

CONNIE D. WOODS, Plaintiff vs. HUGH W. WOODS, III, Defendant, C.P. Franklin County Branch, Civil Action-Law, No. DRS 1998-1343

Woods v. Woods

1. Application of the new support guidelines to a case involving a request for alimony *pendente lite*.
2. Court determined that a lump-sum retirement payment should be considered as an asset rather than pro rated for one-year and applied monthly as income.
3. Court determined that Defendant did not retire solely for the purpose to reduce his support obligation and therefore, refused to ascribe to him a higher earning capacity.
4. Court permitted a downward deviation after considering the short length of time between the parties' marriage and ultimate separation.
5. The Court discusses its view of scheduling Wednesday afternoon support appeal matters in Franklin County.

Michael B. Finucane, Esq., Counsel for Plaintiff
Anne S. Johnson, Esq., Counsel for Defendant

OPINION AND ORDER

WALSH, J., July 12, 1999:

This matter is before the Court on Connie D. Woods' ("Plaintiff") request for a hearing *de novo* following the Domestic Relations Office's dismissal of her Complaint for Alimony *Pendente Lite*. Plaintiff filed her Complaint on or about December 8, 1998, the very same day that the Pennsylvania Supreme Court adopted new rules concerning the support guidelines. See Pa.R.C.P. No. 1910.16-1 *et seq.* Considering that these new rules were given an effective date of **April 1, 1999**, and that this matter was heard at a protracted hearing held on **May 21 and 25, 1999**, this Court is left with the quandary of which version of the

rules are applicable to this dispute.¹ This Court will adhere to its recommendation to the Domestic Relations Section and apply the rules and guidelines as they existed at the time the Plaintiff's Complaint was filed; however, as to that period extending beyond April 1, 1999, the Court will apply the new rules and guidelines. Following hearing and the parties' submission of post-hearing memoranda, this matter is ripe for decision. The Court makes the following:

FINDINGS OF FACT

1. The parties were married on March 20, 1998.
2. Hugh W. Woods, III, ("Defendant") filed for divorce on or about November 19, 1998, and Plaintiff filed a counterclaim with a request for equitable distribution, alimony *pendente lite* and alimony on or about December 8, 1998.
3. The Plaintiff filed a Complaint for Alimony *Pendente Lite* with the Domestic Relations Section on December 8, 1998.
4. **Both parties** reside (in separate rooms) at 11057 Skyline Drive, Roxbury, Franklin County, Pennsylvania, in a residence that the Defendant acquired before the marriage.

¹1. By Memorandum dated April 8, 1999, this writer advised the Domestic Relations Section of Franklin County that:

[f]or matters first initiated (i.e. a new complaint for support filed or petition for modification filed) prior to January 1, 1999, the Court will consider application of the old guidelines for that period from the filing to April 1, 1999 and application of the new guidelines for that period of time from April 1, 1999 through the date of decision. As a practical matter, the Court would encourage your office to make a reasonable determination as to whether this "dual calculation" approach ought to be used on a case-by-case basis and to use the "dual calculation" approach when, in your judgment, fairness requires it.

5. At the time of the hearing, Plaintiff was employed at Woven Hearts in Chambersburg, Pennsylvania, and her net monthly income from that employment was \$926.94.

6. Plaintiff also receives child support in the amount of \$89.00 per week (\$385.37 per month) for the support of her two teenage daughters *who do not reside with her*.

7. In 1998, in addition to her usual employment, Plaintiff worked a second job for approximately six months earning \$7.00 per hour. Plaintiff was unable to estimate her earnings from this second position as she was paid in cash and failed to report the earnings for any income tax purposes.

8. Plaintiff's testimony that she presently does not work a second job earning additional income that she is not reporting was not credible.

9. From her current income, Plaintiff is able to save \$100.00 per month in a Vacation Club and \$50.00 every two weeks (\$108.33 per month) in a Christmas Club.

10. Defendant retired from the federal government on January 2, 1999, after twenty-four years of service. He applied for retirement in October of 1998, but his retirement had been planned and discussed before the parties married.

11. Defendant presently receives a monthly pension in the amount of \$994.74.

12. For the past twenty-four years, Defendant was employed as a truck driver hauling hazardous waste for the federal government. He does not possess a commercial driver's license ("CDL").

13. In February of 1999, Defendant received a lump-sum Voluntary Separation Incentive Payment (VSIP) in the amount of \$16,750.00 as a result of his retirement from the federal government.

14. Defendant used a major portion of the VSIP to repay *marital debt*, including a boat purchase and the purchase of household appliances.

15. Plaintiff is qualified to receive subsidized housing at Hamilton Park Apartments whereby she could rent a three bedroom townhouse for \$420.00 per month plus approximately \$65.00 per month for utilities.

