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Hurney v Hurney

Gloria J. Hurney, Plaintiff v. William M. Hurney, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Fulton County Branch
DRS 56-2012 DR; PACSES No. 910113502

HEADNOTES

Spousal Support; Support Appeal; Determination of Earning Capacity

1. Spousal and child support are to be awarded pursuant to statewide guidelines which place primary emphasis on the net income and earning capacities of the parties.
2. A person's earning capacity is defined not as an amount which a person could theoretically earn, but as that amount which the person could realistically earn under the circumstances, considering his or her age, health, mental and physical condition, training and the amount of time that the person had been out of work during the marriage.
3. The Pennsylvania Superior Court has upheld trial courts' determinations that actual income equals earning capacity where the party's work history is sporadic, due to familial relocation and the needs of the children, and any employment was part-time.
4. For purposes of determining earning capacity, the Court finds the following facts significant. First, mother did not work outside the home for most of the thirty-four year marriage and the only long-term employment experience she had was similar to her current employment. Second, her primary role, for the bulk of the marriage, was homemaker yet when she did work outside the home, it was sporadic. Third, mother had a degree in biblical studies, outside the field of her current employment of substitute teaching, and that mother was currently fifty-five years of age.
5. The Pennsylvania Rules of Civil Procedure specifically state that a "determination of what constitutes a reasonable work regimen depends upon all relevant circumstances including choice of jobs available within a particular occupation, working hours, working conditions and whether a party has exerted substantial good faith efforts to find employment." Where a party has employment that is, by nature, fluid and flexible such as substitute teaching and the party would not be able to obtain a full-time teaching position because they do not have a teaching certificate, it is reasonable for that party to work less than full-time as long as they are working as many hours as are available.

Appearances:

Kristin D. Nicklas, Attorney for the Plaintiff

William M. Hurney, Pro Se, Defendant

Gloria J. Hurney, Plaintiff

OPINION

Before Meyers, J.

The issue before the Court stems from the Plaintiff's appeal of a Final Support Order dated October 31, 2012. The Plaintiff, Mrs. Gloria J. Hurney, filed a demand for an appeal hearing on November 21, 2012, raising one issue for this Court's review: whether the Defendant failed to prove that the Plaintiff willfully failed to obtain or maintain appropriate employment such that her earning capacity was wrongly calculated based upon a work schedule of seven hours per day and five days per week. The hearing officer's determinations as to the Defendant, Mr. William M. Hurney's, monthly net income and the mortgage deviation calculated in favor of Mr. Hurney were not raised on appeal, therefore, they will not be addressed by this Court. The facts and issues outlined in this Opinion were heard by the Court at the de novo hearing on January 8, 2013 and were supported by the Plaintiff's Pre-Trial Memorandum.^[1]

BACKGROUND

On October 31, 2012, a support order was entered setting Mrs. Gloria Hurney's monthly net income at \$1,710.08 and Mr. William Hurney's monthly net income at \$2,770.91. Based upon the findings of the hearing officer, Mr. Hurney was

ordered to pay \$228.63 per month, payable weekly with the first payment of \$47.62 due immediately. Arrears were set at \$470.40 as of October 23, 2012 and were due in full immediately. The order of support was made for the support of Mrs. Hurney. On November 21, 2012, Mrs. Hurney filed an appeal of the order of October 31, 2012, demanding a hearing before the Court, which was scheduled for January 8, 2013.

As part of her Pre-Trial Memorandum, Mrs. Hurney contested the earning capacity that the Domestic Relations hearing officer had assigned to her. Under Pa.R.C.P. 1019.11 (j)(1), the parties may request the Court to schedule the matter for a separate hearing based upon complex questions of law and unique fact patterns which would require additional hearing time beyond that which is regularly afforded parties during the weekly support court.

The parties have been married for thirty-four years but separated on September 1, 2012. Mrs. Hurney was a homemaker during the marriage but began working outside the home approximately six years ago.

