

reasonable request for a scheduling accommodation should never be unreasonably refused.

4. Be punctual in appointments, communications and in honoring scheduled appearances. Neglect and tardiness are demeaning to others and to the judicial system.

5. Procedural rules are necessary to judicial order and decorum. Be mindful that pleadings, discovery processes and motions cost time and money. They should not be heedlessly used. If an adversary is entitled to something, provide it without unnecessary formalities.

6. Grant extensions of time when they are reasonable and when they will not have a material, adverse effect on your client's interest.

7. Resolve differences through negotiation, expeditiously and without needless expense.

8. Enjoy what you are doing and the company you keep. You and the world will be better for it.

Beyond all this, the respect of our peers and the society which we serve is the ultimate measure of responsible professional conduct.

DENISE E. MILLER, PLAINTIFF vs. GERALD A. MILLER,
DEFENDANT, FRANKLIN COUNTY BRANCH, CIVIL
ACTION-SUPPORT - NO. F.R. 1996-46

Miller v. Miller

Child Support - Medical Payments for Dependent Child- Res Judicata

1. Under Pennsylvania Support Law, a parent must contribute to the payment of a child's orthodontic care if it is reasonable and necessary.
2. Since both parties initially agreed that their child's dental work was necessary and preliminary medical procedures had commenced, one party's subsequent change in economic status does not relieve the obligation to contribute toward payment of the remaining dental work.
3. Although it is nearly impossible to determine what is "necessary" medical treatment in the absence of a life-threatening situation, once treatment has begun, the steps needed to complete that treatment are medically necessary.
4. If a party fails to file a demand for a hearing after entry of an order following the support conference, that order becomes a final order under Pa.R.C.P. 1910.11(h). Therefore, subsequent modification petitions raising the same issue are barred by the doctrine of *res judicata*.

Carol L. Van Horn, Esq., Attorney for Plaintiff
Michael B. Finucane, Esq., Attorney for Defendant

Kaye, J., July 1996

OPINION AND ORDER

Denise E. Miller ("plaintiff") and Gerald a. Miller ("defendant") are the parents of one child, Tiffany, who was born on September 17, 1981, and who is in plaintiff's custody. In the instant child support proceeding, we have before us cross-complaints to modify an existing order of support.

1. Plaintiff is seeking modification to require defendant to contribute toward the cost of orthodontia being provided for Tiffany for which neither party has insurance;
2. Defendant is seeking reduction of the existing support order because of his being unemployed and consequent lack of income.

A hearing on the foregoing issues was held before the undersigned on June 26, 1996, at the conclusion of which counsel were directed to provide the Court with memoranda to support their respective positions. Those memoranda have been received, and the matter is now before the Court for disposition.

1. Plaintiff's complaint for modification:

As we understand defendant's position, he should not have to assist in the orthodontic care being provided for Tiffany because he believes it to be unnecessary, and because of his current economic status. We will defer consideration of the second contention to the subsequent discussion of defendant's complaint for modification, and will address only the remaining issue, i.e. whether the dental care is necessary.

We begin this discussion by noting that the Pennsylvania Support Law now provides, *inter al.*, as follows:

Mandatory inclusion of child medical support

(a) General rule-In every proceeding to establish or modify an order which requires the payment of child support, the court shall ascertain the ability of each parent to provide health coverage for the children of the parties.

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(e) Uninsured expenses.-The court shall determine the amount of any deductible and copayments which each parent shall pay. In addition, the court may require that either parent or both parents pay a designated percentage of the reasonable and necessary uncovered health care expenses of the parties' children, including birth-related expenses incurred prior to the filing of the complaint.

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(1) Definitions. -As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Child." A child to whom a duty of child support is owed.

"Health care coverage." Coverage for medical, dental, orthodontic, optical, psychological, psychiatric or other health care services for a child. For the purposes of this section, medical assistance under Subarticle (f) of Article IV of the act of June 13, 1967 (P.L. 31, No. 21), known as the Public Welfare Code, shall not be considered health care coverage.

23 Pa.C.S.A. sec. 4326.

From the foregoing statutory language, the court in a child support proceeding must ascertain the ability of each parent to provide insurance coverage for, *inter al.*, their child's orthodonture treatments, and may require each parent to pay a percentage of those expenses not paid by insurance if the expenses are reasonable and necessary. In the case sub judice, neither parent currently has insurance coverage to provide for Tiffany's orthodonture, and there was no request that insurance coverage should be provided. Rather, plaintiff seeks an order requiring defendant to pay a share of the obligation incurred for such treatment, and defendant responded by both claiming an inability to pay, and that the treatment is unnecessary.

