

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

CYNTHIA L. PROVIZZI,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 153 DR 10
	:	PACSES No. 358111636
WILLIAM J. PROVIZZI,	:	
	:	
Defendant	:	
Susan M. Sernak-Martinelli, Esquire		Counsel for Plaintiff
Gordon L. Bigelow, Esquire		Counsel for Defendant

MEMORANDUM OPINION

Serfass, J. - March 30, 2011

Here before the Court are Plaintiff's Exceptions to the Domestic Relations Hearing Officer's Report dated October 15, 2010. For the reasons that follow, Plaintiff's Exceptions are granted in part and denied in part.

FACTUAL AND PROCEDURAL BACKGROUND

On May 4, 2010, Plaintiff filed a Complaint for Support, seeking spousal support for herself and child support for two minor children, Skyler Rose Provizzi (Date of Birth: September 29, 2002) and Olivia Lynn Provizzi (Date of Birth: September 14, 2005). On October 15, 2010, following a hearing held on the same date, the Domestic Relations Hearing Officer, William G. Schwab, Esquire (hereinafter "Hearing Officer"), issued a Report setting forth his Findings of Fact and Conclusions of Law.

Plaintiff works for the Weatherly Area School District as a cafeteria worker, working four and three-quarter ( $4\frac{3}{4}$ ) hours per day earning seven dollars and eighty cents (\$7.80) per hour. (Hearing Officer's Report, 10/15/10, p. 1). She has no day care expenses because a neighbor watches the youngest child, but there is an outstanding day care bill of two hundred ninety dollars (\$290.00) that she has been paying. (Id.) He also noted that Plaintiff did not offer any testimony that she is incapable of working full time. (Id.) The Hearing Officer determined that Plaintiff has an earning capacity of one thousand three hundred fifty-one dollars (\$1,351.00) per month for full time employment. (Id.)

Defendant works for Hershey Foods, where he earns twenty-one dollars and thirty-four cents (\$21.34) per hour including a shift premium for mandatory overtime. (Id.) The Hearing Officer noted that Defendant worked eight (8) hours of mandatory overtime in the two (2) months prior to October 15, 2010 and had been compensated for one and one-half ( $1\frac{1}{2}$ ) hours of voluntary overtime in his last paycheck. (Id.) Defendant was subject to mandatory overtime on a regular basis up until last year, but is now seldom subject to mandatory overtime due to his seniority. (Id.) The Hearing Officer indicates in the Report that he relied on Defendant's last pay stub and earnings for the year to date in calculating Defendant's overtime. (Id.) The

Hearing Officer determined that Defendant has a gross earning capacity of three thousand seven hundred ninety-nine dollars (\$3,799.00) per month, including an appropriate amount for overtime. (Id.)

Based on the foregoing, the Hearing Officer determined that Defendant has a support obligation of eight hundred seventeen dollars (\$817.00) per month for the children, and a spousal support obligation of two hundred seventy-three dollars (\$273.00) per month. (Hearing Officer's Report, 10/15/10, p. 2). He also determined that Defendant was to be charged one hundred seventy-four dollars (\$174.00) to his arrearages as his pro-rated unpaid accrued daycare expenses; that uncompensated medical bills over two hundred fifty dollars (\$250.00) per year were to be split between the parties, with Defendant responsible for seventy-one percent (71%) and Plaintiff responsible for twenty-nine percent (29%); and that Defendant is allowed to claim both children on his tax returns. (Id.) He further determined that the spousal support portion of Defendant's obligation would terminate on October 10, 2011, unless Plaintiff files a Petition for Extension. (Id.) On October 15, 2010, this Court issued an Order consistent with the Hearing Officer's Report.

