SUPREME COURT OF PENNSYLVANIA
DOMESTIC RELATIONS PROCEDURAL RULES COMMITTEE

PUBLICATION REPORT

Proposed Amendment of Pa.R.Civ.P. 1910.1, 1910.11, 1910.12, 1910.16-1, 1910.16-2, 1910.16-3, 1910.16-3.1, 1910.16-4, 1910.16-5, 1910.16-6, 1910.16-7, 1910.19, 1910.21, 1910.27, and 1910.29

The Domestic Relations Procedural Rules Committee (Committee) is considering proposing the amendment of Pennsylvania Rules of Civil Procedure 1910.1, 1910.11, 1910.12, 1910.16-1, 1910.16-2, 1910.16-3, 1910.16-3.1, 1910.16-4, 1910.16-5, 1910.16-6, 1910.16-7, 1910.19, 1910.21, 1910.27, and 1910.29 as part of the quadrennial support guidelines review pursuant to 23 Pa.C.S. § 4322(a).

Pennsylvania's support guidelines are subject to review every four years. *See* 23 Pa.C.S. § 4322(a); 45 C.F.R. § 302.56(e). The Committee is tasked with conducting that review. *See* Pa.R.Civ.P. 1910.16.1(e). The Committee is assisted in its review by Jane Venohr, Ph.D., an economist with the Center for Policy research. Dr. Venohr, whose services are contracted through the Pennsylvania Bureau of Child Support Enforcement, has assisted the Committee on several previous reviews.

As more fully discussed in Dr. Venohr's *Review of the Pennsylvania Child Support Guidelines: Updated Schedule and Findings from Analysis of Case File Data* ("Review"), which can be found at: https://www.pacourts.us/courts/supreme-court/committees/rules-committees/domestic-relations-procedural-rules-committee, the guidelines review is intended to assure the continued compliance of Pennsylvania's guidelines with federal requirements and to update the basic child support schedules. The timely review of guidelines is the primary objective of this proposed rulemaking.

As has been the practice in prior reviews, the Committee has incorporated other proposed amendments to the support procedures into the present rulemaking. This approach is intended to avoid piecemeal amendments to the support rules. These other proposed amendments will be discussed by topic in this Publication Report. Notwithstanding the goal of avoiding piecemeal amendments, if a proposed amendment warrants republication or further study following review of comments, it will be decoupled from the proposal so as not to delay submission of amendments related to the guidelines review.

Stylistic Revisions

Readers will notice stylistic revisions proposed throughout the rules. The revisions are not intended to make substantive changes to the rules or their application.

Organizationally, the most significant revision is relocating the commentary consisting of notes and examples interspersed throughout a rule to a Comment following the rule text. As an aside, examples have been updated to reflect the updated guidelines amounts. The historical commentary episodic of rulemaking, often in the form of an "explanatory comment," has been labeled as such and added to the end of the Comment. Other revisions are intended to bring a degree of consistency among the various rules.

Because these stylistic revisions often appear throughout an entire rule, the length of the proposal has increased. The Committee has attempted to limit the use of ellipsis to provide context for the revisions, as well as the proposed amendments.

Guidelines Review

Preliminarily, readers are advised to review Dr. Venohr's report for a more thorough discussion of assumptions and data. The following summarizes the Committee's decisions underlying the guidelines.

When the guidelines were last reviewed, the 5th Betson-Rothbarth study using the Rothbarth methodology (BR5) was adopted. There appeared to be no new studies using more recent expenditure data. A majority of states use a Betson-Rothbarth study and nine other states use the BR-5. Accordingly, the Committee elected to retain the BR5 methodology.

The Committee also elected to retain the current guidelines model using income shares. This model has been traditionally used in Pennsylvania as well as the majority of states.

The existing guidelines reflect October 2020 price levels. The existing self-support reserve of $1,063 is based on the 2020 Federal Poverty Level. The Committee elected to not change the assumptions underlying the current guidelines but to update the guideline numbers to reflect current price levels and to increase the self-support reserve to the 2023 Federal Poverty Level.

