THE BALANCING ACT OF IMPUTING INCOME *

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"My husband says he's going to quit his job if he has to pay alimony"[1]. The comment is one matrimonial lawyers all too often hear. We assure the client that the court will not tolerate such behavior and that it will "impute" income in such a case. The client stares at you with a dazed look. You then explain that by imputing income, the court will ascribe an income to this person as if he is working based upon his past earnings. Rarely are the cases this easy.

Company downsizing, job-hopping and career changes are commonplace in today's job marketplace. The days of 30 years of service and a company gold watch are almost extinct. When a person's livelihood changes, it obviously affects the financial structure of a family. The courts have been grappling with the issues of unemployment and underemployment for years in considering both child support and alimony. There is no bright line rule for determining when and how much to impute. This article will attempt to provide the points to be argued for and against imputation of income as well as practical tips to navigate this area of the law. While attorneys have recently complained that guidelines take away our ability to creatively "lawyer" for our clients, the area of imputation of income provides fertile grounds for the opportunity to use your legal talents.

STATUTORY STANDARDS FOR IMPUTATION

Rule 5:6A, Child Support Guidelines states that Appendix IX of these Rules shall be applied when an application to establish or modify support is considered by the court.

[1] Husband is used in this example simply because wives tend to make the complaint more often! Whether it is as a result of husbands making more threats or wives tending to report such facts more frequently is of no moment. The application of law is, in fact, gender neutral.

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Appendix IX-A, "Considerations in the Use of Child Support Guidelines", paragraph 12 entitled Imputing Income to Parents, provides the following:

> The fairness of a child support award resulting from the application of these guidelines, is dependent on the accurate determination of a parent's net income. **If the Court finds that either parent is, without just cause, voluntarily underemployed or unemployed, it shall impute income to that parent.....** (Emphasis added) Pressler, 2005 N.J. Court Rules p. 2516.
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> In applying the above standard, the section provides:
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> In determining whether income should be imputed to a parent and the amount of such income, the court should consider:
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> (1) what the employment status and earning capacity of that parent would have been if the family had remained intact or would have formed,
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> (2) the reason and intent for the voluntary underemployment or unemployment,
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> (3) the availability of other assets that may be used to pay support, and
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> (4) the ages of any children in the parent's household and child-care alternatives. Id. at 2517.

Once the court makes a finding that there is voluntary unemployment or voluntary underemployment, the court is to determine the amount of income to be imputed. The court rule states that income shall be imputed according to the following priorities:

> a. Impute income based on potential employment and earning capacity using the parent's work history, occupational qualifications, educational background, and prevailing job opportunities in the region. The court may impute income based on the parent's former income at that person's usual or former occupation or the average earnings for that occupation as reported by the New Jersey Department of Labor (NJDOL);
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> b. If potential earnings cannot be determined, impute income based on the parent's most recent wage or benefit record (a minimum of two calendar quarters) on file with the NJDOL (note: NJDOL records include wage and benefit income only, and, thus, may differ from the parent's actual income); or

c. if a NJDOL wage or benefit record is not available, impute income based on the full-time employment (40 hours) at the New Jersey minimum wage ($5.15 per hour). Id. at 2516.

Practical Tip #1 The New Jersey Department of Labor has an excellent website at www.state.nj.us/labor.com. The website allows you to research occupational employment and wages throughout the state. It also has tabs for job searches, career explorers and job training. These can be helpful tools in determining when and how income should be imputed. It may also be reviewed before hiring an employment expert to see whether the cost of such experts can be avoided. You can ask the court to take judicial notice of the information obtained from the website under N.J.R.E. 201 by providing prior notice to the court and your adversary. Several recent cases, both published and unpublished have relied upon this information or suggested parties utilize this information absent expert testimony. See, Tash v. Tash, 353 N.J. Super. 94, 99-100 (App. Div. 2002), Greco v. Greco, not approved for publication, Docket No. A-6336-00T5, decided June 7, 2004 and Storey v. Storey, 2004 WL 2871755 (N.J. Super. A.D.)

There is no language in the court rule that mandates the maximum amount of income be imputed. It seems reasonable that the court impute income based on realistic estimates of earning potential. See, Trainor, Basis for Imputing Income for Purpose of Determining Child Support Where Obligor Spouse Is Voluntarily Unemployed or Underemployed, 76 A.L.R.5th 191.