On October 27, 2010, Plaintiff filed timely Exceptions to the Domestic Relations Hearing Officer's Report. Plaintiff

argues that the Hearing Officer: (1) erred in applying Pa. R.C.P. 1910(d) (2) and (4) to the facts; (2) erred in applying an earning capacity to Defendant rather than his actual earnings; (3) failed to take into consideration Defendant's earnings from overtime; (4) erred in finding that Defendant was represented by Attorney Beltrami when he was actually represented by Attorney Bigelow; (5) failed to apply the nurturing parent doctrine when considering Plaintiff's earning capacity; (6) erred in awarding both children as tax exemptions to Defendant; and (7) erred in setting a termination date for the spousal support portion of the Order. Plaintiff filed a Brief in Support of her Exceptions on January 5, 2011 and Defendant filed a Brief in Opposition to the Plaintiff's Exceptions on January 14, 2011. Oral argument was held before the Court on January 21, 2011.

#### DISCUSSION<sup>1</sup>

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 preponderate weight or authority which must be overcome."

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<sup>1</sup> We do not discuss Plaintiff's Exception 4 because the record clearly reflects that Defendant was represented by Attorney Bigelow, and conclude that the reference in the Hearing Officer's Report to Attorney Beltrami was a typographical error.

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).

1. Plaintiff's Exceptions 1-3 -

Overtime Pay and Earning Capacity

As to Plaintiff's Exceptions 1-3, the issues of overtime pay and earning capacity, Plaintiff argues that the Hearing Officer improperly applied Pa. R.C.P. 1910.16-2(a), (c), (d)(2) and (d)(4) because he did not fully consider Defendant's overtime wages, and that he should have used Defendant's actual earnings instead of earning capacity because it has not been determined that Defendant failed to obtain or maintain appropriate employment. In response, Defendant argues that the Hearing Officer received and evaluated the documentary evidence and testimony, and properly established the earning capacity for both parties, including an appropriate amount for overtime hours.

Pennsylvania Rule of Civil Procedure 1910.16-2 provides that the amount of support to be awarded is generally based upon the parties' monthly net income. The statutory

definition of income is set forth at 23 Pa. C.S.A. §4302 and Pennsylvania Rule of Civil Procedure 1910.16-2(a). "Income" includes compensation for services, including, but not limited to, wages, salaries, bonuses, fees, commissions, and "any form of payment due to and collectible by an individual regardless of source." 23 Pa. C.S.A. § 4302; Pa. R.C.P. 1910.16-2(a). Pennsylvania Rule of Civil Procedure 1910.16-1(c) sets forth the only items which are to be deducted from a party's monthly gross income to arrive at that party's net income for purposes of calculating the appropriate amount of support to be awarded. Overtime wages are not listed as such a deduction. Therefore, the total amount of compensation earned by the Defendant for services rendered to Hershey Foods must include his overtime wages. Accordingly, we conclude that compensation earned through working overtime hours constitutes income for purposes of determining an appropriate support award.

A party's earning capacity may be used to establish income where the trier of fact determines that the party has willfully failed to obtain or maintain appropriate employment. Pa. R.C.P. 1910.16-2(d)(4). "Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity." Id. "Although a person's actual earnings usually reflect his earning capacity, where there is a

divergence, the obligation is determined more by earning capacity than actual earnings." Woskob v. Woskob, 843 A.2d 1247, 1251 (Pa. Super. 2004).

Defendant testified that he works forty (40) hours per week, and has not generally been subject to mandatory overtime for the past year due to his seniority. (N.T., 10/15/10, pp. 20, 30). He does, however, work voluntary overtime, which is reflected in his pay stub. (N.T., 10/15/10, p. 21). Defendant also testified that he is, at times, required to work mandatory overtime, and that he worked eight (8) hours of such overtime on October 8, 2010. (N.T., 10/15/10, p. 21). Defendant's testimony appears consistent with the Hearing Officer's Report, which indicates that he relied on Defendant's pay stub and earnings to date in calculating Defendant's overtime. However, Plaintiff argues that the Hearing Officer erred in calculating Defendant's overtime because Defendant's most recent pay stub indicates that he earned twenty-three (23) hours of overtime per month through October 10, 2010. (Plaintiff's Brief p. 4-5). Plaintiff submits that Defendant's gross income would be five thousand forty-eight dollars (\$5,048.00) per month if the Hearing Officer had relied upon the pay stub. (Plaintiff's Brief p. 5). Also, the amount of overtime reflected in the testimony is seventeen thousand fifty-two dollars and eighty-three cents (\$17,052.83). (N.T., 10/15/10, p. 27).

