IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

SCK, : NO. 14 – 20,578
Petitioner : PACSES NO. 455114628
:
vs. :
: DOMESTIC RELATIONS SECTION
TGK, :
Respondent : Exceptions

OPINION AND ORDER

Before the Court are cross-exceptions to the Family Court Order of April 27, 2016. Argument on the exceptions was heard August 16, 2016, following which the court requested that Respondent provide certain documentation. That documentation now having been provided, the matter is ripe for decision.

The Family Court Order of April 27, 2016 was entered in response to Respondent's petition for modification, filed February 3, 2016. In that petition, Respondent requested a review based on the fact that as of March 29, 2016, he would be separating from the armed forces and would now be receiving unemployment compensation.[1] The hearing officer assessed an earning capacity to Respondent based on recent employment at Surplus City which he had quit and, finding that Petitioner now earned more than Respondent, and based on the parties 50/50 custody arrangement, suspended the child support obligation effective March 29, 2016. She also directed the Domestic Relations Office to enter an administrative order in accordance with calculations made in the order at such time as Respondent filed for support. That Order was entered May 5, 2016 to No. 16 – 20,579.

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[1] The prior Order had been entered in May 2014 and was based on Respondent's income from the Navy.

Petitioner lists fifteen (15) claims of error in her exceptions, but the court will group them as follows:

(1) The hearing officer should have considered the actual number of overnights with each party rather than the general provision for 50/50 custody in the parties' custody order.

(2) The hearing officer erred in the amount of the Respondent's earning capacity.

(3) The hearing officer should have required that Respondent provide documentation of his pay with Surplus City and his unemployment compensation.

(4) The hearing officer erred in failing to consider that Respondent had additional income while working at Surplus City as he still received Navy pay during that time.

(5) The hearing officer erred in authorizing the Domestic Relations Office to enter an administrative order when Respondent filed for support.

Respondent alleges error in

(6) the hearing officer's addition of a tax refund to his earning capacity and

(7) the use of 40 hours to calculate his weekly earning capacity, rather than 37.5 hours.

Each of these issues will be addressed in turn.

(1) The hearing officer should have considered the actual number of overnights with each party rather than the general provision for 50/50 custody in the parties' custody order. The issue of considering the actual number of overnights was presented by Petitioner based on her having kept a

record of each time the children or one of them spent the night with her rather than with their Father and it was, under the custody order, "his time".[2] Respondent explained that he would rather have had the children stay with his parents but was required by the custody order to offer Petitioner the opportunity to have them under what is generally known as a "babysitting clause" in the order.[3] Much of the testimony focused on whether Respondent requested "make-up time" when he asked Petitioner to take the children on his time, whether Petitioner allowed such and what it was that Respondent was doing during this time. Petitioner also claimed that Respondent was never available to take the children when she asked him to take them on her time, but also testified that she arranged her schedule so that asking wasn't necessary.

The court believes the hearing officer's determination in this matter is well-reasoned and appropriate under the circumstances, and will adopt that reasoning as its own, as follows:

> Mother contends she should not be required to pay child support because although the parties' custody order sets forth a 50/50 schedule, she has had more overnights with the children than Father. Mother has kept a detailed calendar of all the nights she has had the children during Father's custody time, which she summarized in a document labeled Plaintiff's Exhibit #5. According to that exhibit, in 2014 there were eighteen overnights when Mother had the children on Father's time; six of these were overnights with Paige alone. In 2015, there were twenty-one overnights. Eleven of these were with Paige alone. In 2016 there were seven overnights. One of these was with Paige alone.
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> Father did not dispute the contents of Plaintiff's Exhibit #5, as he did not keep meticulous track of the overnights, like Mother did. He acknowledged there were times one or both children stayed with

[2] This record covered 2014, 2015 and up to the date of the hearing in 2016.

[3] It appears from the testimony that Petitioner insisted on the clause and although Respondent did not want it, it is in the Order.

Mother on his custody time, but he made several arguments as to why the Hearing Officer should consider the custody schedule 50/50. First, Father testified that seventy-five percent of these overnights were due to work or work-related events, which he needed to attend. The Hearing Officer believes that many of these missed nights were work-related. Although Father had trouble pinpointing his whereabouts for each of the overnights on Plaintiff's Exhibit #5, he knew for certain that the recent overnights he missed, six overnights in February and March 2016 were due to his two-week training in Altoona for Surplus City. Mother agreed the overnights in February and March 2016 were work-related. Father received some make-up time for these overnights.

