

Witmer v. Witmer

Family Law- Divorce- Alimony Pendente Lite- Imputed Income- Educational Exception

Family Law- Divorce- Child Support- Spouse Unemployed- Shared Custody- Imputed Income

1. The purpose of alimony pendente lite is not only to maintain the dependent spouse in a situation of relative financial equality during the divorce action, but also to permit the dependent spouse to complete education embarked upon before the divorce complaint was filed.
2. Where the dependent spouse will complete an educational course within a year, and has not been employed during the pendency of the divorce action, it was error for the Domestic Relations Hearing Officer to impute an income to her.
3. Both parents owe their children a duty of support.
4. Pa. R.C.P. 1910.16-5(c)(5) provides a means for imputing income to a parent not currently employed who has willfully failed to obtain employment.
5. Where a parent was previously employed separately from the other, so that the employment did not assist the other parent in his or her business prior to the divorce, and where the unemployed parent does not have primary physical custody, it was error for the Domestic Relations Hearing Officer to assign an income of zero to the unemployed spouse.
6. Nurturing parent doctrine does not apply to parent who is unemployed through seeking to further her education, and who shares physical custody with the other parent.
7. The court will not consider the lack of rent or child care expenses to be income to the unemployed spouse under 23 Pa. C.S. §4302.
8. Unreimbursed medical expenses for the children will be allocated according to each parent's combined income for child support.

William F. Kaminski, Esquire, Counsel for Plaintiff

Kimberly S. Gray, Esquire, Counsel for Defendant Franklin County Domestic Relations

OPINION AND ORDERS OF COURT

HERMAN, J., June 4, 1996

Sidney W. Witmer filed this appeal from a determination by the Domestic Relations Office which assigned Sharon L. Witmer an earning capacity of zero for child support purposes. In addition, the hearing officer did not include alimony pendente lite payments when calculating child support. Sidney W. Witmer appeals from the Domestic Relations Officer's findings on these

two points. The hearing officer's determinations were based on a conference held on January 12, 1996. A support hearing was held on February 14, 1996. Both parties have filed briefs on this matter. The case is ready for decision

FINDINGS OF FACT

The parties were married on June 18, 1983 and separated on or about November 15, 1995. They are the parents of two minor children, Amber, age 11 and Jessica, age 4, who are the subjects of this support appeal. The parties share legal and residential custody of the children and both agree with the custody order currently in place. The sole issue for the Court's determination is whether the domestic Relations Office erred in its determination of the child support obligations of the parties and the defendant's obligation to pay alimony pendente lite.

On January 12, 1996, the Domestic Relations Office held a conference to determine the parties' child support obligations and alimony pendente lite. Although Sharon Witmer was not employed at the time of the hearing, the hearing officer imputed an earning capacity to her of one-half minimum wage (net \$281.50 per month) for purposes of determining alimony pendente lite. The hearing officer did not impute an earning capacity to Sharon Witmer for purposes of determining her child support obligation. In making these calculations, the hearing officer computed child support before computing alimony pendente lite. Thus, Mrs. Witmer's receipt of alimony pendente lite was not considered in determining her child support obligation. In addition, the hearing officer determined that Sidney Witmer should be responsible for 100% of the children's unreimbursed medical expenses and 80% of Sharon Witmer's unreimbursed medical expenses.

Mr. Witmer is a full-time employee of the Antrim Township Waste Water Treatment Plant. The parties have stipulated that his net monthly income is \$1048.00. Prior to the parties' separation, Mrs. Witmer was attending Hagerstown Junior College on a part-time basis and was employed as a babysitter. According to Mr. Witmer, Mrs. Witmer earned between \$100.00 and \$300.00 per week from babysitting. Mrs. Witmer does not dispute these figures, but does assert that her income from

babysitting fluctuated. Mrs. Witmer was previously self-employed in a pet grooming business. In addition, she is a licensed cosmetologist. In the spring of 1995, prior to the parties' separation, Mrs. Witmer stopped working and began attending Hagerstown Junior College on a full-time basis.

DISCUSSION OF LAW

A. *Alimony Pendente Lite*

We first address the issue of whether the Domestic Relations Officer erred in assigning the mother an income of one-half the minimum wage for purposes of calculating alimony pendente lite.

