

CAROLINE M. SHRECK, Plaintiff,
v. JEFFREY W. SHRECK, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Support, No. 2003-735

Spousal support; Bonus as income; Timing of support appeal; Equitable distribution

1. A support order shall be modified to reflect the obligor's current income when the obligor was involuntarily terminated and the obligor obtained reasonable employment after said termination.
2. A bonus awarded to an obligor is characterized as income for support purposes since "income" includes "wages, salaries, bonuses, fees and commissions, etc." 23 Pa.C.S. §4302.
3. While it is proper to include a bonus as income, it is improper to make this inclusion retroactive to the time the bonus was distributed. Rather, the inclusion is retroactive to the time of the filing of the support complaint.
4. Although an entire bonus may not be considered as income for support purposes, the obligee is entitled to argue that the obligor had use of the full bonus amount as a factor in proceedings involving the equitable distribution of marital assets.

Appearances:

M. Teri Hall Stiltner, Esq., Counsel for Plaintiff
D.L. Reichard II, Esq., Counsel for Defendant

OPINION

Van Horn, J., May 13, 2004

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Factual Background

1. Caroline M. Shreck (hereinafter "Wife") and Jeffrey W. Shreck (hereinafter "Husband") were married on January 31, 1976.
2. Husband and Wife separated on February 20, 2002.
3. Wife earns \$1,087.36 net monthly and the parties stipulated to her entitlement to support.
4. Wife testified that Husband agreed to take care of expenses at the time of the parties' separation. Wife testified that he paid for the following:
 - a. The first and second mortgage on the house until it was sold in December of 2003.
 - b. The automobile insurance until March 26, 2004.
 - c. Wife's health insurance.
 - d. The parties' joint credit card debt.
5. Husband testified that he paid all Wife's expenses, except gas and food, from the time of separation to the time she filed for support, after which he paid only the expenses listed above by Wife.

6. Wife filed for support on September 25, 2003.

7. Husband has worked retail since 1975 and has worked much of this time in a managerial role. His education consists of a high school diploma.

8. He has been employed with WalMart since 1994 and was a store manager from 1999 to November 26, 2003.

9. Timothy Middleton, the District Manager overseeing Husband's store when he was a store manager, testified that he terminated Husband's employment in November of 2003 because Husband violated the store policy on gun sales when he allowed a gun to leave the store without a background check being performed on the customer.

10. The gun sale was made over a weekend and the problem was discovered on Monday. Husband testified that he went to the customer himself and had him sign the appropriate documents. He then returned to work to perform the background check, which was fine, and proceeded to turn the paperwork into the appropriate Department Manager. Those documents were subsequently misplaced and the customer had to again sign the appropriate documents.

11. Mr. Middleton was advised of the problem with the sale by the Loss Prevention Supervisor and then made the decision to terminate Husband after discussing the issue with his superiors.

12. Mr. Middleton testified that the produce manager and an hourly employee were also involved in this incident. He was not sure if they were reprimanded. The produce manager is still employed with WalMart and Mr. Middleton believes the hourly employee is still there as well.

13. William Matthews, the Loss Prevention Supervisor, testified that Husband did not do anything deliberately to cause his termination.

14. At the time of Husband's termination, he had two prior incidents of misconduct on his record which played a part in his termination.

15. Husband described the prior incidents. First, in September of 2002, he ran out of gas as he was traveling on Interstate 81 and called the store to ask one of the two managers on duty to bring him gas. Paul Clark, the District Manager at the time, reprimanded Husband for not calling him with the problem. Second, in December of 2002, Husband had to deal with an incident involving the death of an individual in WalMart's parking lot. He had dealt with a similar situation that took place in the WalMart parking lot prior to this and was never told he handled that situation inappropriately. He handled this situation in the same way and was reprimanded by Mr. Clark for not calling him.

16. Mr. Middleton contacted Husband about returning to WalMart the day after he was terminated. Therefore, other than looking at publications for national chains, Husband did nothing in pursuit of another job after his termination.

17. Husband testified that he was told he could post for a store manager's position upon rehire.

18. Husband was reemployed as assistant manager of a WalMart in Hagerstown on January 10, 2004. Husband testified that he accepted this reemployment for two reasons. First, he needed a job. Second, he wanted to ensure that he received the bonus he earned from the past fiscal year.

19. As assistant manager he is two steps removed from store manager as the level of managers is as follows: assistant manager, co-manager and store manager.

20. As store manager he had a salary and was entitled to a bonus according to the profit of the store over the prior year. As assistant manager, he has a salary and is entitled to a stakeholder's bonus, which is much less than the bonus to which a store manager is entitled. In addition to his salary, Husband is entitled to receive a housing differential under either of the above two positions.