Although the court rule only addresses the issue of child support, the courts have routinely applied the standards for imputing income described above to alimony cases as well. See, Storey v. Storey, supra, Gollan v. Gollan, 344 N.J. Super. 337 (App. Div. 2001), Lynn v. Lynn, 165 N.J. Super. 328 (App. Div. 1979). The courts are faced with the task of

determining whether the payor or payee is voluntarily or involuntarily unemployed or underemployed. There are sixteen different permutations that can be applied to imputation of income.[2] No wonder there is no hard and fast rule to apply. Instead, each matter must be decided on a case-by-case basis.

HOW TO IMPUTE INCOME

Appendix IX-A, Paragraph 12 tells us what income should and should not be included for purposes of calculating child support when imputing income.

> Income of other household members, current spouses, and children shall not be used to impute income to either parent except when determining the other-dependent credit.
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> When imputing income to a parent who is caring for young children, the parent's income share of child-care costs necessary to allow that person to work outside the home shall be deducted from imputed income. Id. at 2517.

Before you seek to impute income for purposes of child support, you should determine your goals in seeking this relief. If the goal to decrease child support payments, then you must determine whether imputing income to the custodial parent will be significant enough to make the application. Generally speaking, in Child Support Guidelines cases, imputation of income to a custodial parent will have little impact on the amount of child support to be paid. It may, however, have a larger impact on any alimony award. On the other hand, imputation of income to the non-custodial parent may make a significant difference in the amount of support to be paid. Often times, the biggest impact concerns the percentage contributions to work-related child-care and unreimbursed medical expenses.

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[2] The different permutations are voluntarily underemployed payor in child support case, involuntarily unemployed payor in child support case, voluntarily unemployed payor in child support case, involuntarily underemployed payor in child support case, etc.

Practical Tip #2 Before making an application to impute income, calculate the child support and alimony using best-case and likely scenarios. Review this with your client to determine whether it is worthwhile making such a case.

To illustrate whether it is cost-effective to your client to seek an imputation of income in the above situation, assume the following:

Husband earns $1000/week gross earnings

Wife is a stay-at-home mother

There are 2 children in elementary school

Work-related child-care would cost $200/week

Husband seeks to impute $300/week income to Wife

Six guideline worksheets were calculated to determine the differences in support as a result of imputation of income and/or actual earnings. The attached worksheets represent the following:

In situations where alimony was not applied:

Worksheet A. Husband pays $238/week with no imputed income.

Worksheet B. Husband pays $217/week with imputed income. The parent's share of work-related child-care was deducted from the imputed income.

If alimony is applied:

Worksheet C. Husband pays $300/week alimony with no imputed income. Net cost[3] to Husband is $359/week.

Worksheet D. Husband pays $180/week alimony with imputed income. Net cost to Husband is $293/week.

[3] In determining "net cost" to Husband, the amount of alimony paid was reduced by the tax savings demonstrated on the worksheet.

If Wife earns $300/week:

Worksheet E. Husband pays $361/week including contribution to work-related child-care.

Worksheet F. Husband pays $180/week alimony, plus child support and contribution to work-related child-care with a net cost of $408/week.

In the above scenario, the Husband pays the most in support if the Wife actually earns the income the Husband seeks to impute. In other words, forcing a custodial parent to work may require the non-custodial parent to contribute more to the support of the family.

Practical Tip #3 Attach the guideline worksheets to demonstrate the significance of your position in an application before the court. Too often, parties argue over this issue, only to learn that it is not cost-effective. The argument is far more compelling when the court knows exactly what is at stake by the imputation. If the amount is insignificant, it may simply defeat the application and be cause for an award of counsel fees.

Caveat: Remember your goal in imputing income. There may be other reasons to seek imputation, i.e. forcing the custodial parent back into the workforce to prevent long-term alimony.

The courts in New Jersey have addressed many types of imputation cases, both in setting the initial support order and in applications seeking modification. The initial determination of support tends to follow the standard set forth in Appendix IX-A; namely, is the person, without just cause, voluntarily underemployed or unemployed. With respect to modification applications, the recent focus seems to be away from voluntary or involuntary underemployment and unemployment and instead motivation of the payor and the effect on the payee.

INVOLUNTARY UNDEREMPLOYMENT OR UNEMPLOYMENT

If a person is found to be involuntarily underemployed or unemployed, the sense is that the person is acting in good faith. Under Appendix IX-A, this would seem to indicate that the courts cannot impute income to the party. Nevertheless, courts often set support based on imputed income because the party is either "temporarily" underemployed or unemployed.

