

Carbaugh v. Carbaugh

FAITH A. CARBAUGH, Plaintiff, v. MARVIN L. CARBAUGH, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Domestic Relations Section
No. 2005-117

Spousal Support, Income Determination, Earning Capacity, Ability to Work

1. When the evidence from Plaintiff's physician was that Plaintiff "cannot work a full-time schedule that involves any significant physical endurance or physical labor," that "she must work in a clean, air-conditioned environment" and that, in the opinion of the physician, Plaintiff "can work only part-time in a sedentary type job in a clean air-conditioned environment" the physician did not rule out that Plaintiff is currently employable in a part-time capacity.
2. Evidence of Plaintiff's daily activities, the performance of which appear to contradict her claims of work-related limitations, will be considered when evaluating Plaintiff's claims that she is unable to engage in certain activities.

Appearances:

Barbara B. Townsend, Esq., Counsel for Plaintiff

Carol A. Redding, Esq., Counsel for Defendant

OPINION

Walsh, J., November 15, 2005

A. Background

On February 8, 2005, Plaintiff Faith A. Carbaugh ("Faith" or "Plaintiff" or "Mrs. Carbaugh") filed a new Complaint for spousal support against Marvin L. Carbaugh ("Marvin" or "Defendant" or "Mr. Carbaugh"). The Complaint alleges that the parties were married on December 18, 1971 at McConnellsburg, Pennsylvania and that they separated on January 18, 2005. Plaintiff sought only spousal support. By Order dated February 15, 2005, a Domestic Relations Office Conference was set for April 4, 2005.

Following the Domestic Relations Office Conference, the Court issued an administrative Order dated April 4, 2005 in which it ordered Defendant to pay \$236.28 a month payable bi-weekly at the bi-weekly rate of \$109.05 plus \$5.00 toward arrearages and noted an effective date of February 8, 2005. Arrearages were established as a credit of \$663.80. On April 11, 2005, Plaintiff, by her then counsel Michael B. Finucane, Esq., demanded a hearing before a Judge on the issue of spousal support for the reason "that Plaintiff was incorrectly assigned an earning capacity." A *de novo* hearing was set for June 8, 2005 and the parties were ordered to bring to the hearing their Federal Income Tax Returns with W-2's, pay stubs, childcare expense verification and proof of medical coverage. Thereafter, at Defendant's request for a continuance, the matter was rescheduled for July 20, 2005.

On June 13, 2005, Plaintiff's new counsel, Barbara B. Townsend, Esq. petitioned for a special hearing noting that it would be necessary for two doctors to testify by telephone and asserting that the hearing would take approximately an hour and a half. Defendant's counsel filed an Answer not opposing setting the matter down for a special hearing "so long as medical records or other documentation being referred to by such doctors is provided to the Defendant no later than thirty days prior to any scheduled hearing." Defendant's Answer, Paragraph 2. A three-hour time slot was allotted for the hearing. On July 15, 2005, Plaintiff's counsel filed an Amended Statement for Reasons of Appeal identifying the following:

1. Defendant's income is grievously understated.
2. Plaintiff does not currently have an earning capacity as stated for:
 - A. Plaintiff has a combination of medical and psychological handicaps which severely limit her ability to work outside the home.
 - B. Plaintiff takes or did take medication which interferes with her ability to do work from the home.
 - C. A deviation for the cost of the mortgage, homeowner's insurance, insurance and taxes should have been added.

By Order dated July 18, 2005, the matter was set down for a special hearing on September 20, 2005 and the evidentiary hearing happened on that date. Both parties were directed to submit post-hearing memoranda. Only Plaintiff's counsel delivered a post-hearing memo. The matter is now ripe for disposition.

B. Stipulations

Plaintiff's counsel read the following proposed stipulations of fact into the record:

1. Mr. Carbaugh paid \$16.75 bi-weekly for union dues.
2. Mr. Carbaugh pays, as his portion of the medical insurance, \$2,662.14 a year or \$221.86 a month.
3. Mr. and Mrs. Carbaugh own real estate for which there is a monthly mortgage payment of \$549.00.
4. \$25.00 a month is homeowner's insurance and \$131.37 is taxes.
5. Mrs. Carbaugh has testified to \$280.00 co-pay per month on medical.
6. Plaintiff's counsel stipulated that Defendant's Exhibit No. 1 is accurate as to Mr. Carbaugh's paychecks.

