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

WILLIAM J. HARTMAN, SR., Plaintiff/Appellant	:	
vs.	:	No. 257 DR 2010
	:	PACSES No. 672111873
TAMMY MILLS, Defendant/Appellee	:	

Bohdan J. Zelechiwsky, Esquire — Counsel for Appellant
Jeffrey Philip Paul, Esquire — Counsel for Appellee

MEMORANDUM OPINION

Matika, J. - March 22, 2013

William J. Hartman, Sr., (hereinafter "Father"), has appealed this Court's order dated December 27, 2012, wherein the Court granted the exceptions of Tammy Mills, (hereinafter "Mother"), and denied Father's exceptions to the report and recommendation of the Hearing Officer, William G. Schwab, Esquire, in regards to a child support obligation for D.W.H., a minor.

Father, in response to this Court's Rule 1925(b) order, filed a concise statement of matters complained of on appeal within the twenty-one days time limit of said order. This opinion addresses the issues raised in Father's concise statement.

FACTUAL AND PROCEDURAL BACKGROUND

On March 23, 2012, Mother, Tammy Mills, filed a petition for modification of an existing support order for the support of one minor child, D.W.H. An interim order was issued on April 30, 2012, from which Mother requested a hearing *de novo*. The hearing, held before Hearing Officer, William G. Schwab, Esquire, took place on June 13, 2012. At this hearing, Father testified that he earned $82.50 per hour working for DeAngelo Brothers. Father stated he also had weekly health care deductions for family coverage in the amount of $397.43 per week. Mother testified that, although she has a degree in K-8 elementary education, she prefers to, and has for some time, worked as a TSS (therapeutic staff support) worker for Community Service Group, grossing an average of $2,433.00 per month.

As a result, the Hearing Officer authored a report and recommendation in which he found no basis to modify the support amount, but required Mother to submit biweekly job search application forms for ten places of employment, preferably teaching positions, and provide the same to Carbon County Domestic Relations.

As a result, both parties filed timely exceptions to the Hearing Officer's report and recommendation. Mother's exceptions, filed first on July 2, 2012, challenged the findings

and conclusions that she had a greater earning capacity than the income she has earned as a 30-hour per week TSS worker. Additionally, Mother objected to the job search requirement of the report and recommendation.

One day later, on July 3, 2012, Father filed exceptions to the report and recommendation of the Hearing Officer. Father's exceptions, in essence, claimed that the Hearing Officer erred by concluding that, notwithstanding the denial of the Mother's petition to modify, the Hearing Officer was required to recommend the interim order of April 30, 2012, as the "most current and controlling order" that should be put into effect and not the previous final order of October 12, 2010.

Argument was scheduled and heard after which this Court issued an order on December 27, 2012, granting Mother's exceptions and denying Father's. Fundamentally, this Court's order of December 27, 2012, maintained the status quo as set forth in the October 12, 2010 Order of Court.

On January 25, 2013, Father filed this instant appeal. This Court, on February 7, 2013, directed that Father file a concise statement of matters complained of on appeal pursuant to Rule 1925(b) of Pennsylvania Rules of Civil Procedure. In following said order, Father claims the following trial court errors:

1. It is believed and therefore averred that this

Honorable Court committed an error of law and/or an abuse of discretion in not affording sufficient weight to the finder of facts finding Defendant an incredible witness. Pa.R.C.P. 1910.16-2(d)(4).

2. It is believed and therefore averred that this Honorable Court committed an error of law and/or an abuse of discretion reversing the finder of facts conclusion of law finding that Defendant's support obligation be based upon any other factor other than her earning capacity as a teacher regardless whether there had been a reduction in Defendant's income. Pa.R.C.P. 1910.16-2(d)(4).

3. It is believed and therefore averred that this Honorable Court committed an error of law and/or abuse of discretion in dismissing Plaintiff's Exceptions upholding an April 30, 2012 Order based upon Defendant's earning capacity and 40 hour work week.

