

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS SECTION

JULI' A. D'ANCONA-MAHER,
Plaintiff

v.

JEREMY D. GERHART,
Defendant

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No. 197 DR 96;
PACSES No. 035001882

Joseph P. Maher, Esquire
Jeremy D. Gerhart

Counsel for Plaintiff
Unrepresented

MEMORANDUM OPINION

Webb, S.J. – January 19, 2012

Plaintiff Juli' A. D'Ancona-Maher ("Plaintiff") appeals this Court's Order dated September 29, 2011, denying Plaintiff's Exceptions to the Domestic Relations Hearing Officer's Report dated June 27, 2011. We file the following Memorandum Opinion pursuant to Pa.R.A.P. 1925 and recommend that our September 29, 2011 Order be affirmed for the reasons set forth below.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Jeremy Gerhart ("Defendant") filed a Petition for Modification of Support on December 3, 2010, for one minor child, Sage Gerhart ("Child"). A support conference was held on April 21, 2011, and the Conference Officer entered an Order on April 26, 2011. Plaintiff filed a request for a de novo hearing regarding the April 26, 2011 Order. The hearing was held on June 22, 2011. On June 27, 2011, the Master's Report and Order were filed. Plaintiff timely

filed Exceptions to the June 27, 2011 Order. On September 27, 2011, we held argument on Plaintiff's Exceptions. We denied the Exceptions two days later on September 29, 2011. On October 31, 2011, Plaintiff sent a Notice of Appeal via e-mail to the Domestic Relations Officer. The Notice was accompanied by an explanation for the unorthodox and untimely filing.¹ Despite the delay and failure to notify chambers of the exigent circumstances, we have nevertheless decided to set forth our reasons underlying the September 29, 2011 denial of Plaintiff's Exceptions.²

II. PLAINTIFF'S EXCEPTIONS

Plaintiff's Exceptions, filed on July 18, 2011, encompass three main issues, as set forth in Plaintiff's Brief in Support of the Exceptions, filed on September 20, 2011, and reproduced below:

- (1) Whether the Master improperly interfered [sic] in the judicial process at the June 23, 2011 hearing by asking questions of Plaintiff that were not at issue especially since the purpose of her testimony was simply to put on record her current earning/earning capacity as well as produce evidence of what Defendant's earning capacity or income should be?
- (2) Whether the Master committed an error of law and/or an abuse of discretion in not allowing Plaintiff an upward deviation in child support since Defendant admitted and no other contrary testimony was presented that the parties' child spent little to no time with Defendant nor did Defendant make any expenditures on behalf of his child outside of paying child support?
- (3) Whether the Master committed an error of law and/or an abuse of discretion in not finding that Defendant should have been given a higher [sic] earnings capacity/deemed income due to his habitual unemployment and the fact that he has had no longer term jobs, but rather was almost continually on unemployment?

¹ The 30 day appeal period expired Monday October 31, 2011 (due to October 29, 2011 falling on a Saturday). However, via e-mail to the Domestic Relations Officer, Attorney Maher indicated that he had lost power in his office and home due to a snow storm on Saturday October 29, 2011. The loss of power rendered him unable to timely file the Notice of Appeal. Therefore, the Notice of Appeal was actually filed on November 3, 2011. The appeal was facially untimely. We did not find out about the reason for the late filing until November 9, 2011, when inquiries were made of the Domestic Relations Office regarding service of the Notice of Appeal.

² Despite the issues of timeliness, on or about November 15, 2011, we issued an Order requesting Plaintiff to file (within 21 days) a Concise Statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

On appeal, Plaintiff has reduced her exceptions into the following two issues, reproduced below:

- (1) The Court committed an abuse of discretion and/or error of law in not allowing Plaintiff an upward deviation in child support pursuant to Pa.R.C.P. 1910.16-4 when Defendant admits that he spent practically no time with the child nor did he make any expenditures on her behalf other than paying basic child support. (Exception #4).³
- (2) The Court committed an abuse of discretion and/or error of law in not properly calculating the parties respective net incomes for the three relevant periods of December 3, 2010 (the filing date of Defendant's Petition to Modify) through March 31, 2011 (when Defendant states he obtained new full time employment); April 1, 2011 through June 30, 2011; and July 1, 2011 (when Plaintiff's employment hours were cut from her normal fulltime 35 hours per week to 17 ½ hours due to budgetary cuts occurring as a result of cuts in her employer's funding from the Commonwealth) forward. (Exception #s 2&6).⁴

III. ISSUE #1: UPWARD DEVIATION

Plaintiff's argument in favor of an upward deviation in child support rests upon the 2010 commentary to Pa.R.C.P. 1910.16-4, which states in pertinent part:

The basic support schedule incorporates an assumption that the children spend 30% of the time with the obligor and that the obligor makes direct expenditures on their behalf during that time. Variable expenditures, such as food and entertainment that fluctuate based upon parenting time, were adjusted in the schedule to build in the assumption of 30% parenting time. Upward deviation should be considered in cases in which the obligor has little or no contact with the children

Explanatory comments are meant to offer helpful insight into the purpose and use of a rule—not to have the force of law. In this case, the explanatory comment indicates that upward deviation should be considered in cases in which the obligor has little or no contact with the child[ren]. Based upon the testimony, the relationship between Defendant and Child could conceivably be categorized this way. However, when confronted with this issue, we agree with

³ An "Exception #4" did not appear in the Exceptions at issue.