In 1950, the New Jersey Supreme Court in Bonanno v. Bonanno 4 N.J. 268, 275 held that "capacity to earn the support awarded by diligent attention to business – his earning capacity or prospective earnings – are all proper elements for the court's consideration..." in determining support. Mr. Bonanno was collecting unemployment compensation and was seeking a reduction in support. "It has often been held that temporary unemployment is not grounds for modification of support." Gertcher v. Gertcher, 262 N.J. Super. 176, 177 (Ch. Div. 1992).

The philosophy that the courts has followed over the years have been described by Judge Krafte as follows:

> [I]t is not a party's actual employment which is significant but that it is a party's immediate past ability to earn a specific salary and to find employment which will yield an income sufficient to fulfill their obligations which the court must evaluate. One of the strongest indicators of a party's ability to earn is the salary which he or she was recently earning, especially when a party has been unemployed for only a brief period of time. Id.
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> [O]ne cannot find himself in, and choose to remain in, a position where he has diminished or no earning capacity and expect to be relieved of or to be able to ignore the obligations of support to one's family. Arribi v. Arribi, 186 N.J. Super. 116, 118 (Ch. Div. 1982)

It appears that it is only in cases where the reduced earnings are permanent and a result of an involuntary act, will a court rely upon actual earnings and the financial

circumstances of the parties. In the early retirement case of Deegan v. Deegan, 254 N.J. Super. 351 (App. Div. 1992), the court held, "[w]here the change is involuntary, all that is required is an analysis of the alterations in the parties' financial circumstances." At 355.

Practical Tip #4 If a client become involuntarily underemployed or unemployed, make sure he or she retains copies of all termination notices, severance letters, cover letters seeking employment, list of appointments and interviews, job searches and a calendar of daily efforts made to find suitable employment. Notify your adversary immediately and keep the other party informed as to these efforts. Check with the NJDOL to see how many jobs may be available in the particular field.

At some point in time, involuntary unemployment may be considered voluntary underemployment or unemployment. Again, there is no bright line rule that says how much time is reasonable to be unemployed before alternate career choices can reasonably be pursued. This can only be decided on a case-by-case determination.

VOLUNTARY UNDEREMPLOYMENT OR UNEMPLOYMENT

While it is recognized that the court is mandated to impute income in the event of voluntary underemployment or unemployment in child support cases, there are many circumstances in which the issues of whether the party is voluntarily underemployed or unemployed have been addressed. The cases listed below are provided to give some insight into the arguments that have been advanced and how they have been received by the courts.

Stay-at-Home Parents

There is no published case in New Jersey that mandates imputation of income to a custodial parent who chooses to voluntarily stay at home with the children. Before the

court can impute income, there must first be a finding that the parent is voluntarily underemployed or unemployed. Looking at the factors in Appendix IX-A, one of the threshold questions is whether the custodial parent would have sought gainful employment outside the home if the family remained intact. Can it be argued that it is in the best interest of the children that the parent stay home? Is the parent home because it was a mutual decision by the parties or some other reason? Now that the family is separated, are there enough available resources to meet their financial obligations or has it created a situation where returning to the workforce is inevitable? How old are the children and what alternatives are available for child-care and at what cost?

Looking to other jurisdictions, the appellate court in Missouri held that imputation of income to a custodial parent was not an abuse of discretion based on the mother's earning potential. Stanton v. Abbey, 874 S.W. 2d 493 (Mo. Ct. App. E.D. 1994) The court noted that it had never imputed income to a custodial parent who chooses to stay home with minor children, but that it should be reviewed on a case-by-case basis considering such factors as:

1. the age, maturity, health, and number of children in the home;
2. the custodial parent's employment history;
3. the age and health of the custodial parent;
4. the availability of appropriate child-care givers;
5. the relationship between the expense of child-care and the net income of the custodial parent;
6. the cost, if any, for transportation, etc., required for the custodial parent to have imputed income;

7. the custodial parent's motivation of reasons for being at home; and

8. the adequacy of available resources if the custodial parent remains at home.

In the Stanton case, the custodial parent had worked as a physician during the time her four children were born. She had average annual earnings of $100,000. Six months after she remarried, she ceased practicing medicine. The court imputed income to her. While arguing that staying home with your children is a good faith motivation, the court was undoubtedly mindful of the fact that the custodial parent most likely would not have quit her job had she not remarried and had the additional resources of her new spouse.