Defense counsel agreed to the above stipulations.

C. Findings of Fact

Upon consideration of all of the evidence, we make the following findings of fact:

1. Defendant's gross earnings by September 7, 2005 were \$29,180.70. Defendant's Exhibit No. 1 reflects Mr. Carbaugh had received 18 bi-weekly paychecks by September 7, 2005.
2. Defendant's pay is subject to mandatory retirement of nine (9%) percent of his gross income. Further, Defendant's pay stub from September 7, 2005 shows a year-to-date pension deduction totaling \$2,626.27.
3. By September 7, 2005, Defendant had had deducted from each of his bi-weekly paychecks an average of \$145.90 for pension.
4. Defendant's total pay up to and including his check stub from September 7, 2005 totaled \$27,292.75. Defendant's year-to-date earnings, through that same period, totaled \$29,180.70, of which \$4,360.52 was overtime pay.

5. Defendant's average pay per pay period is \$1,516.26. Considering that there are 26.07 pay periods per year, we determine that Defendant's total pay is \$39,528.90 annually or a gross of \$3294.07 per month.

6. Based upon the pay stubs provided, annualizing and converting to monthly amounts, we find that Defendant has the following monthly deductions which we are required to consider by virtue of Pa.R.C.P. 1910.16-2(c):

a. Federal income taxes	\$374.77
b. State income taxes	\$104.09
c. Local income taxes	\$ 32.94
d. FICA payments	\$246.69
e. Non-voluntary retirement	\$316.98
f. Union dues	\$ 35.90
g. Total monthly deductions	\$1,111.37

7. Defendant's net monthly income after the foregoing deductions is \$2,182.70 (\$3,294.07 minus \$1,111.37).

8. Plaintiff called Dr. Gaudiose to testify and he testified that Plaintiff had chronic asthma, chronic obstructive pulmonary disease and allergies. He believed that Plaintiff could work up to a half time job, but that because of her medications, she should not work in a job involving heavy machinery, or in any situation requiring high intensity focus or high intensity repetitive activities.

9. Dr. Gaudiose testified that Plaintiff could work in a slower paced office answering telephones.

10. Questioned about Plaintiff's prognosis, Dr. Gaudiose testified that based on Plaintiff's chronic obstructive pulmonary disease, he was **not sure** that she will be able to return to full time employment in a vigorous, manual or highly active situation. At least for the next six months or so, there would be a significant limitation in her being able to perform duties that would require a lot of focus and attention, especially in a high paced job.

11. Dr. Gaudiose authenticated a letter dated June 1, 2005 which he authored asserting that "it is my opinion that Faith cannot work a full-time schedule that involves any significant physical endurance or physical labor" and that "she must work in a clean, air-conditioned environment." The letter expressed further that "it is thus, my opinion, that Faith Carbaugh can work only part-time in a sedentary type job in a clean air-conditioned environment." See Plaintiff's Motion for Continuance, Exhibit B-1.

12. Based on his testimony and the tentative nature of his expressed opinion regarding her prognosis, Dr. Gaudiose did not rule out that the Plaintiff is currently employable part-time in some capacity.

13. Further, Defendant's counsel clearly established during cross-examination that Dr. Gaudiose was not familiar with many daily activities of Plaintiff, the performance of which appears to contradict Plaintiff's claims that she is unable to engage in certain activities.

14. Defense counsel further established on cross-examination that Citicorp, where Plaintiff worked for a number of years, is a sedentary, clean, air conditioned, inside work environment.

15. Plaintiff called Molly Collicot, a social worker in the outpatient psychotherapy unit of Summit Behavioral Health. Ms. Collicot testified that Plaintiff had not seen a psychiatrist. Ms. Collicot was not qualified as an expert witness and was unable to answer important questions other than to relate what others had told her.

16. Asked whether, in her opinion, Faith is capable of full time employment at all at this time, Ms. Collicot testified that she "sees nothing in the chart, but Becky and I had conversation in the hall and Becky said she is still depressed and cannot work."

17. During the examination of Ms. Collicot, she was apparently reading through a chart at notes that she had not made; she did not understand some of the abbreviations in the chart which she was reading.

18. Ms. Collicot was not tendered as an expert witness, she was not qualified to testify about those things about which she was questioned, her qualifications to make diagnoses that she claimed to have made was not clear, and any opinions she rendered were not rendered with the requisite degree of professional certainty.