4. It is believed and therefore averred that this Honorable Court's reliance upon *Dennis v. Whitney*, 844 A.2d 1267 (Pa. Super. Ct. 2004) was erroneous insofar as it is factually distinguishable from the instant case as there were no jobs available in the

obligor's vicinity in which his degree as an Agricultural Engineer could be utilized.

In reviewing these alleged errors, this Court believes Father has raised, in all actuality, two errors: 1) The failure of the Trial Court in refusing to defer to the credibility findings of the Hearing Officer; and 2) The failure of the Court to impose a greater earning capacity upon Mother as compared to her actual earnings in an inferior employment position. This opinion will address each of these two issues separately.

CREDIBILITY FINDINGS OF HEARING OFFICER

It must first be noted that since Mother began this support action, by means of a petition to modify an existing order, the burden of proof is on her. As the Superior Court previously stated:

> When modification of a child support order is sought, the moving party has the burden of proving by competent evidence that a material and substantial change of circumstances has occurred since the entry of the original or modified order. The lower court must consider all pertinent circumstances and base its decision upon facts appearing in the record which indicate that the moving party did or did not meet the burden of proof as to changed conditions.

Samii v. Samii, 847 A.2d 691, 695 (Pa. Super. Ct. 2004)(citing *Commonwealth ex rel. Sladek v. Sladek,* 563 A.2d 172, 173 (Pa. Super. Ct. 1989)). Therefore, in order for Mother to succeed and obtain a lower support obligation, she must carry her burden

of proof and prove her case.[1]

Mother testified that while she has a teaching degree, she has not sought employment as a teacher for at least the three years she has been employed as a T.S.S. worker. (N.T. 6/13/12 at 9-10).[2] However, Mother testified that she uses her teaching degree in her current employment, which provides her with thirty hours of work per week. (N.T. 6/13/12 at 7-8).[3] Further, Mother asserted that her employer assured her that it, the employer, would be flexible with her needs to take her ill daughter to various doctor appointments. (N.T. 6/13/12 at 6-7).

The Hearing Officer found, as identified in his report as finding of fact 6, that "based on [Mother's] demeanor and inclination, the DRO Hearing Officer gives no credibility to her testimony that she cannot work fulltime due to medical conditions. It seems overstated and exaggerated." Additionally, the Hearing Officer determined, as finding of fact 8, that "upon consideration of the Defendant's reflection,

---

[1] Mother's petition for modification dealt solely with the issue of the cost for counseling services for the minor child. However, this issue was not developed at the hearing. Instead the crux of the Mother's testimony and questioning of her centered on her employment status as a TSS worker as opposed to her obtaining employment as a teacher, and thus a greater earning capacity. Since everything affecting a support order is "on the table" at such a proceedings, the Court has no issue with delving into this area; however, our issue is with the credibility finds of the Hearing Officer as a result.

[2] Additionally, Mother has never worked as a school teacher for any school district. (N.T. 6/13/12 at 9-10).

[3] Mother also stated that had her current employer offered her more hours, she would accept such hours. (N.T. 6/13/12 at 7-8).

inclination and demeanor, the DRO Hearing Officer does not find the Defendant's testimony as to his [*sic*] income credible and has given it no weight."

Normally, an appellate court will not interfere with the broad discretion afforded to the trial court. *Boni v. Boni*, 448 A.2d 547, 549-50 (Pa. Super. Ct. 1982). The assessment of a witness's credibility is within the sole province of the trial court. *Kembel v. Schlegel*, 478 A.2d 11, 14 (Pa. Super. Ct. 1984). As such, a hearing officer is in the best position to evaluate a witness's credibility, and as such, a child support order will not be disturbed, even by the trial court in the form of granting a party's exceptions, unless there is insufficient evidence to sustain the support order, or the hearing officer abused his discretion in fashioning the award. *Fee v. Fee*, 496 A.2d 793, 794 (Pa. Super. Ct. 1985)(citing *Commonwealth ex rel. Robinson v. Robinson*, 465 A.2d 27 (Pa. Super. Ct. 1983)). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, . . . discretion is abused." *Doherty v. Doherty*, 859 A.2d 811, 812 (Pa. Super. Ct. 2004)(citing *Fee*, 496 A.2d at 796)).