The purpose of alimony pendente lite is to maintain the dependent spouse in a situation of relative financial equality with the other spouse while pursuing the divorce action. *McNulty v. McNulty*, 347 Pa. Super. 363, 500 A.2d 876 (1985). An award of alimony pendente lite is also proper when it is granted to allow a spouse "to complete education embarked upon long before the divorce complaint was filed." *Id.* at 373, 500 A.2d at 881.

Mr. Witmer argues, as did the husband in *McNulty*, that his wife already has employable skills - she has a cosmetology license and has worked as a babysitter and a dog groomer. However, as the court pointed out in *McNulty*, alimony pendente lite may be awarded to allow a spouse to pursue education in order to obtain appropriate employment, that is, "employment that is suited to the expectancies and abilities of the parties." *Id.* Mrs. Witmer will complete her course of study in approximately one year. Because the award is temporary in nature and Mrs. Witmer has not been employed during the pendency of the divorce action, we find the Domestic Relations Officer erred in assigning Mrs. Witmer an income of \$281.50 per month for purposes of this calculation.

B. *Child Support*

In computing the parties' child support obligations, the Domestic Relations Office also assigned Mrs. Witmer an income of zero. This is at odds with the general proposition that both parents owe a duty of support to their children. *Depp v. Holland*, 431 Pa. Super. 209, 213, 636 A.2d 204, 206 (1993); *Dewalt v. Dewalt*, 365 Pa. Super. 280, 529 A.2d 508 (1987).

Mrs. Witmer argues that Pa.R.C.P.1910.16-5(c)(5) does not apply to her because she terminated her employment in order to attend school full-time before she and Mr. Witmer separated. Pa.R.C.P. 1910.16-5(c)(5) provides a means for imputing income based on earning capacity when "a party...willfully fails to obtain appropriate employment".¹ The crux of her argument is that she has not willfully failed to obtain employment, but rather that her unemployment was a mutual decision reached together with her spouse prior to their separation.

Mrs. Witmer further relies on the case of *Giamber v. Giamber*, 225 Pa. Super. 111, 386 A.2d 160 (1978). In that case, the court did not impute an earning capacity to the wife, who was pursuing graduate level work in the field of community counseling. Prior to the divorce, she had been employed as a receptionist, secretary and nurse in her husband's cardiology practice; however, she was unemployed at the time of the support hearing. The child for whom support was disputed in *Giamber* lived with her mother.

We find the case at bar distinguishable for two reasons. First, this is not a case where the wife's sole source of income during the marriage came from assisting her husband in his work, as was the case in *Giamber*. Mrs. Witmer's employment was independent from her husband's employment, and her continued employment did not depend on his willingness to continue as her employer. Second, in this case the parties share residential custody of their two children on a rotating weekly basis. In *Giamber*, the child resided with her mother.

We find Judge Tamilia's concurring opinion in *Depp* instructive in this case. In *Depp*, the mother, who had half-time custody, sought to be relieved of her child support obligation

¹ The full text of subsection 1910.16-5(c)(5) provides as follows:
Income Potential. Ordinarily, a party who willfully fails to obtain appropriate employment will be considered to have an income equal to the party's earning capacity. Age, education, training, health, work experience, earnings history and child care responsibilities are factors which shall be considered in determining earning capacity.

under the nurturing parent doctrine because she was caring for a young child not born of the marriage. Judge Tamalia noted that

where ... there is an agreement and consent Order of hared custody, and where the mother had significant earning capacity prior to the birth of the child, but chooses to pursue her education rather than be employed, her part-time parenting does not qualify for a full exemption from child support by claiming the nurturing parent benefit. The law has never permitted a parent to withdraw from support or maintaining children to pursue private education goals.

Depp, 431 Pa. Super. at 218, 636 A.2d at 208. Although Mrs. Witmer does not claim the nurturing parent benefit in this case, Judge Tamalia's comments make it clear that a parent who has shared physical custody cannot be relieved of their entire support obligation simply because they are furthering their education. We further note that many single parents work on a part-time basis while attending school. Thus we must conclude that the Domestic Relations Office erred when it did not impute an earning capacity to Mrs. Witmer for working part-time at minimum wage.

