

Dillon v. Brallier

CHERYL K. DILLON, Plaintiff,
v. JOHN L. BRALLIER, III, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Domestic Relations Section
Civil Action - Law, No. 1999-771

Child support; Parent's inability to work; Contribution toward private school tuition;

Health Care Reimbursement

1. Based upon the testimony of Mother and a Memorandum from her physician, Mother met her burden of proof and established that she is currently unable to work. Father produced no credible evidence regarding the current state of Mother's health, therefore there was insufficient to rebut Cheryl's claim that she is currently disabled and unable to work.
2. Mother's current inability to work justifies ascribing to her an earning capacity of zero.
3. Apportioning reimbursement for medical expenses according to the parties' net incomes is excessive where Mother has no income, Father would thereby pay 100% of the costs, Father incurs out-of-pocket expenses for health care coverage, and Mother testified that Father should not have to pay 100% of the unreimbursed costs.
4. If the court determines that private school tuition is reasonable, "the expense thereof **shall be allocated** between the parties in proportion to their net incomes."
5. In determining whether private school tuition is reasonable under the circumstances of a given case, the court should determine "... whether the cost of private schooling is a reasonable need of the child and a reasonable expectation and expense of the parents. In determining if the need is reasonable, the court must determine if the child will benefit from private schooling. In addition, the court must determine if private schooling is consistent with the family's standard of living and station in life before the separation."
6. In order to resolve the matter in the fairest manner possible and to determine what is reasonable where Mother has no earning capacity and Father pays substantial sums in child support and health care coverage and reimbursement, the Court may chose to consider the children for purposes of determining the reasonableness of private school tuition.

Appearances:

Eric J. Weisbrod, Esq.

Cheryl K. Dillon, *Plaintiff*

John L. Brallier, III, *Defendant*

OPINION

Walsh, J., December 14, 2004

Background

This is a support appeal. Proceedings were initiated on May 28, 2004, when Plaintiff Cheryl K. Dillon

("Cheryl") filed a Petition for Modification of a support order, which required John Brallier, III ("John"), to pay child support. It appears that three (3) children are the subject of this support order and its appeal: Joshua Brallier ("Joshua"), born January 5, 1987; Jessica Brallier ("Jessica"), born January 7, 1989; and Jennifer Brallier ("Jennifer"), born November 3, 1990. A Domestic Relations Office Conference took place on August 11, 2004, as a result of which the Domestic Relations Office issued a modified Order for Support on that same date. That Order is based upon a determination that Cheryl's monthly net income is zero and John's monthly net income is \$3,396.65. It set monthly support at \$1,187.00^[1] to be paid bi-weekly at the rate of \$547.85 plus \$15.00 in arrearages. The modified Order bore an effective date of May 28, 2004, and as of the hearing, arrearages were set at \$671.97. Among others, the August 11, 2004, Order contains the following two (2) additional provisions:

- a. Unreimbursed medical expenses that exceed \$250.00 annually per child and/or spouse are to be paid as follows: 100% by Defendant and 0% by Plaintiff.
- b. This Order considers that there is a maximum amount on the unreimbursed medical expenses that Defendant is responsible for [sic]. The Plaintiff is responsible for the first \$250.00 per child per year of any unreimbursed medical expenses. The Defendant is only responsible for the remaining expenses not to exceed \$500.00 per child per year.

On August 30, 2004, Cheryl timely filed a Demand for Hearing setting forth her objections to the Order as follows: "There was a \$500.00 cap on medical expenses for my children. They have already exceeded this cap due to asthma and maintenance meds. Justly unfair. Already determined I am disabled! What to do!"

The matter was set down for *de novo* hearing on Wednesday, September 29, 2004, but the Court determined on that day that there was insufficient time to address the claims before the Court. By Order of that date, the matter was set down for hearing on Monday, November 22, 2004, at 1:30 p.m. Both parties appeared on that date without counsel.