21. Husband is currently making a base salary of \$45,000.00 as an assistant manager. He was making a base salary of \$50,000.00 as store manager.

22. Husband testified that WalMart's fiscal year runs from February 1 to January 31 of the following year and that the yearly bonus is received in March.

23. Husband received a bonus of \$96,006.95 in March of 2003 for the preceding year.

24. Mr. Middleton testified that Husband is not currently eligible for a higher position as an employee must be in his/her current position for six months before becoming eligible. The next step up

would be co-manager and Husband would need to be there for six months to a year before being eligible to be a store manager again. He testified that someone above him could decide to make an exception to these time constraints.

25. Mr. Middleton testified that Husband was a good store manager.

26. Mr. Matthews testified that he believed Husband was an effective manager.

27. Husband testified that he is currently not in good health. He testified that he has some heart trouble and is on medication for high blood pressure. He also testified that he is currently suffering from depression and anxiety and has been on medication for those ailments for approximately a year.

28. Because of his health problems which have resulted in Husband having difficulty focusing and performing job duties, Husband is currently on medical leave which was effective as of early March of this year.

29. Husband's leave was approved for three months, although he anticipates returning sooner if he is feeling better. He is being fully compensated for the time he is on leave.

Procedural Background

1. On September 25, 2003, Plaintiff initiated this support action by filing a Complaint in Support.

2. On November 17, 2003, a support conference was held and a support order was entered December 4, 2003, which ordered Defendant to pay \$1,184.79 per month for spousal support based on Plaintiff's monthly net income of \$1,087.36 and Defendant's monthly net income of \$4,116.52. Defendant was also ordered to provide Plaintiff with 40% of his future net bonuses, which he receives annually.

3. On December 17, 2003, Plaintiff filed an appeal, contending that Defendant's bonus, which was received in March 2003, should have been included in Defendant's calculation of net income.

4. On January 9, 2004, a Support Modification Conference was held based upon Defendant's petition following his termination from employment at WalMart.

5. Defendant's request for modification was denied and Defendant appealed on January 15, 2004.

6. Plaintiff's and Defendant's support appeals were consolidated and heard by the Court on April 5, 2004.

Discussion

There are two issues before the Court. First, whether the current support order should be modified to reflect Husband's current income. Second, whether Husband's bonus of \$96,006.95 paid in 2003 constitutes income to Husband and in what amount should it be factored into the calculation of spousal support to be paid to Wife.

1. Whether the current support order should be modified to reflect Husband's current income.

Wife claims that Husband should be held to the earning capacity of a WalMart store manager because he was terminated for cause from his position as a store manager, and because he willfully failed to obtain appropriate employment after his termination.

Husband had been employed with WalMart as a store manager from 1999 to November 26, 2003. In this capacity he made a base salary of \$50,000.00, received a housing differential, and earned a bonus that often exceeded more than 200% of his annual base salary.

On November 26, 2003, Husband was terminated from his employment as store manager. The Court agrees with Husband's assertion that he did nothing intentional to cause this termination but rather was involuntarily terminated.

While it is clear Husband was terminated, the circumstances are uncontradicted and do not give rise to a voluntary termination. The testimony of Husband's supervisors support his assertion that the termination was involuntary. Both Mr. Matthews, the Loss Prevention Supervisor, who reported Husband's problem with a gun sale, and Mr. Middleton, the District Manager, who ultimately terminated Husband's employment, testified that Husband was a good store manager. Furthermore, Mr. Matthews specifically stated that he did not believe Husband did anything intentional to warrant his termination.

As to Wife's claim that Husband willfully failed to obtain appropriate employment after his

termination, Husband credibly testified that in accepting a job as assistant manager with WalMart the day after he was terminated, he was told he would be eligible to return to a position as a store manager and has every intention of doing so. Although it is unclear how long it may take him to regain this status, it is clear he has the ability to do so and that his supervisors believe him capable. Husband testified that upon rehire he was told he could post for the position of a store manager. However, no openings were available at that time. Mr. Middleton testified that it could take Husband some time to reapply as store policy requires a person to be in his/her current position for a certain period of time before applying for a higher-level position.

The Court determines that Husband was reasonable in going back to a job that pays a ten percent lower base salary because of the potential to return to his earlier status of store manager where a bonus of two hundred percent is possible based on past experience. Husband testified as to his history of employment in retail and no other job from his past employment offered potential to earn the bonus he is entitled to as a store manager at WalMart.

Nothing that Husband has done in regards to his employment seems to have been done intentionally to lower his support obligations. He has suffered just as much financially as Wife, if not more, from his termination and subsequent rehire.