In addition to this income, Mrs. Witmer earns \$45.00 per month from interest income. This amount should also be considered in the child support computations. While we agree with Mr. Witmer, the Court must take into account that Mrs. Witmer is living rent free and has no child care expenses, upon consideration, we do not believe these factors are considered income under 23 Pa.C.S.A. Section 4302. Mr. Witmer himself has no mortgage payment.

Finally, we agree with appellant, Mr. Witmer, the allocation of unreimbursed medical expenses for the children should follow each parent's percentage of combined income for child support. The amount awarded by the domestic Relations Hearing Officer will therefore be adjusted in accordance with the Court's calculation of child support Pa.R.C.P. 1910.16-5(p). As to the allocation made by the hearing officer of unreimbursed medical expenses for Mrs. Witmer under the A.P.L. Order the court does not agree with Mrs. Witmer that such allocation is, in essence, an

inappropriate increase in the A.P.L. Order. As Judge Tamalia stated in *McNulty v. McNulty*, supra. at p. 371, when referring to alimony, alimony pendente lite and support, "Thus, all three are species of support and as such, the relevant considerations in arriving at the amount are those elemental to any support order: duty of the obligor, need of the obligee, and ability to pay on the part of the obligor." Section 4324 of the Domestic Relations Code specifically authorizes the Court to require the payment of reasonable and necessary health care expenses. [23 Pa.C.S.A. Section 4324]. Nonetheless, the evidence in this case does not support the hearing officer's decision to allocate 100% of Mrs. Witmer's unreimbursed medical expenses to the defendant. We will therefore vacate that portion of the A.P.L. Order of January 17, 1996.

We therefore arrive at the following computations:

ALIMONY PENDENTE LITE

Father	Mother
\$1048.00	\$ 45.00

$\$1048.00 - \$45.00 = \$1003.00$
 $\$1003.00 \times 30\% = \$300.90/\text{month}$

SUPPORT GUIDELINE COMPUTATION
 CHILD SUPPORT

	MOTHER	FATHER
1. Total Net Income (Monthly)	300.90	1048.00
	45.00	<u>300.90</u>
	<u>281.50</u>	747.10
	627.40	
2. Combined Total Monthly Net Income		1374.50
3. Proportionate Expenditure (Determined From the Charts of Proportionate Expenditures in Subdivision (b) of this Rule)		33.7%

4. Basic Child Support	463.21	
5. Net Income Expressed as a Percentage of the Combined Amount	46%	54%
6. Each Parent's Guideline Obligation	213.08	250.13
7. Child Care Expenses	0.00	0.00
8. Each Parent's Guideline Obligation Including Child Care Expenses	213.80	250.13
9. Father's Support Obligation is \$37.05 monthly.		

The Court will enter appropriate alimony pendente lite and child support orders in accordance with the within findings of fact and conclusions of law.

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA -- FRANKLIN COUNTY BRANCH

Sharon L. Witmer, Plaintiff vs. Sidney W. Witmer, Defendant
 SSN: 187-56-6108 SSN: 172-54-3983
 CIVIL ACTION - SUPPORT Docket No: FR 1995 1029
 Case No: 10950-S01 Complaint No: 14041
 DPW No: Original Order
 x Modified Order of January 17, 1996

ORDER OF COURT

AND NOW, this ____ day of _____, 19__ , based upon the Court's determination that the Plaintiff's monthly net income/ is \$627.40, and Defendant's monthly net income/ is \$747.10, it is hereby ordered that the Defendant pay to the Domestic Relations Section, Court of Common Pleas, \$17.10 current support plus .50 service charge biweekly effective Monday, December 4, 1995. Arrears set at \$585.70-credit as of May 31, 1996 are due in full IMMEDIATELY.

Contempt proceedings, credit bureau reporting, tax refund offset certification and entrance of judgement may be held in abeyance as long as Defendant pays \$ _____ on arrears each payment date. Failure to make each payment on time and in full will cause all arrears to become subject to immediate collection by all of the means listed above.

For the support of the Plaintiff \$ _____ and the following children, Amber Witmer born August 24, 1984. Jessica Witmer born July 10, 1991. \$ 17.10

Said money to be turned over by the Domestic Relations Section to: Sharon L. Witmer Payments must be made by cash, check or money order. Cash payments must be made person. All checks and money orders must be made payable to Domestic Relations Section a delivered or mailed to Domestic Relations Section, 218 North Second Street, P.O. Box 475, Chambersburg, PA 17201. Each payment must bear your Domestic Relations number in order to be processed.