16. If Plaintiff had submitted an application to Hamilton Park Apartments in March of 1999, it is likely that she would have been eligible for a three-bedroom townhouse which was to become available June 1, 1999.

17. The only fees required by Hamilton Park Apartments in addition to rent and utilities, are a \$50.00 charge at the time a housing unit becomes available and an additional \$50.00 security deposit at the time a tenant moves in.

18. Plaintiff would have assistance in moving at no cost to her.

19. Plaintiff's testimony regarding her inquiries of and application to Hamilton Park Apartments was fabricated and not credible. She testified untruthfully concerning her submission of an application to Hamilton Park Apartments in January of 1999; in fact, an application had not been submitted as of the final day of the hearing.

20. Before beginning employment at Letterkenny Army Depot twenty-four years ago, Defendant was employed as a carpenter's helper and has performed some minor carpentry work around his home and occasionally for friends.

21. Defendant owns a tractor which could be used to perform landscaping work, however, he does not own a trailer on which to haul the tractor to other locations.

DISCUSSION

The Court will first determine the amount of alimony *pendente lite*, if any, that should have been awarded from December 8, 1998, through March 31, 1999. In pursuing this determination, the Court will apply the support guidelines as they existed prior to their most recent amendment on December 8, 1998. The law is clear that there is a rebuttable presumption that the amount of alimony *pendente lite* determined by the use of the support guidelines is the appropriate amount to be awarded. See *Landis v. Landis*, 456 Pa. Super. 727, 691 A.2d 939 (1997); Pa.R.C.P. No. 1910.16-1(b) (*amended by* Pa.R.C.P. No. 1910.16-1(d) *effective* April 1, 1999). However, it is entirely within the discretion of the Court to deviate from the guidelines when their application would result in unjust or inappropriate awards. See *Landis* at 731, 691 A.2d at 941; and Pa.R.C.P. No. 1910.16-1(b) (*amended by* Pa.R.C.P. No. 1910.16-1(d) *effective* April 1, 1999). When deviating from the award generated by the use of the support guidelines, the trier of fact must state the amount of the guideline award and the factors that led to the deviation. See Pa.R.C.P. No. 1910.16-4(a) (*amended by* Pa.R.C.P. No. 1910.16-5(a) *effective* April 1, 1999).

The starting point of all support matters is a factual determination of each individual's net monthly earnings. In this case, despite the Plaintiff's lack of candor with the federal, state and local taxing authorities concerning her 1998 earnings, the Court ascribes to the Plaintiff a net monthly income of only \$926.94. With respect to the Defendant, the Court determines that only his retirement pension earnings of \$994.74 should be considered in determining his monthly net income. See Pa.R.C.P. No. 1910.16-5(b)(4) (*amended by* Pa.R.C.P. No. 1910.16-2(a)(4) *effective* April 1, 1999). The Plaintiff argues that the Defendant's lump-sum VSIP payment should be prorated and that one-twelfth of it should be attributed towards

22. Defendant is the only relative available to assist his elderly parents who are experiencing health problems.

23. Defendant is currently making payments in the amount of \$115.83 per month for a vehicle he purchased for Plaintiff during the parties' marriage. The vehicle is in her possession and under her exclusive control.

24. Plaintiff has made no serious efforts to move from Defendant's home in the nearly seven months since the Defendant filed for divorce.

CONCLUSIONS OF LAW

1. There is a rebuttable presumption that the award determined by the application of the support guidelines is the appropriate amount to be awarded. See 23 Pa.C.S.A. § 4322 (1985 *as amended* 1989); Pa.R.C.P. No. 1910.16-1(b) (*amended by* Pa.R.C.P. No. 1910.16-1(d) *effective* April 1, 1999).

2. "[Alimony *pendente lite*] is based on the need of one party to have equal financial resources to pursue a divorce proceeding when, in theory, the other party has major assets which are the financial sinews of domestic warfare." *Litmans v. Litmans*, 449 Pa. Super. 209, 222, 673 A.2d 382, 388 (1996) *quoting DeMasi v. DeMasi*, 408 Pa. Super. 414, 420, 597 A.2d 101, 104 (1991) *alloc. denied* 535 Pa. 619, 629 A.2d 1380 (1993).

3. Under the application of the former and the amended support guideline rules, the Court is not required to pro rate a lump-sum retirement buyout as part of the Defendant's net monthly income.

