IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY, PENNSYLVANIA

FAMILY DIVISION - DOMESTIC RELATIONS SECTION

KIMBERLY M. FREDERICK, **Plaintiff**	:	**NO. 2018-5-0222** **PACSES NO. 182117585**
v.	:	
WILLARD R. FREDERICK, JR., **Defendant**	:	

APPEARANCES

Greer Anderson, Esq. — **For Plaintiff**

Rebecca Smith, Esq. — **For Defendant**

OPINION BY CHARLES, J., August 1, 2025

This case has a tortured procedural and substantive history. Since 2019, five (5) hearings have been conducted before Domestic Relations Hearing Officers (DRHOs) and this case has been reviewed three (3) times by this Court via exceptions filed by one of the parties. During the time that this case has been pending, the personal and financial circumstances surrounding Willard R. Frederick, Jr. (hereafter HUSBAND) devolved from business owner with a six-figure income to a Social Security-dependent retiree who may or may not be able to receive income from a business that owes approximately $400,000 in back taxes. Today, we are asked to review the latest DRHO decision with an eye toward addressing three primary issues:

(1) How should a six (6) year duration of a spousal support award be considered?;

(2) What findings of fact are needed to support the imposition of an earning capacity significantly higher than a litigant's actual earnings?; and

(3) To what extent can a Court consider statistical evidence of income potential when assessing earning capacity?

Because we conclude that the record before us is woefully inadequate to support the recommendation of the DRHO, we will grant HUSBAND's exceptions and returning this case to the DRHO for additional action consistent with this Opinion.

I. FACTS and PROCEDURAL HISTORY

HUSBAND and Kimberly M. Frederick (hereafter WIFE) married in 1986 and separated in 2017. On May 1, 2019, WIFE filed a Complaint for spousal support. After several hearings were conducted, the DRHO submitted a proposed Order requiring HUSBAND to pay $1, 231.month. This recommendation was predicated upon the conclusion that HUSBAND earned $120,000/year from his trucking business.

WIFE appealed the DRHO's recommendation. On February 20, 2020, this Court entered an Order via which we concluded that HUSBAND consistently co-mingled his business and personal expenses in a manner that made it difficult to ascertain his income. We also documented that

HUSBAND failed to pay Federal Income Taxes between 2014 and 2017. Everyone, including HUSBAND's own lawyer, agreed that he had acted irresponsibly. We stated:

> "While we acknowledge that the picture painted of HUSBAND's finances is sub-optimal and that this sub-optimal financial picture is due to HUSBAND's irresponsibility, we will not immediately remand this case to the DRM. We perceive that there is very little additional information that the DRM could consider that was not presented in the December 2019 hearing...Because we estimate that most of [HUSBAND's claimed] deprecation expense should have been included as part of HUSBAND's income, we will increase HUSBAND's spousal support obligation to $1,500/month."

The next "round" of spousal support litigation occurred in 2022. On June 22, 2022, the DRHO submitted findings and a recommendation that the existing spousal support order should remain in full force and effect. The DRHO's findings specified that the unpaid taxes owed by HUSBAND totaled more than $400,000, excluding interest and penalties. The DRHO also found that HUSBAND was obligated to pay $2,000/month toward this back tax obligation. Even though the DRHO determined that HUSBAND earned significantly less by 2022 than he had earned in 2020, the DRHO chose not to modify HUSBAND's spousal support order.

HUSBAND filed exceptions and the matter was argued before this Court. On January 24, 2023, this Court issued a written Opinion to address the parties' spousal support dispute. Emphasizing that credibility issues are uniquely within the purview of the DRHO, we found little reason to challenge the DRHO's conclusion that HUSBAND was still able to earn considerable income. However, we refused to adopt WIFE's proposed narrative that the entirety of HUSBAND's tax liability should be disregarded because it resulted from his own malfeasance. We stated:

> "Despite our conclusion that the DRM did not err in her support calculation, we will permit HUSBAND a right to file a Petition for Modification if and when HUSBAND is affected by the governmental lien placed on his property. HUSBAND neglected his duty to file Income Taxes both personally and for his business for the tax years of 2015 through 2018. In doing so, HUSBAND realized additional income of approximately $400,000. But HUSBAND alone did not benefit from this amount. Rather, because WIFE and HUSBAND were married and living together for a significant portion of this time period, both HUSBAND and WIFE benefitted from HUSBAND's malfeasance. WIFE collaterally benefitted from a substantial amount of unreported monies during the parties' marriage. To what extent WIFE benefitted is a question for another day. For now, we will affirm the DRM's findings with the caveat that we will allow HUSBAND to file a Petition for Modification if and when he is affected by the governmental lien." (Slip Opinion at page 6).

