

**GENERAL PRACTITIONER'S UPDATE  
MAY 2013 SUPPORT UPDATE**

**I. Revisions to Support Procedural Rules:**

**A. Pa. R. Civ. P. 1910.25 Enforcement. Support Order. Contempt Petition.**

Pa. R. Civ. P. 1910.25 was amended effective December 30, 2012, to address the United States Supreme Court's decision in Turner v. Rogers, 131 S. Ct. 2507 (2011). The United States Supreme Court held that "counsel need not automatically be appointed for indigent support obligors facing incarceration in civil contempt proceedings." In this decision, the Court held that the due process requirements of the 14<sup>th</sup> Amendment to the Constitution do not require counsel to be provided where the state provides alternative procedural safeguards, including adequate notice of the importance of the ability to pay, a fair opportunity to present and dispute relevant information, and the court expressly makes findings as to the obligor's ability to pay. The revisions to Rule 1910.25 provided supplemental language to the contempt scheduling order directed toward defendants, including additional notice "You will have the opportunity to disclose income, other financial information, and any relevant personal information at the conference/hearing so the court can determine if you have the ability to pay."

**B. Pa. R. Civ. P. 1910.27 and 1910.29 Form of Support Order (Physician Verification Form).**

Pa. R. Civ. P. 1910.27 was amended to specifically provide that "if a physician has determined that a medical condition affects your ability to earn income, you must obtain a Physician Verification Form from the Domestic Relations Section, sign it, have it completed by your doctor, and bring it with you to the conference."

Pa. R. Civ. P. 1910.29 was revised to provide for the use of Physician Verification Forms in record and non-record proceedings. These revisions direct that if a party properly obtains a Physician Verification Form, it may be considered by the conference officer during non-record proceedings. If a party has received Social Security Disability or Worker's Compensation, a party may submit copies of the determination in lieu of the Physician Verification Form.

In record proceedings, if a party wishes to introduce the Physician Verification Form into evidence, he or she must serve the form on the other party no later than 20 days after the support conference. The other party must object within 10 days of the date of the service. If the party objects, and the physician testifies, the trier of fact has discretion to allocate the costs of the physician's testimony. If there is no objection, the form may be admitted into evidence without the testimony of the physician.

**C. Changes to the Rules to Address Overpayment of Support.**

Effective December 5, 2012, the Pennsylvania Rules of Civil Procedure were amended to address overpayment of support.

Pa. R. Civ. P. 1910.19(g) provides that if there is an overpayment in an amount in excess of two months of the monthly support obligation and a charging order remains in effect, the Domestic Relations Section shall reduce the charging order by 20% or an amount sufficient to retire the overpayment. The parties have the opportunity to contact the Domestic Relations Section within 30 days if they wish to contest the proposed reduction in the charging order.

As previously set forth in the rules, if there was an overpayment and no charging order in effect, the obligor must bring an action within one year of the termination of the charging order and the Domestic Relations Office may schedule a conference in the same manner governing support actions. The Domestic Relations Office may enter an order against the former obligee for the amount of the overpayment in a monthly amount.

## II. Case Law Updates:

### A. Pennsylvania Superior Court Cases.

#### **M.K. v. E.K., 957 MDA 2012 (Non-Precedential Opinion, filed March 20, 2013).**

The issue in M.K. v. E.K. was whether a mother was entitled to child support during a period of time in which she was violation of a child custody order. The custody order provided that the parties were to share physical custody, and in violation of the order, mother retained primary physical custody. Father argued that mother was unjustly enriched during the months in which she violated the custody order and received support.

On June 21, 2010, the trial court entered a support order requiring father to pay \$1,200 per month to mother for support of two children. At that time, mother was exercising primary physical custody of the children. On February 1, 2011, the trial court entered a new custody order where the parties agreed to equally share physical custody of the children. On March 17, 2011, father filed a petition to modify child support based on the shared physical custody order.

At the support hearing, the parties stipulated to their net monthly incomes (which were almost identical) and also stipulated that the February 1, 2011 custody order provided for shared physical custody. Despite the custody order, the parties agreed that the custody order had not been followed and that mother has continued to exercise sole physical custody of the children.

Based upon the fact that mother continued to exercise sole physical custody of the children, the support master refused to eliminate the support order and recommended that father pay \$1,197.87 in support, and an additional \$20 per month in arrears.

Father filed timely exceptions. In the meantime, on January 12, 2012, the parties commenced equal shared physical custody pursuant to the February 1, 2011 custody order. In review of the exceptions, the trial court entered an order denying father's exceptions but modifying the support order. The trial court set father's support obligation to \$0.00 effective January 12, 2012, the day in which the parties actually began sharing physical custody. Despite Mother's violations of the February 1, 2011 custody order, father remained responsible for child support until January 12, 2012.

