

**IN THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

N---- K---
Petitioner
v.
D----- K---
Respondent

FILE NO.: CN16-02327

CPI NO.: 16-09339
(Divorce – Ancillary Matters – Property
Division, Alimony, Counsel Fees)

CASE HISTORY:

Date of Marriage: 8/22/02
Date of Separation: 4/30/15
Date of Divorce: 5/17/16
Order for Hearing on Motion to Reopen Divorce:
2/27/18
Order to Keep Record Open: 5/18/18
Stipulation and Order on Petition for Custody:
5/18/18
Order on Motion to Reopen Divorce: 6/4/18
Letter Order: 6/26/18
Amended Ancillary Financial Disclosure Report:
8/27/18
Ancillary Scheduling Order: 9/21/18
Order Permitting Telephone Appearance: 10/22/18
Ancillary Pretrial Stipulation: 11/27/18
Ancillary Pretrial Conference Order: 12/3/18
Order Denying Telephone Appearance: 1/10/19

PRESENT FOR THE HEARING:

N---- K---, Wife
Susan C. Over, Esq., Atty. for Wife
D----- K---, Husband
Joseph A. Wahl, Esq., Atty. for Husband

DECISION AND ORDER ON ANCILLARY MATTERS

A hearing was held on January 18, 2019 regarding the ancillary matters of property division, alimony and counsel fees arising out of a Petition for Divorce filed by D----- K--- (Husband) against N---- K--- (Wife). Prior to the May 2016 divorce of the parties, neither Husband nor Wife requested that the Court retain jurisdiction on property division or alimony. However, on June 4, 2018, the Court granted Wife's request to reopen the divorce to consider property division and alimony. Husband is represented by Joseph Wahl, Esquire. Wife is represented by Susan Over, Esquire. At the outset of the hearing, Ms. Over informed the Court that, despite her January 4, 2019 Motion to Amend the Ancillary Pretrial Stipulation to include Dr. Sundararajan as a witness for Wife that the Court granted on January 15, 2019, she would not be calling Dr. Sundararajan or Dr. Hosny, whom she listed on the original Ancillary Pretrial Stipulation. In response, Mr. Wahl

requested that he be awarded counsel fees for the cost of preparing his cross examination of these two potential witnesses.

I. Background

The parties were married on August 22, 2002, separated on April 30, 2015 and divorced on May 17, 2016. They have two children together, D----- K--- born April --, 2003 and D----- K--- born September --, 2005. Husband and Wife share legal custody of the children, with Wife having primary residency, and Husband having visitation at the recommendation of a therapist or the agreement of the parties. Neither party has any other children.

II. Issues in Agreement

At the outset of the hearing, the Husband and Wife reached an agreement on both Husband's life insurance policy and the liquidation post separation of a marital 401(k) account. As to the life insurance policy, the parties agreed to keep the children collectively as 40% beneficiaries and Husband's new wife as a 60% beneficiary. As to the 401(k) account, the parties agreed that Wife will receive 65% and Husband will receive 35% of the value in the account at the date of separation plus the same percentage of any earnings or losses thereafter.

III. Issues in Dispute

After resolving the remaining property division matters, the only issues which Husband and Wife requested the Court to resolve are alimony and counsel fees.

IV. Alimony

Pursuant to 13 *Del. C.* § 1512(b), the Court may only award alimony in cases wherein the person party requesting alimony is found to be dependent.¹

¹ 13 *Del. C.* § 1512(b) A party may be awarded alimony only if he or she is a dependent party after consideration of all relevant factors contained in subsection (c) of this section in that he or she:

- (1) Is dependent upon the other party for support and the other party is not contractually or otherwise obligated to provide that support after the entry of a decree of divorce or annulment;
- (2) Lacks sufficient property, including any award of marital property made by the Court, to provide for his or her reasonable needs; and
- (3) Is unable to support himself or herself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that he or she not be required to seek employment.

