

CRISTEN BAKER, Plaintiff, v. RICHARD RODRIGUEZ, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
No. 2007-492, PACSES Case No. 294109276

Military severance pay as income for child support purposes;
Earning capacity vs. actual income

1. The defendant's support obligation is properly based on his earning capacity, which is higher than his current actual income, where his education and job experience in the military qualify him for employment which will pay that higher salary and such employment is available in the general geographical area where he lives.

2. The defendant's severance pay, which he received after being involuntarily separated from the military after a domestic violence incident, constitutes income for child support purposes under recent dispositive case law.

Appearances:

Janice M. Hawbaker, Esq., Counsel for Plaintiff

Richard Rodriguez, Defendant

OPINION

Herman, J., January 10, 2008

Before the Court is the plaintiff's request for review by hearing *de novo* of a child support Order entered September 21, 2007 which determined the defendant's obligation to pay child support should be based on defendant's income from actual earnings from his current employment. The Court took evidence in the matter at a hearing conducted on December 20, 2007.

The plaintiff's first objection to this Order is that the defendant is under employed and he should be assigned an earning capacity based on his prior military service.

The plaintiff also claims that a severance payment received by the defendant as a result of his involuntary discharge from the military on March 1, 2007 should be included as income available towards payment of his child support. The defendant, of course, maintains that his child support obligation should be based on his actual earnings because he has made an effort to mitigate the decrease in income after discharge from the military by searching for employment equal to that which he held during his military service. He also has taken the position that the severance pay he received in March of 2007 should not count as income for child support purposes because it was identified as marital property in the parties' final divorce decree filed in the state of Texas on July 28, 2006. That decree, pursuant to paragraph 7, directed any severance pay, whether the defendant was voluntarily or involuntarily separated from the military, be divided 25% to the plaintiff and 75% to the defendant. It is the 75% in the amount of \$56,427.32 received by the defendant in September 2007 that the plaintiff claims should be included as income for child support purposes.

Finally the defendant claims he is entitled to \$2,800 credit for payments he made either directly to

the plaintiff or through the state of Texas which were not credited to his required support payments.

We will discuss these issues separately beginning with the issue of earning capacity versus actual income.

Earning Capacity Versus Actual Income

The defendant was, in his own words, involuntarily separated from the Navy after an incident of domestic violence which caused him to be passed over for promotions and unable to receive future promotions. He testified that his intention was to maintain his career in the military if he could continue to be promoted. The plaintiff provided evidence that close to the time of the defendant's separation from the military, his income was approximately \$85,000.00. The defendant disagrees with that to the extent that he argues this amount included allowance for housing and other benefits which were not considered to be part of his base salary by the military and that his actual earnings in the military, without these allowances, was approximately \$52,000.00 per year.

With regard to this issue, the Superior Court of Pennsylvania held in Alexander v. Armstrong, 415 Pa. Super. 263, 609 A.2d 183 (1992) that these types of allowances are income for child support purposes.

The larger issue is whether or not the defendant's income during his service in the Navy should be the measure of his support obligation. He is currently employed as an engineer for the Schindler Elevator Corporation and earns \$70,000.00 per year. He testified that upon his separation from the Navy he conducted an extensive job search in the areas of Washington, D.C., Pennsylvania, Maryland, and West Virginia seeking employment on a supervisory level. According to his testimony he had several interviews for higher paying jobs but did not receive any offers from prospective employers.

The defendant has a Bachelor's Degree from the United States Naval Academy having graduated in 1995. He received a Master's Degree in Mechanical Engineering in 2002. The defendant believes that he was unable to obtain higher paying supervisory level jobs because he did not have experience in the type of quality control engineering required by employers in the manufacturing industry. He is, however, now performing that type of work for his current employer. However, we note, according to evidence presented by the plaintiff marked Exhibit 1 which is a survey conducted by Abbott, Langer Association Surveys of salaries in mechanical engineering, that the primary difference in qualifications between entry level engineers and managers and supervisors is the administration and managerial functions associated with supervising lower level employees. The defendant testified that in addition to his education and training as a mechanical engineer, his main duties in the Navy involved management and supervision of men and equipment. At one point he held the position of an executive officer. It appears that the defendant is in a very good position to meet the academic and management experience requirements as a manager or supervisor in the field of mechanical engineering in private industry. The defendant testified that his decision to choose employment with the Schindler Elevator Corporation was largely based on his desire to be closer to his children. He lives in Gettysburg, Pennsylvania. He testified that he wants to earn a higher salary than he is currently earning and will continue to seek employment at higher levels.