2. Whether Husband's bonus of \$96,006.95 paid in 2003 constitutes income to Husband and in what amount should it be factored into the calculation of spousal support to be paid to Wife.

There is no question that Husband's bonus is characterized as income for support purposes since "income" includes "wages, salaries, bonuses, fees and commissions, etc." 23 Pa.C.S. §4302. The issue is what amount, if any, of Husband's bonus is Wife entitled to receive as support.

Wife claims that the bonus should be considered partially as a marital asset for equitable distribution purposes and partially as income for support purposes. Wife claims that even though the bonus was paid post-separation, the portion that Husband alleges was earned during the marriage could be considered a marital asset that is subject to equitable distribution. See, Brown v. Brown, 669 A.2d 969, 975 (Pa. Super. 1995)(finding that deferred compensation earned during the marriage, but paid after separation, is marital property subject to equitable distribution). Wife claims at least a few months worth of the bonus could be a marital asset subject to equitable distribution. However, because WalMart's fiscal year, for the year in question would have started February 1, 2002, and the parties separated on February 20, 2002, only nineteen days worth of the bonus could be considered for equitable distribution. This issue is not for this Court to decide at this time, although the Master, in a determination of equitable distribution, may hear it.

The Court agrees with Wife that she did not waive her interest in Husband's bonus by not filing for support until September 25, 2003. However, the Court agrees with Husband that Wife is only entitled to a portion of it due to the filing date.

The parties separated on February 20, 2002, and Wife did not file a support complaint until September 25, 2003. During that period of separation, Husband testified that he paid all Wife's expenses and Wife did not dispute that he paid the first and second mortgage on the house until it was sold in December of 2003, automobile insurance, utilities, health insurance, and the parties' joint credit card debt. Neither party submitted evidence as to the amounts paid for these expenses from the time of separation until the time Wife filed for support. It is undisputed that Husband and Wife had an agreement that provided for Husband to directly pay expenses in lieu of support for a period of a year and seven months before Wife decided to formally file for support.

Husband received no credit for payments he made to her, and she likewise should receive no benefit from money earned during the time period when they had their own arrangement worked out. While it is proper to include the bonus as income, it is improper to make this inclusion retroactive to the time the bonus was distributed in March 2003. Despite this finding, Wife is entitled to argue the fact that Husband had use of the full \$96,006.95 since March 2003 as a factor in proceedings involving the equitable distribution of marital assets.

Wife shall receive 40% of the prorated amount from September 25, 2003, the date the support complaint was filed, through January 31, 2004, the date WalMart's fiscal year ends. This time period equals 18.29 weeks. Unfortunately, neither party provided the net figure relative to Husband's bonus received in March of 2003. The parties are directed to exchange information regarding the net amount received by Husband after appropriate deductions from the gross amount of \$96,006.95 for the payment of taxes and other delineated expenses pursuant to statute and the Civil Rules of Procedure. 23 Pa.C.S. §4302 and Pa.R.C.P. 1910.16-2(a). The yearly net figure shall be divided by 52 weeks to determine a weekly net figure which shall then be multiplied by 18.29 representing the number of weeks during the fiscal year for

which Wife is entitled to share in the bonus. The figure representing net bonus for an 18.29-week period shall then be multiplied by 40% to arrive at the amount due from Husband to Wife which shall be paid within thirty (30) days of the date of this Order.

Conclusion

The Court determines that Husband's income shall be set at \$45,000.00 annual gross which amount reflects his current base income. Any bonuses received in the future shall be divided such that Wife receives 40% of the net bonus.

Further the Court determines that Wife shall receive 40% of the prorated amount of Husband's bonus received in March of 2003 equal to 18.29 weeks (35.17% of the total net bonus).

In the event the parties are unable to agree upon the net bonus calculation, either party may make application to the Court for a hearing on that issue alone.

ORDER OF COURT

And now this 13th day of May, 2004, upon consideration of the parties' support appeals, a hearing and briefs, it is hereby ordered as follows:

1. Husband's income is set at \$45,000.00 gross annual base salary;
2. Husband shall pay to Wife 40% of the prorated bonus paid in March of 2003 to which she is entitled to share for 18.29 weeks or 35.17% of the total net bonus; and
3. The payment ordered in paragraph 2 above shall be made within thirty (30) days of the date of this Order. If the parties are unable to agree upon the net amount of the bonus received by Husband in March of 2003, either party may petition the Court for the scheduling of a hearing on this matter alone.

This case is remanded to the Domestic Relations division of this Court in order for a calculation to be performed as to any credit that may be due and owing Husband based on our determination of his annual gross income of \$45,000.00 retroactive to January 10, 2004.