In Florida, the courts refuse to impute income to custodial parents if it finds that it is necessary for the parent to stay at home with the child. Louisiana has a statute that prohibits imputation to a parent who is "caring for a child of the parties under the age of five." La. Rev. Sat. Ann. Section 9:315:9. West Virginia will not impute income to a custodial parent regardless of parentage under circumstances in which a reasonable similarly-situated parent would have devoted time to care for the children had the family stayed intact or had a household had been formed. Josimovich v. Josimovich, 575 S.E. 2d 633 (W. Va. 2002)

The issue of imputing income to stay-at-home parents has been raised at least twice in New Jersey. In both cases, however, these parents were at home to care for children other than the children for whom child support was sought. In the matter of Thomas v. Thomas, 248 N.J. Super. 33 (Ch. Div. 1991), the trial court ruled that a full-time caregiver to two young children of a subsequent marriage was exonerated from contributing to the support of children from a prior relationship. The court stated, "employment as a mother

and care giver is different in quality from voluntary unemployment. While the latter does not excuse an obligation to support children monetarily, the former does." Id. at 36.

The following year, a similar case was heard. In Bencivenga v. Bencivenga, 254 N.J. Super. 328 (App. Div. 1992), the court specifically stated that it disapproves of the *per se* approach utilized in Thomas holding that the parent's decision to leave gainful employment to care for the children of a second marriage suspends any duty to care for the children of the first. Id. at 332. The court remanded the matter for the trial court to examine all the circumstances of the parties and children including assets, earning capacity, child care alternatives and the possibility of part-time employment. The court provided:

> A parent who voluntarily leaves the world of gainful employment, for however good a reason, does not thereby foreclose inquiry into the need for child support and the responsibility of that parent to supply it. The fact that no court will actually order defendant to go to work does not mean that it cannot impute income to her (citations omitted) and impose a fair obligation to care for her first two children like her obligation to her second two.
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> [I]t may be that a mother's decision to stay home with her new children is made possible by the ample income or resources of her new husband. It seems odd that the benefits of her decision to devote a share of the current family resources to her second family's care could work so much to the disadvantage of her first children. ... We merely point out that such facts should, where present and pertinent, be considered, and might be sufficient to affect the outcome of a custodial parent's effort to secure an order for support. Id.

While Bencivenga disapproves of the application of the rule in Thomas automatically, it did not go so far as suggesting that "employment as a mother and care giver is different in quality from voluntary unemployment" is obsolete or to be disregarded. Would the Thomas court have ruled the same if the non-custodial parent was the father?

The factors in the Stanton, supra, case are probably the best and most concise considerations that should be brought before a court if the issue is raised.

One of the other interesting issues raised, but not addressed in Bencivenga, supra is the relevance of second-family resources. The Appendix IX-A considerations expressly exclude income of other household members except when determining the other dependent credit. If support is calculated utilizing the other dependent credit, should the child-care expenses for the other family be deducted from the parent's income? The Appendix IX-A considerations specifically state that when imputing income, that parent's income share of child-care costs necessary to work outside the home shall be deducted from the imputed income. At least one state has addressed this issue. In Kansas, the courts have specifically provided that there is no deduction for child-care for children other than for whom support is sought. In Matter of Marriage of Milano, 23 Kan. App.2d 858 (1997).

The costs of hypothetical child-care have not been addressed by the courts. Obviously, the amount of child-care would depend on numerous factors, including the type of child-care needed, the hours needed based on the children's school and summer schedules, any transportation expenses associated with child-care and the available resources, among others. Parenthetically, according to the New Jersey Department of Labor Occupational Employment Statistics Wage Survey, child-care workers in the Middlesex, Somerset, Hunterdon County Area have median wages of $18,545. This may be an important factor in determining whether it makes economic sense to impute income.

Practical Tip #5 Gather information locally to determine what child-care services are available consistent with the parent's specific needs. Additional information is available

on-line at www.stte.nj.us/humanservices. Each county has a Unified Child Care Agency to assist parents seeking child-care. They should be contacted and asked to provide all pertinent and up-to-date information concerning available local child care.

