

BRENDA S. ORTH, Plaintiff, v. THOMAS M. ORTH, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Support, No. 2003-358

Support appeal; Earning capacity; Deviation in support; Equitable distribution

1. The amount of support to be awarded is based in large part upon the parties' monthly net income. Pa.R.C.P. 1910.16-2. Monthly gross income is normally based upon at least a six-month average of all of a party's income ... and includes income from any source. Pa.R.C.P. 1910.16-2(a). However, an individual's ability to pay support is determined primarily by financial resources and earning capacity.
2. When an obligor credibly testifies as to why he/she earned much more in prior years than in recent years, the obligor cannot be held to his/her prior income absent evidence that the obligor clearly manipulated his/her earnings to deprive the obligee of support.
3. An obligor may request a deviation from the support he/she is determined to owe pursuant to Pa.R.C.P. 1910.16-5. However, depending on the circumstances, this may be a request better suited for equitable distribution.

Appearances:

Laurie A. Saltzgeber, Esq., Counsel for Plaintiff

Maria P. Cognetti, Esq., Counsel for Defendant

OPINION

Van Horn, J., May 11, 2004

-

Factual Background

1. Brenda S. Orth (hereinafter "Wife") and Thomas M. Orth (hereinafter "Husband") were married on March 27, 1983.
2. The parties separated on April 22, 2003.
3. The separation occurred after Wife received a phone call from Lorna Pyke, Husband's long-term paramour. Husband admitted he had been involved with Ms. Pyke since 1987 and he left the marital residence.
4. Husband admitted he has sent Ms. Pyke a little under \$500,000.00 in the last several years and is working on identifying the sources from which this money came. Husband testified that all the money came from easily identifiable sources.
5. The parties stipulated to Wife's entitlement for support.
6. During the parties' marriage, they were able to live a comfortable lifestyle and maintained two homes with one in Virginia and one in South Mountain, Pennsylvania, which was the marital home, as well as a beach property in North Carolina.
7. Wife testified that she had a very good lifestyle during the marriage. They never worried about

money and took nice vacations. Between them they had numerous investments (401(k)s, IRAs, stocks and bonds).

8. The parties took out a loan for an addition to the South Mountain residence, and Wife has never contributed to the payments on this loan.

9. Husband secured a home equity line of credit on the vacation property years ago and continues to pay on that to the present day.

10. Wife lived in the South Mountain residence until January 17, 2004. She paid for the upkeep while she was there and now claims that she is prepared to sell this property.

11. Wife testified that she trusted Husband completely with the finances and she never took part in familiarizing herself with the particulars of their finances.

12. Wife testified that her lifestyle is quite different now. She testified that she now lives paycheck to paycheck and while she is comfortable in her new home she has little in the way of furniture and clothing. She also testified that sometimes her bills do not get paid on a timely basis.

13. Wife testified that she had to pay some unexpected bills after separation. These included homeowner's insurance, real estate taxes, a bill to refill a propane tank, and phone bills incurred when the phone was changed from a residential to a business line by Husband. She did acknowledge that Husband paid some of the phone bill although the amount was not quantified.

14. Wife earned \$146,000.00 during last year that she was employed with Exxon/Mobil Corporation which ended in 2002.

15. Wife left her position with Exxon/Mobil Corporation at the end of 2002 and took a position with the Commonwealth of Pennsylvania in January of 2003 where she continues to work at the present time.

16. Wife testified that she took this lower paying job, only after being assured by Husband that they were financially sound. She did not know that his income was anticipated to be drastically reduced from the most recent years' earnings.

17. The parties stipulated to Wife's current income of \$62,000.00 gross annually.

18. Both parties had reports prepared by their respective accountants regarding Husband's current income and past earnings' history. The report offered by Husband's accountant, Mr. Crumling, sets forth a monthly net disposable income of \$9,512.00 for the year 2002 and a monthly net disposable income of \$9,055.00 for the year 2003. The report prepared by Wife's accountant, Mr. Brown, sets forth a monthly net disposable income of \$8,955.00 for the year 2002.

19. The parties stipulated to the monthly net disposable income as set forth in Mr. Crumling's report for the years 2002 and 2003 as being accurate.

20. Mr. Brown's report also sets forth a monthly net disposable income of \$21,852.00 for the year 2000 and \$19,299.00 for the year 2001.

21. Husband's income is derived from two sources. First, he receives income from the company he started in the mid-90s, Corporate Relocation Management Network, LLC. Second, he receives income in the form of a retirement payment from the Marine Corps.

22. Husband testified that at any given time, his business is largely dependant on the needs of one major client and a small number of smaller corporations and businesses. Due to the nature of his work, he bids one-third to one-half of his jobs which requires the dedication of time and resources with no guaranteed employment.