While we commend the defendant's efforts to find employment in a locality which is close to his children, we also find that this location does not pose any significant obstacles to finding employment commensurate with defendant's skill, knowledge and experience.

Mr. Rodriguez has only worked for Schindler Elevator Corporation since March 28, 2007. It is too early in his work experience for the Court to conclude that he cannot rise to managerial level with his current employer or obtain employment with other employers at a higher position. We find that his education and experience in the military qualify him for positions that pay at least \$85,000.00 per year annual salary.

Plaintiff's exhibit 1 which was a salary survey published in December 6, 2006 by Abbott, Langer Association Surveys confirms that the position of quality control manager or engineering supervisor should pay approximately this salary in locations near central Pennsylvania, northern Virginia and Maryland.

The Court will hold the defendant to an earning capacity of \$85,000.00 per year annual salary and directs that the Domestic Relations Section recalculate the defendant's support obligation based on this finding.

The Court will not accept review of this holding any sooner than 12 months from the issuance of the Order recalculating the defendant's support obligation. Either party may petition for review after that time upon substantial changes in circumstances.

The Court has had an opportunity to review written argument from counsel for plaintiff as well as the defendant which argue their respective positions regarding the severance pay provided to the defendant upon his separation from the Navy. After review of relevant case law the Court concludes that the Superior Court's holding in Berry v. Berry, 898 A.2d 1100 (Pa. Super 2006) is dispositive on the issue of whether Mr. Rodriguez's severance pay is income available for child support. Primarily the purpose of severance pay is to replace income that the employee would have earned had he continued in employment, in other words, to lessen the impact of the loss of employment. As we noted previously Mr. Rodriguez testified that his separation from the military was involuntary and he would have continued in his career if he would have been eligible for future promotions. Primarily due to his actions he became ineligible for such promotions. We agree with counsel for plaintiff that simply because the arrangement for distribution of severance pay was dealt with in the parties' Texas divorce decree does not automatically determine that the severance benefit is marital property not available for child support obligation. We find that the severance payment of \$56,427.32 meets the criteria as income available for child support under Berry v. Berry, *supra*.

Credit Toward Arrearage For Direct Payments

The defendant claims he should be awarded credit for direct payments to the plaintiff for which he was not credited in the amount of \$2,800.00. At the hearing held on December 20, 2007 the defendant attempted to provide evidence of payment of this amount to the plaintiff as child support. However this documentation did not support the defendant's claim and even suggested that amounts paid by Domestic Relations in the state of Texas to the plaintiff were not reimbursed by the defendant. Nonetheless, at the hearing, the plaintiff conceded that the defendant was entitled to credit which he had not received by the Franklin County Domestic Relations Section in the amount of \$1,900.00 for November 2007. In addition, the letter containing written argument from counsel for plaintiff dated January 4, 2008 to the Court concedes that the defendant should have an additional credit for \$1,300.00 paid to the plaintiff in September. However, this amount may still be due to the Domestic Relations Section in the state of Texas and, if so, Mr. Rodriguez still has an obligation to reimburse the state of Texas for that amount.

The evidence produced at the hearing, as well as information provided directly to the Court by the defendant after the hearing, does not support the defendant's claim for credit beyond the \$1,900.00 for November of 2007 and \$1,300.00 for September of 2007. We will enter an Order consistent with this decision.

We agree that the record of the hearing shows the last submission by Mr. Rodriguez but does not show any evidence of credit toward these two amounts and the Court will add only those two amounts.

ORDER OF COURT

Now this 10th day of January 2008 in accordance with the attached Opinion, the Court hereby directs the Domestic Relation Section to recalculate the defendant's support obligation based on his earning capacity set at an annual salary of \$85,000.00.

It is further ordered that the severance payment obligation by the defendant post divorce in the amount of \$56,427.32 be included as income available for support and be prorated as additional income over a period of three years.

The defendant is awarded credit for direct payments made to the plaintiff in the amount of \$3,200.00 not previously credited in the Order of September 21, 2007.

The Domestic Relations Section shall give written notice of the entry of this Order, including a copy of this Order, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.