In this case, we agree with Plaintiff that Defendant's overtime must be included in his income. However, a remand on this issue is necessary because it appears from the testimony and briefs of counsel that there may have been a miscalculation of the amount of Defendant's overtime.

As to the issue of earning capacity, the assessment of Defendant's income based on an earning capacity which is less than his actual earnings was improper because no determination was made that Defendant failed to obtain or maintain appropriate employment pursuant to Pa.R.C.P. 1910.16-2(d)(4). Furthermore, there is no basis to conclude that Defendant's earning capacity differs from his actual year-to-date earnings. In assessing the Defendant an earning capacity which is less than his actual earnings, the Hearing Officer relied upon the Superior Court's decision in Samii v. Samii, 847 A.2d 691 (Pa. Super. 2004), to support his conclusion that the "determination of a parent's ability to provide child support is based upon the parents' earning capacity rather than the parent's actual earnings" (Hearing Officer's Report, 10/15/10, Page 2, Paragraph 3). In Samii, the Court declined to use a party's actual earnings where that party voluntarily left her employment as an orthodontist. Instead, the Court assigned that party an earning capacity commensurate with her prior earnings as an orthodontist finding that her situation was the result of her own bad choices in



electing not to work. Id. at 697. Here, because Defendant has maintained appropriate employment and his year-to-date earnings reflect a realistic and reasonable income, the Hearing Officer's reliance upon Samii is misplaced and Defendant's actual earnings must be utilized in determining his monthly gross income. Thus, Plaintiff's Exceptions 1-3 must be granted, and a remand to the Hearing Officer is necessary for a recalculation of Defendant's overtime and gross income, as well as a recalculation of Defendant's support obligation based upon his net income.

## 2. Plaintiff's Exception 5 -

### The Nurturing Parent Doctrine

As to Plaintiff's Exception 5, the issue of the nurturing parent doctrine, Plaintiff avers that the Hearing Officer should have used her actual earnings to determine her gross income. Defendant argues that the record lacks evidence to support the application of the doctrine in this case. He avers that Plaintiff had financial resources available to her to pay for child care; her neighbor is available to watch the child; and there was no testimony that unique health or medical issues required Plaintiff to stay at home with the child. Defendant further avers that Plaintiff received three hundred fifty-five dollars and fifty-seven cents (\$355.57) under the August 24, 2010 Interim Order for child care expenses incurred which were necessary for Plaintiff to continue her employment.

At the hearing, Plaintiff testified that she works for the Weatherly Area School District as a cafeteria worker five (5) days per week, for four and three-quarter ( $4\frac{3}{4}$ ) hours per day, for a total of twenty-three and three-quarter ( $23\frac{3}{4}$ ) hours per week. (N.T., 10/15/10, pp. 5-7). She stated that she needs daycare for her five (5) year-old daughter Olivia because the child is not yet in school. (N.T., 10/15/10, p. 7). Plaintiff's neighbor, Denise Zubeck, currently watches Olivia free of charge because Olivia was pulled out of day care after two (2) weeks due to a lack of state aid. (N.T., 10/15/10, pp. 7-8). Plaintiff also testified that she would need additional daycare if she worked beyond the hours of 8:45 a.m. to 1:30 p.m. (N.T., 10/15/10, p. 9). Before obtaining her job at the Weatherly Area School District, Plaintiff last worked eight (8) years ago for Excel and left when she became pregnant with her first child. (N.T., 10/15/10, pp. 10-11). She stated in her brief that she has not worked full time since the birth of her first child in 2002, and that she has re-entered the work force part time consistent with the free babysitting hours provided by her neighbor for her five (5) year-old child. (Plaintiff's Brief p. 7).