Within one (1) month following our January 24, 2023 decision, HUSBAND filed another Petition to Modify. Another hearing was conducted before a DRHO on October 19, 2023. On November 6, 2023, the DRHO issued additional findings. In those findings, the DRHO chronicled the decline of HUSBAND's trucking business. The DRHO decried HUSBAND's refusal to provide documentation regarding his business. More troubling, the DRHO concluded "It is problematic that Defendant's trucks are now being operated by his former girlfriend who purchased them after Defendant had them towed to a salvage yard." The DRHO acknowledged that HUSBAND was 62 years old. However, she concluded "There is no health reason that would require Defendant to retire at this time." Once again, the DRHO determined that spousal support should continue as ordered in 2020.

HUBAND filed another Petition for Modification on October 28, 2024. The DRHO issued yet another report on March 18, 2025. This most recent report revealed that HUSBAND receives Social Security retirement pay totaling $1,467/month. The report also documented that HUSBAND claimed that his "hip and back are shot" and that he can no longer work as a truck driver. The DRHO documented the existence of a dispute regarding the ultimate disposition of twelve (12) trucks that were previously owned by HUSBAND. She stated: "Many of these issues should be addressed in equitable distribution." Even though HUSBAND stopped working as a truck driver in 2023, the DRHO determined that he had an earning capacity of $90,000/year based on his perceived ability to drive a truck on a full-time basis.

HUSBAND filed exceptions once again. He argues that he can no longer work as a full-time truck driver because he is 63 years of age and he has hip and back issues. He also argues that the DRHO erred by concluding without any evidence that truck drivers in Pennsylvania could earn $90,000/year. We conducted oral argument regarding HUSBAND's exceptions on July 22, 2025. During oral argument, both counsel agreed that there were gaps in the findings issued by the DRHO. We can, and we must, return this case to the DRHO given what was said at oral argument.

However, we have chosen to issue this written Opinion to provide everyone with additional guidance when this matter is re-litigated before the DRHO.

II. STANDARD OF REVIEW

Our Superior Court has provided guidance with respect to the scope of review that we should ordinarily employ. In reviewing a DRM's report, we must give "fullest consideration" to the credibility findings of the DRM, who was present to observe the demeanor of witnesses and hear their testimony. ***Schuback v. Schuback***, 603 A.2d 194, 195-6 (Pa. Super. 1992); ***Dukmen v. Dukmen***, 420 A.2d 667, 670 (Pa. Super. 1980). A DRM's report should not be lightly disregarded. ***Pasternak v. Pasternak***, 204 A.2d 290, 291 (Pa. Super. 1964). However, the DRM's report is only advisory, and we are not bound by its conclusions. ***Id.*** When we have a transcribed record to review, we must consider all of the evidence *de novo* and make an independent determination of the amount of support due and owing. ***Id.*** (citing ***Rankin v. Rankin***, 124 A.2d 689 (Pa. Super. 1956)).

We cannot forget the advantage enjoyed by the DRM in assessing the credibility of the parties. We are limited to the static black and white of the transcript and exhibits that were admitted at the hearing; the DRM had the ability to actually eyeball the witnesses as they testified. As our Superior Court discussed the nuances of credibility under ***Smith v. Smith***, 43 A.2d 371 (Pa. Super. 1945):

> "Although we are not concluded by a master's findings upon credibility, his judgment upon that vital factor is entitled to the fullest consideration, and especially in a contested case. He possesses an advantage not granted to us. He sees the parties and their witnesses face to face and observes their appearance and demeanor as they testify. We are restricted to the cold type of the record from which temperament and personality have been subtracted. Yet the demeanor of witnesses is the very touchstone of credibility; in the absence of reactions produced by other applicable tests, the appearance and demeanor of witnesses are the litmus by which the presence of truth is revealed. They are trifles light as air, imponderables, but for all that they are luminous integrants which ineluctably enter into the calculation by which trustworthiness is appraised. The spontaneous gesture, the lifting of an eyebrow, the shrug of the shoulders, the intonation of the voice, the flash of the eye, the facial expression,-these are a few of the vital and influential indicia of credibility which the master observes and by which he is guided. The mental and psychological impact of these inarticulate expressions experienced by a master form the basis for a conclusion which, to borrow the telling phrase of an anonymous master, 'will depend upon a judgment or intuition more subtle than can be objectively demonstrated.' Frequently, they speak more eloquently and possess greater significance than the verbal utterance which they accompany, yet they cannot be reproduced upon the record submitted to the reviewing court."