Unreimbursed medical expenses are to be paid 54% by Defendant and 46% by Plaintiff. Defendant to provide medical insurance coverage for the minor children. Within 30 days after the entry of this order, Defendant shall submit to the person having custody of the child(ren) written proof that medical insurance coverage has been made. Proof of coverage shall consist, at a minimum, of : (1) the name of the health care coverage provider(s); (2) any applicable identification numbers; (3) any cards evidencing coverage; (4) the address to which claims should be made; (5) a description of any restrictions on usage, such as a prior approval for hospital admissions, and manner of obtaining approval; (6) a copy of the benefit booklet or coverage contract; (7) a description of all deductibles and co-payments; and (8) five copies of any claim forms.

If by reason of a loss of income, and/or hours of employment defendant fails to comply with this order, defendant shall report to the Domestic Relations Office within seven (7) days and complete one (1) employment search form per week until such time as defendant is once again in compliance.

IMPORTANT LEGAL NOTICE

PARTIES MUST WITHIN SEVEN DAYS INFORM THE DOMESTIC RELATIONS SECTION AND THE OTHER PARTIES, IN WRITING, OF ANY MATERIAL CHANGE IN CIRCUMSTANCES RELEVANT TO THE LEVEL OF SUPPORT OR THE ADMINISTRATION OF THE SUPPORT ORDER, INCLUDING, BUT NOT LIMITED TO, LOSS OR CHANGE OF INCOME OR EMPLOYMENT AND CHANGE OF PERSONAL ADDRESS OR CHANGE OF ADDRESS OF ANY CHILD RECEIVING SUPPORT. A PARTY WHO WILLFULLY FAILS TO REPORT A MATERIAL CHANGE IN CIRCUMSTANCE MAY BE ADJUDGED IN CONTEMPT OF COURT, AND MAY BE FINED OR IMPRISONED.

PENNSYLVANIA LAW PROVIDES THAT ALL SUPPORT ORDERS SHALL BE REVIEWED AT LEAST ONCE EVERY THREE (3) YEARS IF SUCH A REVIEW IS REQUESTED BY ONE OF THE PARTIES. IF YOU WISH TO REQUEST A REVIEW AND ADJUSTMENT OF YOUR ORDER, YOU MUST DO THE FOLLOWING: AN UNREPRESENTED PERSON WHO WANTS TO MODIFY (ADJUST) A SUPPORT ORDER SHOULD FILE A PETITION FOR MODIFICATION. FORMS ARE AVAILABLE AT THE DOMESTIC RELATIONS OFFICE.

A MANDATORY INCOME ATTACHMENT WILL ISSUE UNLESS THE DEFENDANT IS NOT IN ARREARS IN PAYMENT IN AN AMOUNT EQUAL TO OR GREATER THAN ONE MONTH'S SUPPORT OBLIGATION AND (1) THE COURT FINDS THAT THERE IS GOOD CAUSE NOT TO REQUIRE IMMEDIATE INCOME WITHHOLDING; OR (2) A WRITTEN AGREEMENT IS REACHED BETWEEN THE PARTIES WHICH PROVIDES FOR AN ALTERNATE ARRANGEMENT.

DELINQUENT ARREARAGE BALANCES MAY BE REPORTED TO CREDIT AGENCIES, ON AND AFTER THE DATE IT IS DUE, EACH UNPAID SUPPORT PAYMENT SHALL CONSTITUTE A JUDGEMENT AGAINST YOU.

IT IS FURTHER ORDERED that, upon a defendant's failure to comply with this order, defendant may be arrested and brought

before the Court for a Contempt hearing; defendant's wages, salary, commissions, and/or income may be attached in accordance with the law, this Order will be increased without further hearing by \$30.00 per week to be applied to the arrearage until all arrearages are paid in full. Defendant is responsible for \$40.50 court costs and fees as determined by the Domestic Relations Section.

This order shall become final ten days after the mailing of the notice of the entry of the order to the parties unless either party files a written demand with the Domestic Relations Section for a hearing de novo before the Court.

Date of recommendation May 30, 1996.

