LYNN S. HODGE,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	DOMESTIC RELATIONS SECTION
	:	
vs.	:	NO. 95-20,042
	:	
MICHAEL J. HESS,	:	CHILD SUPPORT
	:	
Defendant	:	EXCEPTIONS

OPINION and ORDER

The matter presently before the Court concerns Exceptions filed by Defendant Michael J. Hess (hereinafter "Defendant" or "Father") to the Master's Order of August 26, 1999 (hereinafter "Order") which directed the Defendant/Father to pay child support in the amount of $444.28 effective July 6, 1999 and an additional sum of $42.44 for childcare costs beginning August 30, 1999, to Lynn S. Hodge (hereinafter "Plaintiff" or "Mother") for the parties' one child, T.A.H. Mother had filed a Petition for Modification of Child Support on July 15, 1999, requesting modification of the prior Order of May 26, 1998, based upon the new Child Support Guidelines, which went into effect on April 1, 1999.

At a hearing on August 26, 1999, the Master found Mother to have a total net monthly income of $1,223.90 and Father a net monthly income of $2,144.11. Father's income was found to be 63.66% of the parties' total income. The Master further found that the annualized cost of Mother's obtaining childcare when she would be at work was $800. Father's appropriate share of that expense was set at $42.44 monthly; this obligation would commence on August 30, 1999, at the beginning of the school year. The Order required Mother to provide childcare expense documentation on a monthly basis to the Domestic Relations Office. The Master further found as follows: 1) the parties had appropriately shared dental expenses for the child based upon their private agreement; 2) Father does not support any other children; 3) Father provides medical and dental insurance for the minor child

through his employment without cost; 4) the child has no special needs; 5) neither party has any extraordinary expenses.[1]

Father's Exceptions to the Order question the following:

1. The payment of $100 on account of the arrearage amount;

2. Payment of childcare expenses to PA SCDU instead of the Domestic Relations Office or directly to Mother;

3. Confusion as to how payments should be made, either by Father or his employer; and

4. Failure of the Order to provide that Father should be allowed to claim the child as an exemption for income tax deduction purposes.

For the reasons set forth in the following discussion, which will address the Exceptions in the above order, this Court finds that Father's first three Exceptions are without merit. However, the proceedings must be remanded to the Master for further testimony in order for determination to be made as to whether Father should be allowed to claim the child as an exemption for tax deduction purposes, even thought he is the non-custodial parent.

[1] The Order was filed September 10, 1999. Father's Exceptions were filed September 17, 1999; oral argument was held December 14, 1999. Neither party has requested a transcript of the Master's hearing. Accordingly, the Exceptions will be determined on the facts found by the Master.

Discussion

Arrearage

Defendant's first Exception is that the Hearing Master erred by ordering Father to pay an additional $100 per month on account of the arrearage until the arrearage was paid in full. At the time of argument the arrearage stated by the Domestic Relations Office was approximately $688.89, which would have been attributed to the retroactive effect of the Order (being effective as to support on July 15, 1999 and childcare August 30, 1998). The prior child support order had directed Father to pay child support only in the amount of $67.42 weekly, or a monthly payment of $292.16. (*See* Order of May 26, 1998.) The increase of support to $444.28 plus the additional $42.44 per month for childcare expenses thus resulted in a total monthly increase in Father's support obligation of $194.56. When the arrearage payment of $100 per month is added, Father's obligation (until the arrearage is paid) is $586.72.

Defendant argues that the appropriate amount that he should be required to pay on the arrearage is $25 out of fairness to him because of the large increase in his support obligation of almost $200 per month. He argues that increasing his support obligation by an additional $100 a month on top of that increase is confiscatory, inasmuch as the total payment, $586.72, including the arrearage, amounts to 27% of his monthly net income.

In fixing the amount to be paid on an arrearage the Court must take into consideration the total amount of the arrearage, the reasons for the existence of the arrearage, whether any bad faith occurred in its accumulation, the length of time the arrearage has accrued and the ability of Father to make payment on the arrearage. Generally, where the party in arrears has the ability to pay, the Court believes it is in the best interest of the child that the arrearage be paid as soon as possible, as a starting point in the analysis, the Court would expect any arrearage due solely to the retroactive effect of an Order should be paid off in approximately the same amount of time over which it was accumulated. Applying that principle to this case, Father could have been ordered to pay almost $200 per month on

account of the arrearage. If that would have been ordered, the result would have been to take nearly 32% of Defendant's net monthly income for child support purposes. Defendant has presented no evidence of hardship or extraordinary expenses and has no other children to support. The Master's discussion notes that Father has a new wife who has at least one child and who presumably would contribute to the Father's household expenses in some manner. Considering all the foregoing factors, this Court can find no abuse of discretion in the Master's direction that Father pay an additional $100 per month until the arrearage is paid, inasmuch as he has the ability to so do without undue hardship.

