff	:
vs.		:
		:
DAW,		:
	Defendant	: Exceptions

**OPINION AND ORDER**

Before the Court are Defendant's exceptions to the Family Court Order of October 23, 2007. Argument on the exceptions was heard January 4, 2008, at which time Defendant requested the preparation of transcripts of the hearings in Family Court to aid the Court in its decision. Those transcripts were completed March 7, 2008.

In her exceptions, Defendant contends the hearing officer erred in assessing her an earning capacity of \$2000 per month, in adding to that earning capacity an income tax refund, in failing to assess Plaintiff an earning capacity, in granting Plaintiff's request for a deviation based on his payment of a mortgage and rent, in suspending Plaintiff's obligation for a certain time period, in failing to order the Domestic Relations Section to enforce a prior arrearage, and in giving Plaintiff a credit of \$1700. These will be addressed seriatim.

With respect to the assessment of an earning capacity of \$2000 per month to Defendant, the Court agrees with Defendant that such was error under the circumstances. The Court notes there was no evidence to support the figure of \$2000 per month. Further, Defendant continues to work as a substitute teacher and continues to look for a full-time teaching position, the same situation she was in at the time of the previous order in this matter. The Court does not believe the passage of eight to nine months<sup>1</sup> is such that her inability to find a full-time position should be deemed a "failure to earn an income commensurate with her abilities". Therefore, since she is in the same position, the Court will continue to consider the income she was earning at the time of the last Order, or \$630 per month.

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<sup>1</sup> The prior Order was entered in January 2007, the instant hearings were held in August and October, 2007.

With respect to the tax refund, the Court agrees with Defendant that a tax refund should not be added to an arbitrary earning capacity, but since the Court will consider Defendant's actual earnings, and since that figure was taken from a pay stub and thus represents a net income, addition of a tax refund to that figure is appropriate. Adding the refund of \$385 per month to Defendant's income from employment results in a total monthly income of \$1015.

With respect to Defendant's contention that Plaintiff should have been assessed an earning capacity, the Court has reviewed the transcript and considering the evidence does not find any error in the hearing officer's determination that Plaintiff's support obligation should be based on his current earnings.

With respect to the deviation granted to Plaintiff based on his payment of both a mortgage and rent, the Court notes such a deviation was granted in the previous order and thus continuation of such is not error as long as the circumstances continue to be the same. In that regard, it is noted that at the prior hearing, Plaintiff testified that his wife had not moved with him as her youngest child was finishing high school and that he was maintaining two households until that child graduated. At the hearing on August 31, Plaintiff testified that that child has now graduated, but that his wife continues in the same employment. Since Plaintiff lost his previous job in the spring of 2007, at the time his wife would have been making the decision to seek employment elsewhere,<sup>2</sup> the Court will assume she made the decision to not give up her job in light of Plaintiff's circumstances. Now that he has found stable employment, however, it will be assumed that she will be able to leave her job and seek new employment in Philadelphia, and thus the deviation will be discontinued as of July 1, 2008.

With respect to the suspension of Plaintiff's support obligation for the period of time during which he was unemployed, as the hearing officer found that Plaintiff lost his job through no fault of his own and undertook to mitigate that loss,<sup>3</sup> and as both of those findings are supported by the record, the Court believes the suspension appropriate.

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<sup>2</sup> Plaintiff's wife is employed by a school district and thus the spring is when most of the job openings appear.

<sup>3</sup> Plaintiff's request for unemployment compensation was opposed by his prior employer, and although he pursued an appeal, he found new employment and discontinued the pursuit of unemployment compensation. The Court cannot say that such circumstances should support assessment of an "earning capacity" equal to the unemployment compensation he would have received had the appeal been successful.

With respect to the request to have the Domestic Relations Section enforce a prior arrearage, the Court notes this issue was addressed by a separate petition for special relief<sup>4</sup> and thus will not be addressed herein.

Finally, with respect to the contention the hearing officer erred in giving Plaintiff a credit of \$1700, the Court notes that Plaintiff did make such a payment to Defendant, but Defendant seeks to have the credit applied to the arrearage referred to above, rather than to the obligation being currently enforced by the Domestic Relations Section. Since the payment was made after Defendant sought collection and enforcement through the Domestic Relations Office, however, that office applied the payment to the obligation Defendant sought to enforce, which is appropriate. The Court sees no reason to “undo” the credit, and thus will not modify the hearing officer’s directive in this regard.

Accordingly, considering Plaintiff’s income of \$4032 per month, and Defendant’s income of \$1015 per month, the guidelines suggest a payment for the support of two minor children of \$1001.82 per month. The deviation for mortgage/rent lowers that payment to \$941.71 per month.

### **ORDER**

AND NOW, this 12<sup>th</sup> day of March 2008, for the foregoing reasons, Defendant’s exceptions are hereby granted in part and denied in part. Paragraph 3 of the Order of October 23, 2007, is hereby modified to provide for a payment of child support in the amount of \$941.71 per month from July 17, 2007, until July 1, 2008, at which time it shall be modified to \$1001.82 per month. Paragraph 6 of the Order of October 23, 2007, shall be modified to provide for apportionment of responsibility for medical expenses 79.89% to Plaintiff, 20.11% to Defendant.

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<sup>4</sup> This Court’s Order in that matter was filed January 8, 2008.

As modified herein, the Order of October 23, 2007, is hereby affirmed.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Family Court  
Domestic Relations Section  
Rebecca Reinhardt, Esq.  
Joy McCoy, Esq.  
Gary Weber, Esq.  
No. 07 – 21,140  
Hon. Dudley Anderson