Wife's Income

Wife, 43 years old, testified that she is not currently employed and that she has not worked full-time since 2013. However, she also receives Social Security disability income for the children because D----- has anxiety and limited hearing and D----- has Asperger's Syndrome and Tourette's Syndrome. Although Wife testified, without supporting evidence, that she is currently receiving only \$1120 per month collectively for the children, the Court attributes her with \$1400 per month based on evidence presented during the January 2018 child support hearing that the children were collectively receiving \$1373 per month over three years ago and there have been cost of living increases since then. She also receives \$1269 per month in Court-ordered child support from Husband.² Wife further testified that she receives support to make up her monthly shortfall in the form of financial gifts or loans from her family.

Wife testified that she is not presently able to work full-time for several reasons. First, the children are only out of the home from about 7:00 AM until 2:00 PM on Monday through Friday, and Wife believes that the children need oversight to complete their homework and they are unable to cook dinner for themselves aside from D----- using the microwave. Second, Husband is not involved in the day-to-day responsibilities of caring for the children, and Wife has no one else that she knows who can help her on a regular basis. Therefore, Wife has to transport the children to and from all medical appointments or extracurricular activities. Third, Wife testified that she has been diagnosed with lupus, fibromyalgia, and rheumatoid arthritis, and that she sees both Dr. Hosny and Dr. Sundararajan to manage her symptoms. Although she provided no medical documentation, she also testified that her condition has worsened in the past year.³ For example, she has had recurring flare ups of her lupus that can immobilize her,⁴ and sometimes have led to her admission into a hospital or emergency room. Additionally, her current pain levels are such that she cannot lift items over ten pounds, or stand or stoop for long periods of time. She added that she is also not presently able to jog or go to the gym, and that she has stopped participating in school field trips because of her pain. However, she admitted that she could physically perform

² Wife testified that Husband has paid off his former arrears in full and therefore he is no longer obligated to pay \$231 per month in arrears on top of the \$1269 as set out in the Permanent New Support Order of February 1, 2018.

³ Although a Commissioner of the Court concluded after a January 30, 2018 hearing, for the purpose of child support, that Wife "did not prove her disability and is imputed with minimum wage," this judge permitted Wife to testify to any changes in her physical health or medical condition that has arisen since that time.

⁴ On direct examination, Wife initially testified that she has been having "monthly" flare ups since January 2018. But on cross examination, when challenged that she testified to having "daily" flare ups at her January 30, 2018 child support hearing, Wife responded that now "it's monthly and I also have days in there where it can be weekly – a couple of days."

sedentary, phone and/or computer work, and that she is capable of caring for herself and the children at home.

Wife also testified that she is seeking part-time employment through temp agencies but she has been denied four positions. Again, no documentation was provided. She believes that her present difficulties in finding work are two-fold: (1) she has been out of work for several years, and (2) she cannot pass a drug test because she has been taking medically prescribed marijuana for about two-and-a-half years and oxycodone for the last four months. Wife testified that she has not attempted to provide potential employers with medical letters explaining that she has prescriptions for both drugs.

As to her education and employment history, Wife testified that she is “four or five” credits away from getting an Associate’s degree but that earning her degree is not her present focus. Furthermore, she has experience working for about \$20 per hour, as recently as 2011 or 2012, in recruiting and human resources positions with such employers as a Richmond, Virginia area law firm.

In response, Husband testified that he does not believe Wife is disabled and that he believes that she should be able to work at \$20 per hour as a recruiter, as she has in the past.