Mother claimed all of the other overnights were due to recreational activities such as hunting, golf, and motorcycle trips. Father testified that he did miss some custody time because of hunting, during the regular hunting season. He further testified that although some of the activities seem to be recreational, they were actually work-related. For instance, he attended a Navy-sponsored golf event, and a motorcycle event because he was the motorcycle safety coordinator for the Navy. Going forward, it is unknown what type of job Father will obtain, and whether he will have work-related events during his custody time.

Father did admit that there were times the children spent nights at Mother's home because he was unavailable for personal reasons (taking a trip with his friends, hunting, etc.).

Next, Father argued that his parents would have loved to care for the children when he was unavailable, but he sent them to Mother because the parties' custody order required him to offer her the first chance to watch the children, and Mother threatened him with contempt of the custody order if he did not let her have the children. Mother acknowledged that it was she who wanted the babysitting provision in the order, and she had insisted on enforcing it.

Next, Father testified that he tried to get make-up time, but Mother usually did not agree to it. It is noted that the custody order does not require make-up time for custody time a parent misses. Mother testified that Father never requested make-up time. The Hearing Officer believes that Father sometimes requested make-up time, but it was rarely granted.

Next, Father testified the reason Paige spent more overnights with Mother than Noah is because Father had an RV at a river lot. Paige is a "girly-girl" and did not want to stay at the river lot, so Father did not force her. In October 2015, however, he got a site at a different campground, where she has more friends and likes it better.

After considering the testimony, the Hearing Officer finds that the custody schedule should be considered 50/50 despite Mother having more actual overnights, for the following reasons. First, the custody order sets forth a 50/50 schedule, which was generally followed. When Father was not available—no matter the reason—he was required to offer Mother the chance to have the children. Technically, Mother is acting as a babysitter in this case. The Hearing Officer is very reluctant to start counting such times as overnights for child support purposes, as it will discourage parents from agreeing to the babysitter provision, and therefore deprive parents of having priority over a babysitter. In any event, parents wanting such a babysitting provision should not then turn around and want child support for the babysitting time they requested.

Second, counting such overnights in the child support calculation discourages parents from granting make-up time, which is generally beneficial to the children. Make-up time is especially encouraged when parents must miss time for reasons beyond their control.

Third, such a policy would penalize parents who miss time with their children due to work commitments beyond their control. And even when the reasons are personal, so long as such days are kept to a reasonable number, it would be foolhardy for the courts to penalize parents for spending some recreational time with other adults now and then. While children should generally come first, parents benefit from other interests and relationships, which can make them better parents.

And finally, a policy of strictly counting all overnights would discourage parents from being flexible with the custody schedule, according to the real-life situations everyone encounters. For instance, parents would be less likely to grant additional time for special events with the other party, or for other reasons that could be beneficial to the children. In the case at hand, Father would have been tempted to force Paige to sleep at the river lot, against her

> wishes, in order to avoid a "got you" moment in support court. It is not in the best interests of children to essentially force parents to stick to a rigid custody schedule for financial reasons alone.
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> In short, a policy of blindly counting each overnight reduces the idea of shared physical custody to a daily calculation, and could result in parents using the children as pawns in their child support game on an even greater basis than already happens. The children are the ones who would ultimately suffer from such a policy.
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> In the case at hand, this is not a father who is always trying to get rid of the kids during his custody time. He is clearly a very involved father who has exercised his 50/50 schedule regularly and consistently, although not perfectly.

The court dismisses as without merit Petitioner's specific claims that the hearing officer "erred in her findings that Defendant is not a Father who is always trying to get rid of the kids during his custody time", that "many of Father's missed custody nights were work related," and that "Father sometimes requested make-up time from Mother, but it was rarely granted." These findings are supported by a review of the record in its entirety.

(2) The hearing officer erred in the amount of the Respondent's earning capacity. Respondent's earning capacity was based on his employment with Surplus City. Petitioner argues that because Respondent answered an interrogatory (in the divorce proceedings) by indicating that he had earned $60-70,000 per year as a salesman at a previous time, he should have been assessed with a capacity higher than $17 per hour. Since the record showed that the sales position ended when the company downsized and he was laid off, and that he worked as a manager at Lowe's earning $18.50 per hour for two and one-half years after that, the court finds no error in the hearing officer's decision to use the most recent income to set the earning capacity. The paystub submitted shows that

Respondent earned $700 per week, however, not $17 per hour ($680 per week) and that figure will therefore be used.

(3) The hearing officer should have required that Respondent provide documentation of his pay with Surplus City and his unemployment compensation. The court agrees the hearing officer should have required that Respondent submit documentation of his pay at Surplus City and of his unemployment compensation. Both of those documents have now been received and, as noted above, the paystub shows a slightly higher income than was represented. The unemployment statement verifies the amount to which Respondent testified.