4. Following the effective date of the amended rules, a court may consider the length of time that the parties lived together prior to separation in determining whether the guideline award of alimony *pendente lite* is proper.

his monthly net earnings for a period of one year. Although the Plaintiff does not provide any authority for this proposition, it appears as though she is relying upon the definition of income as set forth in Pa.R.C.P. No. 1910.16-5(b)(4) which reads as follows:

Monthly Net Income. The amount of support to be awarded is based in large part upon the parties' monthly net income. Monthly gross income is ordinarily based upon at least a six-month average of all of a party's income. The term "income" is defined by the support law, 23 Pa.C.S. § 4302, and includes income from any source. The statute lists many types of income including: (4) pensions and all forms of retirement[.]

(Emphasis added). This Court was unable to uncover any appellate authority *mandating* the inclusion of a pro rata share of such payments as part of a payor spouse's monthly net income when calculating alimony *pendente lite*. See *Darby v. Darby*, 455 Pa. Super. 63, 686 A.2d 1346 (1996) *alloc. denied* 548 Pa. 670, 698 A.2d 594 (1997) (child support award, court included pro rata share of lump-sum tort settlement received by payor as income in one year); *Butler v. Butler*, 339 Pa. Super. 312, 488 A.2d 1141 (1985) (same). The Court concludes that a pro rata portion of the Defendant's lump-sum VSIP payment is not required to be included in his net monthly earnings when calculating an award of alimony *pendente lite* for the period extending from December 8, 1998, through March 31, 1999. Rather than include the lump-sum VSIP as a pro rata portion of the Defendant's monthly net income, the Court chooses to consider it as a depleted asset pursuant to Pa.R.C.P. No. 1910.16-4(b)(5) (*amended by* Pa.R.C.P. No. 1910.16-5(b)(5) *effective* April 1, 1999). Because the Court treats the VSIP as *depleted*, no upward deviation is necessary to level the domestic battlefield.

The Plaintiff has also advanced the theory that the Defendant should be ascribed a higher earning capacity than his retirement pension allows because he voluntarily reduced his income by retiring. See Pa.R.C.P. No. 1910.16-5(c)(5) (*amended by* Pa.R.C.P. No. 1910.16-2(d)(4) *effective* April 1, 1999). The Court is not drawn to her argument. The Plaintiff and the Defendant discussed the Defendant's proposed retirement before the parties even married in March of 1998. This was not a unilateral act on the Defendant's part to purposely reduce his income in an attempt to avoid support. See *Klahold v. Kroh*, 437 Pa. Super. 150, 156, 649 A.2d 701, 704 (1994) ("steps taken to reduce income for the purpose of avoiding or decreasing support are ineffective, insofar as diminishment of the support obligation is concerned.") The Defendant had worked twenty-four years for the federal government hauling hazardous waste and he opted to take early retirement as offered to him by the government. He discussed his plans with the Plaintiff and despite her knowledge of them, she choose to marry him.

After determining each of the parties' net incomes, it is now appropriate to calculate the award of alimony *pendente lite* to which the Plaintiff is entitled for that period covering December 8, 1998, through March 31, 1999.² Upon calculation, this Court finds that the Plaintiff is entitled to an award of alimony *pendente lite* in the amount of \$27.12 per month for the period encompassing December 8, 1998, through March 31, 1999. The Court chooses not to deviate from the guideline figure as it is appropriate considering that

²2. The calculation required by Pa.R.C.P. No. 1910.16-3(a) (*amended by* Pa.R.C.P. No. 1910.16-4(a) *effective* April 1, 1999) follows:

Defendant's Net Monthly Income:	\$994.74	
Plaintiff's Net Monthly Income:	\$926.94	
Difference:		\$
67.80		
	Multiply by 40%:	\$
27.12		

both parties have equal resources to pursue and defend their divorce.

The Court must now turn to the amount of support to be awarded from that period beginning April 1, 1999, to the present. It is initially noted that the amended rules do not change the definition of income with respect to the Defendant's VSIP. See Pa.R.C.P. No. 1910.16-2(a)(4) (*as amended* April 1, 1999). The Court relies upon its prior interpretation of this rule, *supra*, and declines to pro rate the Defendant's VSIP and ascribe to him a portion of it per month as income. Rather, the Court will treat the VSIP as a depleted asset, as the Defendant used most of it to satisfy marital debt. See Pa.R.C.P. No. 1910.16-5(b)(5) *effective* April 1, 1999.

The Court notes that, despite the amendments to the rules concerning the Support Guidelines, the parties are still to be ascribed the same monthly net earnings. However, several amendments to the rules tangentially affect the award of alimony *pendente lite*. Considering the Plaintiff's net monthly earnings of \$926.94 and the Defendant's \$994.74, the guidelines suggest that \$27.12 per month is the appropriate amount of alimony *pendente lite* that should be awarded during the pendency of the parties' divorce.³ The Court may always deviate from the suggested guideline amount if it finds that the award is unjust or inappropriate. Pa.R.C.P. No. 1910.16-1(d) *effective April 1, 1999*. As with the older rules, the new rules require that trier of fact state its reasons for deviation in writing. *Id.* What follows is prompted by this requirement. As a factor for deviating from the support guidelines when determining alimony *pendente lite*, the trier of fact is now required to consider "the period of time during which the parties lived together from the date of the marriage to the date of final separation." Pa.R.C.P. No. 1910.16-5(b)(8) (*as amended*

³ See footnote No. 2 for calculations and Pa.R.C.P. No. 1910.16-4 (a) *effective* April 1, 1999.