Id. at 372 (internal citations omitted).

III. DISCUSSION

We will begin by considering whether or how the almost eight (8) year period of time that has elapsed since the parties' separation should be considered when assessing spousal support. Thereafter, we will address what type of evidence and findings are necessary in order for a litigant to be assessed earning capacity. We will then briefly set forth why statistical information alone cannot be used to establish a litigant's earning capacity.

A. Duration of Spousal Support Award

There is no Statute or Rule of Court that specifically limits the duration of spousal support. However, Pa.R.C.P. 1910.16-5 permits a trier of fact to deviate from Support Guidelines based in part upon "in a spousal support or alimony pendente lite action, the obligation's duration." *See*, Pa.R.C.P. 1910.16-5(2)(v).

This Court has always been concerned about the duration of a spousal support or alimony pendente lite (APL) award. By their very nature, spousal support and APL are designed to be temporary; they afford a financially dependent spouse with needed financial resources following the trauma of separation and until a more permanent financial arrangement can be established via equitable distribution and/or alimony.

In several prior decisions, we have written about the risks of long-term spousal support or APL. Almost inevitably, long-term payments to an obligee spouse will overlap with issues that need to be addressed via equitable distribution and/or alimony.[1] More important, we have recognized the reality that when an obligee spouse receives considerable APL or

[1] In this case, HUSBAND claims that he sold many trucks belonging to his business in order to pay spousal support. The trucks HUSBAND sold could be characterized as marital assets. It could thus be argued that affording WIFE with a portion of the value of those trucks would facilitate a "double-dip" whereby the value of the trucks was considered via spousal support and equitable distribution.

spousal support, that spouse will have very little incentive to resolve or promptly litigate the divorce; he/she knows that support and APL will end when a divorce is finalized. *See, e.g.*, ***Orr v. Orr***, 461 A.2d 850, n.2 (Pa. Super. 1983)("It is to be noted that the purpose of an award of alimony pendente lite is to 'maintain the wife' during the pendency of her divorce action and her receiving this award should not cause her to delay the divorce proceedings."); ***Rolon v. Rolon***, C.P.Leb.Co. No. 2012-5-0710 (Jan 24, 2023); ***Tobias v. Tobias***, C.P.Leb.Co. No. 2019-20625 (Aug. 7, 2023); ***Kreider v. Kreider***, C.P.Leb.Co. No. 2022-5-0557 (Aug. 1, 2024).

In this case, eight (8) years have passed since the parties separated. Spousal support of at least $1,500/month has been ordered for six (6) years. In the opinion of this Court, the duration of spousal support is now a factor that should be considered.

We understand that the parties married in 1986 and remained together as husband and wife for thirty (30) years. The length of this marriage weighs in favor of extending spousal support. However, WIFE is employed. She earns roughly $60,000/year. She is not a completely dependent spouse. Moreover, we cannot ignore the reality that some of HUSBAND's current financial woes exist because *both parties* received the ability to enjoy income while they were together that otherwise should have been paid in taxes.

As we weigh everything outlined above, we conclude that the DRHO erred by not employing a deviation analysis. If spousal support is deemed to be appropriate based upon the parties' income and earning capacity, the amount determined under the Spousal Support Formula should be reduced based upon a deviation analysis.

B. Proof Needed for Earning Capacity

The general rule in Pennsylvania is that support should be based upon actual earnings. *See*, ***Portugal v. Portugal***, 798 A.2d 246 (Pa. Super. 2002). This Court has stated:

> "As a general rule, a person's earnings are the benchmark by which support is gauged...Thus, absent unusual circumstances, we will not base an obligor's support obligation upon an artificially high amount that exceeds his or her actual income. *See,* ***Feudale v. Regus***, C.P.Leb.Co. No. 2009-5-0087 (Sept. 7, 2010).

We have often commented that to be viable, a Support Order must be enforceable. In ***Shimer v. Sweinhart***, C.P.Leb.Co. No. 2005-5-0354 (Feb. 26, 2010), this Court stated:

> "Child support awards should not become an exercise in futility. To be meaningful, a child support award must be enforceable. Enforcement occurs via a Child Support Contempt proceeding. In such a proceeding, we can find the Defendant in contempt only if he/she "willfully" refused to pay support. 23 Pa.C.S.A. §4345. If an obligor simply does not have the income or resources to pay child support award, we cannot find him/her in contempt. *See, e.g.,* ***Calloway v. Calloway***, 594 A.2d 708 (Pa. Super. 1991); ***Muraco v. Pitulski***, 368 A.2d 624 (Pa. 1977). In short, we cannot enforce a child support award unless we can look the obligor in the eye at a contempt proceeding and say: "You could and should have paid the amount you owe."