An area of potential non-compliance with the federal regulations was identified during the review under Pa.R.Civ.P. 1910.16-2(d)(2)(ii)(B). That rule provides that a party's income reduction due to incarceration is to be considered an involuntary income reduction. *See also* 45 C.F.R. § 302.56(c)(3) (incarceration not to be treated as voluntary unemployment). The rule also contains an exception for when the incarceration is due to support enforcement or a criminal offense in which the party's dependent child or the obligee was the victim. This exception was added in the last guidelines review, based, in part, upon the "unjust or inappropriate" exception in 45 C.F.R. § 302.56(g). The exception was also based, in part, on 23 Pa.C.S. § 4352(a.1), which states: "Effect of incarceration.--Incarceration, except incarceration for nonpayment of support, shall constitute a material

and substantial change in circumstance that may warrant modification or termination of an order of support where the obligor lacks verifiable income or assets sufficient to enforce and collect amounts due." Notably the then-named federal Office of Child Support Enforcement (OCSE) (later renamed the Office of Child Support Services, or OCSS) had proposed a similar regulatory amendment. *See* 85 F.R. 58029-01 (September 17, 2020).

After the Pennsylvania guidelines amendments were adopted, the OCSS withdrew the proposal. *See* 86 F.R. 62502-01 (November 10, 2021). OCSS's withdrawal of the proposal and its previous response to comments at 81 F.R. 93492-01, 93526 (December 20, 2016) suggested that the exception in Pa.R.Civ.P. 1910.16-2(d)(2)(ii)(B) should be eliminated. The Committee also took note of guidance provided by the OCSS to another state unambiguously indicating that such incarceration exceptions are not permitted.

Accordingly, the Committee proposes amending Pa.R.Civ.P. 1910.16-2 to add "incarceration" to subdivision (d)(2)(i) (Involuntary Income Reduction) and to rescind subdivision (d)(2)(ii) containing the "exception[s]." Insofar as this amendment and rescission may be inconsistent with 23 Pa.C.S. § 4352(a.2), see Pa.R.Civ.P. 1910.50(7). The Committee notes that Pa.R.Civ.P. 1910.19 concerning support order modification or termination requires the court to consider whether the obligor "has no known income or assets." Pa.R.Civ.P. 1910.19(f)(2). This requirement should operate to permit continuation of a support obligation, notwithstanding the obligor's incarceration, if the obligor has passive income or assets.

Default Orders

In this guidelines review, as in the prior review, it was observed that PACSES did not have the functionality to capture data showing when an order has been entered by default. *See also* 45 C.F.R. § 302.56(h)(2) (requiring analysis of default orders). Alternative methods have been used to gauge defaults. However, such functionality will be added to PACSES and become effective on January 1, 2026.

To support this enhanced functionality, the Committee is proposing the amendment of Pa.R.Civ.P. 1910.1(c) to add a definition of "default order." The phrase would be defined as "a support order entered when a party fails to respond or appear after proper notice." *See also* 23 Pa.C.S. § 4342(e) (requiring a court to enter a default order enforcing support upon a showing that the defendant has been properly served and has not appeared). Corresponding amendments are proposed for Pa.R.Civ.P. 1910.11(b) and Pa.R.Civ.P. 1910.12(b).

The Committee notes that "default" is also used in two rules to denote when an obligor's obligation is overdue. To eliminate the varied use of "default," the Committee proposes to amend the title of Pa.R.Civ.P. 1910.21(f) and the text of Pa.R.Civ.P.

1910.19(h)(6) to change "default" to "overdue," a more frequently used term in the rules with similar meaning. *See also* Pa.R.Civ.P. 1910.1 (defining "overdue support").

"Domestic Relations Section" Name Change

The Domestic Relations Association of Pennsylvania requested that the rules rename the "Domestic Relations Section" to "__ County Child Support Services." The new name was believed to be more intuitive to people seeking their office, especially self-represented parties.

"Domestic Relations Section" is a statutory name. *See, e.g.*, 42 Pa.C.S. § 961. Ordinarily, a request for rulemaking would be predicated on the statute first being amended, but the change from "master" to "hearing officer" required no such precursor. The Committee was receptive of the change but believed mentioning only "child" might suggest that the office does not handle spousal support and alimony *pendente lite*. The Committee proposes the name be modified as: "__ County Child/Spousal Support Services."

To implement this name change throughout the rules would involve amending 26 separate rules. The Committee did not wish to mandate the renaming of offices throughout Pennsylvania. Nor did the Committee wish to include alternative office names throughout the rules. Rather, the Committee proposes to add "Domestic Relations Sections" as a definition in Pa.R.Civ.P. 1910.1(c) and to include "__ County Child/Spousal Support Services" as a synonymous phrase. This would permit, but not mandate, the offices to refer to themselves using the more descriptive name.

Support Conference Documents

The parties are required to bring certain documents to the office conference, *see* Pa.R.Civ.P. 1910.11(c), but there is no rule-based requirement for one party to bring copies for the other party. Absent a rule, there appears to be an inconsistent practice for exchanging documents at the office conference. As a basic matter of due process, the Committee believes that the parties should know what inputs are being used to derive net income to establish the basic child support obligation. Further, a party would be unable to make an informed decision on whether to agree to a support amount or seek further review.

