

GEORGE H. PAPE, SR., PLAINTIFF vs SUSAN S. PAPE,
DEFENDANT, Franklin County Branch, Civil Action-Law No. F.R.
1995 - 868 Support

ALIMONY PENDENTE LITE - CHILD SUPPORT

Husband filed for alimony pendente lite against his wife and wife sought child support from husband. The court applied the support guidelines stated in Pa.R.C.P. No. 1910.16, and analyzed the evidence in order to determine the plaintiff's income potential.

1. While APL and child support each involve a determination of a monetary obligation on one party to the other, the legal considerations for the award are fundamentally different.
2. An award of APL is based on the concept that a dependent spouse needs financial resources to maintain or defend a divorce action.
3. Child support is an obligation of both parents to their unemancipated children under the age of 18 years, continuing until the child graduates from high school if that occurs after the child's eighteenth birthday.
4. In order for the court to find a person's earning capacity to be significantly lower than his past earnings suggest, that person must demonstrate a credible and bona fide effort to secure employment that is commensurate with his work experience, training, licensing and background, and an inability to find such employment despite his best efforts to do so.
5. The effective date of a support order generally is to be the same date as the filing of the complaint.

Patrick J. Redding, Esquire, attorney for plaintiff

Carol L. Van Horn, Esquire, attorney for defendant

**OPINION SUR COMPLAINTS FOR ALIMONY
PENDENTE LITE FILED BY GEORGE H. PAPE AND FOR
CHILD SUPPORT
FILED BY SUSAN H. PAPE**

William H. Kaye, J.

We currently have before us for a decision cross-complaints filed by George H. Pape, Sr. ("George") in which he seeks an award for alimony pendente lite against Susan S. Pape ("Susan"), and by Susan in which she seeks an award for child support against George. Following an initial support conference before the Domestic Relations Officer, Susan filed a demand for hearing which resulted in a hearing *de novo* before the undersigned. We have now received memoranda from the parties, and thus the matter is ripe for disposition.

The parties are married. George filed a complaint for divorce on September 28, 1995 in which he alleged that both parties resided at

2314 McCleary Drive, Chambersburg. Although there was some confusion of the date of the parties' separation, for purposes hereof, the filing date is the only crucial date as it is the date on which a demand by George for APL was initiated.

George and Susan are the parents of two (2) children, George H. Pape, Jr., born on September 21, 1981 and Leanne F. Pape, born July 14, 1984, both of whom are in Susan's custody. Susan is an employee in an administrative capacity at Chambersburg Hospital, where she has been employed for two (2) years, and is executive officer of her U.S. Naval Reserve unit, where she has served for a total of six (6) years, of which one (1) year has been spent in her current unit. It was stipulated that her net income is \$3,220 per month from her hospital employment and Naval Reserve duties.

George is not employed and apparently has not held regular employment in a number of years. However, in the past, he had significant income from various employers. In 1987, we worked for Matthews Industrial Piping, Inc. in New York City, and was paid at an hourly rate of \$41.25 for a 40 hour work week. After deductions were taken out of his pay, he received a net weekly pay of \$978.22. We received numerous pay packets from his income received from the same employer in 1988 which, unlike the prior year, do not indicate an hourly rate of pay or number of hours worked, but do show a *gross* weekly pay of \$700.00, with net after tax pay of \$528.35, but with unexplained "job expenses" added thereon of \$335.00, resulting in a net weekly receipt of \$863.35. Prior to that employment, George had worked for Royal Petroleum for the period of 1971 through 1987, earning a maximum of \$33,000 annually as area superintendent in charge of two oil terminals in New York. He testified that that job ended when the terminals closed.

The Industrial Piping job ended with defendant alleging he was then earning \$10.00 per hour, and with the job the company had worked on having been completed.

Thereafter, George remained at home, from time to time doing only odd jobs which he described in vague terms. Susan then returned to work in the field of nursing at a Veterans Administration Hospital in Northport, New York. Since then, she has been employed continuously.

In February, 1993, George was convicted in federal court of two counts of jury tampering in the John Gotti case in New York, and received a sentence that resulted in his incarceration at the Allenwood Federal Prison until November 2, 1994, at which time he was released to a halfway house in Brooklyn, New York. He worked as an electrician's helper for Precision Electric until January, 1995, and then went to work as a clerk with Matthews Industrial Piping until he moved to Chambersburg on March 3, 1995. He claims that he was asked by Susan to help her with the children, especially their daughter who has epilepsy.

Throughout his testimony, George claimed that Susan had asked him to remain at home to care for the parties' children, while Susan was adamant that she not only did not ask him to remain at home, but repeatedly insisted that he seek employment. We do not find George's testimony to be credible. His conviction for crimes in the nature of jury tampering makes his testimony suspect. Additionally, his testimony regarding Susan's stated desires regarding his securing employment was directly refuted by her testimony, which we find to be totally credible. Moreover, for a lengthy period time, George was gainfully employed outside the home, and was receiving a significant income from that employment which the family utilized for its support. While the testimony did not make clear what caused George not only to lose his former employment, but to remove himself from even attempting to secure employment except on an occasional basis, we believe this was not a decision which Susan has concurred in.

