

# P E N N S Y L V A N I A LAW WEEKLY

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## **MAKING 'CENTS' OF EARNING CAPACITY**

*Contradiction is the only constant in child support obligation calculations*

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Is a parent's obligation to support a child based upon present earnings or earning capacity? Each time a case is decided and we believe we have guidance, there is yet another case which seems contradictory.

Last month, the Superior Court decided *Grigoruk v. Grigoruk*, PICS Case No. 06-1634 (Pa. Super. Nov. 20, 2006) Bowes, J. (9 pages). In this matter, the parents shared physical custody of two children, ages 12 and 9, and in March 2005, Melissa Grigoruk filed for an upward modification of an existing child support order. She had been earning between \$84,000 and \$101,000 annually as an administrator, primarily in the field of education, and was the chief executive officer of the Greater Lehigh Valley Girl Scout Council, earning approximately \$90,000 annually. She had earned undergraduate, master's and doctoral degrees in education, and was also certified as an elementary and secondary school principal, as a school superintendent and as a reading specialist.

Melissa Grigoruk left her position with the Girl Scouts in March 2004 and was employed as a reading specialist with an annual salary of \$52,000 when she filed for modification. Her severance agreement with the Girl Scouts contained a confidentiality clause and she could not testify as to whether she was discharged for misconduct or whether she voluntarily left her position. The children's father, Michael Grigoruk, of course, asserted that Melissa had been terminated for willful misconduct and therefore should not be awarded an increase in support, arguing she should not be rewarded for willfully reducing her earnings. For purposes of the hearing, the trial court assumed that Melissa had been terminated for cause.

After accepting the reading specialist job, Melissa Grigoruk did not search for any other positions and she testified that the job was less demanding than her prior employment and that it afforded her more time with her children. The trial court found that she should not be assessed earnings commensurate with her earning capacity and that her current earnings would be used instead.

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Michael Grigoruk appealed to the Superior Court, arguing first that the children's mother should be assessed an earning capacity as a school administrator. The Superior Court held that the trial court correctly assessed Melissa Grigoruk's earning capacity based upon her current employment as a reading specialist rather than imposing upon her the much higher earning capacity of when she was an administrator.

Michael also argued that Melissa had an ongoing duty to mitigate her loss of income by continuing to search for a position equal to her prior employment. He stated that her request for modification was premature in that higher paying jobs available to her were advertised subsequent to her securing the reading specialist job and she had an obligation to pursue those higher paying opportunities.

## **Mitigating Reduced Income**

The second argument by the father, that Melissa had an ongoing duty to mitigate income loss, created a case of first impression in Pennsylvania. The Superior Court held that the law does not impose an ongoing duty to mitigate reduced income.

A review of *Samii v. Samii*, 847 A.2d 691 (Pa. Super. 2004), evidences a very different outcome. In *Samii*, the mother and father were both dentists with father being an endodontist and mother an orthodontist. Both parties practiced in Lancaster County. Agnes Samii had filed a petition for modification of child support and the trial court dismissed the petition. The record indicated that mother had earned approximately \$81,000 in 1999 prior to her starting to cut back on her work hours. Agnes finally stopped working in 2002 to stay home full-time with her six-year-old child. In 2001, Hossein Samii earned \$780,000 and in 2002, \$654,402. When Agnes finally stopped working, she proffered that her employment contract contained a covenant not to compete and that she could not find a job close enough to Lancaster to pick up her daughter after school. Further, the nanny who had stayed with the child when mother worked left in May 2000 and mother cut back her hours so that she only worked when the child, Alexa, was at school or at her father's.