Accordingly, the Committee proposes to amend Pa.R.Civ.P. 1910.11(c) and Pa.R.Civ.P. 1910.27(b) to add a requirement that the parties exchange copies of their documents prior to or at the conference. The documents would be subject to the proponent's inclusion of the Confidential Information Form as required by Section 7.0 of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania*. Further, the Comment to Pa.R.Civ.P. 1910.11(c) also states that, if a party does not

provide a copy, then the other party may inspect or obtain a copy from the conference officer along with the Confidential Information Form. A party who is a victim of domestic violence, sexual assault, stalking, human trafficking, or child abduction and chooses to keep their address out of public records, including on the Confidential Information Form, may apply for an alternate address to keep his or her address out of public records by applying online at this link: Address Confidentiality Program (ACP) | Office of Victim Advocate | Commonwealth of Pennsylvania, or by contacting the Pennsylvania Office of Victim Advocate at 800-563-6399.

Readers should note that the proposed amendment of Pa.R.Civ.P. 1910.27(b) includes providing a copy of the "Advanced Practice Provider's Statement," which required corollary amendment of Pa.R.Civ.P. 1910.29(c)(2)(i)(C). The Statement is discussed elsewhere in this Publication Report.

Voluntary Income Reduction

During the last guidelines review, Pa.R.Civ.P. 1910.16-2(d)(1), concerning voluntary income reduction, was amended. The amendment was intended to preclude a downward adjustment of net income if the party's income reduction was willful for the purpose of reducing the party's support obligation or if the party's income reduction was voluntary. Subdivision (d)(2) was also amended to permit a downward adjustment of net income if the income reduction was involuntary because the party had no control of the employment situation.

The Committee has reconsidered the language of these subdivisions, as amended. Subdivisions (d)(1) and (d)(2) are intended to address income fluctuations from all causes. As such, the subdivisions' language should be reciprocal. Simply stated, subdivision (d)(2) governs when to adjust net income, subject to an exception for normal or temporary earning fluctuations, and subdivision (d)(1) governs when not to adjust net income.

Subdivision (d)(2) contains the primary factor of the income reduction being "involuntary." Synonymous within that factor is the party's "control" over employment stated within that subdivision. The reciprocal to "involuntary" is "voluntary." However, notwithstanding the title of subdivision (d)(1) containing "voluntary," subdivision (d)(1)(i), concerning a party's "willful attempt" does not mention the voluntariness of the act, but rather the intent of the actor.

The Committee proposes amending Pa.R.Civ.P. 1910.16-2(d)(1) to eliminate the "willful attempt" prong and to restate the subdivision with the primary factor of the income reduction being "voluntary." The structure would parallel that of subdivision (d)(2)(i).

The Committee seeks input on whether subdivision (d)(2)(i) concerning involuntary income reduction should specifically address whether terminating employment for a "necessitous and compelling reason" should be treated as an involuntary income reduction. *See also* 43 P.S. § 802(b). Obviously, unemployment compensation is considered as "monthly gross income" for support purposes. Yet, the Committee is contemplating a scenario where a parent is not receiving unemployment compensation but would otherwise have a "necessitous and compelling reason" for not seeking employment. *See, e.g., Beachem v. UCBR*, 760 A.2d 68 (Pa. Cmwlth. 2000) (child needing the emotional and psychological support of a parent may be a "necessitous and compelling reason" to voluntarily terminate employment). One concern may be that determining the entitlement to unemployment compensation may turn a support conference into a "proceeding within a proceeding." Alternatively, the rules could leave the issue a matter of interpretation over whether the party exercised "control" over the situation.

Earning Capacity

As discussed in greater detail in the Committee's Adoption Report accompanying the Court's October 25, 2024 amendment of, *inter alia*, Pa.R.Civ.P. 1910.16-2, see 54 Pa.B. 7348 (November 9, 2024), the titles to subdivisions (d)(1), (d)(2), and (d)(4) were amended to clarify their application. Subdivision (d)(4)'s title was amended to indicate its applicability to initial orders. A residuary question remained whether subdivision (d)(4), which governs earning capacity determinations, might also apply when a party seeks to modify an existing support order.

The Committee concluded that subdivision (d)(4) *may* also apply when a trier-of-fact is considering whether to amend or terminate a support order. Obviously, not every modification petition would require an earning capacity determination. For example, a party's monthly net income may have increased through an indisputable increase wage, as may be reflected in a pay stub. Alternatively, as indicated in Pa.R.Civ.P. 1910.19(a), revised guidelines may result in an amendment without the need for an earning capacity determination.