Unemployed with Significant Assets

The recent case of Caplan v. Caplan, 364 N.J. Super. 68, 88 (App. Div. 2003) certif. granted 179 N.J. 309 (2004) held that "the issue of imputation of income cannot be avoided by the reality that either party could meet the reasonable needs of the children from their unearned income produced by their assets." At 88. In the Caplan case, the husband, then age 37, was terminated from his job as a mortgage trader where he earned an average $2.8 million in the three years prior to his severance. The trial court found that Mr. Caplan was voluntarily unemployed, but had sufficient assets in which to pay support. In setting support, the trial court relied exclusively on the unearned income from both parties. The appellate division reversed, stating:

> We reach that conclusion because of the necessity that the court *allocate* the reasonable needs of the children between the parties. It would be inequitable to allocate those needs simply based upon an analysis of unearned income, since one or both parents would thereby have the ability to decrease their respective responsibility for the children's needs by simply not working and avoiding imputation-of-income principles. Id.

In Loro v. Colliano, 354 N.J. Super. 212 (App. Div. 2002), the court stated that child support would be based on income rather than net worth. It appears from Caplan that child support will be based upon earned and unearned income. The appellate court in Caplan remanded the matter to the trial court to determine the ability of each parent to earn income. Interestingly, the court reminded the trial court to consider the wife's enhanced responsibilities in caring for a special needs child. Supra at 89.

Appendix IX-B, "Use of the Child Support Guidelines" instructs how to determine income for purposes of utilizing the guidelines. It provides that gross income is all earned and unearned income that is recurring or will increase the income available to the recipient over an extended period of time. It includes, but is not limited to, compensation for services, interest and dividends, annuities or an interest in a trust, net capital gains from the sale of investments or earnings from investments, among others. Does this then require that we *always* include unearned income into the child support equation? The guidelines tell us that "an income source should be included...if it would have been available to pay expenses related to the child if the family would have remained intact or would have formed..." Is there an argument that investment income should only be considered if the parties utilized such income during the marriage? Or is its mere availability enough?

Underemployment

Appendix IX-A specifically mandates imputation of income to a person found to be voluntarily underemployed. Even before the implementation of the guidelines, the court in Mowery v. Mowery, 38 N.J. Super. 92 stated:

> In determining what is a proper amount to be paid for the support of the children, we cannot indulge defendant his fancy that he is unable to do anything in this workaday world but farm labor. This court has every right to appraise realistically defendant's potential earning power.... The choice of employment is his, but he cannot shirk his parental duties toward his children. Id. at 102.

In the well-known case of Lynn v. Lynn, 165 N.J. Super. 328 (App. Div. 1979), the court looked beyond the husband's reduced earnings in determining support despite its finding that his decision to change medical careers was made in good faith and not with the intent of avoiding support obligations. Dr. Lynn made the decision to change medical careers from oncology to psychiatry because he found his line of work too depressing. A

residency in psychiatry would take another three years before he could return to the practice of medicine. While there was some disagreement with his motivation for making a career change, the court accepted Dr. Lynn's position. The court would not, however, allow his significant reduction in income abruptly impact his children. The court reasoned:

> If the family had remained intact and Dr. Lynn altered his life course, we cannot believe that he would have resorted only to his current earnings... for their support over his medical residency. Almost certainly savings and capital would have been invaded during the interim to reinforce earnings and maintain some consistency of lifestyle. One function of savings and capital in ordinary life is the absorption of economic downturns, whether invited or uninvited. Savings and capital are not accumulated solely to provide income. Id. at 341-342.

The court also opined that Mrs. Lynn's assets could be considered since both parents have an obligation to support their children. The court further cautioned, however, that a paramount consideration should be Dr. Lynn's ability to recoup his capital depletion after completing his residency.

In situations with reduced earnings combined with significant assets, the parties' assets should be considered. The standard of what the parties would have done had the marriage stayed intact is instructive. For instance, for involuntarily unemployed high wage earners, as in the Caplan matter, it is presumable that the parties would have utilized some of their assets to meet lifestyle until Mr. Caplan could find a reasonably comparable job.

In the event there are no assets, the court will not provide the supporting parent with as long a period of time to find employment. A parent cannot decide to accept only employment in his or her field and thereby remain unemployed for a considerable amount of time. Arribi v. Arribi, supra. A parent will, however, be granted a reduction in support if he or she can show that the reduction in income was involuntary and new employment was obtained diligently and in good faith. Dorfman v. Dorfman, 315 N.J. Super. 511 (App. Div.

