

- (1) a true copy of your most recent Federal Income Tax Return, as filed,
- (2) your pay stubs for the preceding six months, and
- (3) a complete Income and Expense Statement.

If you fail to appear for the conference or to bring the required documents, the court may issue a warrant for your arrest.

MILES V. MILES, C.P. Franklin County Branch, No. F.R. 1980 - 96 - S

Support - Income Capacity - Overtime Pay

1. There is no legal distinction between overtime and other pay or assets.
2. A 40 hour work week is not such a standard as to give rise to a presumption earnings based on 40 hours per week represent the extent of one's earning capacity.
3. Where a defendant has been working overtime continuously for several years, the overtime pay may be used as evidence of earning capacity.

Robert E. Graham, Jr., Esq., Attorney for Plaintiff

Kenneth E. Hankins, Jr., Esq., Attorney for Defendant

OPINION AND ORDER

KEITH B. QUIGLEY, P.J., *Specially Presiding, July 11, 1983:

This case arises out of a petition by plaintiff, Shirley, for increased support payments for herself and the parties' minor child, Anthony. The original support order was entered on April 28, 1981, and the current petition for an increase was made on February 14, 1983. An order has been issued by a Hearing Officer

*Editor's Note: President Judge of the 41st Judicial District.

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SHERIFF'S SALES, cont.

28006; thence in the said center line, North 5 degrees 14 minutes East 80 feet to an existing nail; thence North 10 degrees 28 minutes 57 seconds East 165 feet to a set nail and washer in the place of beginning.

BEING and intended to be Lot 2 and containing 1.567 acres, as shown on draft of Thomas Michael Englerth, R.E., dated April 19-22, 1977, duly approved for subdivision and recorded in Franklin County, Pa., Deed Book Vol. 749, Page 637.

THE above-described real estate is part of the same which Ronald L. Clark and Angeline M. Clark a/k/a Angeline Clark, conveyed to Joseph S. Peloso, Sr., by deed dated June 17, 1977, and recorded in Franklin County, Pa., Deed Book Vol. 743, Page 901, and which the said Joseph S. Peloso, Sr., joined by his wife, Mary Grace Peloso, conveyed to Joseph S. Peloso, Jr., single, by deed dated June 20, 1977, and recorded in Franklin County, Pa., Deed Book Vol. 744, Page 194. The said Joseph S. Peloso, Jr., appointed Angeline M. Peloso (formerly Clark) as his attorney in fact, by power of attorney dated July 3, 1978, and recorded in Franklin County, Pa., Deed Book Vol. 765, Page 350.

SUBJECT to all easements, restrictions and rights of way as may appear of record.

AND FURTHER SUBJECT to the reservations of 25 feet from the center line of LR 28006 for the future widening of the right of way.

AND FURTHER excepting and reserving unto the Grantor, his heirs and assigns, the full free right and liberty to the uninterrupted use of the water supply and connecting lines situate on the tract herein conveyed for the benefit of lands retained by Grantor,

SHERIFF'S SALES, cont.

as shown on the survey of Thomas Michael Englerth, R.E., dated April 19-22, 1977, and recorded in Franklin County, Pa., Deed Book Vol. 749, Page 637, the same to terminate upon the alienation of Lot 4 on said survey.

AND FURTHER under and subject to the condition and restriction that no junk or derelict vehicles shall be kept or parked upon the real estate unless the same be within a garage.

BEING sold as the property of Charles Douglas Lehman and Linda Kaye Lehman, Writ No. AD 1983-171.

TERMS

As soon as the property is knocked down to a purchaser, 10% of the purchase price plus 2% transfer tax, or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the Auctioneer to resell the property.

The balance due shall be paid to the Sheriff BY NOT LATER THAN MONDAY, SEPTEMBER 19, 1983 AT 4:00 E.D.S.T. OTHERWISE ALL MONEY PREVIOUSLY PAID WILL BE FORFEITED AND THE PROPERTY WILL BE RESOLD AT 1:00 P.M. ON FRIDAY, SEPTEMBER 23, 1983, in the Franklin County Courthouse, 3rd Floor, Jury Assembly Room, Chambersburg, Pennsylvania, at which time the full purchase price or all costs, whichever may be higher, shall be paid in full.

**Raymond Z. Hussack
Sheriff
Franklin County, Chambersburg, PA**

approving the petition to the extent of a \$140 total weekly payment apportioned so that \$100 per week is to go to the child and the remainder to the plaintiff. Defendant, Michael, has appealed the amount of the order based solely on two points of law now before the court: first, whether income capacity should be defined to include overtime pay under circumstances in which overtime pay has occurred over a given period of time; and, second, whether a person can lower his income capacity by working less overtime than previously.

