

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CL,	:	NO. 88-20,779
Petitioner	:	
	:	
vs.	:	DOMESTIC RELATIONS SECTION
	:	Exceptions
RJL,	:	
Respondent	:	

OPINION AND ORDER

Before the Court are cross-exceptions to the Family Court Order of January 28, 2002, in which Respondent was directed to pay child support to Petitioner for the support of the parties' two (2) minor children. Argument on the exceptions was heard March 27, 2002.

In his exceptions, Respondent contends the hearing officer erred in determining Petitioner's income, in requiring him to be responsible for \$131.21 per month toward Petitioner's health insurance premium, in calculating his income, and in failing to consider as income to Petitioner certain monies from a tort settlement. In her exceptions, Petitioner contends the hearing officer erred in assessing her an earning capacity as a full time substitute teacher, in assessing her an earning capacity as a full time summer employee, and in deviating below the guidelines based upon Respondent's medical bills. These exceptions will be addressed seriatim.

With respect to Petitioner's income, and the errors alleged by Respondent with regard thereto, Respondent specifically contends the hearing officer erred in adding a monthly annuity amount to a yearly income amount, in failing to assess Petitioner an earning capacity from her employment with Joann's throughout the year rather than just during the summer, and in admitting over objection certain medical evidence. At argument, Petitioner's counsel agreed there was indeed an error in adding the monthly annuity amount rather than a yearly annuity amount. Correcting that error, an annuity amount

of \$10,898.00, rather than \$908.13, should be added to Petitioner's other annual income. With respect to the income from Joann's, the hearing officer assessed Petitioner an earning capacity during the summer based upon full time employment at Joann's. The earning capacity from Joann's was not assessed during the school year inasmuch as Petitioner was assessed a full time earning capacity as a substitute teacher during the school year. Respondent seeks to have the earning capacity at Joann's assessed throughout the year but considering that Petitioner has been assessed a full time capacity during the school year, it appears appropriate to limit the earning capacity from Joann's to the summer. Finally, with respect to the medical evidence admitted over Respondent's objection, without determining whether the evidence, a letter from Petitioner's treating physician, was properly admitted, the Court notes that in an Order dated June 30, 1997, Petitioner was found to be receiving a disability pension from the United States government based upon a diagnosis of rheumatoid arthritis, "which prevented her from continuing her employment at the U.S. Post Office." The instant Petition for Modification filed by Respondent alleges that Petitioner is able to return to her employment at the post office. Respondent therefore has the burden of proof, and the Court notes, he is free to obtain an IME. It is not up to Petitioner to continually prove that she is unable to return to the post office, once that finding of fact has been made.

With respect to the health insurance premium, Respondent contends the hearing officer erred in two respects: that he could obtain less expensive but comparable insurance for the children and therefore should not be required to contribute to Petitioner's expense, and that he should have to pay only a proportionate share of the cost allocated to the children, and not the cost allocated to Petitioner. Inasmuch as Respondent presented no evidence of any less expensive but comparable insurance at the hearing in Family Court, this exception will not be addressed. Further, Respondent is incorrect with respect to his contention regarding Petitioner's portion and his obligation to contribute to such, as the Rule clearly provides, as was explained to Respondent at argument, for a contribution to the portion attributable to not only the children, but to Petitioner as well.

With respect to the allegation concerning his income, Respondent specifically contends the hearing officer erred in failing to deduct the 2% fee charged by his employer to effectuate the wage

attachment. This issue was not raised in Family Court and no specific evidence was presented at that time. The Court will therefore not address this contention.

With respect to the tort settlement, in a prior Order, Petitioner was assessed with \$9,500.00 income, averaged over a period of twelve (12) months, based upon the portion of the tort settlement attributable to her. Apparently there was another portion, attributable to the children. At the hearing in Family Court on January 24, 2002, Petitioner testified to having withdrawn certain monies from the children's portion, in order to pay attorney's fees and restitution for one of the children who had found himself in trouble with the law, and also to purchase an automobile for one of the children. The Court believes these are not ordinary child rearing expenses and likens such to those which would be paid by the child if he had a summer job. In that case, the Court would not consider the child's income from the child's employment and, therefore, will not consider the funds withdrawn from the children's trust accounts.