Childcare Payment

Under Exception 2, Father claims it was error for the Hearing Master to order that the childcare payment of $42.44 be paid to PA SCDU[2] in Harrisburg, as the childcare costs may vary monthly. Father requests that the childcare amount be paid locally to Domestic Relations, after they have received verification of Plaintiff's actual expense, or more preferably, that Father simply reimburse Mother directly for his share of the childcare expense after she presents him with appropriate receipts. This Exception is denied. As discussed at oral argument, the State regulations now require the total of child support and related payments must be made to PA SCDU. To require the Domestic Relations Office to set up a collection procedure for the childcare expense would not only violate those regulations, but would require Domestic Relations to perform a task they are no longer equipped or staffed to do. Furthermore, to require Mother to deal directly with Father is contrary to the intent and purpose of a court ordered support obligation, as doing so could very likely lead to needless confrontation between the parties disputes as to who did what, when, and unnecessary litigation. At argument, the parties and the Domestic Relations Office did agree that the Master's order should be modified for the convenience of all involved to direct that Plaintiff submit the biweekly childcare receipts directly to Defendant. If Defendant pays more than his share of the cost of the childcare, he can request that he be credited with the overpayment through Domestic Relations.

Responsibility for Payment

In Exception 3, Defendant argues the Order is confusing as to the manner of payment. He claims the Order indicates Defendant is to pay by check or money order to Pa. S.C.D.U., but in another paragraph indicates his employer should deduct the total amount of child support from his wages. Page 3 of the Order states as follows: "Based upon Mr. Hess' net monthly income of $2114.11 and Ms. Hodges' net monthly income of $1223.90 Mr. Hess shall pay by check or money order to PA SCDU, P. O. Box 6910, Harrisburg, PA 17169-110 for support of the (child) the sum of $444.28…. The check or money order shall contain Defendant's social security number." Page 5 of the Order contains the following language: "Mr. Hess shall be responsible for the payment of any balance remaining if his employer is unable to deduct the total amount of child support, childcare costs, and arrearages pursuant to this Order…" A wage attachment order directing that Father's employer pay bi-weekly payments to PA SCDU in the amount of $269.99 was filed September 28, 1999.

It is clear that total payment is to be deducted by the employer. It is only in the event that his employer cannot, for some reason, effect the total deduction that Defendant is responsible to see the entire amount is timely sent to PA SCDU. The Court sees no need for further clarification.

Allocation of Tax Exemption

Finally, in Exception 4 Defendant claims the Hearing Master should have ordered that Defendant could claim the minor child as an income tax deduction. In the recent case of ***Miller v. Miller***, No. 66 EDA 1999, (Pa.Super. December 31, 1999), the Superior Court (noting that there was no prior controlling case law on this issue), acknowledged the general rule under the Internal Revenue Code is that the custodial parent is entitled to the dependency tax exemption absent an agreement to the contrary. ***Miller*** held, however, that Pennsylvania courts do "have the authority to award dependency exemptions to a non-custodial parent where appropriate" Slip Opinion at paragraph 10.

[2] The Pennsylvania State Collection and Disbursement Unit.

The ***Miller*** Court reasoned that this authority is not precluded by the Internal Revenue Code and is exercisable under the equitable powers of the Court. The Divorce Code gives courts authority to issue appropriate orders to effect economic justice. ***Miller*** stated, "Because the exemption will generally reduce a non-custodial parent's liability and thereby increase the income available for support, we find that awarding the exemption to that parent in appropriate cases will further the purposes of the Divorce Code." ***Id***. at paragraph 17. The trial court was directed by ***Miller*** to exercise its discretion on remand as to whether it was appropriate to award the exemption to the non-custodial parent, given the "... overall scheme of APL and child support…in the case." ***Id***. at paragraph 18.

The Master's Report in this case does not discuss issues relating to the claiming of the child as an exemption for tax purposes, nor the economic effect thereof. The Order therefore does not make any decision or determination concerning the maximizing of the income available for child support through allowing the child to be claimed for exemption purposes by either party. Since neither party obtained a transcript this Court cannot evaluate what testimony or arguments were raised on this issue before the Master. Nevertheless, this Court believes the exemption matter has been preserved for review by the Exceptions filed by Defendant, which specifically raised the issue. Further, Plaintiff has not argued that the issue was not raised at the Master's hearing.