(4) The hearing officer erred in failing to consider that Respondent had additional income while working at Surplus City as he still received Navy pay during that time. The court also agrees that the hearing officer should have considered the additional income Respondent had while working at Surplus City and still receiving Navy pay. The documents show that Respondent worked at Surplus City from February 22 through March 25, earning $521.92 net per week, or $2261.65 net per month. Adding this to his Navy pay of $4575.74 per month,[4] and including the refund of $278.50 per month,[5] results in a total monthly net income of $7115.89. Together with Petitioner's income of $4403.29 per month,[6] the parties had a total monthly net income of $11,519.18, which under the guidelines calls for support for two minor children of $2149. Since Respondent's income is 61.77% of the total, and considering the 20% reduction

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[4] This figure was used in the May 2014 Order.

[5] The refund is used here because the income considered is based on paystubs, which are subject to discretionary withholding, rather than calculation of the actual tax liability.

called for in light of the 50/50 custody, resulting in him owing 41.77% of the support, his obligation is $897.64 per month. This amount will be directed to be paid from February 22 through March 29, 2016.[7]

(5) The hearing officer erred in authorizing the Domestic Relations Office to enter an administrative order when Respondent filed for support. The court cannot understand why Petitioner would prefer to have an additional hearing to establish the support she must pay to Respondent instead of having the Domestic Relations Office enter an administrative order based on findings made at a time which necessarily will be quite recent to any such hearing and thus based on the same circumstances. A clue is provided, however, by her petition for modification of the administrative order, filed May 31, 2016. Petitioner states as a basis for review that "[she] would like the order modified as [she] feels the [Respondent's] income was incorrectly assessed at the last hearing. She would like another hearing in order to question the [Respondent] further concerning his income." This is not an appropriate reason for either the request for a hearing rather than an administrative order, or the petition for modification. In fact, the court will dismiss the petition for modification in the interests of judicial economy.[8]

(6) The hearing officer erred in adding Respondent's tax refund to his earning capacity. The court agrees that the hearing officer should not have added Respondent's tax refund to his earning capacity. A tax refund is added

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[6] Although the Order of April 27, 2016 calculates Petitioner's income to be $4054.96 per month, this is clearly a mathematical error as $3900.04 and $503.25 do not add up to $4054.96. That $3900.04 and $503.25 are the correct figures is substantiated by Plaintiff's Exhibits Nos. 2 and 3.

[7] Even though the employment lasted only through March 25, Respondent should be assessed with an earning capacity based on that employment through March 29, as he voluntarily left the employment.

[8] The court sees no point in having the Domestic Relations Office schedule a hearing on the petition, only to have the hearing officer dismiss it for failure to allege a substantial change in circumstances.

only when the capacity is based on paystubs which reflect withholding, as such withholding is subject to manipulation, and may or may not be accurate. A tax refund refunds this over-withholding. A capacity, on the other hand, calculates the actual tax liability and assumes no over-withholding and thus no refund. Respondent's income will therefore be calculated without adding the refund.

As noted above, Respondent's earning capacity was based on his employment at Surplus City where he earned $700 per week gross, or $3033.33 per month gross. Deducting 20% for taxes yields a net of $2426.67 per month. Together with Petitioner's monthly net income of $4403.29, the parties have a total monthly net income of $6829.96, which under the guidelines calls for support for two minor children of $1607. Since Petitioner's income is 64.47% of the total, and considering the 20% reduction called for in light of the 50/50 custody, resulting in her owing 44.47% of the support, her obligation is $714.63 per month. The administrative order will be modified accordingly.

(7) The hearing officer erred in using 40 hours to calculate Respondent's weekly earning capacity, rather than 37.5 hours. Finally, Respondent has offered no authority which would persuade this court to reject the long-standing tradition of using 40 hours per week as a standard work week in assessing earning capacity. This exception is thus considered without merit.

ORDER

AND NOW, this 7th day of September 2016, for the foregoing reasons, the exceptions filed by both parties are hereby sustained in part and overruled in part. The Order of April 27, 2016, is modified to provide that Respondent pay for the support of the parties' two minor children the sum of $897.64 per month, from February 22, 2016 through March 29, 2016. Any medical expenses paid during this time shall be adjusted in accordance with the incomes found herein.

As modified herein, the Order of April 27, 2016, is hereby affirmed.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Family Court
Domestic Relations Section
Christina Dinges, Esq.
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Hon. Dudley Anderson