1998). In Dorfman, the former husband lost his job after seventeen years of service, earning approximately $100,000 per year. He immediately sent out resumes, followed through with telephone calls and arranged for interviews. He received one job offer for $40,000, which he declined and later accepted another for $60,000 a year one month after he lost his job. Mr. Dorfman did not make an application to reduce his support obligation until July 1997 because he had received a termination package. The court reversed the trial court's denial of his application for a reduction in support because the lower court had not made a finding that Mr. Dorfman was without just cause, voluntarily underemployed. "Inherent in a finding of 'underemployment' is the notion that the obligor is intentionally failing to earn that which he or she is capable of earning." Id. at 516.

In two recent unreported decisions, the appellate court addressed the right to a reduction in support when an obligor changes careers. In the case of Sherman v. Sherman, Docket No. A-2534-03T, decided October 14, 2004, the court denied the obligor's application to terminate alimony. The obligor stated that he lost his job in May 2003 and received a six-month severance package in return for a covenant not to compete. He then obtained his real estate license and was working strictly on commissions. He further argued that the events of September 11th made him unable to work in New York, which was the only place he could find comparable employment. The appellate court affirmed the trial court's denial of Mr. Sherman's application and found that the obligor was voluntarily underemployed. It should be noted that the application to reduce his support obligation was heard in November 2003, just six months after termination and just as the severance package had expired.

In the unreported decision of Rojek-Bogaczewicz v. Bogaczewicz, Docket No. A-6160-02T5, decided November 30, 2004, the obligor was terminated from his job and changed careers. The obligor had submitted detailed information demonstrating that he unsuccessfully sought employment in his own field before deciding to change careers and join the Navy. His application to reduce his support obligation was granted notwithstanding the obligee's assertion that he was voluntarily underemployed.

These cases highlight the importance of providing a concise record at the trial level in demonstrating the cause for unemployment and the efforts made to secure alternate employment. The time-line appears crucial. As soon as the obligor becomes unemployed, he or she should immediately seek employment in his or her field or a related field. If evidence can be offered that no such employment exists, then the obligor can seek alternate careers that may result in reduced earnings. Questionable motives are often ascribed to the obligor who immediately chooses a new career. The choice to accept reduced remuneration must be reasonable in light of the support obligations already defined. The trial judge will be asked to make findings based on the proofs submitted.

> A trial court's rulings on an application to modify alimony, including the decision to impute income, are discretionary rulings, and we do not overturn those determinations unless the court abused its discretion, failed to consider controlling legal principles or made findings inconsistent with or unsupported by competent evidence. Storey v. Storey, supra, citing Tash, supra, 353 N.J. Super. at 99; Rolnick, supra, 262 N.J. Super. at 359-60.

The most recent published decision regarding imputation of income is Storey v. Storey, supra. In Storey, the obligor lost his $111,000 a year job as a computer hardware specialist due to a reduction in force. One month later, he decided to move to Florida and become a massage therapist earning $300 per week. The husband argued that because his job loss was involuntary, his alimony obligation should be based upon his present not

his imputed earnings. The appellate division rejected this argument and followed the ruling of Deegan, 254 N.J. Super. 350 (App. Div. 1992); a case involving unanticipated early retirement. The court specifically rejected a bright line rule based solely on "voluntariness", "fault" or "good faith" in support of the statutory mandate of N.J.S.A. 2A:34-23, which requires that alimony awards be "fit, reasonable and just" based on the "circumstances of the parties and the nature of the case."

In adopting the Deegan approach, the Storey court applied a standard which requires the court to determine whether the obligor's decision is "reasonable" under the circumstances and, ultimately, whether the advantages to the supporting spouse "substantially outweigh" the disadvantages to the supported spouse. Storey, supra.

The reasonableness and relative advantages of a career change were found to be substantially similar to early retirement. The court then looked to the statutory factors for alimony in N.J.S.A. 2A:34-23(b)(1) through (13) and determined that factors (1) through (12) are statutorily recognized and therefore, entitled to greater weight than factor (13) which provides that the court shall consider any other factors it may deem relevant.

