



## 1. Earning Capacity Issues/Mitigating Loss

Amount of awarded support is based largely upon each parties' monthly net income. Pa.R.C.P. 1910.16-2.

Some parties do not maintain employment that is appropriate to their history or ability. The Court can conclude that a party has an "earning capacity" based upon their "age, education, training, health, work experience, earnings history and child care responsibilities" in determining what their potential earning are. Pa.R.C.P. 1910.16-2(d)(4). See also, *Riley v. Foley*, 783 A.2d 807, 811 (Pa. Super. 2001)

In some cases, the facts may purport to show that a person is not meeting their earning potential, when a more indepth review of the facts would indicate otherwise. In *Arbet v. Arbet*, the trial court found that the Wife's actual earnings did equal her earning capacity even though she did not work full time. "While earning additional money as a night shift employee, Mother's week on/week off schedule maximizes her availability to the needs of the children and eliminates the cost of child care during the weeks when she has custody, thus lessening the support obligations of Father." *Arbet v. Arbet*, 863 A.2d 34 (2004) citing *Isralsky v. Isralsky*, 824 A.2d 1178, 1190 (Pa. Super. 2003)

In addition, when a party claims reduction or loss of job thus affecting earning capacity, the Court shall look towards that party's ability to mitigate their earning's change.

In order to "modify a support obligation based upon reduced income, a petitioner must first establish that the voluntary change in employment which resulted in a reduction of income was not made for the purpose of avoiding a child support obligation and secondly, that a reduction in support is warranted based on petitioner;s efforts to



mitigate any income loss. In effect, Petitioner must present evidence as to why he or she voluntarily left the prior employment and also as to why the acceptance of a lower paying job was necessary. Otherwise, for calculation of a support obligation, the petitioner will be considered to have an income equal to his or her earning capacity as defined in the support guidelines.” Bredbenner v. Bredbenner, 2003 WL 22506517 (Pa.Com.Pl.) citing Grimes v. Grimes, 408 Pa. Super. 158, 163, 596 A.2d 240, 242 (1991).

Therefore, you must question the following:

- a. Was the change reasonable under the circumstances?
- b. What was the party’s history of employment?
- c. Did the party seek a comparable paying job?
- d. How quickly did they secure the current job?
- e. Did the party act in bad faith?

The Defendant in Bredbenner did not comply with the prong in Grimes regarding by spending time search for a similarly paying position, the Defendant did find quickly and secure employment and thus was determined to have mitigated his income loss and permitting modification.

## 2. Additional Expenses

A party’s basic support obligation can be adjusted by taking into consideration expenses for child care, health insurance premiums, unreimbursed medical expenses, private school tuition, summer camp, mortgage payment or other costs that the Court deems reasonable under the circumstances. Pa.R.C.P.1910.16-6.



Seeking contribution for expenses can be either at the establishment phase or in any modification request, however, it was the moving party's burden to establish by competent evidence a material and substantial change in expenses from the entry of the last modified order in a future request for an increase based upon additional expenses.

For example, in Samii v. Samii, 847 A.2d 69,

Mother's comparison of her 1999 expenses to her current expenses through use of Plaintiff's Exhibits 9 and 10 is not adequate proof of an increase during the past year. Lacking a schedule of expenses for March of 2002, Mother instead testified that tuition at the child's private school had increased from \$5,000 to \$7,300. The child's horseback riding lessons had increased from once to twice a week, for a cost differential of \$45 per week. Additionally, Alexa now takes swimming lessons three times a week at a cost of \$10 per session and requires a pool membership for \$300 per year. Mother believes that the child requires an additional \$100 per month for clothing. She also claims that the taxes for her New Jersey house had increased, as had the costs of garden care at the Lancaster house, but she was unable to specify the amount of those increases. **Mother presented no documentation for any of the claimed increases and the Court cannot consider vague statements about increases in taxes and gardening costs as competent evidence.** Mother testified that her financial situation was so bad that she had to cut back on lunches out with friends, stop her yoga study and color her hair at home instead of having it done at a salon. (N.T. 69) These relatively minor budgetary restraints do not prove the dire circumstances Mother claims as a result of the increased costs of raising her daughter, and the Court cannot treat them as indicative of serious financial difficulties.