As noted in the first paragraph of this opinion, we are being asked to rule upon George's complaint for alimony pendente lite ("APL") against Susan and for Susan's complaint against George for the support of the parties' two minor children. While both types of relief sought involve a determination of a monetary obligation of one party to the other, the legal considerations for the award are fundamentally different. APL is available to sustain a dependent spouse on the basis of equality with the other spouse while maintaining or defending a divorce action. *Krakovsky v. Krakovsky*, 400 Pa.Super. 260, 583 A.2d 485 (1990). APL is defined in the Divorce Code simply as "[a]n order for temporary support granted to a spouse during the pendency of a divorce or annulment proceeding", 23 Pa.C.S.A. §3103, and is provided for at 23 Pa.C.S.A. §3702. An award of APL is based upon the concept that a dependent spouse needs financial resources to

maintain or defend a divorce action"...when, in theory, the other spouse has major assets 'which are the financial sinews of domestic warfare'". *Musko v. Musko*, _____ Pa.Super. _____, _____, 668 A.2d 561, 565 (1995), citing *Spink v. Spink*, 422 Pa.Super. 126, 130, 619 A.2d 277, 279 (1992).

Child support is another matter, as it is an obligation of both parents to their unemancipated children under the age of 18 years. 23 Pa.C.S.A. §4321(b). This duty continues until the child graduates from high school if that occurs after the child's eighteenth birthday. *Blue v. Blue*, 532 Pa. 521, 616 A.2d 628 (1992). Both parents equally share in the child support obligation, *Klahold v. Kroh*, 437 Pa.Super. 150, 649 A.2d 701 (1994). The duty of a parent to support a minor child today is absolute. *Oeler by Gross v. Oeler*, 527 Pa. 532, 537, 594 A.2d 649, 651 (1991).

Additionally, the determination of the amount of the parties' obligations for APL and child support is to be determined through application of the support guidelines as stated in Pa.R.C.P. No. 1910.16-1(a):

(a) The amount of support (child support, spousal support or alimony pendente lite) to be awarded pursuant to the procedures under Rules 1910.11 and 1910.12 shall be determined in accordance with the support guidelines which consist of the guidelines expressed as grids set forth in Rule 1910.16-2 and as formula in Rule 1910.16-3 and the operation of the guidelines set forth in Rule 1910.16-5.

(b) If it has been determined that there is an obligation to pay support, there shall be a rebuttable presumption that the amount of the award determined from the guidelines is the correct amount of support to be awarded. The presumption shall be rebutted if the trier of the fact makes a written finding, or a specific finding on the record, that an award in the amount determined from the guidelines would be unjust or inappropriate.

Application of the support guidelines depends upon a determination of the parties' respective earnings or earning capacity.

In the instant case, there is no question of Susan's earnings, and the question of George's earning capacity is the crux of the issue presented herein. The Rules of Civil Procedure provide as follows:

(5) Income potential. Ordinarily, a party who wilfully 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.

Pa.R.C.P. No. 1910.16-5(c).

The concept of "earning capacity", though theoretically forthright, in reality is quite difficult to ascertain. In *Malenfant v. Malenfant*, 433 Pa.Super. 139, 143, 639 A.2d 1249, 1251 (1994), citing *Adams v. Adams*, 387 Pa.Super. 1, 8, 563 A.2d 913, 916 (1989), Superior Court stated,

[t]he earning capacity of a party, [sic] is not the amount the party could potentially earn, but rather the amount [the party] could realistically earn under the circumstances considering health, age, mental and physical condition, training and the amount of time the party has been unemployed.

While that is clear enough, applying those principles to real-world situations is quite difficult in the absence - as is the case herein - of expert testimony regarding an individual's potential for earnings. It appears that George has no mental or physical impairment, and that he is middle-aged. Although we were not informed specifically of his educational background, he has a work history involving supervision of the operation of several petroleum terminals, for which he was paid as much as \$41.25 per hour in the mid-1980s.

However, he has apparently not held employment on a regular basis for about eight (8) years, and he spent 21 months of the intervening period incarcerated in a federal prison after his conviction for the serious crime of jury tampering in a notorious criminal case. He is now living alone, and claims not even to have transportation to

seek employment beyond walking distance from his current place of habitation, and essentially testified that he is destitute.

Although the foregoing may correctly state George's current economic status, that is largely a self-imposed status. He possesses a commercial driver's license (CDL) with special provision to haul hazardous wastes, has a real estate license, insurance adjuster training, computer training, can perform electrical and carpentry work, and his work experience indicates that he can supervise workers and run a petroleum storage facility.