However, the Committee contemplated that there may be a "material and substantial change in circumstances" based upon a party's earning capacity rather than an external metric such as wages or guideline amount. For example, a party may have obtained a higher occupational certification, completed a training or course of education, or recovered from a medical episode that may have changed a party's earning capacity. Further, there may also be a basis for decreasing a support order through Pa.R.Civ.P. 1910.19. The process for determining that party's earning capacity is through application of Pa.R.Civ.P. 1910.16-2(d)(4).

Accordingly, the Committee proposes the further amendment of Pa.R.Civ.P. 1910.16-2(d)(4) to include modification of an existing order. Correspondingly, the Comment to Pa.R.Civ.P. 1910.29 would be revised to include a reference to Pa.R.Civ.P. 1910.16-2(d)(4).

Additionally, the Committee considered the language in Pa.R.Civ.P. 1910.16-2(d)(4)(i) concerning its application. Related to the proposal to permit application of this rule to modifications, the Committee proposes to insert "or modifying an existing order" to subdivision (d)(4)(i).

As currently indicated, subdivision (d)(4)(i) conditions an earning capacity determination on whether a party has "willfully" failed to obtain or maintain appropriate employment. If so, then an earning capacity determination to impute income is discretionary. "Willfulness" seemingly operates as a precondition to determining an income capacity, which requires a finding of intent. Moreover, if there is such an intent, then application of the rule appears to presuppose the existing of an earning capacity left to the trier-of-fact's determination.

The Committee proposes to eliminate the "willful" condition and to require an earning capacity determination whenever a party has failed to obtain or maintain appropriate employment. If, after considering the factors in subdivision (d)(4)(ii), a party is determined to have no earning capacity, then the earning capacity would be $0.00. Commentary to the rule is proposed to indicate such. This change is intended to assist the trier-of-fact in identifying the factors that may result in a $0.00 earning capacity so that remedial efforts may be considered to address those factors.

The Committee specifically seeks comment on this aspect of Pa.R.Civ.P. 1910.16-2(d)(4)(i), especially from stakeholders that would be conducting the earning determinations.

Allocation of Hypothetical Child Care Expenses

As part of the last review, the Committee recommended the amendment of Pa.R.Civ.P. 1910.16-2(d)(4) governing earning capacity, *i.e.*, income imputation, if a party is unemployed or underemployed. This subdivision contained limits on earning capacity and set forth factors to be considered by the trier-of-fact when determining an earning capacity. The subdivision also required the trier-of-fact to consider child care expenses the party would incur if employed. *See* Pa.R.Civ.P. 1910.16-2(d)(4)(i)(D). This latter requirement was intended to permit those hypothetical child care expenses to be allocated when an earning capacity is imputed.

Pa.R.Civ.P. 1910.16-6(a), governing the allocation of child care expenses, was also amended to add subdivision (a)(1)(ii) indicating that child care expenses "paid" when

imputing an earning capacity may be allocated. This subdivision also contained a cross-reference to Pa.R.Civ.P. 1910.16-2(d)(4)(i)(D).

The intended operation of Pa.R.Civ.P. 1910.16-2(d)(4)(i)(D) and Pa.R.Civ.P. 1910.16-6(a)(1)(ii) concerning the discretionary allocation of hypothetical child care expenses when an earning capacity has been imputed was frustrated with the errant use of "paid" in Pa.R.Civ.P. 1910.16-6(a)(1)(ii). *See, e.g.*, *M.M.F. v. M.F.*, 273 A.3d 1036 (Pa. Super. 2022), *appeal granted in part sub nom. Fiochetta v. Fiochetta*, 283 A.3d 1244 (Pa. 2022), and *appeal dismissed as improvidently granted sub nom. Fiochetta v. Fiochetta*, 300 A.3d 317 (Pa. 2023).

As mentioned, on October 25, 2024, the Court amended Pa.R.Civ.P. 1910.16-2(d)(4)(i)(D) to clarify its purpose of discretionary allocation pursuant to Pa.R.Civ.P. 1910.16-6(a)(1)(ii). Further, the Comment to Pa.R.Civ.P. 1910.16-2 was supplemented to guide the intended application of subdivision (d)(4) and to eliminate the practice of using hypothetical child care expenses to reduce an imputed income. Additional commentary was also intended to foreclose the potential practice of "double counting" hypothetical child care expenses whereby they are used to reduce imputed income *and* are allocated.