23. Husband landed the extremely lucrative business created by the merger of Cooper Lybrand and Price Waterhouse in 1998.

24. The merger was announced in 1998 and created work for Husband that spanned a period of three years. Husband's income for these three years was extraordinarily high.

25. Husband testified that this was a once in a lifetime opportunity that will most likely never reoccur.

26. In fact, he testified that after completing this job, he has had to find a new niche to rebuild his business as his contacts prior to the merger had been with people on the Cooper Lybrand side of the

merger and because Price Waterhouse was the dominant party in the merger many of his contacts lost their jobs.

27. Husband testified that he has done everything in his power to expand the business. He testified that he never turns business away, services people the best he can and works the same 60-80 hours a week he has always worked.

28. Due to the nature of his work, Husband must pay expenses up front as well as costs for his sub-contractors, ranging from food and hotel bills to their paychecks. However, the client generally does not pay him until the job is done.

29. Husband has not yet filed his tax return for 2003. However, his pro forma return shows Husband's income for 2003 as a negative number. He testified that this is because he got paid for jobs he did in 2003 in 2004. If he had been paid in 2003 for the jobs he did in 2003, Husband's income for 2003 would be similar to his income in 2002.

30. Husband testified that his clients can deposit their payments directly into his bank account, but that it is not possible to have clients deposit their payments directly into a bank account in another country.

31. Husband testified that he is the only person providing information to his accountant about the business.

32. Husband testified that he has accounted for all bank accounts he holds.

33. Husband testified that he has hidden no income, nor diverted it, nor opened accounts in foreign countries, nor failed to disclose any assets.

Procedural History

1. On May 7, 2003, Wife filed a Complaint in Support.

2. On June 30, 2003, a Support Conference was held before Domestic Relations Hearing Officer Sagirashvili of the Franklin County Domestic Relations Section.

3. On July 1, 2003, the Court entered an Order, based on the Officer's recommendation, awarding Wife \$1,758.38 monthly, plus \$40.00 monthly against arrears of \$3,592.76.

4. On July 14, 2003, Wife demanded a hearing on the matter alleging that Officer Sagirashvili erred in his calculation of Husband's income.

5. On August 6, 2003, Wife filed a Motion for Special Listing which the Court scheduled for October 20, 2003.

6. The Court granted Continuances twice in the matter upon the request of counsel for the parties.

7. Based upon Wife's Motion for Hearing filed with the Court on March 4, 2004, the Court scheduled this hearing for April 22, 2004.

Discussion

There are two issues before the Court: (1) whether Husband should be held to his earning capacity demonstrated during 2000 and 2001 or his actual earnings as of the two most recent years of 2002 and 2003; and (2) whether Husband should be awarded a deviation in the support ordered due to expenses he pays.

1. Whether Husband should be held to an earning capacity based on income earned in years 2000 and 2001 or his actual earnings in the years 2002 and 2003.

Rule 1910.16-2 of the Pennsylvania Rules of Civil Procedure governs the general process by which an obligor's net income is calculated. Rule 1910.16-2 states that the "amount of support to be awarded is based in large part upon the parties' monthly net income." Pa.R.C.P. 1910.16-2. "Monthly gross income is normally based upon at least a six month average of all of a party's income ... and includes income from any source." Pa.R.C.P. 1910.16-2(a). However, an individual's "ability to pay support is determined primarily by financial resources and earning capacity." DeMasi v. DeMasi, 530 A.2d 871, 877 (Pa. Super. 1987), citing Hesidenz v. Carbin, 512 A.2d 707 (Pa. Super. 1986). "The obligation of support, then, is measured more by earning capacity than by actual earnings." Id.

Wife claims that Husband's income for the years 2000 and 2001 reflect his true earning capacity and although it appears that he has earned less in recent years, he should be held to his prior earning capacity. Wife suggests that Husband's earning capacity and actual earnings have not actually declined in recent years, but rather present a suggestion of a decline because Husband is engaging in such activities as hiding assets, diverting funds to overseas bank accounts and diverting funds to his subcontractors. Wife claims that she saw no signs, by way of the parties' lifestyle, that would indicate that Husband's income had decreased in 2002.

Wife cites Neil v. Neil, 731 A.2d 156 (Pa. Super. 1999), in support of her claim that Husband should be held to his prior income because he has "clearly manipulated his earnings to deprive Wife of support." (Wife's Memorandum of Law.) In Neil, the husband worked for his family's corporation and had been gifted shares of stock in the company by his parents. Id. at 157. He received an annual salary as well as periodic distributions from the corporation. Id. While the parties were experiencing marital difficulty, and a few months prior to their actual separation, husband sold his stock back to the company without Mrs. Neil's knowledge. Id.