At the de novo hearing, this Court only heard testimony from the Plaintiff, Gloria J. Hurney. Mrs. Hurney testified that she usually works three and a half days per week due to school breaks, holidays, and summer time. Although she usually does not work during the summers, she was able to work as an aide for the Tuscarora Intermediate Unit last summer (summer of 2012). During the marriage, Mrs. Hurney testified that her work history consisted of:

1. Two years at a Christian school
2. An aide at one of her children's schools in 1993^[2]
3. Part-time at a consignment shop for approximately \$8.50/hour in 2006
4. H&R Block in 2008 with tax preparation
5. Substitute teacher around 2008

Although Mrs. Hurney has a bachelor's degree in biblical studies she has been recently working as a substitute teacher for Tuscarora School District, Southern Fulton School District, Forbes Road School District, and Tuscarora Intermediate. In support of her recent work history, Mrs. Hurney introduced Exhibit A which included copies of her paystubs from four different school districts in 2012 totaling \$12,106.49. Mrs. Hurney testified that she tries to take as much work as she can when it is offered to her.

DISCUSSION

Mrs. Hurney is contesting the earning capacity that was assigned to her by the Domestic Relations hearing officer. The officer based her earning capacity on her rate of pay for Tuscarora Intermediate Unit which is \$95 a day or \$13.57 per hour. Although the officer acknowledged that her hours depend on availability of work and she is not currently working full time, the officer calculated her earning capacity based on a 7 hour work day, 5 days a week. The exact calculation used was: "\$13.57 per hour x 7 hours per day x 5 days per week = \$474.95 gross per week." Ultimately, Mrs. Hurney is arguing that she has not willfully failed to obtain or maintain appropriate employment as she has the same employment prior to the separation and she is accepting all the available hours that her employers provide.

Spousal and child support are to be awarded pursuant to statewide guidelines which place primary emphasis on the net income and earning capacities of the parties. Pa.R.C.P. 1910.16-1; 23 Pa.C.S.A. § 4322. "A person's earning capacity is defined not as an amount which a person could theoretically earn, but as that amount which the person could realistically earn under the circumstances, considering his or her age, health, mental and physical condition, training and the amount of time that the person, during the marriage, had been out of work." *Strawn v. Strawn*, 444 Pa. Super 390, 664 A.2d 129, 132 (1995).

Mrs. Hurney argues that her biblical studies degree would not allow her to be hired as a full-time teacher because she does not have a teaching certificate. Furthermore, Mrs. Hurney submitted paystubs to the Court that supported her allegation that her gross income for 2012 was \$12,106.49. Mrs. Hurney has testified that she has made more or less the same amount as when she was married and that she is accepting all the available hours that are offered to her.

In *Arbet v. Arbet*, 863 A.2d 34, 43 (Pa. Super. 2004), the trial court determined that mother's actual income equaled her earning capacity for a number of reasons. *Id.* at 42. During the marriage the mother's work history was sporadic due to the parties' relocation from Iowa to Pennsylvania and the needs of their children. *Id.* at 43. When mother did work outside the home, most of her employment was part-time. *Id.* Furthermore, the father in *Arbet*, who argued that mother's earning capacity should exceed her actual income, did not present any evidence to establish that there was other work available to mother with a higher salary. *Id.* Similarly, Mr. Hurney failed to present any evidence to this Court at the de novo hearing and failed to submit a Pre-Trial Memorandum. Mr. Hurney did not present evidence that Mrs. Hurney could have obtained alternate employment at a higher salary or prove, in any way, that she was willfully failing to obtain more hours

in her current employment.