To implement what was intended, "that would be" has been added to precede "paid" in Pa.R.Civ.P. 1910.16-6(a)(1)(ii). Further, "for the purpose of discretionary allocation pursuant to Pa.R.Civ.P. 1910.16-6(a)(1)(ii)" was added to Pa.R.Civ.P. 1910.16-2(d)(4)(i)(D) to provide a reciprocal cross-reference.

This guidelines review provided the Committee with the opportunity to study further different approaches towards considering hypothetical child care expenses when determining an earning capacity. To better explain its proposal, the Committee shares its assessment of each considered approach. The first approach was to not consider hypothetical child care expenses at all. The second approach was to "deduct" hypothetical child care expenses from imputed income for the calculation of the basic child support obligation. The third approach was to "allocate" hypothetical child care expenses after calculation of the basic child support obligation.

Regarding the first approach of not considering hypothetical child care expenses at all, to this point, there is no federal requirement to do so. *See* 45 C.F.R. § 302.56(c)(1)(iii). However, the Committee rejected this approach because the base amount of support does not include an amount for child care expenses, and because the calculated amount of imputed income would be less accurate without apportioning these expenses because it does not reflect the expenses that would produce that income. Moreover, the approach was rejected *a fortiori* because Pa.R.Civ.P. 1910.16-2(d)(4) currently requires consideration of hypothetical child care expenses. Further, at the most fundamental level, the approach is capable of producing an absurd result whereby an

earning capacity calculation could impute an income even though hypothetical child care expenses may exceed the imputed income. That result would be untethered from reality because employment would produce a net loss.

Under the second approach, an unemployed or underemployed party's earning capacity is initially determined without consideration of hypothetical child care expense. The combined incomes are used to ascertain the guideline amount. The hypothetical child care expenses are then apportioned between the parties based on income shares. Thereafter, the unemployed or underemployed party's imputed income is reduced by the apportioned amount of the hypothetical child care expenses. The unemployed or underemployed party's income share is then recalculated with the other party's income share being the reciprocal of that calculation. Both income shares are applied to the previously ascertained guideline amount to determine the obligor's basic child support obligation.

For example, Mother has primary custody of the parties' child. Mother's imputed monthly net income is $2,000 and Father's monthly net income is $3,500. At the combined monthly net income of $5,500, the current guideline amount is $1,048. Father's income represents 64% of the parties' combined monthly net income and, correspondingly, Mother's income is 36%. Mother anticipates monthly child care expenses of $1,000. Apportioning the hypothetical child care expenses, Mother would be responsible for 36% or $360. Therefore, Mother's adjusted imputed income is $1,640 ($2,000 - $360). Using the above-approach, Mother's income share based on her adjusted income would be 30% ($1,640/$5,500) and Father's income share would be 70% (100% - 30%). Father's basic child support obligation would be $734 (70% x $1048).

A benefit of the deduction approach is that hypothetical child care expenses are apportioned based on income shares similar to the allocation of actual child care expenses. Drawbacks to this approach include that it (1) overlooks the threshold question of whether the total, unapportioned hypothetical child care expenses exceed whatever income could be earned by the unemployed or underemployed party; and (2) generates the administrative burden of calculating and applying two income shares.

The final, and perhaps the most compelling~~,~~ drawback to the deduction approach is that it uses hypothetical child care expenses to determine a party's share of the basic child support amount. Child care is not included in the basic child support expenses in the guidelines schedule. *See* Review at 65 ("Childcare expenses are excluded [from the schedule] because the actual amount of work-related childcare expenses is considered in the guidelines calculation on a case-by-case basis."). Nor are child care expenses subtracted from gross income when determining net income. *See* Pa.R.Civ.P. 1910.16-2(c). To factor hypothetical child care expenses into an earning capacity, which operates as a surrogate for that party's net income, would result in a potentially unfair result: obligees who are not attributed an earning capacity would receive an allocated share of

the child care expenses they incur, while obligees who are attributed an earning capacity would not. Instead, the obligees with an earning capacity would be required to use their basic child support to pay for child care expenses without receiving a contribution toward those expenses. The Committee determined that this approach was not consonant with Pennsylvania's guidelines.

The Committee recognizes that the deduction approach is neutral because it categorically favors neither the obligor nor obligee. The approach does operate to decrease imputed income for the party with hypothetical child care expenses, which impacts income shares, which impacts the obligor's support obligation. However, Pa.R.Civ.P. 1910.16-2(d)(4) applies to both an unemployed or underemployed obligee, as well as an obligor.