Issues Raised by the Parties

At the outset of the hearing, the parties identified the issues for the Court. Petitioner Cheryl identified the following three (3) issues:

1. She questioned the \$500.00 per child per year cap on John's payment of unreimbursed medical expenses.
2. She seeks assistance on private school tuition for Joshua, Jessica and Jennifer with Jessica currently attending Shalom Christian Academy, Joshua currently attending Mercersburg Academy and Jessica currently attending Faust Junior High School in Chambersburg but with a strong desire to attend Mercersburg Academy.
3. She claimed an inability to work.

Respondent John challenges the assertion that Cheryl is unable to work.

At the conclusion of the hearing, both parties confirmed with the Court that we had properly identified their issues and had taken all of the evidence they sought to offer on those issues.^[2]

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Findings of Fact

A. Cheryl Dillon's Inability to Work

1. Cheryl has ulcerative colitis.
2. She has been seen by gastroenterologists both at Chambersburg Hospital and at the Johns Hopkins University Medical Center.
3. In May 2003, Cheryl had her large intestine removed.
4. Thereafter, abscesses reoccurred five times, one of those times resulting in stapling the abscess in order to get it to heal.

5. Cheryl also suffers from osteonecrosis bilaterally of her hips and bilaterally of her knees.
6. As a result of her osteonecrosis, she testified that she is at risk for needing replacements of all four joints.
7. Cheryl testified that she suffers from chronic vomiting and nausea and that she suffers from depression.
8. Cheryl provided some medical documentation in the nature of letters from her healthcare providers establishing her diagnoses of ulcerative colitis, major depression and osteonecrosis.
9. Cheryl produced a July 29, 2004, Memorandum from Susan L. Gearhart, M.D., Assistant Professor of Colorectal Surgery at Johns Hopkins. The report contains the following:

"Ms. Cheryl Dillon has been a patient since February 2003. She has a long standing history of ulcerative colitis and has had multiple surgeries including a total proctocolectomy with ileoanal pouch anastomosis and diverting loop ileostomy, complicated by the development of abscesses, necessitating multiple examinations under anesthesia and drainages, and a reversal of the ileostomy. Ms. Dillon continues to be under close medical supervision.

Ms. Dillon is currently unable to work and will most likely be unable to work for an indefinite period of time."
10. Cheryl testified that she has been hospitalized twelve (12) times in calendar year 2004, at one point for a period of three (3) weeks, from March 2 through March 23, 2004.
11. Cheryl has also been seen at Johns Hopkins University for depression.
12. Cheryl testified that her last periods of gainful employment were in calendar years 2000 and 2001 when she was employed doing bookwork for her current husband's company.
13. Cheryl has carried her burden of establishing that she is currently unable to work, justifying ascribing to her an earning capacity of zero.

B. Cap on Unreimbursed Medical Expenses

14. Each of the parties' children has incurred substantial medical expenses in calendar year 2004.
15. Cheryl testified that medical bills incurred to date on behalf of the children and not reimbursed by medical insurance for calendar year 2004 totaled as follows: \$980.75 for Jennifer; \$1,620.24 for Jessica; and \$930.66 for Joshua.
16. Cheryl produced supporting documentation for those expenses.
17. Pursuant to the August 11, 2004, Order for Support, Cheryl is responsible for the first \$250.00 per child per year of any unreimbursed medical expenses. See I.b. *supra*.
18. As of the date of the hearing, the children's unreimbursed medical expenses for calendar year 2004 totaled \$3,531.65. Of that amount, Cheryl has already paid \$1,787.25, which amount is \$1,037.25 greater than her \$750.00 obligation, which represents \$250.00 per child for unreimbursed medical expenses.
19. Based upon the children's unreimbursed medical expenses through October 2004, extrapolation suggests that the children's unreimbursed medical expenses may total \$4,238.00 by year's end.
20. John testified that he pays \$312.00 per month for health insurance premiums for his children. Annualized, the medical insurance premium he pays for his children is \$3,744.00.
21. Of the \$4,238.00 anticipated unreimbursed medical expenses for calendar year 2004, under the current arrangement, \$1,988.00 will continue to remain unpaid after Cheryl pays the first \$750.00 and after John pays his cap of \$1,500.00.
22. Under the current arrangement, John's expense for medical coverage for his children in calendar year 2004 will not exceed \$5,244.00, which is comprised of his health insurance

premium of \$3,744.00 and his cap obligation of \$1,500.00.