Notwithstanding the Hearing Officer's wide discretion in assessing the witness's credibility, this Court found error in his credibility findings.

Mother testified about her current employment status as a T.S.S. worker, the number of hours she works per week at her hourly rate of pay, and the fact that she did not, and has not, sought employment as a "teacher" for at least the last three years. Even if the Hearing Officer totally discredits this testimony, which he did, there was no evidence presented or testimony elicited from Mother or Father to establish that Mother has a greater earning capacity.

Apart from that, the end result of whether the Appellate Court affirms the Hearing Officer's credibility determinations, or the Appellate Court follows the rationale of this Court, the fact remains that the October 12, 2010 Order of Court is controlling in this matter. The Hearing Officer, by denying Mother's petition for modification, in effect, placed the parties in the same position and under the same Order of Court as they were in prior to the filing of Mother's petition.

For the same reasons as just stated above, this Court's denial of Father's exceptions places the parties, in terms of child support obligation, under the control of the October 2010 Order of Court.[4]

Despite Father's belief that this Court committed an error

---

[4] Father has also raised issue with this Court's use of the October 2010 order as controlling as opposed to that of April 2012, which came as a result of a conference with the Hearing Officer. This issue will be addressed later within this opinion.

by not affording sufficient weight to the Hearing Officer's findings, such contention is without merit, as there is no factual basis for such a finding.

EARNING CAPACITY

Father's other issue raised in this appeal is that this Court erred in denying his exceptions and not finding that Mother had a greater earning capacity analogous to that of a fulltime working teacher.

Pennsylvania Rules of Civil Procedure Rule 1910.16-2(d) provides in relevant part:

> (4) *Earning Capacity*. If the trier of fact determines that a party to a support action has willfully failed to obtain or maintain appropriate employment, the trier of fact may impute to that party an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity.

Pa.R.C.P. 1910.16-2(d)(4). Earning capacity is regarded as the amount a person realistically could earn under the circumstances, considering her age, health, mental and physical condition, training, and earnings history. *Gephart v. Gephart*, 764 A.2d 613, 615 (Pa. Super. Ct. 2000)(quoting *Myers v. Myers*, 592 A.2d 339, 343 (Pa. Super. Ct. 1991)).

Father contends that based upon the factors outlined in Rule 1910.16-2(d) of Pennsylvania Rules of Civil Procedure, and the applicable case law, Mother should be held to a greater earning capacity of a teacher as opposed to a T.S.S. worker. As stated previously, this Court's rationale for rejecting Father's argument is based upon the fact that there was insufficient evidence offered to support such a finding or conclusion.

However, even assuming Father is correct, based upon the evidence as found credible by the Hearing Officer, Mother's net income would only increase from a previous finding of a net monthly income of $2,064.12 for a thirty hour per week T.S.S. worker, to that as a fulltime teacher with a net earning capacity of $2,085.29 per month.[5] Therefore, even if this Court were to agree with the Hearing Officer and Father, Mother's net increase, based upon an earning capacity of a fulltime teacher would be de minimus.[6]

Father next claims that even based upon the Court's findings in regards to the exceptions, the Court should have

---

[5] This net amount was based upon the Hearing officer finding that Mother had a gross monthly income of $2,433.00, the same amount as found by the Conference Officer, which also found that it resulted in a net income of $2,085.29.

[6] It should also be noted that Father's income increased from a net of $8,619.13 per month to $10,488.24 per month during this same time period. This would result in the finding of a child support obligation of $278.00 in October 2010 and $267.00 in April of 2012. The increases to $330.00 and $400.00, respectively, will be discussed further in this opinion.

placed in effect and made controlling in this matter the "interim" order as determined at the initial conference held on the petition to modify as opposed to the October 2010 order, which was the subject of that petition.