The third approach is to permit allocation of hypothetical child care expenses after the basic child support obligation has been determined using unemployed or underemployed party's earning capacity. This approach does not use hypothetical child care expenses as a factor in determining an earning capacity. It more closely aligns with the process for determining the basic child support obligation and adjusting the obligation when the parties both have actual net income and actual child care expenditures.

For example, Mother has primary custody of the parties' child. Mother's imputed monthly net income is $2,000 and Father's monthly net income is $3,500. At the combined monthly net income of $5,500, the current basic child support obligation is $1,048. Father's income represents 64% of the parties' combined monthly net income and, correspondingly, Mother's income is 36%. Mother anticipates incurring monthly child care expenses of $1,000. Father's basic child support obligation to Mother would be $671 or 64% of $1,048. The hypothetical child care expenses would then be allocated based on the parties' income shares. Father's share of the hypothetical child care expenses would be $640 or 64% of $1,000, for a total child support obligation to Mother of $1,311.

This approach is not without concerns. First, it may incentivize the unemployed or underemployed parent to not work by increasing the amount of support received. Second, it may disincentivize a party from seeking an earning capacity determination of another party. Third, the approach may compel the employed party to compensate the unemployed or under-employed for providing child care if child care expenses are not incurred. Fourth, it does not account for when hypothetical child care expenses exceed an earning capacity.

The Committee acknowledges these concerns but believes they can be ameliorated with the court exercising discretion whether to allocate such hypothetical child care expenses. The Committee believes the discretionary allocation approach to hypothetical child care expenses places the parties in the same position regardless of whether income is earned or imputed. As stated in one jurisdiction: "An important

reason—if not the chief reason—for imputing income to a voluntarily underemployed parent is to goad the parent into full employment by attaching an unpleasant consequence (a mounting child support debt or, in certain cases of shared custody, a reduced child support payment) to continued inaction." *Beaudoin v. Beaudoin*, 24 P.3d 523, 530 (Alaska 2001). If a hypothetical determination of one party's income is intended to prevent that party from avoiding or reducing their obligation to contribute to their child's support, then that determination should not allow the other parent to avoid or reduce their obligation to pay hypothetical child care expenses required to sustain the higher income. It is only fair and logical that these hypotheticals work both ways.

The Committee proposes the amendment of Pa.R.Civ.P. 1910.16-2(d)(4)(i) to require, rather than permit, an earning capacity determination for the imputation of income. If a party has no earning capacity, then that party has an income of $0.00 under this rule. As currently stated, it appears that the entire subdivision is discretionary, which would include subdivision (d)(4)(ii) and the factors used to determine the existence of an earning capacity.

The Committee also proposes revisions to clarify the distinction between "earning capacity" and "imputed income." An unemployed or underemployed parent's earning capacity is determined through this rule. That earning capacity determination is then used to impute (or assign a value to) an income to a parent for the income shares model. This rule is not the sole means of imputing income – income may also be imputed pursuant to Pa.R.Civ.P. 1910.16-2(a) (Monthly Gross Income) and 23 Pa.C.S. § 4302 (defining "income") regardless of the parent's employment status.

Next, the Committee wishes to address the seemingly redundant consideration of hypothetical child care expenses in subdivision (d)(4). More specifically, subdivision (d)(4)(i)(D) requires consideration of hypothetical child care expenses for the purpose of discretionary allocation. Subdivision (d)(4)(ii)(A) requires consideration of child care responsibilities and expenses as a factor.

The Committee discussed the context in which child care responsibilities and expenses should be considered as a factor in determining an earning capacity. The Superior Court has recognized the "nurturing parent doctrine," insofar as it relates to child support cases, as a legal principle providing that a parent with a legitimate reason to stay home with a young child may be excused from contributing financial support and the full earning capacity of that parent need not be considered in calculating child support. *See, e.g., Reinert v. Reinert*, 926 A.2d 539, 543 (Pa. Super. 2007); *Deputy v. Deputy*, No. 2689 EDA 2019 (April 13, 2020) (nonprecedential). However, the Committee questioned whether this analysis is based purely on an economic analysis.

Arguably, the court may assess no earning capacity when it determines that it is in the best interest of a child for a parent to care for that child instead of being employed.

Such a determination is not a strict cost-benefit calculation. A child may have emotional or physical needs requiring the parent's presence in the home even though third party child care is available at a cost less than what the parent could earn. The child's best interest supersedes the income potential.

