

**A SEVERANCE PAYMENT AND DISTRIBUTION OF  
AN ACCRUAL ACCOUNT INCOME FOR SUPPORT  
OR ASSETS FOR EQUITABLE DISTRIBUTION?  
BY DAVID C. SCHANBACHER, ESQ.**

**BERRY V. BERRY**  
**898 A.2d 1100 (Pa. Super. 2006)**

The June 2, 2006 decision of the Pennsylvania Superior Court addresses the significant and often difficult distinction between classification of an income source for support purposes or as an asset for equitable distribution. The decision also focuses on appropriate and non-appropriate deductions of business expenses to determine gross income under Rule 1910.16-2(a)(2) as well as deductions to determine monthly net income under Rule 1910.16-2(c)(1).

Father and mother were married on November 14, 1998 and have two minor children. Father filed for divorce on January 30, 2004 and the divorce and equitable distribution are pending as of the date of this appeal and this Superior Court decision. Mother filed for child and spousal support on May 6, 2004.

In 1983, father began employment with the accounting firm of KPMG, LLP and was made a partner in the firm in 1995. In June 2004, KPMG terminated father's employment. Pursuant to the KPMG By-Laws, father received a severance payment of \$306,250.00, before taxes, which was equal to seven months of his base compensation from the prior year. He also received from KPMG a distribution of the balance of his accrual account which represented income earned in prior periods which had not yet been distributed to him, in the amount of \$109,002.01, before taxes. In July 2004, father secured employment with another accounting firm, Parente Randolph, LLC.

Following a conference before the Domestic Relations Section of the Court of Common Pleas of York County, an Order was entered based upon a net monthly income of \$4,150.33 for mother and a net monthly income of \$39,841.73 for father. As a result of those net monthly incomes, this case was a high income case and both parties submitted expense statements at the conference level which were considered pursuant to *Melzer v. Witsberger*, 505 Pa. 462, 480 A.2d 991 (1984). Following the *Melzer* analysis, the initial Order entered (after the Domestic Relations conference) directed father to pay \$3,153.00 bi-weekly in child support and \$3,968.00 bi-weekly in spousal support. This portion of the initial support order was based on the parties' 2004 incomes. The initial Order further provided for a modification effective January 1, 2005 directing father, at that time, to pay \$3,885.00 bi-weekly in child support and \$1,532.00 bi-weekly in spousal support.

Father filed a demand for a *de novo* hearing from the initial Order and requested a special support hearing. A special support hearing was conducted by the trial court. Mother's contentions at that hearing were that the severance pay and distribution of the accrual account should not be classified as income under 23 Pa.C.S.A. §4302, but should be marital assets subject to equitable distribution. The trial court did not accept the position of mother and ruled that the severance pay and the distribution of the accrual account were income for purposes of determining father's child and spousal support obligations. Consequently, the trial court entered an Order on June 9, 2005 directing father to pay \$1,896.00 bi-weekly in child support and \$3,065.00 bi-weekly in spousal support retroactive to May 13, 2004. The Order further provided effective, January 1, 2005, that father pay \$1,781.00 bi-weekly in child support and \$1,418.00 bi-weekly in spousal support.

Mother appealed the trial court's child support Order raising the following issues.

- A. Inclusion of capital marital assets in excess of \$415,000.00 as income to father to calculate a *Melzer* child support award for the year 2004 only, which resulted in a mere additional \$2,990.00 to mother, the recipient of the *Melzer* child support award, is error when mother requested such capital assets be included in the pending divorce action.

1. Since the purpose of the support guidelines is to benefit the obligee and the children, mother's request to treat a severance payment and a partner accrual account as marital assets should be honored when mother only benefits an additional \$2,990.00 of child support for seven months while losing marital assets in excess of \$415,000.00.
  2. Severance pay of \$306,250.00 and a partner accrual account of \$109,002.01 are clearly capital marital assets; however, if included as income for child support, father will receive a significant windfall since this is a *Melzer* case and double dipping is impermissible.
- B. The child support guidelines do not permit father's net income to be reduced by PAC contributions, loan principal payments, unreimbursed business expenses or optional pension contributions.