In a petition to modify a support order, once a party files for a hearing *de novo* from the recommendation of a support conference officer, such legal effect is a new proceeding before the hearing officer. Black's Law Dictionary defines a hearing *de novo* as "a new hearing or a hearing for the second time, contemplating an entire trial in same manner in which matter was originally heard and a review of previous hearing. On hearing 'de novo' court hears matters as court of original and not appellate jurisdiction." BLACK'S LAW DICTIONARY 649 (5th ed. 1979).

In *Baehr v. Baehr*, 889 A.2d 1240 (Pa. Super. Ct. 2005), the Appellate Court found that despite mother being imputed a monthly income of $1,000.00, the hearing *de novo* held in that matter negated that finding as the trail court was not bound by its previous determinations. *Id.* at 1244.

Along the same lines, in *Rebert v. Rebert*, 757 A.2d 981 (Pa. Super. Ct. 2000) the Superior Court stated:

> "De novo" review entails, as the term suggests, full consideration of the case anew. The reviewing body is in effect substituted for the prior decision maker and

> redecides the case. *D'Arciprete v. D'Arciprete*, 323 Pa.Super. 430, 470 A.2d 995, 996 (1984)(quoting *Commonwealth v. Gussey*, 319 Pa.Super. 398, 466 A.2d 219, 222 (1983)). In *Warner* [*v. Pollock*, 644 A.2d 757 (Pa. Super. Ct. 1994)], this Court stated under Rule 1910.11 "one demands a hearing, one does not file an appeal." *Id.* at 750. The Court emphasized the differences between an appeal and a hearing *de novo*, explaining an appeal deals with assertion of specific error whereas a *de novo* hearing is a full reconsideration of the case.

Rebert v. Rebert, 757 A.2d 981, 984 (Pa. Super. Ct. 2000)(edit ours).

Therefore, the Hearing Officer was correct, as was this Court, to base our respective decisions on the evidence presented at the hearing *de novo*. Since the end result was a denial of the petition to modify, the natural consequence was to reinstate the previous order, which both the Hearing Officer and this Court did in this case. The Court would also call to attention that the Hearing Officer correctly discounted the basis for the filing of the petition in the first instance, that being counseling expenses, as there was no testimony presented at that hearing *de novo*.

Further, while there was testimony regarding Father's paying of health care benefits for the child, and Father was credited accordingly, there was no testimony regarding after school and summer programs costs.[7]

---

[7] The interim order which Father wanted this Court to revert back to makes reference to these items. However, the lack of testimony at the hearing *de*

Lastly, Father argues that this Court, in support of its decision not to find a greater earning capacity for Mother, erred in relying upon *Dennis v. Whitney*, 844 A.2d 1267 (Pa. Super. Ct. 2004). Father contends that the situation before the Court is distinguishable from the facts in *Dennis v. Whitney*, for the reason that "there were no jobs available in the obligor's vicinity in which his degree as an Agricultural Engineer could be utilized."

While this Court agrees with Father's assertion that there needs to be consideration of the available jobs as it relates to the determination of one's earning capacity, there was no evidence or testimony presented by the Mother or through cross-examination by Father's Counsel that there were teaching jobs available to Mother in her vicinity. Father, on this issue, had the burden of proof to provide evidence in support of his claim that potential teaching jobs existed in the vicinity of Mother, and that she refused to accept such positions. If true, then the Court should have imposed a greater earning capacity upon her rather than base the support obligation on her actual income. However, Father presented no evidence on this issue.

---

novo precludes this Court's consideration of such. Only the proportionate share of health care benefits was considered as chargeable to Mother to arrive at a total support amount which was similar to the October 2010 obligation; thus, the reason for reversion back to the October 2010 order.

Based upon the foregoing, this Court recommends that Father's appeal be dismissed on the merits and this Court's Order of December 27, 2012 be affirmed.

BY THE COURT:

Joseph J. Matika, J.