The nurturing parent doctrine recognizes that a custodial parent who stays at home and cares for a child does, in fact, support the child. Kraisinger v. Kraisinger, 928 A.2d

333 (Pa. Super. 2007). The nurturing parent doctrine is not an absolute rule and is but one factor to be considered by the trial court in determining whether to excuse a parent from contributing to support. Depp v. Holland, 636 A.2d 204 (Pa. Super. 1994). When determining child support, the court is not strictly bound by the nurturing parent's assertion that the best interest of the child is served by the parent's presence in the home. Doherty v. Doherty, 859 A.2d 811 (Pa. Super. 2004). Among the proper considerations are the age and maturity of the child, the availability of others to assist the parent, the adequacy of financial resources if the parent stays at home, and the parent's desire to stay home and nurture the child. Id. The facts in this case are similar to those in Gildner v. Blackwell, 1 DR 02 (C.P. Carbon 2007). In Gildner, the mother worked twenty (20) to twenty-five (25) hours per week and cared for three (3) children. She testified that she could not work more hours because it would be difficult to do so while caring for three (3) children, and because child care would be expensive. Id. The Court imputed to the mother an earning capacity based on her actual earnings for twenty-two and one-half (22 ½) hours of work per week.

In this case, the nurturing parent doctrine is applicable because Plaintiff cannot work more hours without paying for child care that she may not be able to afford. There

is no indication that Plaintiff will not have adequate financial resources available to her if she works part time. It also appears that she has a desire to nurture Olivia. Therefore, consistent with Gildner, Plaintiff's earning capacity should be assessed based on her actual earnings. Accordingly, Plaintiff's Exception 5 must be granted, and a remand to the Hearing Officer is necessary in order to reassess Plaintiff's earning capacity based upon her actual earnings, and a determination as to whether Defendant should continue to be responsible for child care expenses.

### 3. Plaintiff's Exception 6 -

#### Child Dependency Tax Exemption

As to Plaintiff's Exception 6, the issue of income tax exemptions for the children, Pa. R.C.P. 1910.16-2(f) provides that:

In order to maximize the total income available to the parties and children, the court may, as justice and fairness require, award the federal child dependency tax exemption to the non-custodial parent, or to either parent in cases of equally shared custody, and order the other party to execute the waiver required by the Internal Revenue Code, 26 U.S.C.A. § 152(e). The tax consequences resulting from an award of the child dependency exemption must be considered in calculating each party's income available for support.

Plaintiff argues that there was no testimony regarding the impact the exemptions would have on Defendant's tax refund and income available for support.

In this case, we agree with Plaintiff. While Defendant argues that awarding the tax exemptions to him will provide additional income for support, there is no testimony in the record regarding the effect that the tax exemptions would have on Defendant's income or the income available for support. As a result, the Hearing Officer could not consider and determine that justice and fairness require that Defendant receive the tax exemptions. Accordingly, the Hearing Officer erred in concluding that Defendant should be awarded the child dependency tax exemptions. Thus, Plaintiff's Exception 6 must be granted, and a remand to the Hearing Officer is necessary on this issue.

4. Plaintiff's Exception 7 -

Duration of Spousal Support Award

As to Plaintiff's Exception 7, Plaintiff argues that Pa. R.C.P. 1910.16-1(c)(2) requires the Court to take into consideration the duration of the marriage in determining spousal support and that the Hearing Officer did not justify the need to terminate support after one (1) year despite the parties having been married for twenty (20) years, Plaintiff's limited earnings, and her care for the two (2) children. Defendant argues that Plaintiff failed to properly interpret the Hearing Officer's ruling, which merely requires that a petition be filed to show the basis and need for a continued spousal support award, especially in light of the pending divorce action.