Of course, the concept of earning capacity exists for a reason. During twenty-six (26) years of presiding in Support Court, this Court has encountered hundreds of obligors who have intentionally chosen not to work to their capacity in order to avoid paying child support. In ***Price v. Price***, C.P.Leb.Co. No. 1996-5-00517 (May 31, 2012), we confronted a father who claimed for two years that he could not find a job. We stated:

> "After two years of repeatedly claiming "I cannot find a job", we are forced to conclude that John Price simply does not wish to work. Having reached this conclusion, we will be assessing an earning capacity for him and will base a child support obligation upon that earning capacity...
>
> The bottom line is that [Mr. Price] must get a job. He can no longer sit at home and watch T.V. while waiting for the perfect opportunity that may not exist. He will have to work, even if that means taking a job at a fast-food restaurant or convenience store. There are no longer any excuses that we will accept for [Mr. Price's] refusal to work and there will be consequences if he refuses to do so."

Pennsylvania's Support Rules permit a finder of fact to base a support obligation upon an earning capacity that exceeds actual income.[2] However, the Support Rules specifically list criteria that must be considered when assessing earning capacity. Pa.R.C.P. 1910.16-2(d)(4) lists those factors as follows:

(A) child care responsibilities and expenses;
(B) assets;
(C) residence;
(D) employment and earnings history;
(E) job skills;

[2] As noted above, in most situations earning capacity is defined by a person's actual earnings. Predicating a support award on an amount that an individual does not actually earn should be employed only sparingly and when justified by the unique facts of a case.

(F) educational attainment;
(G) literacy;
(H) age;
(I) health;
(J) criminal record and other employment barriers;
(K) record of seeking work;
(L) local job market, including the availability of employers who are willing to hire the party;
(M) local community prevailing earnings level; and
(N) other relevant factors.

In ***Seibert v. Gosnell***, C.P.Leb.Co. No. 2010-5-0630 (Aug. 15, 2011), this Court stated:

> "Pennsylvania's Support Guidelines relative to earning capacity state: 'Age, education, training, health, work experience, earnings history and childcare responsibilities are factors which shall be considered in determining earning capacity. In order for an earning capacity to be assessed, the trier of fact must state the reasons for the assessment in writing...' Pa.R.C.P. 1910.16-2(d)(4). On multiple occasions and in multiple contexts, we have repeatedly rejected an approach that simply declares: "The Defendant formerly earned X amount. Because the Defendant should still be employed at that location, his earning capacity will be deemed X." [8 citations omitted] At the risk of appearing obstinate but with the desire to promote consistency, we will again issue an Opinion that will require a comprehensive analysis of earning capacity instead of a simplistic 'this is what your earning capacity is because this is what you formerly earned' approach."

There is certainly a history in this case that can and must serve as a foundation for any on-going support award. We cannot ask a DRHO to ignore historical context. In this case, the DRHO has historically had concerns about HUSBAND's credibility. Almost since day one, the DRHO has rejected HUSBAND's claim of financial distress. On multiple occasions, the DRHO commented upon efforts by HUSBAND to divert income and assets into the name of his girlfriend to lower his income available for support. It is obvious that the DRHO's current recommendation was predicated at least in part upon the past history of this litigation. Like the DRHO, this Court will not ignore that history.

With the above being said, we also cannot ignore the reality that it is now 2025 and not 2020 or 2022; HUSBAND is not now in the same financial position as he was three or more years ago. His business no longer exists as it once did. He owes over $400,000 in delinquent taxes. To avoid the possibility of incarceration imposed by the IRS, he has been asked to pay $2,000/month toward his back taxes. All of the above has been documented by the DRHO within her reports. We cannot and will not ignore this aspect of the parties' history.

Another reality that we cannot ignore is that HUSBAND is now 63 years of age. He is no longer a young man. A reality of human existence is that people become less vigorous and physically capable as they age. We cannot expect a 63-year-old to have strength and endurance of a younger man in his thirties or forties. Neither should a DRHO.