April 1, 1999). The Explanatory Comments to Rule 1910.16-5 goes on to suggest:

The primary purpose of this subdivision is to prevent the unfairness that arises in a short-term marriage when the obligor is required to pay support over a substantially longer period of time than the parties were married and there is little or no opportunity for credit for these payments at the time of equitable distribution.

Presently, the Court is dealing with a marriage of very short duration, a mere eight months when calculated from the date that the Defendant filed his Complaint for Divorce. The Court believes that it would be entirely unjust to require the Defendant to continue making any payments for alimony *pendente lite* to the Plaintiff. It would be unjust because both parties earn approximately the same amount per month and yet, the Defendant is required to continue to maintain the home in which both are residing while the Plaintiff is able to save for a vacation and for Christmas; the Defendant should only be so fortunate. Furthermore, the Plaintiff has not made a good faith effort to find a suitable residence since the Defendant's filing for divorce. Based upon the above analysis, the Court finds that a downward deviation of \$27.12 per month is appropriate.

A word or two about the scheduling of this hearing is in order. Generally, the Court believes it makes little sense to permit alimony *pendente lite* (or support) matters such as this one to remain on a typical Wednesday afternoon docket along with several other *de novo* appeal hearings. As a result of the time constraints placed upon the Court on this typical Wednesday afternoon and despite the parties' desires to proceed on Wednesday, at the end of the afternoon on April 14, 1999 (the date this matter was initially set for hearing), without time for even a word of testimony, the Court was required to reschedule this matter for a separate hearing on Friday, May 21, 1999, more than 5 weeks hence.

Even then, the parties still were unable to conclude the matter on May 21st, and counsel were required to seek yet another (third!) date for a continued hearing. In this particular case, the parties were fortunate to receive the continued date of May 25, 1999, but that was only because another matter, previously scheduled for that, happened to settle. Considering that this matter, from its inception, had the potential of requiring a prolonged hearing--and in fact required two separate days to conclude--counsel might well have availed themselves of the opportunity to move for a separate hearing date. See Pa.R.C.P. No. 1910.11(j)(1).⁴ Had either party done so, both would have been able to avail themselves of discovery rather than attempt to conduct a last minute fishing expedition during the course of the hearing. *Id.* The Domestic Relations Bar is urged to consider a far more effective use of judicial resources by listing matters such as these for *separate hearings* pursuant to Rule 1910.11(j) and thereby, among other things, avail themselves of the opportunity to conduct minimal, cost effective, poignant and appropriate discovery in an attempt to settle those issues and facts capable of resolution. Had this matter been scheduled separately, a plethora of discovery tools would have been available to the parties including requests for admission which the law requires be responded to within thirty (30) days. See Pa.R.C.P. 4014. A request for admission is a very effective discovery tool and could be well-employed in support and alimony *pendente lite* appeal hearings. The conducting of fairly

⁴ Rule 1910.11(j) reads as follows:

(1) Promptly after receipt of the notice of the scheduled hearing, a party may move the court for a separate listing where

- (i) there are complex questions of law, fact or both, or
- (ii) the hearing will be protracted, or
- (iii) the orderly administration of justice requires that the hearing be listed separately.

(2) If the motion for separate listing is granted, discovery shall be available in accordance with Rule 4001 et seq.

simple discovery would likely minimize the need to probe witnesses at length during the course of a scheduled hearing. If such matters are scheduled separately pursuant to Rule 1910.11(j), the Court believes that it would be able to conduct more streamlined hearings without sacrificing the parties' rights to a hearing *de novo* before the Court.

The Court will enter an appropriate Order.

ORDER

July 12, 1999, having heard testimony at hearings held on May 21 and 25, 1999, and having reviewed post-trial memoranda submitted by the parties, the Court determines that the Plaintiff's net monthly earnings total \$926.94 and the Defendant's net monthly earnings total \$994.74.

IT IS HEREBY ORDERED that the Defendant pay to the Plaintiff alimony *pendente lite* in the amount of \$20.12 for the month of December 1998, and \$27.12 for each of the months of January 1999, February 1999, and March 1999, or a total of \$101.48.

IT IS FURTHER ORDERED that beginning April 1, 1999, the Plaintiff is no longer entitled to alimony *pendente lite*.