Initially the Superior Court focused its analysis on the definition of income under Pennsylvania Statutory Support Law, 23 Pa.C.S.A. §4302, as well as the definition of marital property under 23 Pa.C.S.A. §3501. Turning its focus to the issues mother raised, the court acknowledged the significance of these issues to mother given the prohibition against use of the same income stream as a source for support and an asset for equitable distribution. The Superior Court first addressed mother's argument that the accrual account was a marital asset available for equitable distribution and not income for support purposes. The answer to this issue, centered on the time frame during which the income was earned, specifically, was the income earned during the marriage and prior to separation? The parties disagreed on the date of separation. Father contended it was September 2003 while mother asserted a date of separation of January 30, 2004. Regardless of the parties' respective positions on the date of separation, the record established that the accrual account funds were in father's partnership capital account in 2002 prior to either date of separation asserted by the parties. Consequently, the Superior Court held that the accrual account was money earned during the marriage and subject to equitable distribution. Therefore, the trial court abused its discretion in finding the accrual account was income for support purposes under 23 Pa.C.S.A. §4302.

The Superior Court next addressed mother's argument that the severance payment should be classified as a marital asset and not as income for support purposes. Interestingly, the issue of the classification of the severance payment as income for support or an asset for equitable distribution is one of first impression for the appellate courts of Pennsylvania. Consequently, the Superior Court analyzed decisions from other states on this issue and concluded that the answer to the classification question depended on whether or not the severance pay was intended to replace post-separation earnings as well as the timing of the payment. The answer to this question, in this case, was in the language of the severance agreement as contained within the KPMG By-Laws. Specifically, the By-Laws provided that severance was paid only to "a member who is requested to voluntarily withdraw from the firm..." By Laws of KPMG, LLP, Article XIII requested withdrawal (a). Further, the By-Laws also expressly prohibited the payment of severance to a member who voluntarily left employment. The language from the KPMG By-Laws in addition to the fact that the severance payment was made after the parties' separation when father left employment on June 30, 2004; led the Superior Court to conclude that the severance payment was income under 23 Pa.C.S.A. §4302. Consequently, the Superior Court upheld the trial court's ruling on the severance payment issue despite the fact that the severance payment was calculated, in part, on father's length of service during the marriage. The effect of the holding on this issue meant that mother lost the benefit of a marital asset in the amount of \$306,250.00 in exchange for a far less consequential increase in child support over approximately 7 1/2 months from May 13, 2004 to January 1, 2005.

The last issue the Superior Court dealt with was the deductions from father's income for loan principal payments, unreimbursed business expenses, pension contributions and political action committee (PAC) contributions. The total of these income deductions was \$86,298.00. In addressing this issue, the Superior Court applied a two-step process to arrive at net monthly income for purposes of calculating child support.

The first step under Rule 1910.16-2(a)(2) determines monthly gross income which includes income that is "net income from business". The word *net* applies to the deduction of legitimate business expenses to calculate monthly gross income. The trial court allowed the deduction for mandatory pension contributions to determine gross monthly income in this first step. The Superior Court concluded that the trial court abused its discretion by allowing mandatory pension contributions to be deducted under Rule 1910.16-2(a)(2). Additionally, the Court held that the trial court also abused its discretion by accepting father's expert's conclusions that the deductions for unreimbursed business expenses, PAC contributions and loan principal payments were appropriate business expense deductions without itemization or documentation to support these deductions.

The Superior Court then concluded its analysis of this issue with Rule 1910.16-2(c)(1) which sets forth appropriate deductions to determine net monthly income. This Rule expressly provides for a deduction for mandatory retirement payments. Mother argued that father did not prove the pension contributions were mandatory. However, the Superior Court upheld the trial court's ruling in allowing the pension contributions as deductions in calculating net monthly income. The Superior Court cited to father's expert's testimony that the pension contributions were mandatory and mother did not rebut this expert testimony.

Therefore, the final order of the Superior Court was to vacate the child support order (the spousal support order was interlocutory and non-appealable at the time) and remand to the trial court to recalculate father's income consistent with the Superior Court opinion.

#### **CASE NOTE AUTHOR'S COMMENTS:**

The case for now is a continuing lesson on the significance of classification of an income source (other than from salary or wages) for support and equitable distribution purposes. The key to answering the classification question depends on the timing of as well as the intent and purpose for the payment of the income. Additionally, the Superior Court's analysis of deductions to determine gross and net monthly income is interesting and instructive, particularly in cases where experts are utilized. Both parties have filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. A decision on those Petitions was pending as of the writing of this case note.