23. Under the current arrangement, Cheryl's likely exposure for calendar year 2004 totals \$2,738.00, which is comprised of the full anticipated unreimbursed medical expenses for 2004 in the amount of \$4,238.00 less John's \$1,500.00 capped contribution.

24. Under the present arrangement, John's exposure for medical-related expenses for 2004 exceeds Cheryl's likely expenses by \$2,506.00 (\$5,244.00 less \$2,738.00).

C. Private School Tuition

25. Jessica is currently attending Shalom Christian Academy and is a student in 10th grade. She would like to continue attending Shalom.

26. Joshua is currently a 12th grade student at Mercersburg Academy and would like to be able to continue attending Mercersburg Academy.

27. Jennifer is currently a 9th grade student at Faust Junior High in Chambersburg and would like to attend Mercersburg Academy.

28. During Joshua's current junior year at Mercersburg, his boarding tuition, exclusive of transportation, books, other supplies and expenses, totals \$32,750.00 annually. He is the beneficiary of grants and loans totaling \$25,020.00. Accordingly, his family's annual contribution to his education at Mercersburg Academy is \$7,730.00.

29. Cheryl testified that she would anticipate the family's expense for Jennifer's attendance at Mercersburg to be less than the family's expense for Joshua, but, in any event, probably not more than the family's expense for Joshua. Cheryl provided no real basis for this belief.

30. Jessica's net tuition at Shalom Christian Academy after consideration of a small scholarship is \$3,520.00 annually.

31. The evidence as to whether the parties' three children attended private schools throughout their educations was not clear. Cheryl testified that the parties' lifestyle during their marriage allowed their children to attend private schools almost exclusively except for very brief periods. John believed there were full years during their marriage when one or more of the children attended public schools (the states of Kansas and Virginia were mentioned), but his testimony surely was not definite.

32. Joshua testified that he believes his educational horizons are far broader at Mercersburg Academy than they are in the public schools in Chambersburg.

33. Jessica testified that when her parents were still married, she attended private school, specifically Corpus Christi from Grades 1-7. She indicated that she had a tough time at Faust Junior High School, but that she is happy to continue attending Shalom Christian Academy.

34. Jennifer testified to interests in law and basketball. She attended private school at Corpus Christi from pre-school through fifth grade. She currently attends Faust Junior High in Chambersburg, but is interested in attending Mercersburg Academy, where Joshua attends.

35. The Court received credible evidence that both Joshua and Jessica are getting good grades in school.

36. Cheryl seeks an Order requiring John to pay private school tuition for Joshua and Jennifer at Mercersburg Academy and for Jessica at Shalom Christian Academy.

37. John testified that he believes public education to be satisfactory for his children.

38. John testified that his estimated incomes were as follows: \$42,000.00 in calendar year 2000; \$40,000.00 in calendar year 2001; and \$52,000.00 anticipated for calendar year 2004.

39. Michael Dillon, Cheryl's current husband, testified that he paid a portion of Jonathan Brallier's ("Jonathan")^[3] tuition at Mercersburg Academy during his junior year and that he paid the family contribution of Jonathan's tuition for Jonathan's senior year at Mercersburg

Academy.

40. Michael Dillon testified that he also paid for Jessica's ninth grade tuition at Shalom Christian Academy.

41. Assuming that the family's contribution to tuition at Mercersburg Academy would be identical for Jennifer and Joshua and further assuming that the family contribution to tuition for Jessica at Shalom Christian Academy and Joshua (and therefore Jessica also) at Mercersburg Academy does not change, the annual expense of sending the three children to private schools exclusive of transportation, books, supplies and other expenses totals \$18,980.00 (\$7,730.00 each for Joshua and Jennifer at Mercersburg Academy and \$3,520.00 for Jessica at Shalom Christian Academy).