Plaintiff presented evidence that she and defendant had discussed the issue of Tiffany's orthodontic treatment 2 1/2 years ago, and it was agreed that the treatment would proceed. In preparation for the orthodontic treatment, an oral surgeon extracted several teeth, and a contract was signed with the orthodontist to correct the overcrowding condition of Tiffany's teeth. The total contract amount is \$3,640.00, of which amount plaintiff paid \$600.00 down, and for which she is paying \$100.00 per month.

From the evidence presented, we find that this expense is reasonable and necessary. Both parties formerly had implicitly so indicated over two years ago when they agreed to commence the treatment, and it is only the change in their employment status and relationship with each other in the intervening years that has changed. We doubt that plaintiff and defendant, as loving parents, would have put Tiffany through the tooth extraction process necessary to begin the orthodontic treatment if they had looked upon this treatment as frivolous or unnecessary. Such

extensive and painful dental work, though probably not essential to preserve Tiffany's life, obviously was believed to be necessary by the parties or they would not have had her undergo it.

It is difficult to the point of being nearly impossible to define exactly what "necessary" medical treatment is, though the term statutorily includes dental and orthodontic care, when one deals with a condition that is not life-threatening. With care provided by a physician, generally any care is considered necessary unless it is found to be so insignificant by the physician as to require no treatment and, even then, a medical consultation may be appropriate to assure the concerned parent that there is no reason for a good faith concern.

In the instant case, we note that both an oral surgeon and orthodontist determined that extensive treatment was called for due to dental overcrowding. The parents initially agreed, though defendant later changed his mind due to the changes in his personal circumstances noted above. While we would not think it appropriate to permit a custodial parent to make this decision as one which would be binding on the Court, nonetheless, we think that parent's decision is an important consideration, and we further think that since both parties initially agreed to the treatment, which was actually commenced prior to any objection, that the expense necessary to conclude what was commenced is "necessary" medical treatment. Thus, we will find that entry of an order requiring defendant to assist with this payment is appropriate.

2. Defendant's complaint for modification:

Defendant alleges that his support obligation should be reduced because he no longer has the employment which provided the income upon which the support order was based, and that in fact his income is substantially reduced, thus that a change of circumstances had occurred which warrants reduction of his support obligation. Plaintiff argues that: 1/ this matter was litigated previously, and a ruling was obtained in her favor which was not further pursued; 2/ defendant lost his employment as a result of sleeping on the job, and this does not provide a basis for a reduction in his support obligation' and 3/ defendant has failed to demonstrate sufficient effort to obtain employment comparable

to his prior employment to sustain his burden of proof in this matter. Because of our ruling on the first issue set forth above, we will not address the second two issues.

On November 30, 1995, defendant filed a petition to modify the existing support order, alleging as the grounds therefor that he was no longer employed, and his earnings had been reduced. A support conference was scheduled thereon, and an order was entered on January 23, 1996 which denied relief to defendant on the ground that he had been fired from his employment for sleeping on the job, and that this did not provide a basis for modifying the existing order. Defendant took no further action thereon.¹

On March 4, 1996, defendant again filed a petition to modify the support order on the ground that he was not employed and he had no income, and it is this petition that is one of the matters before the Court for consideration following entry of an order denying relief, and the filing of a demand for hearing. Defendant raised precisely the same issue in the prior proceeding, and obtained a final ruling thereon from which he took no further action. The issue in both proceedings, was identical, i.e. the change in defendant's economic circumstances arising out of his termination from his employment. That issue was decided in the first proceeding, and the instant case is a re-litigation of the prior determination. Thus, the issue has been finally litigated, and the order of January 23, 1996 is res judicata with respect to this matter.

Having so determined, the order of support entered in this matter on November 15, 1995 shall remain in effect, and the parties will be required to comply with all terms thereof, including the payment of unreimbursed medical expenses as set forth therein.

¹ Under Pa.R.C.P. No. 1910.11(h), failure to file a demand for hearing following entry of an order following the support conference causes that order of court to become a final order.

ORDER OF COURT

NOW, July 22, 1996, upon consideration of the parties' petitions for modification of the order of support entered on November 15, 1995, of the evidence presented, and of the arguments of counsel, it is ordered that the order of court dated November 1, 1995 shall remain in full force and effect, and the Court determines that the parties' child's orthodontic treatment is included within the definition of "unreimbursed medical expenses" as contained in the aforesaid order of court. As the said order establishes the parties' responsibility therefor, both parties shall continue to be required to comply therewith.

THANK YOU

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