

## COMMENTARY

### FAMILY LAW

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## Earning Capacity and Its Impact on Support

The Pennsylvania support statute defines earning capacity and outlines the factors a court must consider in applying earning capacity. There are also hundreds of cases in Pennsylvania that discuss earning capacity. But what does it really mean and what is its effect on the final support order? An understanding of earning capacity and its impact on a final support number is an important concept in counseling your client before going to court.

As an attorney, you should be evaluating the necessity of arguing earning capacity before you walk into court. Clients will often feel compelled to argue earning capacity of their estranged spouse without understanding whether it will affect the final numbers or not. If a spouse is only seeking child support, the earning capacity of the dependent spouse will have little to no effect on the final child support number. The guidelines are based on what the payor is earning and the payee's income will have a very insignificant impact on child support. For example, if a spouse argues the dependent spouse can earn \$45,000 gross per year, I might show the client if I run the numbers placing the payee spouse at zero, \$20,000 and \$45,000, the impact may only result in a difference of \$20 per month. Your client must weigh the cost of saving

\$20 per month against the fees your client will spend winning an earning capacity argument.

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Let's say your client is seeking alimony pendente lite. Earning capacity can then be a bigger deal and the client needs to gather some important information to support a low earning capacity. You should always advise your client to obtain a copy of their Social Security earnings record. Not only will the record show the exact earnings of a payee spouse for a given year, but it can be a powerful exhibit if there has been no earnings for a significant period of time. The earnings record also will refresh a client's memory on past work history, number of years worked and the actual earnings for a given year.

Referring to Pa.R.C.P. 1910.16-2(d) (4), numerous factors must be considered in determining earning capacity, including age, education, training, health, work experience, earning his-

tory and child care responsibilities. Don't just walk through the factors, but instead vehemently argue the factors that are in your client's favor and minimize the arguments that will impute a greater earning capacity for your client. Advocacy plays a significant role at this stage of the case and you should be creative in presenting your factors to the court.

Clients will often ask whether they should be employed or start looking for a job before going to court. I will advise the financially dependent spouse to start making applications and try to become employed. The client should keep all records of actual job applications, interviews and responses for court.

Employment can minimize the impact of an earning capacity argument and show the court you are ready to go back to work. If I represent the financially independent spouse, I don't necessarily want the other spouse to look for a job or become employed. If the dependent spouse is not employed, the doors for earning capacity arguments are wide open. I even have had situations where a spouse found job openings for the dependent spouse and I have advised my client to go on the interview. If they don't get the job, they can show the court they aren't employable in that position. If they become employed, then the family will have more money to spend.

Be creative and thoughtful. An earning capacity argument requires a lot of preparation and details. Providing past earning history, job applications and thoughtful arguments comprises one component. Also, showing your client the impact of an earning capacity argument can save the client money in unnecessary litigation. •

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