

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

KAREN FLOCK,	:	
Plaintiff	:	
	:	
v.	:	No. 95-20,683
	:	
GARY R. FLOCK,	:	
Respondent	:	

**OPINION AND ORDER**

Gary Flock has filed exceptions to the order of the Family Court Hearing Officer entered on 27 October 1998, assessing him with an earning capacity of \$2,195.00 per month. Mr. Flock contends that his income should have been determined by annualizing the income that he actually earned, because he is a bricklayer and should be treated as a seasonal employee. Our review of exceptions from a master's report is limited to determining whether the master has committed an error of law or an abuse of discretion.

At argument on the exceptions, counsel for Mr. Flock argued that before an individual can be assigned an earning capacity it must be shown that there is work available for that individual, and Mrs. Flock has not adequately shown this. It is well settled that in determining a parent's ability to provide support, the focus is on a parent's earning capacity rather than his or her actual earnings. Kelley v. Kelley, 430 Pa. Super. 31, 633 A.2d 218 (1993). It is therefore well within the master's discretion to assess Mr. Flock with an earning capacity greater than his actual earnings. "Earning capacity" is defined as the "amount which [the person] could realistically earn under the circumstances, considering his [or her] health, age, mental and physical condition and training." Malizia v. Malizia, 229 Pa. Super. 108, 111, 324 A.2d 386, 388 (1974). Counsel for Mr. Flock has argued that

according to Com. ex rel. Orlow v. Orlow, 270 Pa. Super. 335, 411 A.2d 555 (1979), a court may not assess a parent with earning capacity unless the opposing party shows it is possible for that parent to obtain employment. In Orlow, the Superior Court held that the trial court did not err in refusing to consider a mother's earning capacity as a teacher because of the surplus of teachers in the area. The court granted leave to the husband to demonstrate her earning capability and the opportunity for her to obtain a teaching job or a job in another occupation. This court does not read Orlow to assign that burden to a particular party, but only to require some evidence of the availability of work. Furthermore, the Superior Court has held that absolute proof of employability prior to reaching a decision on earning capacity is not required. Com. ex rel. Simpson v. Simpson, 287 Pa. Super. 356, 430 A.2d 323 (1981).

Unfortunately, Mr. Flock has not provided this court with a record of the hearing, so this court has no idea what evidence, if any, was introduced on this issue. In his exceptions Mr. Flock states, "The Master erred in not realizing that the Defendant/Respondent has seasonal work and in not treating him as he treats all other seasonal employees and annualizing his income." This statement implies that Mr. Flock introduced no evidence that bricklaying was a seasonal occupation, and may not have even raised the issue. Such a proposition is certainly not obvious, given the fact that there is much indoor brickwork which could well be done during cold weather. Without a record of the hearing, this court has absolutely no idea whether the question of seasonal employment ever was addressed at the hearing.<sup>1</sup> Therefore, this court cannot find that the

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<sup>1</sup> At argument, counsel for Mr. Flock stated that the testimony showed that Mr. Flock had never turned down jobs and went out of his way to obtain work. Without a

master committed an abuse of discretion in not determining that Mr. Flock is a seasonal employee. Neither can this court find that the master committed an error law, in light of the above-quoted cases on earning capacity.

It is well established that the challenging party must provide a record to the reviewing court. In the recent case of Ely v. Yankovici, No. 1149 Harrisburg 1997, issued January 12, 1999 (Pa. Super. 1999), the court stated:

It is well established that an appellate court cannot consider anything which is not a part of the record. The burden to produce a complete record for appellate review rests *solely* with the appellant. An appellant's failure to insure that the original record certified for appeal contains sufficient information to conduct a proper review constitutes a waiver of the issue(s) sought to be examined. Further, arguments of counsel are not evidence . . . [citations omitted].

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transcript, however, this court has no idea what evidence was introduced at the hearing.

**ORDER**

AND NOW, this \_\_\_\_\_ day of January, 1999, the exceptions to the Master's Report issued on 27 October 1998 are dismissed.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Janice Yaw, Esq.  
Karen Flock, P.O. Box 102, 16 ½ Main St., Dewart PA 17730  
Gary Weber, Lycoming Reporter  
Domestic Relations  
Gerald SeEVERS, Esq.  
Hon. Clinton W. Smith  
Dana Stuchell, Esq., Law Clerk