For purposes of determining earning capacity, the Court finds it quite significant that Mrs. Hurney did not work outside the home for much of the thirty-four year marriage and the only long-term employment experience she has is in a teaching capacity. Her primary role was that of a homemaker, for the bulk of the marriage, yet when she did work outside the home, it was sporadic. Pa.R.C.P. 1910.16-2 specifically states that a "determination of what constitutes a reasonable work regimen depends upon all relevant circumstances including choice of jobs available within a particular occupation, working hours, working conditions and whether a party has exerted substantial good faith efforts to find employment." Pa.R.C.P. 1910.16-2(d)(4). The Court found Mrs. Hurney's testimony at the hearing to be credible in that she is taking as many hours as are available to her. The nature of a substitute teaching position is that the employment is not as steady as other teaching positions. The Court also takes into account that Mrs. Hurney's bachelor's degree is in an unusual field which may limit her choice of jobs within that area. Instead, Mrs. Hurney has decided to teach and this employment allows Mrs. Hurney to obtain a higher rate of pay than any of the other employment opportunities she had previously held.

Furthermore, Mrs. Hurney's sporadic employment history in various fields does not qualify her for any one type of employment. If this Court were to require Mrs. Hurney to obtain full-time employment, in an effort to obtain a higher salary, it believes she would have to find a new field of employment which would not be likely to pay as much as she is earning as a substitute teacher. Moreover, Mrs. Hurney is currently fifty-five years old. Given her limited work history and field of education, this Court has determined that Mrs. Hurney's employment, although not quite full-time, is a reasonable work regimen based upon the circumstances of this case. The Court finds that Mrs. Hurney is not willfully failing to obtain appropriate employment pursuant to Pa.R.C.P. 1910.16-2, therefore, it does believe it should impute upon Mrs. Hurney an earning capacity that is based upon a work regimen that is beyond what she can actually obtain in her type of employment.

The hearing officer determined Mrs. Hurney's earning capacity using this calculation: "\$13.57 per hour x 7 hours per day x 5 days per week = \$474.95 gross per week." The Court would alter Mrs. Hurney's earning capacity to \$379.96 gross per week based upon the following calculation: \$13.57 per hour x 7 hours per day x 4 days per week = \$379.96 gross per week. Based on Mrs. Hurney's testimony at the de novo hearing that she usually works 3 ½ days per week^[3], this Court finds it reasonable to calculate Mrs. Hurney's earning capacity based on four days of work per week. Furthermore, the Court calculates her average number of weeks worked at 39 weeks as there is usually no availability of hours for roughly ten weeks when school is not in session due to summer break and approximately three weeks during the school year that the teachers may be off. As such, the Court determines that Mrs. Hurney works for 39 weeks of the year. At \$379.96 gross per week and working 39 weeks, the Court calculates a yearly income of \$14,818.44. This figure breaks down into \$1,234.87 per month.

The Domestic Relations officer shall perform further calculations based upon the Court's determination. The rest of the calculations determined by the Domestic Relations hearing officer, including Mr. Hurney's earning capacity and the mortgage deviation, shall be remain unchanged as they have not been challenged.

ORDER OF COURT

AND NOW THIS 23rd day of January, 2013, IT IS HEREBY ORDERED that:

1. Mr. Hurney's (Payor) monthly net income of \$2,770.91 and the mortgage deviation of \$-111.14 in favor of Mr. Hurney shall remain the same.
2. Mrs. Hurney's (Payee) monthly net income shall be calculated based upon her earning capacity of \$379.96 gross per week and working 39 weeks equals a yearly income of \$14,818.44 which breaks down into \$1,234.87 per month.

The Domestic Relations officer shall perform further calculations based upon the Court's determination.

Pursuant to the requirements of Pa. R.C.P. 236 (a)(2), (b), (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Order, to each party's attorney of record, or if unrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.

[¹]The Defendant failed to submit a Pre-Trial Memorandum to the Court.

[²]Mrs. Hurney was paid through a tuition exchange program at the school rather than actual earnings.

[³]Mrs. Hurney's testimony before this Court was that she works 3 ½ days per week while her Pre-Trial Memorandum alleges 2-3 days per week, and the hearing officer recorded that Mrs. Hurney stated she usually works 4 days per week.