In spite of all of the foregoing, George professes that he has not been able to find employment of any kind, and testified that he has sought employment at only three places in nearly a year, viz. a fast-food restaurant, a convenience store, and a food condiment processing plant. While we do not profess to understand why he has permitted this to occur, it is apparent that George's current economic distress is almost totally the result of his utter failure to attempt to secure meaningful (and lawful) employment for the last eight years. We will not find that he has an excuse for his current predicament due to his criminal record because his 21-month incarceration was the product of his own criminal misbehavior. The fact is that he has done nothing of a meaningful nature to attempt to obtain employment, and we will not reward this behavior on his part by according to him, as he suggests, an earning capacity only slightly in excess of the minimum wage. For us to do so, George will have to demonstrate a credible and bona fide effort to secure employment that is commensurate with his work experience, training, licensing, and background, and an inability to find such employment despite his best efforts to do so. He has not done so to our satisfaction. We note, for instance, that he apparently is claiming that he cannot even travel to places where employment might be available due to a lack of transportation, yet he received \$3,700.00 in November from Susan in connection with their divorce proceeding which would have been available to purchase a used car or other transportation.

We think a more realistic approach to this matter is to note that numerous commercial truck driving jobs are available in this area that pay \$12.50 per hour to start, and to find this to be his gross earning capacity. With estimated deductions of 20%, we find his net weekly

earning capacity to be \$400.00 ($\$12.50 - 2.50 = 10.00/\text{hour} \times 40 \text{ hr/wk} = \400.00), or \$1720.00 per month (4.3 weeks).

As we think was aptly pointed out by Susan's counsel, Susan is employed full-time and, in addition thereto, has a part-time position with the Naval Reserves while being the primary custodian as a single parent for two children. We hardly think it is inequitable to accord to George the ability to at least work at one full-time job to become both self sufficient, and to be capable of maintaining his co-equal obligation of support to the parties' children.

In *Bowser v. Bowser*, F.R. 1994-487 decided January 15, 1996, we established the methodology for computing the parties' obligations where the proceeding is for both APL and child support, which we will apply to the facts as we have found them in the instant case, by applying Pa.R.C.P. No. 1910.16-5(j):

1. APL calculation: A. Susan's income/mo. - \$3,220.00
 - B. George's earning capacity/mo. - \$1,720.00
 - C. Difference - \$1,500.00
 - D. Multiply x 30% = 30
 - E. APL \$ 450.00

2. Re-compute spouses' incomes from above calculation

A. Susan	- \$3,220.00
Less	<u>450.00</u>
Net	\$2,770.00

B. George	- \$1,720.00
Plus	<u>450.00</u>
Net	\$2,170.00

3. Calculate George's child support obligation from the figures in step 2.

	Susan	George
A. Income (net/mo.)	\$2,770.00	\$2,170.00
B. Total income	\$4,940.00	
C. Proportionate Expenditure	23.2%	
D. Basic child support (BxC)	\$1,146.08	

E. A divided D	56.1%	43.9%
F. Support obligation (ExD)	642.95	503.13
G. Add 1/2 of child care-annualized	<u>62.50</u>	<u>62.50</u>
H. Total of F+G	705.45	565.63

4. Deduct George's child support obligation (\$565.63) to Susan from Susan's APL obligation (\$450.00) to George = George's net obligation to Susan - \$115.63/month.

As noted in Pa.R.C.P. No. 1910.17, the effective date of the support order generally is to be the same date as the filing of the complaint, i.e. September 28, 1995, and we will therefore make the order effective as of that date.

ORDER OF COURT

NOW, February 21, 1996, following hearing and submission of briefs, the Court hereby finds, orders, and decrees as follows:

1. Plaintiff, George H. Pape, Sr., owes a duty of support to his minor children, George H. Pape, Jr., born September 21, 1981, and Leanne F. Pape, born July 14, 1984;

2. Defendant Susan S. Pape is obligated to pay alimony pendente lite to plaintiff George H. Pape, Sr.;

3. The plaintiff shall pay to the defendant a sum equivalent to \$565.50 per month, plus 50 cent service charge for the above child support obligation;

4. The defendant shall pay to the plaintiff a sum equivalent to \$450.00 per month, plus 50 cent service charge for the above alimony pendente lite obligation;

5. The net obligation resulting from the foregoing, i.e. the monthly equivalent of \$115.63 per month, plus 50 cent service charge, shall be paid by plaintiff to defendant via the collection officer of this Court, effective Monday, October 2, 1995, and the first Monday of each month thereafter until further order of the Court'

6. As it appears that defendant has made a payment of \$400.00 under the prior order entered in this matter, plaintiff shall pay an

additional sum of \$20.00 per month via the collection officer of the Court to reimburse defendant therefor;

7. Accrued arrearages will be paid at a rate of \$20.00 per month until fully paid.

8. Plaintiff will be required to complete and return to the Domestic Relations Office two work search forms per week until he obtains full-time employment. He will be responsible for obtaining the forms, and will be required to notify in writing the Domestic Relations Office of the name and address of his employer upon obtaining employment.

9. Plaintiff and defendant are hereby notified:

A. You are under a continuing obligation to inform the Domestic Relations Section and the other party in writing within seven (7) days of any material change in circumstances relevant to the level of support or 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.

B. Any party who wilfully fails to inform the Domestic Relations Section of the required information may be found in contempt of Court and may be punished by jail, fine or probation.

10. Costs of this proceeding to be paid by plaintiff within thirty (30) days.

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