Therefore, because Wife indicated that she is willing to perform part-time work, the major obstacles to her acquiring such work are her prescription drugs and recent unemployment, and she has previously worked at about \$20 per hour on at least one occasion, the Court declines to find Wife disabled and attributes her with working 20 hours per week at \$20.00 an hour, amounting to an income from wages of \$1733 a month. Combining these wages with her child support and social security disability for the children, Wife’s total gross income per month is \$4402.⁵

Wife’s Monthly Expenses

Wife testified that her reasonable monthly expenses total \$5222.50. Wife’s Ex. #1. However, she provided no documentation of any of these expenses to the Court. Of her expenses, Wife defended the following bills: \$389 for phone, \$100 for laundry, \$200 for hairdresser, \$300 for clothing, \$150 for medical and dental, \$150 for cosmetics and toiletries, \$250 for vacation, \$400 for entertainment/miscellaneous, and \$400 for gasoline. As to the phone bill, she said she

⁵ Because the Court believes that if Wife was only making \$1733 per month in wages, she would likely pay no taxes, the Court will use her gross income rather than income after taxes.

and the children have a Verizon family plan with unlimited minutes and data. She added that the bill is increased an indefinite amount because D----- has a special hearing apparatus and Verizon is the only provider she is aware of that allows for an audio connection directly from D-----'s phone to her hearing aids. As to the laundry, she said she has to use a laundromat twice a week and that she does not have cash reserves to buy a washer/dryer set. As to the hairdresser, she said that she and the children all have dreadlocks and that it is \$45 per week for each child, and that with her pain, she cannot do her children's hair. As to clothing, she said she has to buy new clothing monthly because they are growing out of their old clothes. As to medical and dental, she said some things are not covered by Medicaid such as customized colored hearing aids. As to cosmetics and toiletries, she said that she and the children buy special creams for psoriasis, eczema, and other purposes. As to vacation and gasoline, she said that she and the children regularly go to New York and Virginia to spend time with family, or go to Rehoboth in the summer, and that she is also driving a lot looking for work and attending doctor's appointments. As to entertainment and miscellaneous, she said that D----- likes to attend high school sporting events, and she also attends evening American Sign Language classes once a week.

Husband testified in response, without evidence, that several of Wife's stated bills are either higher than they were during the marriage or "grossly overinflated," such as for vacation, gas and phone. He also stated that he supports D----- having dreadlocks, which she had during the marriage, but not at the cost of \$45 per week.

When Wife was asked to explain how she has been able to avoid accumulating substantial debt in the last year alone when she has been reportedly maintaining a \$5222.50 monthly budget while only taking in \$2389 per month, she struggled to articulate anything more than that she asks for financial gifts or loans from family when needed. She added that some of the expenses either did not get paid or are not incurred on any given month. Because Wife denied residing with a man named "John" and there is no suggestion that Wife is receiving income from any paramour, and because Wife failed to provide physical evidence of any of her expenses, the Court finds that Wife does not have exorbitant debt in part because some of her expenses are inflated. Part of the inflation comes from instances where Wife may be placing the same expense in two different categories such as \$40 per month in "back to school clothes" and \$300 per month in "clothing," and \$100 per month in "prescriptions" and \$200 per month in out of pocket medical expenses. After considering both parties' arguments and without the benefit of any documentation from Wife, the Court has adjusted Wife's expenses as follows:

WIFE'S EXPENSES	REQUESTED	ALLOTTED
Rent	\$ 1150	\$ 1150
Electric	\$ 180	\$ 180
Gas	\$ 35	\$ 35
Cable Television	\$ 190	\$ 100
Telephone	\$ 389	\$ 250
Groceries	\$ 400	\$ 400
Clothing	\$ 300	\$ 150
Out-of-pocket medical expenses	\$ 200	\$ 150
Laundry & dry cleaning	\$ 100	\$ 30
Toys and presents	\$ 100	\$ 50
Cosmetics and toiletries	\$ 150	\$ 35
Hobbies	\$ 10	\$ 10
Barber/Hairdresser	\$ 200	\$ 150
Vacation	\$ 250	\$ 100
Entertainment	\$ 400	\$ 70
Car Payment	\$ 320	\$ 320
Repairs/Maintenance	\$ 100	\$ 100
Insurance	\$ 110	\$ 110
Gasoline	\$ 400	\$ 150
Prescriptions	\$ 100	\$ 0
Miscellaneous ⁶	\$ 33.50	\$ 50
Lunch	\$ 30	\$ 30
Back to school clothes	\$ 40	\$ 0
EZ Pass	\$ 35	\$ 15
TOTAL	\$ 5222.50	\$ 3635