Father appealed to the Superior Court and argued that mother was unjustly enriched, and that the court should not reward mother for improperly withholding custody and collecting support during that period. It was father's position that the effective date of the \$0.00 support order should have been the date he filed for modification, not January 12, 2012.

In review of father's appeal, the Superior Court stated that the benefit of child support is for the benefit of the child, not the parent. The duty of child support "is absolute, it must be discharged by parents even if it causes them some hardship." The court held that "the children were entitled to the benefit from father's support payments during that period," regardless of mother's contempt of the child custody order. The court reasoned that "mother is not "benefitting" from her improper actions, rather, the children benefitted from the support payments." Mother's contempt of the custody order had no bearing on the support decision which was intended for the welfare of the children. Mother's issues of contempt of a custody order should be addressed in the custody action.

**Wetzel v. Daddario, 945 MDA 2012 (Non-Precedential Decision, February 21, 2013).**

This issue in Wetzel v. Daddario was whether an incarcerated person was entitled to terminate his support arrears due to a reduction in his ability to earn income while in prison.

The defendant in Wetzel v. Daddario was incarcerated, serving a 25-90 year sentence for convictions stemming from a sexual assault. The defendant filed a petition in the trial court requesting to terminate the \$2,320 arrearage for child support. The defendant's basis for terminating this arrearage was the fact that he lost his prison employment, and his monthly income was reduced from \$34 per month to \$8.74 per month. In consideration of defendant's petition, the trial court held in abeyance the collection action pending defendant's ability to earn income. However, disagreed that the arrearages should be terminated.

The defendant appealed, arguing that his arrearages should be terminated. The Superior Court stated that while a modification with respect to arrears is permissible, a trial court may only terminate arrears when "the obligor is unable to pay and there is no prospect that the obligor will be able to pay for the foreseeable future." Where arrears were "incurred prior to the incarceration," the support obligor will be "estopped from benefitting from his incarceration."

The trial court correctly noted that the defendant accrued his arrearages prior to his incarceration and should not benefit therefrom. The defendant's release date is at a minimum, 2031, and may have the ability to satisfy the arrearages while in prison or upon his release.

**Orfield v. Weindel, 2012 PA Super. 135 (2012).**

Among several issues raised on appeal, an issue in Orfield v. Weindel was whether the trial court properly imposed a six month incarceration (with a \$4,244 purge amount) for defendant's contempt of a support order.

In the two years leading up to the trial court contempt proceeding, defendant made one payment of \$10.75 toward his \$300 monthly obligation. This single payment was in spite of the fact that defendant had made money under the table as an auto mechanic and an ice cream truck driver.

At the hearing, defendant testified that although he did not have a job, he could immediately borrow \$1,000. The trial court responded that it was “too little, too late,” and found defendant in contempt and imposed a six month term of incarceration, with a purge amount of \$4,244.

The Superior Court found that the trial court was correct in finding defendant in contempt, however, the trial court failed to consider appellant’s ability to pay the purge amount of \$4,244. The Superior Court cited Hyle v. Hyle, 868 A.2d 601, for the proposition that a trial court will commit an abuse of discretion if the court imposes a purge amount where the defendant did not have the present ability to pay.

In this case, although defendant testified that the limit of his financial resources was \$1,000, the trial court imposed of a \$4,244 purge amount. This was an abuse of discretion.

### **Kimoc v. Jones, 2012 PA Super. 128 (2012).**

The issue in Kimoc v. Jones was whether a custody order, which provided mother sole physical and sole legal custody, was so restrictive as to “effectively terminate” father’s custodial rights such that father no longer owed a duty of child support.

Mother and father were married in February 1993, and the child was born the following year. Throughout the marriage, father verbally and physically abused both mother and the child. Mother and father separated in 2004, and the child lived with mother after the parties separated. Father had no contact with the child for the first year after separation.

In April 2005, mother was awarded primary physical custody and the parties were awarded shared legal custody. Father and the child attempted reunification counseling, but such counseling was unsuccessful and ended after five sessions. Father had no contact with the child between the last unification attempt in 2005 until September 2009. In 2009, father filed a petition to modify custody and to compel reunification therapy. Father and the child attended separate reunification sessions, and in 2010, through the child’s counselor, the child communicated that she was strongly opposed to reunification. In February 2011, the court denied father’s petition to modify custody and determined that mother should be awarded sole legal custody.

In February 2011, father filed a petition to terminate child support. The basis for father’s petition was that the February 2011 custody order effectively “terminated his parental rights to the child,” and an involuntary termination of parental rights extinguishes the duty to pay child support.