With respect to Petitioner's complaint regarding the earning capacities assessed to her, the Court finds no error. Petitioner testified to working approximately three (3) days per week as a substitute teacher but to having such work available to her nearly everyday. She testified that she chooses not to work on some days, as there are "some days when I feel I am unable to manage a full time, or you know, that full day." NT, January 24, 2002, @ page 24. The only medical evidence presented by Petitioner regarding her current ability to work, was the letter sought by Respondent to be excluded from evidence, indicating that she is not able to return to the post office. Petitioner presented no medical evidence that she is unable to work as a substitute teacher full time, and indeed, presented evidence that such work is available to her. The hearing officer therefore appropriately assessed her an earning capacity based upon that available employment. With respect to the summer employment, Petitioner testified that she works part-time evenings and weekends at Joann's, a crafts store, and the Court sees no error in assessing her a full time capacity during the summer, when she is not working as a substitute teacher. Even if, as Petitioner alleges, there is no full time position available at Joann's during the summer, her ability to work full time supports a finding of a capacity during the summer, as other jobs surely are available, even if Petitioner were to work two (2) part-time jobs.

Finally, with respect to the deviation from the guidelines awarded to Respondent based upon his medical bills, Petitioner alleges error in two (2) respects: that no documentation was presented to support expenses testified to by Respondent of \$447.00 per month, and that no evidence of a hardship was presented by Respondent. With respect to the first allegation of error, Respondent offered a summary of what he was paying and the hearing officer questioned Respondent regarding what he was paying but Petitioner's counsel made no objection at the time, nor did he request any supporting documentation in order that such might be presented. It seems hardly fair at this time to now disallow the testimony when no objection was presented to such at the time of the hearing. With regard to the evidence of hardship, simply comparing the amount, \$447.00 per month, to his income, \$2,634.00 per month, showing that 17% of his net income is spent each month toward his medical bills, is a sufficient indication of a hardship. The Court finds no error in the hearing officer's award of a 10% deviation, especially considering that trust funds are available to Petitioner for extraordinary expenses of the children.

Petitioner's income is correctly recalculated at \$25,328.00 per year net, or \$2,110.00 per month.¹ Considering Petitioner's monthly net income of \$2,110.00 and Respondent's monthly net income of \$2,634.00, the guidelines provide for a payment for the support of two (2) minor children, considering the 10% deviation and then adding the proportionate contribution to the health insurance expense, of \$755.00 per month. For the support of one (1) minor child, making the same calculations, the guidelines require a payment of \$558.00 per month.

¹ The Court has not added the average monthly income tax refund, as the amounts calculated by the hearing officer from all three (3) sources are net amounts, excluding the actual tax liability. Considering Petitioner's gross annual income of \$31,669.00, as estimated by the hearing officer, a minimal amount if any, of any tax refund would be attributable to an earned income credit, indicating that almost all of the refund, if not all of it, would be a return of taxes. Such have already been considered.

ORDER

AND NOW, this 5th day of April, 2002, for the foregoing reasons, Petitioner's exceptions are hereby denied and Respondent's exceptions are denied in part and granted in part. The Order of January 28, 2002 is hereby modified to provide for a payment for the support of two (2) minor children, including a contribution to health insurance, of \$755.00 per month for the period from November 27, 2001 through May 31, 2002. Effective June 1, 2002, Respondent shall pay for the support of one (1) minor child, including the contribution to the health insurance premium, the sum of \$558.00 per month. The proportionate shares of excess unreimbursed medical expenses are also modified such that Petitioner shall contribute to 44.48% of such and Respondent shall contribute to 55.52% of such.

As modified herein, the Order of January 28, 2002 is hereby affirmed.

By the Court,

Dudley N. Anderson, Judge

cc: Family Court
Domestic Relations
Sean Roman, Esq.
RL
Dana Jacques, Esq.
Gary Weber, Esq.
Hon. Dudley N. Anderson