19. Ms. Collicot's testimony had no evidentiary value.

20. Plaintiff has loaned substantial sums of money to her children which are collectible and for which she is collecting occasional monthly payments.

21. Plaintiff's monthly mortgage obligation, including real estate taxes and homeowner's insurance premiums, is \$712.25.

22. The preliminary amount of monthly spousal support is \$642.57.

23. Plaintiff's net income for determination of mortgage adjustment includes her net monthly earning capacity, determined to be \$576.28, and the presumptive amount of spousal support to which she is entitled, \$642.57, thus making her net monthly income \$1218.85. Pa.R.C.P. 1910.16-6(e).

24. Plaintiff's mortgage obligation is 58.4% of her net income. Pa.R.C.P. 1910.16-6(e).

25. If Plaintiff obligee is living in the marital residence and the mortgage payment exceeds 25% of Plaintiff's net income (including amounts of spousal support, APL and child support), the court may direct the Defendant obligor to assume up to 50% of the excess amount as part of the total support award. Pa.R.C.P. 1910.16-6(e).

26. Defendant may be required to assume up to \$203.77 of Plaintiff's monthly mortgage obligation as part of the total support award.

D. Conclusions of Law

1. Defendant's net monthly income is \$2,182.70.

2. Plaintiff is capable of working a part-time sedentary type job in a clean, air-conditioned environment. She will be ascribed an earning capacity of minimum wage at \$5.15 per hour for a total of 30 hours per week, or \$154.50 per week, or \$8,049.45 per year or \$670.79 per month.

3. Plaintiff's net monthly earning capacity, after appropriate deductions, is \$576.28.

4. There shall be no deductions for child care expenses, private school tuition, summer camp, or other needs. Pa.R.C.P. 1910.16-6.

5. The parties' proportional net incomes are 80% for Defendant husband and 20% for Plaintiff wife.

6. Defendant's monthly health insurance premium payment of \$221.86 includes \$46.59 attributable to Plaintiff's portion (20%) and Defendant's monthly support obligation will be reduced by that amount. Pa.R.C.P. 1910.16-6(b)(1) and (4).

7. Unreimbursed medical expenses that exceed \$250.00 annually shall be paid 80% by the Defendant and 20% by the Plaintiff and Plaintiff shall be responsible to pay the first \$250.00 annually upon her own unreimbursed medical expenses. Medical services do not include psychiatric or psychological services.

8. Defendant will be required to assume \$101.88 of Plaintiff's monthly mortgage obligation.

9. The preliminary amount of monthly spousal support, \$642.57, is adjusted as follows: a deduction of \$46.59 for Plaintiff's health insurance premium paid by Defendant and an addition of \$101.88 for Defendant's contribution to Plaintiff's monthly mortgage obligation. Accordingly, Defendant shall pay to the Pennsylvania State Collection and Disbursement Unit the sum of \$697.86 per month, payable biweekly.

10. Plaintiff asks us to credit Defendant with \$1,100 which she claims that he advanced to her and

the final order should so reflect.

11. The effective date of the order shall be the date of filing of the Complaint for Support.

E. Conclusion

Defendant's monthly net income is \$2,182.70. Plaintiff is ascribed a net monthly earning capacity of \$576.28. Forty (40%) percent of the difference is \$642.57, the preliminary amount of monthly spousal support. Defendant obtains a credit for that portion (20%) of the health insurance premium attributable to Plaintiff in the amount of \$46.59. Defendant will have added to his monthly support obligation \$101.88 as his contribution to the mortgage on the marital residence. Defendant will be credited with the \$1,100 advancement Plaintiff asks us to apply and the effective date of the order to be generated shall be February 8, 2005. The Domestic Relations Office will be directed to prepare a new order, to compute current arrearages and to require that Defendant pay \$20 weekly on the arrearages.

ORDER OF COURT

November 15, 2005, after full evidentiary hearing and upon consideration of the evidence, the arguments and submissions of counsel and the law, it is ordered that this matter be remanded to the Domestic Relations Office with direction to prepare a new Final Order for spousal support consistent with the foregoing Opinion and the directions contained therein. The new Final Order is attached hereto. It is further ordered that the Domestic Relations Office serve a copy of this Opinion, this Order and the new Final Order for support upon the parties.