Both at oral argument and in his Memo in Support of Exceptions, Father has argued he was entitled to claim the exemption, otherwise, the Order is "confiscatory," because Father can barely meet his own living expenses, and due to the "drastic increase" of child support, failure to order that Father may claim the exemption "further aids a growing recognition of the inequity and financially devastating nature of the support order as entered on 26 August 1999." Memo at (unnumbered) p. 2. Father at argument did make mention that he "believed" the tax advantage to him would be greater than the tax detriment to Mother if she is denied the exemption. At argument, both parties agreed Mother is claiming the exemption solely on the basis that she is the primary physical custodian of the

child under the governing custody order. Neither party asserted that there was any other controlling agreement as to claiming the child for tax deduction purposes.

The generally held view of many practicing law in the domestic relations field prior to the ***Miller*** decision was that the Internal Revenue Code, in the absence of an agreement between the parties, directed that the tax exemption attributable to a dependent child would be awarded to the party who had primary physical custody of the child and that this direction removed the issue from the courts. The ***Miller*** decision makes it clear that the Internal Revenue Code does not remove the issue from our jurisdiction.[3] Defendant has raised this issue in the Exceptions. Thereafter, the decision of the Superior Court in ***Miller*** was announced on December 31, 1999, clearly changing the legal standards to be applied to this case. Therefore, this Exception should be granted and the case remanded to the Master in order that each party may introduce further testimony limited solely to the

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[3] Some courts and family law practitioners may criticize ***Miller*** on the basis that the decision may prompt an increase of filings to review support orders under the new criteria, as ***Miller*** notes its holding is one of first impression in the Commonwealth. Realistically, this may not occur because shifting the tax exemption to the non-custodial parent will result in an increase in available income to that parent and most likely a decrease in income to the parent who loses the exemption. As a result, the net effect may be minimal, particularly if only one child is involved, as in this case. Counsel and parties should carefully consider the advantage to be gained, if any, before seeking a modification of an existing order because of ***Miller,*** carefully noting ***Miller*** directs the exemption should be assigned so as to maximize the income available for child support.

issue of whether or not an order should be entered concerning either party being allowed to claim the child for tax exemption purposes by applying the standards enunciated by the Superior Court.[4]

[4] In addition to the possible economic benefit to the child recognized by the court in ***Miller,*** the decision allowing the courts to address this issue in appropriate cases may also indirectly benefit the child's emotional health through avoiding custody litigation filed solely to gain an economic advantage, rather than out of consideration for the child's best interests and well being. The application of Miller, which would allow the economic benefit of a child's tax exemption to be assigned regardless which parent has primary physical custody, will reduce the chance that a parent would file a custody petition seeking to obtain primary physical custody of the child solely to gain the advantage of claiming the child as a tax exemption. Certainly there are no verifiable statistics as to how often custody petitions are filed for such purpose (either primarily or secondarily), but in this Court's handling of custody cases such selfish motivation on the part of a non-custodial parent has often been suspected.

ORDER

AND NOW, this 15th day of February 2000, for the reasons set forth in the foregoing Opinion, Defendant's Exceptions #1 concerning the $100 per month payment on the arrearage and #3 asserting confusion in the Order in the name of the payee or manner of payment are DENIED. Exception #2 concerning payment of childcare costs directly to the Domestic Relations Section of Lycoming County or to the Plaintiff is also DENIED; however, based upon the agreement of the parties it is ORDERED and DIRECTED that the support Order of August 26, 1999 be modified to direct that Plaintiff shall provide documentation of childcare costs on a monthly basis to Defendant, instead of to the Domestic Relations Section. The documentation shall be provided to Defendant not later than the 10th day of month following the month in which the expenses are incurred.

Defendant's 4th Exception regarding the claiming of the child as an exemption for income tax purposes is GRANTED as set forth in the foregoing Order and that issue alone is remanded to the Master for further proceedings. The Domestic Relations Office shall schedule a hearing before the Master in order that each party may introduce appropriate testimony on this issue.

BY THE COURT:

William S. Kieser, Judge

cc: Court Administrator
Domestic Relations
Family Court
John A. Felix, Esquire
Lynn Hodge
457 E. Water Street; Hughesville, PA 17737
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)