The purely economic analysis is whether the cost of third party child care is outweighed by the income a parent could receive if fully employed. As expressed previously, it makes no sense for the court to assess an earning capacity if the cost borne of one parent's employment operates to reduce the sum of both parents' income.[1] The Committee concluded that both the best interest analysis and the financial analysis would be employed in assessing a party's earning capacity. Once the earning capacity is determined, the court would then exercise discretion in allocating hypothetical child care expenses needed to generate that earning capacity.

The following commentary is proposed be added to Pa.R.Civ.P. 1910.16-2(d)(4) to provide guidance to the fact finder in determining whether to impute an earning capacity and whether to allocate hypothetical child care expenses:

> Concerning subdivision (d)(4)(ii)(A), the trier-of-fact shall consider an unemployed or underemployed parent's child care responsibilities and expenses when determining that parent's earning capacity. The trier-of-fact should consider whether child care is available and appropriate considering the child's needs. Assuming child care is available and appropriate, the trier-of-fact should next consider the child care expenses that the parent would actually pay if employed. This excludes child care provided at no cost to the parent by a family member or other responsible person. Additionally, any portion of a child care expense that would be eligible for subsidization by a third party or through a government program should not be included. If the unallocated hypothetical child care expenses are equal to or exceed the parent's earning capacity, then no income should be imputed for that parent, e.g., earning capacity is $0.00. If the unallocated hypothetical child care expenses are less than the parent's earning capacity, then the hypothetical child care expenses that would be actually paid by the parent, if employed, may be allocated pursuant to Pa.R.Civ.P. 1910.16-6(a)(1)(ii).

Regarding Pa.R.Civ.P. 1910.16-6, the Committee proposes revising the prefatory language to address a potential inconsistency. First, the prefatory language states that

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[1] The Committee notes that Wisconsin treats the best interest determination and the economic analysis as separate factors when imputing an income based on an earning capacity. *See* Wis. Admin. Code DC § 150.03(3)(j)-(3)(k).

the trier-of-fact *may* allocate additional expenses while subdivision (a)(1)(i) states the trier-of-fact *shall* allocate actual child care expenses. The Committee believes that the use of "may" in the preface is intended to authorize the trier-of-fact to determine whether to allocate those expenses rather than render the allocation discretionary.

The Committee discussed whether to add explicit limits to the allocation of both actual and hypothetical child care expenses pursuant to subdivision (a)(1). The prefatory language ("even if a basic support order is inappropriate") appears to permit allocation of these expenses even if an obligor's monthly net income was below the self-support reserve. Concern was expressed that the expenses should not be allocated to the point of leaving the other party with actual income below the self-support reserve.

Rather than add explicit limits to the allocation of child care expense, the Committee proposes to add language to the Comment indicating that the allocation of additional expenses, which would not be limited to only child care expenses, may be subject to a deviation analysis pursuant to Pa.R.Civ.P. 1910.16-5. An example involving the self-support reserve was included. This approach seemed consonant with the example accompanying Pa.R.Civ.P. 1910.16-7(c) regarding multiple obligations.

The Committee also proposes amending Pa.R.Civ.P. 1910.16-5 to include "additional expenses" as being subject to deviation. *See also* 23 Pa.C.S. § 4322(a) (permitting "allowable deviations for unusual needs, extraordinary expenses and other factors"). The Comment would be revised to include maintaining a self-support reserve as an example of "other relevant and appropriate factors" in subdivision (b)(9).

Readers should note that subdivision (a)(1)(ii) maintains the discretionary allocation of hypothetical child care expenses. The trier-of-fact is not required to allocate these expenses, and any decision on whether to allocate will be reviewed on an abuse of discretion standard based on the facts of each case. While this approach provides "flexibility," the Committee observes that "flexibility" of application invites the development of inconsistent practices within the state. Addressing any inconsistencies that arise may be the subject of future rulemaking.

Finally, the Committee proposes amendment of Pa.R.Civ.P. 1910.16-6(a)(4) to require a written proposal or estimate from a child care service provider for the allocation of hypothetical child care expenses. This amendment is intended to address the need for evidence of such expenses raised in *Morgan v. Morgan*, 99 A.3d 554 (Pa. Super. 2014).

Presumption of Need for Alimony *Pendente Lite* and Spousal Support

A question arose whether the high-income formula applied through Pa.R.Civ.P. 1910.16-3.1(b) is presumed to address the needs of a spouse. The question involves

whether the holding of *Hanrahan v. Bakker*, 186 A.3d 958 (Pa. 2018), which requires a reasonable needs analysis in high income formula child support cases, extends to high income formula alimony *pendente lite* and spousal support cases. In other words, must the spouse justify the formula amount based on need rather than that amount being presumptively necessary.