This court finds, first, that there is no legal distinction between overtime and other pay or assets as they pertain to support actions such as that present here; such overtime pay is therefore properly included as a part of income or earning capacity. Second, this court finds that before a court can consider a person's earning capacity, and possibly also his support liability, to have been reduced, three conditions must be met: that person's earnings must actually drop; the reduction must be due to circumstances outside his control or for other legitimate reasons such as deteriorating health; and finally, after the income reduction, the resulting burden on the supporting spouse by reason of the reduction in income must have reached the point of being unfair or unreasonable.

The basic principle involved is that a parent's duty to support a minor child is nearly absolute. *Shapera v. Levitt*, 260 Pa. Super. 447, 394 A.2d 1011 (1978), *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974).

Defendant states that including his overtime pay as part of his earning capacity amounts to confiscation, but this court does not read the law in this manner. A long line of cases require that support amounts must be fair and non-confiscatory, however, those terms apply only to the support order itself and have no application to the determination of the supporting spouse's total assets and earning capacity on which the support order is based. In fact few specific limitations relevant to this case are placed on the manner by which the extent of the supporting spouse's assets and earning capacity are determined. *Commonwealth ex rel. Maier v. Maier*, 224 Pa. Super. 580, 418 A.2d 558 (1980). By confiscation is meant not whether a particular item is to be included in the asset base, but the extent of the entire asset base which is directed toward support.

This court is also unpersuaded for other reasons. Contrary to the defendant's premise, a 40 hour work week is not such a standard as to give rise to a presumption that earnings or income based on 40 hours per week represent the extent of one's earning

capacity. *Commonwealth ex rel. Haley v. Haley*, 199 Pa. Super. 235, 184 A.2d 155 (1962). Indeed, the opposite of his premise may be true. Though the distinction between earning capacity and income is subdued in practice, yet it still exists. Income is a relatively discrete figure, usually easily ascertained, but it represents only one evidentiary item in determining earning capacity. *Haley*, supra. While many people do work only 40 hours in a week at a full time job, that figure arose as an artificial standard out of the federal Fair Labor Standards Act (29 U.S.C. Sec. 201 et. seq.) and parallel state enactments which establish rights between the employee and his employer. It has no statutory bearing on, nor has it been adopted in, any of Pennsylvania's support law.

Further, many people, both blue and white collar, normally work less than or greater than a 40 hour week because of formal or informal job descriptions, which in turn developed out of either a personal understanding with their employer or, more commonly, a collective bargaining agreement. Pennsylvania's courts have shown no inclination to adopt the standard week of individual industries as measures of the earning capacities of those who are employed in those industries.

A subissue arises as to the length of time which must pass before the practice of working extensive overtime matures into evidence of earning capacity. There is no set demarcation. However, in this case it appears that the defendant has been continuously working such overtime for several years. This is certainly sufficient to allow consideration of the overtime as strong evidence of an increased earning capacity.

The defendant has averred that he meant the overtime work to be only temporary and for the purpose of paying off a number of debts from prior to the separation. However, the fact remains that the defendant has for several years been making support payments pursuant to an order which was in turn based in part on his overtime earnings. We will not now separately consider a statement of purpose when it was more properly considered in the broader function of determining the defendant's overall assets and earning capacity.

The second and final issue before the court relates to defendant's desire to eliminate or substantially reduce his overtime work sometime in the future. Defendant indicates that his work involves exposure to asbestos and that he is concerned about potential health hazards associated with the material. This assertion, properly established, could well some day be a matter for

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consideration. Tests which have previously been applied involve considerations of good faith and a showing that the circumstances which existed when the prior order was made have materially and substantially changed *Commonwealth ex rel. Long v. Long*, 181 Pa. Super. 41, 121 A.2d 888 (1956). Insofar as a reduction in earnings is necessitated by various exigencies, that reduction may evidence a reduction in earning capacity. The law is not harsh and support should not operate to punish or imprison a supporting spouse.

There being no other issues before the Court, the appeal will be dismissed.

ORDER

AND NOW, July 11, 1983, Defendant's appeal from the Order of the Domestic Relations Hearing Officer is dismissed and the Order affirmed.

HERRITT v. HERRITT, C.P. Franklin County Branch, F.R. 1982
- 34 - D

Divorce - Change of Venue - Pa. R.C.P. 1920.2 - Forum Non Conveniens - Pa. R.C.P. 1006(d)

1. Venue in a divorce action may be brought only in the county in which plaintiff or defendant resides.
2. Proper venue is a matter of law involving no discretion on the part of the court.
3. Under the doctrine of forum non conveniens the plaintiff's choice of forum should not be disturbed except for weighty reasons, and the change must be equally or more convenient for the plaintiff.

Patrick J. Redding, Esq., Counsel for Plaintiff

Hubert X. Gilroy, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., April 25, 1983:

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