In review of father’s argument, the Superior Court stated that “The obligation to support one’s own child does not depend on a parent’s custodial rights,” and the amount of time a parent spends with a child had no bearing on the support obligation. The parent/child relationship is the basis for the duty of child support, and “a parent may not be released from this obligation by the actions of the child. A minor cannot waive [her] right to support. This is so even if [she] renounces the parent and refuses to see him.”

In denying father’s request to terminate his support obligation, the court provided further reasoning that father was the primary cause for the estrangement. During and after the marriage, father verbally and physically abused both mother and the child, and when

recommendations were made to father as to promoting his relationship with the child, he failed to follow those recommendations. “To grant father’s request would offend the goals of child support law and reward father for destroying his relationship with the child.” Therefore, father’s request to terminate his support obligation was properly denied.

## **B. Pennsylvania Trial Court Cases.**

### **Filip v. Filip, 62 Cumb. 104 (Cumberland County C.C.P., February 8, 2013).**

In Filip v. Filip, among other issues, was the issue of whether the obligor, who was residing in the marital residence, was entitled to a downward deviation for paying costs associated with maintaining the marital residence. The trial court identified Pa. R. Civ. P. 1910.16-6(e), that states that if the obligor is occupying a marital residence and the mortgage payment exceeds 25% of the obligor’s monthly net income (less any amount of spousal support), the court “may” make an appropriate downward adjustment in the obligor’s support obligation. In this case, based on the income of the parties and the fact that the support guidelines provided for a spousal support obligation of \$4,445, the obligor was eligible for downward deviation in his monthly obligation.

Although the obligor was eligible for a downward deviation, the trial court refused to deviate from the guideline support amount. The trial court stated that “in the view of the disparity in the parties’ incomes, and defendant’s use of the residence in part for the benefit of a third party of his choosing, a departure from the general principle adopted by the Rules does not seem to the court to be warranted.” The trial court did point out that the defendant was residing in the parties’ six bedroom marital home with his companion, and his companion did not pay rent, nor did she contribute to the aforesaid expenditures related to the property.

### **Feuchtenberger v. Feuchtenberger, No. 207 Support 2009 (Cumberland County C.C.P., May 30, 2012).**

The issue in Feuchtenberger v. Feuchtenberger was the treatment of defendant’s receipt of an inheritance from her grandfather of an annuity with a gross amount of \$165,078, of which \$60,681 was taxable, and a second inheritance in the amount of \$100,000. The trial court cited the case Humphreys v. DeRoss, 790 A.2d 281 (Pa. 2002), for the proposition that the corpus of an inheritance is not “income” within the statutory definition. However, the corpus of an inheritance may be considered when deviating from the support guidelines, and in this matter, the court found that such deviation was appropriate.

### **Tsapla v. Tsapla, 62 Cumb. 65 (Cumberland County C.C.P., January 2, 2013).**

In Tsapla v. Tsapla, the court addressed whether (1) plaintiff had sufficiently proven that she was disabled and (2) the effect of plaintiff’s signature of form I-864 (a form relevant to defendant’s immigration to the United States), in which plaintiff agreed to be financially responsible for defendant.

Regarding the first issue, the trial court found that plaintiff/wife was not disabled. Although plaintiff testified to her physical symptoms and restrictions from lifting, she presented no expert

medical testimony to verify her disability. Furthermore, plaintiff had been denied Social Security Disability benefits. The trial court found that the support master “properly rejected a party’s claim of diminished earning capacity due to [her] medical condition, where the party failed to provide any medical evidence in support of [her] argument.”

Regarding the parties’ second issue, prior to the parties’ marriage, defendant/husband immigrated to the United States. Following the parties’ marriage, plaintiff executed an affidavit (form I-864) that required plaintiff to support defendant at or above 125% of the Federal Poverty Guidelines applicable to the size of the household. The purpose of this form was to facilitate defendant’s/husband’s receipt of permanent resident status in the United States.

The trial court noted that the support master heard testimony regarding wife’s signature of Form I-864 affidavit, but failed to take such form into consideration when preparing the proposed order. The trial court agreed with defendant/husband that wife’s signature on the affidavit warranted consideration as a deviation factor in the award of support.

The trial cited Love v. Love, 33 A.2d 1268 (Pa. Super. 2001), where the Superior Court found the affidavit as relevant evidence to deviate from the support guidelines. The form I-864 affidavit was an “unusual needs and unusual fixed obligations,” which is identified as a permissible deviating factor under Pa. R. Civ. P. 1910.16-5(b). The trial court stated that wife’s “uncontested commitment to support defendant at a minimum amount equal to 125% of the Federal Poverty Guidelines is tantamount to an exceptional circumstance that would warrant a deviation from the guideline amount.” The trial court did not give specific direction as to how the deviation would apply to the support guideline amount, but remanded to the support master to identify the guideline amount and consider the affidavit as an allowable deviation.



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