In an unpublished opinion, the Superior Court has distinguished *Hanrahan* as applying only to child support and not to alimony *pendente lite*. *See Scott v. Hoffman*, 237 A.3d 436, 2020 WL 2299734 at *16-18 (Pa. Super. 2020) (unpublished opinion). However, that opinion predates the 2021 amendment of Pa.R.Civ.P. 1910.16-3.1(a)-(b). With that amendment, subdivision (a)(2)(iii), concerning child support, was titled: "Final Analysis – Reasonable Needs." Subdivision (b)(2), concerning alimony *pendente lite* and spousal support, was merely titled: "Final Analysis." Critically, though, subdivision (b)(2)(iii) was added, which requires the parties to provide expense statements when determining high-income alimony *pendente lite* or spousal support. The trier-of-fact is required to consider the expense statements in addition to the deviation factors in Pa.R.Civ.P. 1910.16-5 and the additional expenses in Pa.R.Civ.P. 1910.16-6. This requirement begs the question of what the additional expense statements are for, other than to consider reasonable needs.

Based upon the language of the subtitles within Pa.R.Civ.P. 1910.16-3.1, the Committee does not believe the 2021 rulemaking was intended to limit the rebuttable presumption of Pa.R.Civ.P. 1910.16-1(d) for high-income alimony *pendente lite* and spousal support cases. Nor does *Hanrahan* so limit the rebuttable presumption as it relates to alimony pendente lite and spousal support.

Accordingly, the Committee proposes to remove the requirement in Pa.R.Civ.P. 1910.16-3.1(b)(2)(iii) that the trier-of-fact consider the parties' expense statements in determining the total spousal support or alimony *pendente lite* obligation to avoid any ambiguity. Expenses in alimony *pendente lite* and spousal support cases should only be used when a party avers unusual needs and expenses that may warrant a deviation from the guidelines pursuant to Pa.R.Civ.P. 1910.16-5 or apportionment of additional expenses pursuant to Pa.R.Civ.P. 1910.16-6, as presently provided under 1910.16-3.1(b)(2)(i) and (ii). Under this proposal, the burden is shifted onto an obligor seeking downward deviation or adjustment or an obligee seeking an upward deviation or adjustment. The Committee also proposes a corollary amendment of Pa.R.Civ.P. 1910.27(c)(2)(A)-(c)(2)(B), which concerns the use and form of expense statements in support proceedings, and Pa.R.Civ.P. 1910.11(c)(2), which concerns the information to be provided and shared at the conference.

Advanced Practice Provider's Statement

A hearsay exception in support actions exists to permit a verified petition, affidavit or document, and a document incorporated by reference in any of them, to be admitted into evidence, provided it would not otherwise be excluded as hearsay if given in person. *See* 23 Pa.C.S. § 4342(f). The document must be admitted under oath by a party or witness to the support action. Pa.R.Civ.P. 1910.29 provides a "Physician's Verification Form" to be used for reporting a party's medical condition. The rule requires that notice of the documents to be admitted be given to the other party prior to the hearing and it sets forth the procedures for raising an objection to the admission of those documents.

The Committee believed that the current form fell short of providing adequate information to the court. The proposed revised form includes the option to select "Fully Disabled," "Partially Disabled," "Able to Work Light Duty Full-Time," or "Able to Work Part-time," as well as the ability to indicate the number of hours per day the individual can work. The Committee also proposed that, in lieu of only allowing physicians to complete the form, "advanced practice providers," including nurse practitioners and physician assistants, should be permitted to complete the form. The term "physician" would be replaced by the name "provider" and the name of the form be revised to "Advanced Practice Provider Verification Form." A proposal was published for comment at 53 Pa.B. 3400 (July 1, 2023). Six comments were received.

Based on the comments, the Committee agreed to: 1) revise the form to include the title of the provider; 2) include psychiatrists and psychologists; 3) replace "verification" with "statement"; and 4) insert an "additional remarks" section in the form. The Committee did not wish for the form to prompt the provider to give an opinion on the patient's ability to work or, given the varying definitions of "disabled," require the provider to opine on the patient's disability but rather prompts the provider to specify the patient's limitations.

Borrowing from the Social Security parameters, the form has been revised to prompt the provider to indicate the patient's ability to engage in various work-related activities. Those activities range from very heavy activity to sedentary activity. Note, "work-related" was used to distinguish between activities of daily living, which have a different meaning.

The Committee now republishes the revised rule as part of the larger proposal.

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The Committee invites all comments, objections, concerns, and suggestions regarding this proposed rulemaking.