Discussion

A. Cheryl Dillon's Inability to Work

Based upon the testimony of Cheryl and the July 29, 2004, Memorandum from Susan L. Gearhart, M.D., Assistant Professor of Colorectal Surgery at Johns Hopkins, Cheryl met her burden of proof, thereby establishing that she is currently unable to work. John testified that Cheryl has in the past been able to work at home for a family related business and he argued that she surely has the ability to earn some minimal income even on a part-time basis. He produced no credible evidence that the current state of her health is even marginally similar to the condition of her health when she was so employed. His evidence was insufficient to rebut Cheryl's claim, supported by medical documentation, that she is currently disabled and unable to work. Her current inability to work justifies ascribing to her an earning capacity of zero, a finding that will have ramifications for the remaining two issues we are asked to address.

B. Cap on Unreimbursed Medical Expenses

Pennsylvania Rule of Civil Procedure 1910.16-6(c) states that unreimbursed medical expenses of the children "shall be allocated in proportion to their [the parties'] respective net incomes." Subsection (2) provides for an annual limitation "when the burden on the obligor would otherwise be excessive." In light of John's out-of-pocket expense for health insurance premiums to cover the children and based upon the Court's calculations of each party's respective share (or likely share) of the children's extrapolated unreimbursed medical expenses, as stated in the Findings of Fact, we believe the burden on John would be excessive if the parties were forced to pay in proportion to their respective incomes, i.e. John would pay 100% and Cheryl would pay 0%. In fact, during her testimony, Cheryl stated she did not believe John should be responsible for all of the unreimbursed medical expenses, but rather 75%, leaving her with the remaining 25%. Because we believe an allocation based upon the respective incomes of the parties would place an excessive burden on John, we hold that the present cap on John's share of the children's unreimbursed medical expenses is fair. John's exposure for unreimbursed medical expenses shall remain capped at \$500 per child. With this cap, John's exposure annually for health insurance costs for his three children is \$5,244 which is comprised of his annual health insurance premium of \$3,744 and his cap of \$1,500 for unreimbursed medical expenses for the three children. Our decision with respect to John's cap on unreimbursed medical expenses is driven, in part, on our decision regarding private school tuition, *infra*.

C. Private School Tuition

In this case, this issue is by far the most difficult. Cheryl would like us to order John to contribute to private school tuition for all three children and the evidence discloses that that cost, annually, with some assumptions, totals just short of \$19,000, excluding transportation, books, supplies and related expenses. John argues that public school educations for his three children are sufficient. The evidence further discloses that [1] John has not recently contributed to the private school tuition for either Joshua or Jessica, [2] Joshua is currently attending 12th grade at Mercersburg Academy and Jessica is attending 10th grade at Shalom Christian Academy, [3] the Cheryl Dillon-Michael Dillon family has paid entirely for the current year's private school tuition for Joshua and for Jessica as well as at least some portion of such expenses in prior school years and [4] Cheryl Dillon has not recently earned any income and is currently unable to work. Moreover, the law provides several other guiding principles.

First, we realize that once we determine that private school tuition is reasonable, "the expense thereof **shall be allocated** between the parties in proportion to their net incomes."

Pa.R.C.P. 1910.16-6(d) (emphasis added). The law leaves us no discretion regarding the allocation of private school tuition. In determining whether private school tuition is reasonable under the circumstances of a given case, the court should apply the following test:

"... [T]he applicable test is whether the cost of private schooling is a reasonable need of the child and a reasonable expectation and expense of the parents. In determining if the need is reasonable, the court must determine if the child will benefit from private schooling. In addition, the court must determine if private schooling is consistent with the family's standard of living and station in life before the separation." (Citation omitted.)

Oxendine v. Burton, 1996 WL 1358460 (Pa. Com. Pl.) 31 Phila. Co. Rptr. 383 (quoting Francis v. Francis, 358 Pa. Super. 391, 396, 517 A.2d 997, 1000 (1986)). Also see Litmans v. Litmans, 673 A.2d 382, 395 (Pa. Super. 1996).

We believe the credible evidence to be that such schooling is a reasonable need of both Joshua and Jessica for reasons that they both articulated during their testimony. See Findings of Fact, nos. 32, 33 and 35. We believe that in both cases the children will benefit from private schooling. Further, we find private schooling to be a reasonable expectation, on the whole, of their parents, even though John testified that he thinks public school is good enough. The children's older brother, Jonathan, enjoyed the benefit of a Mercersburg Academy education. Joshua is currently enrolled there and that speaks volumes about Cheryl's reasonable expectations. The same can be said with respect to Jessica's matriculation at Shalom Christian Academy. We think the credible evidence^[4] establishes that private schooling is consistent with the family's standard of living and station in life before the parties separated. See Finding of Fact no. 31.