Accordingly, the court found the following issues to carry greater weight:

a. the reasons for the career change – both the reasons for leaving prior employment and the reasons for selecting the new job

b. disparity between prior and present earnings

c. efforts to find work at comparable pay – including the need for licensing

d. the extent to which the new career draws or builds upon education, skills and experience

e. the availability of work

f. the extent to which the new career offers opportunities for enhanced earnings in the future

g. age and health

h. former spouse's need for support

The following issues were given less weight because they are not statutorily recognized, although relevant:

a. desire for a less demanding lifestyle

b. a new relationship

c. better working conditions

If either of the factors below apply, they must be balanced by the relative advantages:

a. acquisition of education, training or experience substantially likely to enhance future earnings balanced against the supported spouse's ability to postpone or forego support for a defined period in the interest of enhanced support; or

b. where relocation to permit pursuit of a new relationship is raised, the third party's ability to move may be relevant.

The change in circumstance will not warrant a modification of support unless the advantage to the obligor *substantially outweighs* the disadvantage to the supported spouse. (Emphasis added). Deegan v. Deegan, supra at 350, Storey v. Storey, supra. Absent a showing, a judge will impute earnings consistent with the obligor's capacity to earn. Id. "When the interests are in equipoise, the payor spouse's application will fail because he or she is unable to show that the advantage substantially outweighs the disadvantages to the payee. Id.

Once again, the particular facts of the case will dictate the court's ruling. How would a court rule if an attorney decided to accept an appointment to the bench resulting in a loss of income? Should it make a difference whether the decision to become a judge has been a lifelong dream or the attorney wanted a job that required less hours and/or no worry about cash flow?

Practical Tip #6 Discuss with your client possible career changes when negotiating support. If your client feels strongly about retirement at a given age or a change in career or feels certain that a job loss is imminent, be sure and reference this in the Property Settlement Agreement. "No thoughtful matrimonial lawyer should leave an issue of importance to chance and subject his or her client to lengthy future proceedings." Deegan, at 359.

Incarceration

There is conflicting law in New Jersey whether a person should be entitled to a reduction in support while incarcerated. In the matter of Topham-Rapanotti v. Gulli, 289 N.J. Super. 626 (Ch. Div. 1995), the court held that the commission of a crime is a voluntary act, where the foreseeable result may include incarceration. "Incarceration is the result of a voluntary act and thus does not meet the standard for change of circumstances in New Jersey." Id. at 634. The movant had no income or assets. The court denied the modification of support, but nevertheless, allowed arrears to accrue, determining that it would take no action to collect the arrearages until after his release.

In Bergen County Board of Services v. Steinhauer, 294 N.J. Super. 507 (Ch. Div. 1996), the court granted the suspension of child support during incarceration because the applicant was able to prove that he had no income or assets upon which to base support

while incarcerated. Judge Koblitz established a two-prong inquiry where an incarcerated obligor seeks suspension of support and arrears. The first prong is the length of the sentence and the second is the extent of the obligor's assets. Id. at 518. With regard to the length of the sentence, short-term incarceration would not constitute a change in circumstances. If the obligor has assets, there should be no relief. Judge Koblitz likened this to an unemployed obligor who is expected to use savings or otherwise liquidate assets to meet this obligation. Id. The court agreed that the collection of arrears would be suspended.

In support of the Steinhauer decision, the court believed that public policy dictated that the court not enter orders that are unenforceable. "Courts must enter orders which are fair and reasonable and then enforce those orders without shrinking." Id. at 517.

In 1999, the appellate division addressed the issue of incarceration as a result of the conflicting decisions reported above. In Halliwell v. Halliwell, 326 N.J. Super. 442 (App. Div. 1999), the court found fault with both trial court opinions and devised a new standard of modification applications brought by long-term incarcerated obligors, who have no assets and where the custodial parent is not receiving public assistance. Fearful of the impact of N.J.S.A 2A:17-56.23(a) which prohibits retroactive modification of support orders, the court held that such an application should be deferred pending the obligor's release and the matter should be transferred to the inactive calendar. The court suspended the payment of support and postponed a decision as to future support and arrearage. Upon release and submission of a newly submitted Case Information Statement, the court could then determine future support and an arrearage payment. The court supported the Topham-

Rapanotti principle regarding incarcerated obligors. "It goes against fundamental notions of fairness to relieve criminals of the parental duty of child support." Id. at 647.

Practical Tip #7 If you should take a case involving a destitute and incarcerated obligor, argue the language in Kuron v. Hamilton, supra. at 573 – 576, more fully described below.

Loss of Professional License

To further complicate matters, another appellate panel decided the case of Kuron v. Hamilton, 331 N.J. Super. 561 (App. Div. 2000). This matter concerned the loss of a professional license as a result of criminal acts. Although the defendant in this matter was to be incarcerated, the court ruled solely on the issue of disbarment and the impact on the ability to pay support.