In Samii, the Court questioned the allocation of the minor child's expenses on the schedules submitted by Mother as well as whether certain listed items can be said to be reasonable expenses for the child. Such a division of all of the expenses of the family into equal parts is not permissible. Fitzgerald v. Kemp, 805 A.2d 529 (Pa.Super 2002). As a result of these difficulties, the Court has little, if any, competent evidence before it to indicate that Alexa's expenses have increased materially and substantially, and finds that Mother has not proven a change of circumstances in this regard.



Therefore, in seeking contribution for expense related support for the purposes of child support, it is important to clearly and precisely identify the nature of the expense and the exact cost as it relates to the child or children in question, submitting into evidence the documentation to support each expense.

**3. Each Party Has a Child**

When calculating a child support order and each parent has primary custody of at least one child, the Court shall offset each parties' child support obligation, awarding the difference between the amounts to the obligee. Pa.R.C.P. 1910.16-4(d)

The example provided in the Pennsylvania Rules of Civil Procedure is as follows:

If the parties have three children, one of who resides with Husband and two of whom reside with Wife, and their net incomes are \$1500.00 and \$800.00 respectively, the child support obligation is calculated as followings:

- a. First, Husband owes to Wife the sum of \$508 for her two children;
- b. Second, Wife owes to Husband the sum of \$188.00 for his child;
- c. Third,  $\$508 - \$188 = \$320.00$  payable to Wife from Husband.

However, in the practical application of Rule 1910.16-4(d)(1), when one party is sued for child support and they wish to implicate Rule 1910.16-4(d) seeking an offset, they must file their own complaint for support for the children in their primary custody, thereby putting the other party on notice that they will seek a support order using 1910.16(d).



In Allegheny County, this could be simply by presenting a support intake questionnaire well in advance of the pending hearing seeking child support or by way of a Motion to Consolidate Child Support Issues prior to the hearing.

**4. Consolidating Spousal Support Issues with Child Support Establishment to Offset Child Support Award**

When children are residing with the higher income earning spouse and said spouse sues for child support, the lower income earning, non-custodial parent, can make a claim for spousal support thus offsetting their respective child support calculation.

Pa.R.C.P. 1910.16-4(e).

The example provided by the Pennsylvania Rules of Civil Procedure is as follows: The parties have two children and the non-custodial parent’s monthly net income is \$1000.00 and the custodial parent’s not monthly income if \$2600.00.

- a. First, determine what the custodial parent owes in spousal support to the non-custodial parent using the ‘spousal support without dependent children’ formula.

Ex.     \$2600.00 custodial parent  
       -\$1000.00 non-custodial parent  
       \$1600.00  
              x 40%  
       \$640.00 owed in spousal support to non-custodial parent

- b. Second, recalculate the parties’ income deducting the spousal support payment from the custodial parent and adding it to the non-custodial parent.

Ex.     \$2600 custodial parent     \$1000.00 non-custodial parent



<u>-\$640.00</u>	<u>+\$640.00</u>
\$1960.00	\$1640.00

c. Third, determine the child support with the recalculated incomes:

Ex. \$1960.00 custodial parent  
+\$1640.00 non-custodial parent  
\$3600.00 combined monthly net income

\$1040.00 is the guideline amount

\$468.00 due in child support from the non-custodial parent

d. Fourth, recomputed the support obligation as follows:

Ex. \$640.00 owed by custodial parent in spousal support  
- \$486.00 owed by non-custodial parent in child support  
\$172.00 owed by the custodial parent to the non-custodial parent

The above is applicable, of course, when the parents are separated spouses and the spousal support claim is available to the non-custodial spouse.

However, the practitioner should remember that in the event that the non-custodial spouse cannot claim spousal support due to an entitlement defense argument that may be forth coming from the custodial parent, one should consider the filing of a divorce complaint that would eliminate any spousal support entitlement defenses and provide the non-custodial parent with the alimony pendente lite award to offset the child support obligation.