Pennsylvania Rule of Civil Procedure 1910.16-1(c)(2) provides that "in determining the duration of an award for spousal support or alimony pendente lite, the trier of fact shall consider the duration of the marriage from the date of marriage to the date of final separation." The amount of a support order must be fair, non-confiscatory, and attendant to the circumstances of the parties. Boni v. Boni, 448 A.2d 547, 550 (Pa. Super. 1982). "The function of a court in a proceeding for support is not to punish a husband ... but to fix an amount which is 'reasonable and proper for the comfortable support and maintenance of ... [his] wife.'" Commonwealth ex rel. Gitman v. Gitman, 237 A.2d 181, 186 (Pa. 1967). "When determining the support obligation of a spouse, the trial court must consider income, potential earning capacity and other property and financial resources." Machen v. Machen, 420 A.2d 466, 467 (Pa. Super. 1980). In determining the reasonable needs of the spouse seeking support and the ability of the obligor to provide support, primary emphasis should be placed on the net incomes and earning capacities of the parties. 23 Pa. C.S.A. § 4322.

In this case, we agree with Defendant and conclude that the Hearing Officer did not abuse his discretion in establishing a termination date of October 10, 2011 for the spousal portion of the current support order given that the Plaintiff may file a petition for extension thereof setting

forth the basis and continued need for spousal support. The Court does not interpret the Hearing Officer's Conclusion of Law No. 12 as being a final determination that no spousal support is due and payable to the Plaintiff beyond October 10, 2011. Accordingly, Plaintiff's Exception 7 will be denied.

#### CONCLUSION

For the foregoing reasons, we will GRANT Plaintiff's Exceptions 1, 2, 3, 4, 5, and 6, and DENY Plaintiff's Exception 7. Consistent with the attached Order of Court, a remand to the Hearing Officer is necessary for a recalculation of Defendant's overtime and gross income; a recalculation of Defendant's support obligation based upon his net income; a reassessment of Plaintiff's earning capacity based upon her actual income; a determination as to whether Defendant should continue to be responsible for child care expenses; and a reassessment of which parent is entitled to the child dependency tax exemptions.

BY THE COURT:

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Steven R. Serfass, J.

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DOMESTIC RELATIONS SECTION

CYNTHIA L. PROVIZZI,	:	
	:	
Plaintiff	:	
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v.	:	No. 153 DR 10
	:	PACSES No. 358111636
WILLIAM J. PROVIZZI,	:	
	:	
Defendant	:	
Susan M. Sernak-Martinelli, Esquire		Counsel for Plaintiff
Gordon L. Bigelow, Esquire		Counsel for Defendant

ORDER OF COURT

AND NOW, to wit, this 30<sup>th</sup> day of March, 2011, upon consideration of the Plaintiff's Exceptions to the Domestic Relations Hearing Officer's Report dated October 15, 2010, the briefs of counsel, oral argument thereon, and after careful review of the record created before the Domestic Relations Hearing Officer, and in accordance with our Memorandum Opinion of this same date, it is hereby ORDERED and DECREED that Plaintiff's Exceptions are granted in part and denied in part as follows:

1. Plaintiff's Exceptions 1, 2, 3, 4, 5 and 6 are GRANTED; and
2. Plaintiff's Exception 7 is DENIED.

It is further ORDERED and DECREED that this matter is REMANDED to the Domestic Relations Hearing Officer for further proceedings consistent with this Memorandum Opinion and Order.



Prior to the commencement of such proceedings, the Domestic Relations Hearing Officer shall contact counsel for the parties to ascertain the issues on which said parties desire to present additional testimony. The Domestic Relations Hearing Officer shall then proceed accordingly.

BY THE COURT:

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Steven R. Serfass, J.