

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DLE, : NO. 91-21,866  
Plaintiff :  
 :  
vs. :  
 : Domestic Relations Section  
JME, SR., :  
Defendant :

OPINION IN SUPPORT OF ORDER OF  
MARCH 5, 2003 IN  
COMPLIANCE WITH RULE 1925(A) OF  
THE RULES OF APPELLATE PROCEDURE

Defendant appeals from this Court's Order dated March 5, 2003, granting in part exceptions filed by Plaintiff to a Family Court Order dated October 1, 2002. The reasons for the Court's Order may be found in the Opinion accompanying that Order but the Court writes separately to address several issues raised by Defendant in his Statement of Matters Complained of on Appeal, filed April 17, 2003.

First, Defendant complains of this Court's assessment of an earning capacity commensurate with Defendant's previous employment, in spite of an adjudication by an unemployment compensation referee that Defendant was entitled to receive unemployment compensation. The Court wishes to point out to Defendant that the standards for the receipt of unemployment compensation and for the assessment of an earning capacity are not the same. Defendant was assessed an earning capacity pursuant to Rule 1910.16-2(d)(1) of the Pennsylvania Rules of Civil Procedure, which indicates that an obligor will not be relieved of his child support obligation by being fired for cause, and also pursuant to Rule 1910.16-2(d)(4) which provides for the assessment of an earning capacity where an obligor willfully fails to obtain appropriate employment. The evidence presented in Family Court had indicated that Defendant was fired from his employment for excessive absence and that he had been receiving

unemployment compensation without making any significant effort to obtain employment. Defendant did not deny the allegation of his supervisor that he was fired for excessive absence. The Court believes this falls squarely within the definition of “fired for cause” contained in the rule. Moreover, failing to seek employment brings him within the purview of subsection (4) of the rule, as well.

Defendant also complains regarding addition of a tax refund, indicating that his tax withholding circumstances are no longer the same. The tax refund was added because had Defendant continued in that employment, upon which his earning capacity was based, he would have received such a refund. The actual circumstances are not relevant, when the obligation is based upon an earning capacity.

Next, Defendant contends this Court should not have vacated that portion of the Family Court order, which retroactively eliminated his contribution to a childcare expense. In so doing, this Court found there was no evidence to indicate that Plaintiff had failed to notify the Domestic Relations Office or Defendant of the termination of her child care expense, and therefore there was no basis upon which to retroactively vacate the contribution. Defendant contends there was no evidence to indicate that Plaintiff did notify the Domestic Relations Office or himself and without such, it should be inferred that she did not. A review of the transcript from the Family Court hearing indicates, however, that there was no mention of the childcare expense at all. Although Defendant indicated in his Petition for Modification that Plaintiff no longer had a childcare expense, it was not mentioned at the hearing. Plaintiff therefore had no reason to address whether or not she notified the Domestic Relations Office or Defendant of the termination of her childcare. Modification of a support order will ordinarily be made as of the date of the petition requesting the modification. Albert v Albert, 707 A.2d 234 (Pa. Super. 1998). Retroactivity may be applied to circumstances where one party fails to notify of a change, and the other party files to modify promptly after learning of the change. Id. No evidence of either lack of notification or of prompt filing was presented at the hearing in Family Court, however, and there was thus no basis for retroactivity.

Finally, Defendant complains regarding the Court’s assessment of an earning capacity to Plaintiff, specifically that although her capacity was based on previous employment, it should

have been based on her immediately previous employment. By way of background, Plaintiff had last worked in a job from which she had been laid off and had not worked for over a year since. She was assessed an earning capacity but the capacity was based on employment held prior to her last job, as it was found that her income at her last job was not representative of her previous employment or educational history. The capacity actually assessed was based upon that employment and educational history. It was also noted in assessing the earning capacity that Plaintiff had been laid off from her employment, rather than having been fired for cause or having voluntarily left such employment. Considering all of the circumstances, the Court believes the earning capacity assessed was appropriate.

Date: May 27, 2003

By The Court,

Dudley N. Anderson, Judge

cc: Christina Dinges, Esq.  
Marc Drier, Esq.  
Gary Weber, Esq.  
Hon. Dudley N. Anderson