Based upon the facts of *Samii*, one would think that because father was earning such a huge income and because the nanny had left and because of mother's employment contract containing a covenant not to compete, that the court would have worked with mother's reduced income. Not so. The Superior Court affirmed the trial court's findings that mother did not carry her burden to prove a change in circumstances based on the increase in father's income, the decrease in her income, and an increase in the child's expenses. Agnes Samii argued that her part-time position as an orthodontist in the Lancaster practice had been terminated because the practice had hired a full-time orthodontist, thereby omitting her position. Because of her covenant not to compete by working within a ten-mile radius and because she asserted that she needed to be available to take care of her child's transportation needs, mother argued that the trial court had committed error in

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assigning her an earning capacity. The child in Samii was six years of age and the children in Grigoruk were ages 9 and 12. Nonetheless, the Samii court decided that because the six-year-old was in school for most of the day, mother could work, and her income together with father's obligation would certainly pay someone to look after the child after school. The language of Samii is almost punitive:

"Finally, it is clear that Mother has not always wanted to be Alexa's full time parent," the Samii court said. "For the first several years of Alexa's life, a nanny cared for her while Mother worked. Mother did not fire the nanny because she desired to care for Alexa herself. On the contrary, she made the decision to stay home only when the nanny left to have a child in May of 2000 and she did not fully retire until the child was almost ready to start school. In August of 2000, three months after the nanny left, Mother cut back her employment hours to correspond to the times that Alexa was either in school or at her Father's. Then when he employers found a replacement in July 2002, she stopped work altogether, despite the fact that Alexa was starting school and would still be at her Father's house at least one weekday each week. Mother has not provided the Court with convincing evidence that she is sincerely committed to her decision to stay home with Alexa."

## **No Reconciliation**

Pennsylvania Rule of Civil Procedure 1910.16-2(d)(1) provides that if a party voluntarily assumes a lower paying job or quits a job or leaves employment or is terminated for cause, there will generally be no effect on the person's support obligation. Pennsylvania Rule of Civil Procedure 1910.16-2(d)(4) provides that if a person fails to obtain appropriate employment that person will be assigned an income equal to the party's earning capacity. The Superior Court in *Ewing v. Ewing*, 843 A.2d 1282 (Pa. Super 2004) stated that if a person is fired for cause, the person must mitigate the earning loss in order to receive a reduction. Yet, in *Grigoruk*, the children's mother practically cut her income in half and, with the Court making the assumption that she was terminated for cause, was not assessed a higher earning capacity and was not required to maintain an ongoing obligation to mitigate damages.

The landmark Superior Court case on earning capacity is *Grimes v. Grimes*, 596 A.2d 240 (Pa. Super. 1991), where the former husband took a lower paying job and filed to reduce his support obligation. The trial court granted the relief and the Superior Court reversed, holding that Timothy Grimes could not reduce his child support obligation voluntarily and secure a decrease in his obligation. The Superior Court there held that a petitioner must first establish that the voluntary change in employment resulting in a reduction was not done to avoid a child support obligation and that a reduction was warranted based on the petitioner's carrying the burden of proving that he or she attempted to mitigate income loss. In 2005, the Superior Court held in *Novinger v. Smith*, 2005 Pa. Super. 278, 880 A.2d 1255 (2005), that a parent seeking a reduction in child support must mitigate lost income and prove the same to the Court.

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The mother in Samii lost her job as an orthodontist and desired to stay home with her six-year-old child. She was not permitted to do so. The mother in Grigoruk was terminated for cause, accepted a job for almost one-half of what she had been earning, desired to stay home with children ages 9 and 12, and was permitted to do so. The father in Kersey v. Jefferson, 2002 Pa. Super. 22, 791 A.2d 419 (2002), sought to reduce a prior Support Order when he terminated his employment to go to medical school. While in medical school, he earned approximately one-half of what he was earning prior to enrollment. The Superior Court did not cut father a break; although the court found that he did not go to medical school to avoid his support obligation, the court nonetheless found that he did not mitigate loss of earnings and assigned him the earning capacity he had prior to medical school. How to reconcile these various Superior Court opinions? One simply cannot. There seems no way to make "cents" of earning capacity versus present earnings. Perhaps the Supreme Court will give us further direction. •