Consented:

Plaintiff Sharon L. Witmer

Plaintiff's Attorney

Defendant Sidney W. Witmer

Defendant's Attorney

Hearing Officer
DRS 1995 1029
DRS #

By the Court,

/s/ Douglas W. Herman
J.

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF PENNSYLVANIA -- FRANKLIN COUNTY BRANCH

Sharon L. Witmer, Plaintiff Vs. Sidney W. Witmer, Defendant
SSN: 187-56-6108 SSN: 172-54-3983

CIVIL ACTION - SUPPORT

Docket No: FR 1995 1029

Case No: 10950-S02

Complaint No:

DPW No:

____ Original Order

xx Modified Order of January 17, 1996

Alimony Pendente Lite

ORDER OF COURT

AND NOW, this _____ day of _____, 19____, based upon the Court's determination that the Plaintiff's monthly net income/ is \$45.00, and Defendant's monthly net income/ is \$1048.00, it is hereby ordered that the Defendant pay to the Domestic Relations Section, Court of Common Pleas, \$138.88 current support plus .50 service charge biweekly effective Monday, December 4, 1995. Arrears set at \$ 1033 .44 as of May 31, 1996 are due in full IMMEDIATELY. Contempt proceedings, credit bureau reporting, tax refund offset certification and entrance of a judgement may be held in abeyance as long as Defendant pays \$ _____ on arrears each payment date. Failure to make each payment on time and in full will cause all arrears to become subject to immediate collection by all of the means listed above.

For the support of the Plaintiff \$138.88 and the following children, _____.

Said money to be turned over by the Domestic Relations Section to: Sharon L. Witmer. Payments must be made by cash, check or money order. Cash payments must be made in person. All checks and money orders must be made payable to Domestic Relations Section and delivered or mailed to Domestic Relations Section, 218 North Second Street, P.O. Box 475, Chambersburg, PA 17201,. Each payment must bear your Domestic Relations number in order to be processed.

Unreimbursed medical expenses are to be paid 54% by Defendant and 46% by Plaintiff. Defendant to provide medical insurance coverage for the plaintiff. Within 30 days after the entry of this order, the Defendant shall submit to the person having custody of the child(ren) written proof that medical insurance coverage has been made. Proof of coverage shall consist, at a minimum, of: (1) the name of the health care coverage provider(s); (2) any applicable identification numbers; (3) any cards evidencing coverage; (4) the address to which claims should be made; (5) a description of any restrictions on usage, such as a prior approval for hospital admissions, and the manner of obtaining approval; (6)

a copy of the benefit booklet or coverage contract; (7) a description of all deductibles and co-payments; and (8) five copies of any claim forms.

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(2) A WRITTEN AGREEMENT IS REACHED BETWEEN THE PARTIES WHICH PROVIDES FOR AN ALTERNATE ARRANGEMENT:

DELINQUENT ARREARAGE BALANCES MAY BE REPORTED TO CREDIT AGENCIES, ON AND AFTER THE DATE IT IS DUE, EACH UNPAID SUPPORT PAYMENT SHALL CONSTITUTE A JUDGEMENT AGAINST YOU.

IT IS FURTHER ORDERED that, upon a defendant's failure to comply with this order, defendant may be arrested and brought before the Court for a Contempt hearing; defendant's wages, salary, commissions, and/or income may be attached in accordance with the law, this Order will be increased without further hearing by \$30.00 per week to be applied to the arrearage until all arrearages are paid in full. Defendant is responsible for \$ assessed on S01 court costs and fees as determined by the Domestic Relations Section.

This order shall become final ten days after the mailing of the notice of the entry of the order to the parties unless either party files a written demand with the Domestic Relations Section for a hearing de novo before the Court.

Date of recommendation May 30, 1996

Consented:

Plaintiff Sharon L. Witmer

Plaintiff's Attorney

Defendant Sidney W. Witmer

Defendant's Attorney

Hearing Officer

FR 1995 1029

DRS #

By the Court,
/s/ Douglas W. Herman
J.

DENIAL

Denial is the state of mind of a chemically dependent person which prevents them from seeing the truth about their use of alcohol or other drug.

Denial allows the alcoholic or addict to keep using their drug of choice despite adverse consequences.

Denial allows the disease of addiction to progress causing increasingly more harm to the person's physical and emotional health and their personal and professional lives.

The disease of addiction will eventually lead to divorce, disbarment and early death.

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