JANE E. CLEVELAND,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	DOMESTIC RELATIONS SECTION
	:	
vs.	:	NO. 99-20,336
	:	
GARY L. CLEVELAND,	:	
	:	
Defendant	:	EXCEPTIONS

OPINION AND ORDER

The matter presently before the Court concerns the Exceptions filed by both parties in the above captioned matter, in response to the Order of Court filed May 20, 1999, by the Master, as approved by the Court May 19, 1999.

We first address the Exceptions of Respondent, Gary L. Cleveland (hereinafter "Respondent") regarding his claim that it was error for the Master to find Petitioner, Jane E. Cleveland (hereinafter "Petitioner") was entitled to spousal support as Respondent had legal cause to leave the residence. Respondent's counsel argued Petitioner made him "crazy" and "on edge," and therefore Respondent was basically forced into leaving.

A Master is allowed to make findings of credibility, as a Master hears and sees the witnesses testify, and is therefore prepared to make a reasonable assessment of where the truth lies. ***Mintz v. Mintz***, 392 A.2d 747 (Pa.Super. 1978); ***Thomson v. Thomson***, 519 A.2d 483 (Pa.Super. 1986). Here, the Master heard ample testimony upon which to make such finding. Respondent testified that when he left the residence February 10, 1999, his wife was under the impression he was going to Ohio on work-related business. N.T. 8. Respondent then decided to go to Florida instead; he did not inform Petitioner of his change of plans because he "didn't feel the need to tell her." N.T. 9. Petitioner had found a change of address card in

Respondent's wallet four or five days before he left; Respondent testified he planned on moving but did not tell Petitioner. N.T. 10. Respondent admitted it was his own decision to leave. N.T. 11. Respondent stated that Petitioner had told him to leave and had been mentally driving him from the house for the past year and a half through little accusations and innuendo; he "finally took advantage of the situation" and left. *Ibid.*

Petitioner testified that on the day Respondent left their residence, she was going to drive herself to a class, but Respondent told her she couldn't take the vehicle she had intended to use. N.T. 48. Respondent dropped her off at the class. Petitioner was under the impression he was going to pick her up that afternoon. *Ibid.* Instead, Respondent left with the vehicle. N.T. 49. Petitioner learned of his departure through her daughter. N.T. 46. Petitioner admitted she had argued with Respondent the day before he left and had told him if he didn't like it, he could leave. N.T. 47. However, she added that he had also said the same thing to her on various occasions and she never actually expected him to leave. *Ibid.* Based upon the testimony before the Master, we see no error in the Master's determination that the separation was not mutual and Petitioner is entitled to spousal support.

Respondent takes exception to the Master's determination he should pay $217.25 per month in arrearages. Counsel argues this amount is excessive and asks the figure be halved. Petitioner's counsel answers that Respondent emptied out the parties' bank accounts and took $4,400.00 with him when he left for Florida. Petitioner argues that Respondent should be required to pay the arrearages in a lump sum.

Respondent did admit taking "close" to $4,400.00 when he left on February 10, 1999, including $1,800.00 from the parties' bank account. N.T. 106. The Order provides

Respondent is to pay $50.00 weekly for arrearages owed because of the retroactive effect of the Order ((unnumbered) p. 5, paragraph 5). We see no error.

Respondent claims the Master erred in assessing Petitioner an earning capacity of $9.00 per hour consistent with her job at Shop-Vac. Respondent's counsel argued that Petitioner should have been assessed a higher earning capacity as she is eligible to work at nuclear and other power plants and testified she earned $13.73 per hour doing that work. Conversely, Petitioner claims her net monthly income is lower than the $1,248.00 assessed by the Master. The Master found as follows:

> Mrs. Cleveland *worked* for MPS Energy Services, Inc., and has a net income of $2,620.49 for a 5 week period. She did not work from April 4th until April 21st and she is *presently* employed at A.B.B. where her net pay for one week was $364.29. Prior to the date of separation, both parties were unemployed. Mrs. Cleveland has business expense for motel and meals while she is working on site and which are tax deductible to some extent. She *previously worked* at Shop Vac at $9.00 an hour for ***total*** net income/earning capacity of $1,248.00 monthly. In the 11 weeks since the separation, Mrs. Cleveland *has earned* an *average* of $285.63 weekly or $1,237.75 net monthly. The Officer determines that her income is $1,248.00 monthly.

Order at (unnumbered) p. 3 (emphasis supplied). It is clear the Master considered Petitioner's earning capacity as well as actual earnings to reach a fair determination of her monthly income.