Several years ago, we authored an Opinion that affirmed a credibility decision of the DRHO regarding HUSBAND's earning capacity. Today, we agree with counsel that the record before us does not support a finding that HUSBAND can earn $90,000/year. The record of the dispute now before this Court is devoid of any findings about any continuing effort by HUSBAND to hide or divert income or assets. The record is devoid of any finding that HUSBAND has continued to operate his business surreptitiously or through gratuitous efforts of friends and relatives. The record is even devoid of any information that would lead us to conclude that HUSBAND has the physical and equipment resources necessary to personally drive a truck on a full-time basis. We simply cannot and will not presume, as the DRHO apparently did, that HUSBAND has the present ability to earn $90,000/year as a truck driver.

We are not saying today that HUSBAND must be limited to a Social Security retirement income. What we do want to clearly proclaim is that the record now before us is insufficient to support a finding that HUSBAND is <u>currently</u> able to earn $90,000/year.

C. <u>Use of Government Data</u>

As noted above, the DRHO set forth precious little information about how or why she imposed an earning capacity upon HUSBAND of $90,000/year. If we read between the lines, we suspect that the DRHO looked at Bureau of Labor data in order to reach this conclusion about earning capacity. However, even that suspicion is not supported by an actual finding of fact.

Because we will be remanding this case, we wish to touch upon whether or how a DRHO can use Bureau of Labor statistics in calculating an earning capacity. To be sure, the data compiled by the Bureau of Labor is an objective and independent resource that is routinely relied upon by forensic economists and vocational rehabilitation experts. If DRHOs are prohibited from considering government-driven data about earnings, their analysis of earning capacity could often be limited to an evaluation of self-serving and often hyperbolic "estimates" provided by the parties themselves.

Bureau of Labor statistics can be considered "government records." Such records are self-authenticating under Pa.R.Ev. 902(1). Moreover, information in government records can be admissible as an exception to the Hearsay Rule under Pa.R.Ev. 803(8). On the other hand, our Superior Court has declared that government statistics alone cannot be used to assess an individual's earning capacity. ***P.J. v. E.J.***, 174 A.3d 80 (Pa. Super. 2017).[3] We conclude from the above that Bureau of Labor statistics can be considered by a DRHO, but those statistics cannot be the exclusive basis of earning capacity.

Statistical information compiled by the Bureau of Labor is relevant to assessing an individual's ability to earn an income. However, such statistical information is not definitive. The data itself could be challenged by one or both of the parties. Moreover, statistical information in the form of averages necessarily assumes that individuals exist who earn less than the statistical average. Both parties should therefore have the opportunity to challenge the efficacy of statistical information that DRHO chooses to

[3] ***P.J.*** is a non-precedential Opinion. We cite it for its persuasive and not its binding impact.

consider. By definition, this requires that the DRHO advise parties in advance of a final decision about the statistical information that will be considered so that both parties can be given the opportunity to challenge that information if and as deemed necessary.[4]

IV. CONCLUSION

We will now send the above-referenced case back to the DRHO. If either party requests a new Factual Hearing, the DRHO shall schedule a hearing and take additional evidence. When the DRHO again evaluates this dispute, we afford the following instructions:

(1) The Lebanon County Domestic Relations Office is to provide HUSBAND with a Physician Verification Form. HUSBAND is advised that if he wishes to claim medical disability, he will need corroboration of that disability from a licensed medical provider and he can submit that corroboration via a written Physician Verification Form.

(2) When assessing HUSBAND's earning capacity, the DRHO must consider and set forth findings regarding all of the factors articulated in Pa.R.C.P. 1910.16-2.

(3) The DRHO may consider Bureau of Labor statistical information, but the source of the data must be made known to the parties

[4] This could be done by setting forth the applicable statistical data in a Report and affording the parties with ten (10) days to provide evidence to rebut the data before the Report becomes "final".

at a time and in a manner that would enable the parties to produce rebuttal evidence if desired. The DRHO shall not base earning capacity exclusively upon Bureau of Labor statistics.

(4) If the DRHO determines that HUSBAND has an obligation to pay spousal support, a deviation analysis must be employed. The formula-driven amount of spousal support should be reduced based in part upon the duration and amount of support WIFE has already received.

With the above instructions, we will vacate the recommendation of the DRHO and remand the above-referenced case to her for further proceedings in accordance with this Opinion. Pending the additional proceedings, we will temporarily reduce HUSBAND's spousal support obligation to $200/month. This Temporary Order is without prejudice to the ability of the DRHO to enter an alternative amount based upon the totality of her analysis.