Husband's Income

Husband, 45 years old, testified that he has been working full-time for Insight Global at \$23.00 per hour since he moved to North Carolina with his current wife in September 2018 for a projected annual income of \$47,840. He testified that they moved to North Carolina because his wife got a job transfer. Although he worked 2.75 hours of overtime during the week of October 7, 2018, Husband testified that overtime hours are no longer available. Wife's Ex. #2.⁷ Husband also receives income from the military reserves in the amount of about \$7200 per year.

⁶ The Court included a number of Mother's small expenditures into this Miscellaneous category.

⁷ Although Husband could not provide an end of the year paystub showing how many overtime hours he worked from September 2018 through December 2018, Husband's attorney offered to supplement the record if required by the Court.

Prior to moving to North Carolina, Husband voluntarily left his job as a logistics analyst at Herdt Consulting in Philadelphia where he was projected to earn \$57,000 annually. During the 2017 tax year, Husband worked for Black Horse Carriers, making about \$72,000 per year. Husband's Ex. #2. Husband testified that he left Black Horse Carriers because the job was too stressful for him, and that he had to resume taking anxiety medication as a result. Without any proof, Husband added that he has been medically treated for stress, anxiety and depression for about the last ten years, and that his stress levels are lower in his current job than they were at previous jobs. During the 2016 tax year, Husband earned \$67,721 in total wages. Wife's Ex. #4. During the 2015 tax year, Husband earned \$74,200 in total wages. Wife's Ex. #3. Thus, Husband's current income is significantly less than he has earned in recent years.

As to Husband's current wife, the Court finds it difficult to believe that Husband does not know how much she makes as a manager of a dialysis company, but that he knows it was a raise from her previous income and one that justified moving to North Carolina and he taking a significant decrease in his income. Although they have only been married since July 2018, and Husband reported that they had not filed tax returns yet, the Court believes that the amount of his wife's income would have at least been available to Husband when he and his wife applied for a mortgage in North Carolina.

Taking all of the above into account, the Court attributes Husband with working 40 hours per week at \$23.00 an hour plus 2.75 hours per week at the overtime rate of \$34.50 an hour plus \$600 per month from the military reserves, amounting to a gross income of \$4,998 a month, and a net income after taxes of \$3,862 a month.

Husband's Monthly Expenses

Husband testified that his reasonable monthly expenses total \$3984.00.⁸ Husband's Ex. #3. However, he provided no documentation of any of these expenses to the Court but explained that the listed bills and expenses were only his portion and did not include his wife's expenses. Of his expenses, Husband did very little to defend his bills other than to say that he gets his hair cut twice a month for \$30 each time. If Husband gets \$60 per month to maintain his hair, then it is reasonable for Wife and the two children to spend \$200 per month. Because he is only earning about \$4,000

⁸ Husband explained that there should be two adjustments to the listed \$4015.00 monthly expenses. The rent amount should be adjusted up \$200 and child support should go down \$231 because there are no longer any arrears.

per month, he testified that he cannot afford to pay any alimony to Wife in addition to \$1269 for child support.⁹

The Court finds that most of Husband's alleged expenses are reasonable. However, if Wife and the two children are in a three-bedroom apartment that only costs \$1150 per month, then it is reasonable to reduce Husband's share of his five-bedroom home mortgage from \$850 to \$650 per month. Furthermore, if Husband's listed expenses are truly only his share, then the Court will attribute Husband's reasonable bills for such things as cable television as no higher than half of Wife's expense. After considering both parties' arguments and without the benefit of any documentation from Husband, the Court has adjusted Husband's expenses as follows:

HUSBAND'S EXPENSES	REQUESTED	ALLOTTED
Rent	\$ 850	\$ 650
Water	\$ 30	\$ 30
Electric	\$ 70	\$ 70
Cable Television	\$ 100	\$ 50
Telephone	\$ 120	\$ 100
Household Items	\$ 10	\$ 10
Groceries	\$ 150	\$ 150
Clothing	\$ 50	\$ 50
Health Insurance	\$ 127	\$ 127
Out-of-pocket medical expenses	\$ 50	\$ 50
Laundry & dry cleaning	\$ 20	\$ 20
Toys and presents	\$ 20	\$ 20
Cosmetics and toiletries	\$ 30	\$ 30
Hobbies	\$ 40	\$ 10
Barber/Hairdresser	\$ 60	\$ 30
Vacation	\$ 34	\$ 34
Entertainment	\$ 20	\$ 20
Car Payment	\$ 425	\$ 425
Repairs/Maintenance	\$ 15	\$ 15
Insurance	\$ 180	\$ 180
Gasoline	\$ 150	\$ 150
Life Insurance	\$ 29	\$ 29
Student Loans	\$ 135	\$ 135
Child support	\$ 1269	\$ 1269

⁹ The Court notes that the \$1269 child support amount was set by the Court based on an annual income of about \$80,000 for Husband.

Miscellaneous	\$ 0	\$ 25
TOTAL	\$ 3984.00	\$ 3679

Therefore, the Court concludes that Wife has a potential monthly income of \$4402 and reasonable monthly expenses of only \$3635, whereas Husband has a monthly income \$3862 and reasonable monthly expenses of \$3679 (including child support). As such, once Wife starts working part-time she will have a net cash flow of \$767 and not be dependent pursuant to 13 *Del. C.* § 1512(b).

However, she is not currently employed and has not been employed for several years. In addition, she is receiving little to no assets in the property division to provide for her needs. Without her attributed income of \$1733 per month, Mother has a monthly income of \$2669 and a budget shortfall of negative \$966 per month. Therefore, the Court finds Wife to be dependent for the next three months. Based on her work experience, the Court is confident that three months is sufficient time for Wife to secure appropriate part-time employment.

Based on his attributed income and expenses, Husband has insufficient funds to pay Wife the full amount of her shortfall until she becomes employed. The Court finds it to be fair for the parties to share the effects of that shortfall but believes Husband should share a larger portion of that shortfall because he incurred a significant decrease in his income when he moved to North Carolina for his wife's employment opportunities, which the Court assumes has led to greater household income for him. Wife, who bears the expenses for herself and the parties' two children, has no other sources of household income other than those identified above to meet her portion of the shortfall.

V. Counsel Fees

Wife requests an award of her attorney's fees in litigating this matter. Husband requests an award of his attorney's fees in having to preparing cross examination for both Dr. Sundararajan or Dr. Hosny, two witnesses whom Wife said she planned to call.

VI. Court Rulings

1. By agreement of the parties, Husband's life insurance policy shall list his current wife as a 60% beneficiary and the above-named children collectively as 40% beneficiaries.

2. By agreement of the parties, Wife shall receive 65% and Husband shall receive 35% of the value of Husband's 401(k) account at the date of separation plus the same percentage of any earnings or losses thereafter.
3. The parties have no other marital assets. Each party shall keep assets in his/her name or possession, and shall be responsible for any debt in his/her name.
4. Wife's request for alimony for the next three months is *granted* but *denied* after that. Husband shall pay Wife **\$700 a month** on the first day of the month **for three months only**, starting March 1, 2019.
5. The parties' request for attorney's fees is denied.

IT IS SO ORDERED.

Date Written Order Issued

/S/ BARBARA D. CROWELL, JUDGE

Date Written Order Mailed

BDC/plr