⁴ "Exception #2" encompasses the upward deviation requested by Plaintiff, and "Exception #6" does not appear in the Exceptions at issue.

Master Schwab's findings that at age 16 ½ (at the time of the June 27, 2011 Findings of Fact), visitation is at least somewhat dictated by Child. Thus, we considered the upward deviation, but based upon the testimony regarding Child's active social life, we ultimately decided that imposing one would be inappropriate.

IV. ISSUE #2: INCOME CALCULATION

The second matter Plaintiff addresses is the earnings capacity of the parties.⁵ Plaintiff would like a higher earnings capacity imputed to Defendant and a lower earnings capacity imputed to Plaintiff. At the hearing, Defendant testified that he was working at "Dom N Ali's" in the kitchen, making \$9 an hour and working 33 to 37 hours per week. (*N.T.* 6/23/11 at 4). Defendant did not, however, provide a pay stub.

Plaintiff indicated that she received a letter informing her that her hours would be cut from 35 hours per week to 17 ½ hours per week. That letter as well as a pay stub were made part of the record. Master Schwab asked Plaintiff if she would be receiving partial unemployment to make up for the decrease in salary, and Plaintiff indicated that she was "not sure how it works." (*Id.* at 14).

In regards to the support obligation, Master Schwab determined that Defendant's support obligation would increase from \$255.00 per month to \$279.00 per month, effective April 1, 2011.

Initially, we note that the report of the Hearing Officer "is entitled to great consideration in that he has heard and seen the witnesses and...it should not be lightly disregarded...." *Pasternak v. Pasternak*, 204 A.2d 290, 291 (Pa. Super. 1964). "[H]owever, it is advisory only and the reviewing court is not bound by it and it does not come to the court with any

⁵ Although Plaintiff uses the term "net income" in her Concise Statement, it is clear that earnings capacity was the actual issue when the parties appeared before Master Schwab in June 2011. *See N.T.*

preponderate weight or authority which must be overcome.” *Id.* “The reviewing court must consider the evidence de novo, its weight and the credibility of the witnesses.” *Id.* “The master’s report is not controlling either on the lower court or upon the appellate [c]ourt.” *Id.* Thus, “the trial court is required to make an independent review of the report and recommendations to determine whether they are appropriate.” *Kohl v. Kohl*, 564 A.2d 222, 224 (Pa. Super. 1989).

Considering Master Schwab’s recommendation that Defendant’s support obligation be increased, he seems to have found Defendant’s testimony regarding his past employment history only somewhat credible; whereas Master Schwab found Plaintiff’s testimony to be at least somewhat incredible, noting (in regards to a medical bill Defendant testified to paying):

The Defendant testified that he borrowed the money from his parents and was paying them back. Based on observation of his demeanor and inclination, the DRO Hearing Officer finds him creditable [sic]. For same reasons the DRO Hearing Officer finds the Plaintiff not credible as to her testimony to warrant a deviation. The DRO Hearing Officer finds based on her testimony that she would testify to anything that would help her increase her support amount and embellishes her testimony in that regard. (Master’s Report 6/27/11 at 1, n. 3)

While the Hearing Officer’s report and recommendation is only advisory, “it is to be given the fullest consideration, particularly on the question of credibility of witnesses, because the [Hearing Officer] has the opportunity to observe and assess the behavior and demeanor of the parties.” *Moran v. Moran*, 839 A.2d 1091, 1095 (Pa. Super. 2003). “Great weight must be accorded to the findings of the [Hearing Officer] or of the court below where issues of credibility must necessarily be resolved by personal observation.” *Mintz v. Mintz*, 392 A.2d 747, 749 (Pa. Super. 1978). After a careful review of the record, we find no compelling reason to disturb the

Hearing Officer's implicit credibility determination.⁶ Accordingly, the Hearing Officer did not err in re-calculating Defendant's support obligation.

V. CONCLUSION

For the foregoing reasons, this court recommends that our September 29, 2011 Order denying Plaintiff's Exceptions to the Domestic Relations Office Hearing Officer's Report be affirmed.

BY THE COURT:

Richard W. Webb, S.J.

⁶ A Hearing Officer is not required to make specific findings as to why he credited some testimony, but not other testimony. *Hargrove v. Hargrove*, 381 A.2d 143, 147 (Pa. Super. 1977).