Petitioner argues Respondent's net income is higher than the $2,064.67 indicated in the Order. The Master utilized a period of the prior six months to calculate Respondent's earnings, but Petitioner argues this was Respondent's "slow" earning period. Further, at argument counsel pointed out the Master noted Respondent's yearly income was $48,000.00; counsel also referred the Court to pages 15 and 36 of the transcript.

Page 15 of the transcript contains reference to the $1,300.00 insurance check Respondent left behind; no testimony is given regarding income. On page 36, Respondent testified that the income indicated on the parties' joint *1997* tax return was $52,000.00. We do agree that on (unnumbered) page 2 of the Order, the Master found Respondent earned $48,417.00 in 1998. It is clear the Master was aware of and considered the annual earnings of the Respondent in calculating his monthly earnings, as she did Petitioner's.

Moreover, there is nothing in the record to support Petitioner's contention that the six months relied upon by the Master to calculate Respondent's earning capacity are a "slow" period, requiring the Master to utilize a different time period. Respondent is able to work at nuclear power plants in various locations in the country. There was no testimony that nuclear power plants experience "slow" periods. Assuming counsel's meaning is that the period used by the Master encompassed the winter months, we note Respondent worked at a nuclear power plant in Florida after he left the residence February 10, 1999. Respondent's most recent employment, prior to the Master's hearing on May 4, 1999, was again in Florida. It would appear weather is not a factor. We see no error in the Master's determination with regard to Respondent's income.

Petitioner claims the Master erred in not directing Respondent pay a pro-rated portion of the Petitioner's predictable and recurring medical expenses and not clarifying whether the Respondent's obligation toward Petitioner's medical expenses is effective as of the date of separation.

Petitioner testified regarding her lack of health insurance and monthly medical, dental and prescription expenses in the transcript at pages 65-72, 82-84, 93. Further discussion

regarding Petitioner's insurance coverage through Respondent's policy (and COBRA) between the Master and Petitioner's counsel follows on pages 94-95. Throughout, there is uncertainty as to the amount of medical expenses to be incurred by Petitioner and whether Petitioner should have been refused coverage under Respondent's policy.[1] The Master clearly provided Respondent should pay 62.33% of all reasonable medical services and supplies expenses incurred by Petitioner (Order at (unnumbered) p. 4). The Master indicated that Petitioner is responsible during 1999 for the first $165.00 of unreimbursed medicals incurred from April 1, 1999, through December 31, 1999 (*Ibid.).* The Master included further provision for medical expenses incurred after January 1, 2000 (*Ibid.)*. The Master clearly stated medical expenses do not include over-the-counter medications (*Ibid.*). Further clarification of the Order is unnecessary.

Finally, Petitioner takes issue with the provision in the Order that she proceed immediately, with due diligence, to file appropriate documents for divorce and equitable distribution of property, or risk dismissal of her award of spousal support in 180 days of the date of the Order (*see* Order (unnumbered) p. 5). Respondent's counsel informed the Court at argument that Respondent was preparing to submit the aforesaid filing, so the issue was moot. However, Respondent still desires the provision remain in the Order.

In ***Maietta v. Maietta***, Lycoming County 93-21,075 (Opinion and Order February 9, 1995, Raup, P.J.), the Court considered whether spousal support could be

[1] Petitioner received notice that she was no longer covered under Respondent's policy and must apply for COBRA benefits. N.T. 65-66. Respondent's plan indicates, under "Dependents," that a wife is eligible unless separated under a Court Order of separation, or living apart by mutual agreement. *See* Order, (unnumbered) pp. 3-4. Given the Master's findings, upheld by this Opinion and Order that the parties did not separate by mutual agreement, Petitioner should still be eligible under Respondent's policy.

terminated due to plaintiff's failure to proceed with her divorce complaint. Judge Raup concluded it could not, distinguishing spousal support from alimony pendente lite, which may be terminated for such failure.[2] Accordingly, this provision in the Order must be removed.

ORDER

AND NOW, this 24th day of September 1999, Respondent's Exceptions are HEREBY DISMISSED. Petitioner's Exceptions 1 through 5 and 7 are HEREBY DISMISSED; Petitioner's Exception 6 is GRANTED. The Order of Court filed May 20, 1999, shall be AMENDED to exclude paragraph 7 on (unnumbered) page 5. The balance of the Order remains unchanged and is confirmed.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
David K. Irwin, Esquire
Patricia L. Bowman, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)

[2] As to termination of A.P.L. under such circumstances, see the excellent and well-reasoned opinion of the Honorable Dudley N. Anderson, Judge correctly setting forth both the law of Pennsylvania and the practice and policy of Lycoming County in ***Montgomery v. Montgomery***, 20 Lyc. 407 (Lyc. Co. C.P. 5/7/99).