When Mrs. Neil filed for child and spousal support, she asked that her husband be held to his prior earning capacity when he was a shareholder in the company and his income included the periodic distributions. Id. at 158. Mr. Neil claimed his only income was his current annual salary from the corporation. Id. The Court found that Mr. Neil intentionally sold his shares of stock as a ploy to avoid having to count the dividend payments accrued thereon toward his income for support purposes and therefore, his income did not accurately reflect his earning capacity. Id. at 159.

This Court agrees with Husband that the present case can be distinguished from Neil because here, Wife has produced absolutely NO credible evidence to support her assertions that Husband is intentionally misrepresenting his income.

Husband credibly testified as to why his earning capacity and actual earnings drastically declined from 2000 and 2001 to 2002 and 2003. The job opportunity that resulted from the merger of Cooper Lybrand and Price Waterhouse in 1998 was a once in a lifetime opportunity. While this opportunity did span a number of years, it is unlikely that the market will present such an opportunity again. He certainly did nothing intentional to have this job come to an end as he worked for the entire time he was needed and was handsomely compensated for his work.

Husband testified that he is now working the same kind of hours he previously worked, 60-80 hours a week, to try to rebuild his business and have it meet its highest potential. He has had to develop a new niche in his business after the work resulting from the merger was concluded. Due to the merger he lost his major contacts which were with the Cooper Lybrand side of the merger because Price Waterhouse became the dominant party in the merger and terminated the employment of the people on the Cooper Lybrand side.

Furthermore, while Wife suggests that Husband purposely lowered his income in anticipation of separation, Husband points out that his income began to decline drastically in 2002, well before the separation in April of 2003. The decline coincided with the cessation of Husband's work pursuant to the merger.

The Court finds Husband's explanation of the decline in his income to be extremely credible. The Court also notes that Husband credibly testified that he had no intention of ending his marriage. He wished to continue in his marriage even after Wife found out about his paramour. If Husband had no intention of ending the marriage, he could not possibly have been considering how his income would impact the support he may be required to pay upon separation. He was content to continue the double life he enjoyed for more than a decade.

Husband's income as indicated on his 2002 and 2003 tax returns has remained consistent for a substantial period of time and is indicative of his anticipated future earnings. No justifiable basis was presented to hold Husband to the earning capacity he exhibited during the peak years of his business for several reasons. Husband credibly testified that the job, which resulted from the merger of Cooper Lybrand and Price Waterhouse and provided him with an extraordinary income, was a once in a lifetime opportunity. Husband credibly testified that he has done nothing to purposely reduce his income to avoid his support obligation. Wife has not produced any evidence which would prove that Husband has done anything to purposely reduce his income.

Husband shall be held to his actual earnings of \$9,055.00 net per month.

2. Whether Husband should be given a deviation in his Court-ordered spousal support because of the expenses he directly pays.

Husband is requesting a deviation of 10% from the support he is determined to owe Wife. He is making his request pursuant to Rule 1910.16-5 which instructs the trier of fact to consider a list of factors in deciding whether to deviate from the amount of support determined by the guidelines. One of the factors is "unusual needs and unusual fixed obligations." Rule 1910.16.5(1). Husband claims that he alone is paying on the loan the parties took out to build onto their South Mountain residence as well as a mortgage on the vacation home. Husband testified that due to the money he is spending on these loans and the expenses for both residences, he should be granted a 10% deviation.

The Court believes that this is an issue better suited for equitable distribution. Furthermore, Wife claims that she would like to sell the South Mountain residence and thus Husband should not be given credit for paying the expenses and loan payment on the jointly owned property which Wife wishes to no longer jointly own.

Conclusion

Wife claims that Husband should be held to his earning capacity during the peak years of his business. However, this Court holds Husband to his current earnings. Husband credibly testified that the job, which resulted from the merger of Cooper Lybrand and Price Waterhouse and provided him with an extraordinary income, was a once in a lifetime opportunity. Husband credibly testified that he has done nothing to purposely reduce his income to avoid his support obligation. Wife has not produced any evidence which would prove that Husband has done anything to purposely reduce his income. Therefore, Husband shall be held to his earnings of \$9,055.00 net per month.

As to Husband's request for a deviation of 10% from the support he is determined to owe Wife, the Court believes this is an issue better suited to equitable distribution proceedings and thus denies Husband's request.

ORDER OF COURT

And now this 11th day of May, 2004, upon consideration of Wife's Support Appeal, briefs submitted by counsel and a hearing, it is hereby ordered as follows:

1. Husband shall be held to actual earnings of \$9,055.00 net per month.
2. Husband's request for a deviation of 10% from the support he is determined to owe Wife is denied.

This case is remanded to Domestic Relations to calculate Husband's spousal support obligations based on the above determinations.