In our analysis of what is reasonable in this case, however, we must determine at which point the additional financial burden on John makes the proposition unreasonable. Since Cheryl's net income has been established as zero, we are constrained to find that 100% of the cost of private school tuition determined to be reasonable must be borne by John. Unfortunately for all, Cheryl's argument that John ought to have to "contribute" finds no support in the law.

Also, even though Michael Dillon has apparently contributed or fully underwritten the cost of private school tuition for Joshua and Jessica, he clearly has no legal obligation to do so for his step-children. Commonwealth ex. rel. Travitzky v. Travitzky, 230 Pa. Super. 435, 326 A.2d 883 (1974). At least three of the parties' children (the now graduated and emancipated Jonathan and the currently-enrolled minors, Joshua and Jessica) have been, therefore, the beneficiaries of Michael Dillon's largesse.

In our assessment of reasonableness, we are faced with a troubling choice further complicating this matter: whether this Court should be forced, on the state of this evidentiary record, to pick and choose which of the parties' three children is/are most likely to benefit from private schooling. Because John is required to pay 100% of private school tuition based on the mandate of Pa.R.C.P. 1910.16-6(d), does that mean that we are to order him to pay yet another \$19,000 annually for private school tuition **in addition to** his \$14,250 per year basic child support obligation and his \$5,244 per year medical expense exposure? If we do that, have we reached a reasonable result, or is that amount simply not affordable for John and therefore unreasonable? If we conclude, as we surely are inclined, that \$19,000 is not reasonable for John alone to pay, is the cost for Jessica alone (\$3,520) reasonable? Is the cost for Joshua alone (\$7,730) reasonable? Is the combined private school for Jessica and Joshua (\$11,250) reasonable for John to pay in its entirety?^[5]

In order to resolve the matter in the fairest manner possible, we have chosen to look at the three children separately, rather than as a group, even though the parties did not prioritize for us the relative "needs" of their three children for obtaining private school educations. Sadly, that forces us to draw lines and to risk reaching a result which may be seen as less favorable for one or more of the children than it does for the others. In our effort to achieve an equitable result based on the evidence before us, it may appear that we have been either inequitable or arbitrary, but that certainly is the antithesis of our intentions.^[6]

As to Jennifer, we conclude that we have insufficient evidence to make any determination as to the cost of private school tuition for her at Mercersburg Academy. We are unprepared to make any assumptions as to what that cost may be when Jennifer applies and/or inquires and we are unwilling to rely upon Cheryl's speculation as to the cost of that education as the basis for any sound decision. Cheryl has the burden of producing^[7] evidence of the expense she wishes us to impose on John and she has failed adequately to carry that burden. See 1 West's Pa. Prac., Evidence § 322 (2d ed.) (stating that the party with the burden of production must introduce sufficient evidence on an issue to enable it to go to the

jury; if the party with the burden of production fails to introduce sufficient evidence, the opposing party should receive a favorable legal ruling on that issue).

As to Joshua, we have already found "reasonableness" except for the direct cost of his Mercersburg Academy education, which currently stands at \$7,730 (less transportation, books, supplies and related expenses). We find that it is reasonable for John to pay 100% of that expense and that, though it is a significant additional expense on his anticipated \$52,000 annual income, it is affordable.

As to Jessica, once again we have found "reasonableness" except for the direct cost of her Shalom Christian Academy education, which currently stands at \$3,520. While on its face it does not appear that the dollar amount is extraordinarily high, the question is whether it is reasonable to impose 100% of this burden on John. Under the circumstances, we find that it is not reasonable to do so.

The dollars available to support the three minor children in this case are generated solely by their father; their mother is not working, cannot work, and can contribute nothing - based on her determined net income of zero - to their basic child support, their medical needs or their private school tuition. That is to say, every dollar that goes to support the children comes from their father and that is limited to his annual gross income of about \$52,000. Under those circumstances, we are unwilling to impose upon John an additional obligation to pay 100% of the private school tuition for Jessica. We find this to be an unreasonable demand on his resources.

In reaching this decision, we are mindful that two of the children currently attend private schools and that their father has not contributed to the expenses of those educations. The uncontradicted evidence also establishes Cheryl's husband, Michael Dillon, has paid some or all of those expenses. That is evidence that we choose not to ignore, though we reiterate that Michael Dillon has no such legal obligation and we certainly make no effort to impose such obligation upon him. That reduces our inquiry, therefore, into just how far we are able to stretch John's income; and, based on our understanding of the law, we can apply the law correctly only by considering individually the cost of each child's private school education, which is what we have done.

Neither party presented any form of compromise to the Court regarding private school tuition, nor did either suggest that it was more important for the Court to consider one child's education in preference to another child's education. Cheryl merely asked for each of the children to attend private school and John, in sum, requested that none attend private school. In fairness to the children who stand to benefit from our decision, we have treated their cases individually and as fairly as we believe we are able, though the results may seem disparate.

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Conclusions

1. Cheryl Dillon is currently unable to work and her net income shall be set at zero.
2. John's obligation to pay unreimbursed medical expenses is set at five hundred (\$500.00) per year per child, as in the order of August 11, 2004.
3. John shall pay the expense of Joshua's Mercersburg Academy education not to exceed Seven Thousand Seven Hundred Thirty (\$7,730.00) Dollars annually; he shall make payments to Cheryl, in addition to his basic monthly child support obligation, in the amount of Seven Hundred Seventy Three (\$773) Dollars per month until the total is paid in full.
4. The effective date of this order is May 28, 2004, the date of filing the Petition for Modification.
5. The Domestic Relations Office shall produce a new order and shall establish a correct amount of arrearages.

ORDER OF COURT

December 14, 2004, upon consideration of the record of these proceedings, the testimony and exhibits of the parties, the arguments of the parties and the law, it is ordered that the matter be returned to the Domestic Relations Office for the generation of a new PASCES order consistent with the foregoing opinion.

[1] This is the monthly support amount as determined by application of the guidelines, without deviation. See Pa. R.C.P. 1910.16-3 and 1910.16-4.

[2] We note that Cheryl sought to litigate three issues, not the single issue she noted in her demand for hearing. After the entry of an order following a domestic relations office conference, any party may within ten days after the mailing of the order file a written demand for a hearing before the court. There is no requirement that the party demanding a hearing identify any issues (though any trial judge surely appreciates having issues specified). Pa.R.C.P. 1910.11(f). Moreover, any hearing then conducted by the Court is *de novo*, Pa.R.C.P. 1910.11(i); **each party** is entitled to litigate as if it were the first proceeding. Rebert v. Rebert, 757 A.2d 981 (Pa. Super. 2000), citing Warner v. Pollock, 434 Pa. Super. 551, 644 A.2d 747, 750 (1994). The law requires us to entertain issues raised by a party who has never demanded a hearing. Accordingly, we required both parties to clarify for us precisely which issues they sought to have addressed and we confirmed with them that there were no others.

[3] Jonathan Brallier is a child of Cheryl Dillon and John Brallier, III. He has reached the age of majority and thus is not a subject of this support order.

[4] Cheryl's testimony was more definite and more credible on that point than was John's.

[5] As to the cost of a Mercersburg Academy education for Jennifer, we have only the speculative testimony of her mother that Jennifer's annual private school tuition at Mercersburg Academy would *probably* be about the same as Joshua's.

[6] The Court notes that we are both bound by the law and charged to achieve a just and fair result. Here, those obligations initially appeared at odds and we deliberated at length to reach an equitable result. After much consideration, we believe it is through treating the children individually that we are best able to achieve justice and fairness within the parameters of the law.

[7] The burden of production is defined by Black's Law Dictionary (1996 Pocket ed.) as:

"A party's duty to introduce enough evidence to have a given issue considered by the fact-finder in the case, rather than have the issue be dismissed by the judge in a peremptory ruling, such as a nonsuit or a directed verdict."