The court in Kuron disapproved of the *per se* approach used in Topham-Rapanotti. It accepted a version of the Deegan standards and determined that the court must take into consideration the motives of the payor, the timing of the conduct that brought about the reduction in income, the payor's ability to meet the obligation, even after the reduction and the ability of the payee to provide for himself or herself. Id. at 571. The good faith focus is less concerned with the specific acts that caused the reduction in income than whether the reduction in income is to reduce a support obligation. A finding that the obligor acted reasonably is only one ingredient. It is not entirely dispositive of whether there is a change in circumstances. Notice of the obligor's reduced income and the payee's actions to prepare for this will also be considered. Only if the court determines after the first two factors that the advantage to the obligor *substantially outweighs* the disadvantage to the

payee will the court determine a legitimate change of circumstance warranting a modification of support. Id. at 572.

In remanding the matter to the trial court, the appellate court expressly stated that it disagrees with the reasoning in Halliwell, supra. The court specifically disapproved of a bright line test and encouraged the trial court to follow the rationale of Steinhauer and Deegan. Finally, it again reiterated that motions for modification involving voluntary conduct must be decided on a case-by-case basis.

Both Kuron and Halliwell are appellate division cases. Both cases can be argued as carrying equal weight before a trial court.

IMPUTED INCOME TO THE PAYEE FOR PURPOSES OF ALIMONY

While it has previously been discussed that there is rarely a significant impact in imputing income to a payee in a child support calculation, there may be a significant impact in doing so in an alimony matter. The alimony statutory factors require an examination of the payee's ability to contribute to his or her own needs, earning capacities and employability and investment income. N.J.S.A. 2A:34-23(b)(1), (5) and (11). Crews v. Crews, 164 N.J. 11, 27 (2000) mandates that the court must make express findings in the record regarding the supported spouses ability to contribute to his or her own support.

In Gollan v. Gollan, 344 N.J. Super. 337, 341 (App. Div. 2001), the court followed the principle that a party seeking support who is voluntarily unemployed or underemployed may have income imputed. The court also held that an adjudication by Social Security constitutes a *prima facie* showing of an inability to work that shifts the burden to the other party to rebut.

In Glass v. Glass, 366 N.J. Super. 357 (App. Div. 2004), the payor brought an application to terminate his alimony obligation because his former wife was now able to maintain the standard of living without his alimony payments and based on her own income. The appellate division reversed holding that the court needed to conduct a Crews analysis before ordering a termination of alimony. The court specifically held that the supported spouse's ability to maintain the established marital lifestyle "does not mandate the termination of alimony but is a significant factor that must be considered with other relevant factors in determining whether alimony should be terminated." Id. at 362.

In an unpublished opinion of Greco v. Greco, Docket No. A-6336-00-T5, the court referred to the Appendix IX-A considerations for imputing income even though it was an alimony case. The court also held that even with a permanent alimony determination, the issue of an employment evaluation may still be relevant to the court's findings.

Before embarking on a quest to impute income to the payee in an alimony case, assess the potential impact it may have on the case. In Greco, the court pointed out that there may be little impact to the overall alimony award, even though relevant to the action. Review of the NJDOL wage and employment records may be an appropriate starting place.

IMPUTATION OF INCOME TO ASSETS

In the seminal case of Miller v. Miller, 160 N.J. 408 (1999), the court held that investment income can be imputed to a party's investment assets when determining an alimony obligation. The court imputed an interest income higher than that realized by the husband from the investments in order to avoid a situation where the obligor was "equity rich but alimony poor". Justice Coleman likened the imputation of income through investment to imputation of income through earnings.

Investment income from a party's inheritance can be considered for purposes of a modification of support. Aronson v. Aronson, 245 N.J. Super. 354 (App. Div. 1991). In Stifler v. Stifler, 304 N.J Super. 96 (Ch. Div. 1997), the court imputed a 6% interest rate to an asset inherited by a party even though the inheritance was used to purchase a new house. The concept of Stifler is that the supporting spouse cannot insulate his or her income by investing in a non-income producing manner. Is there a different standard for a supported spouse? In Connell v. Connell, 313 N.J. Super. 426 (App. Div. 1998), the court held that imputation of income to inheritance applies in determining child support. The court went further to state that the imputation could take place even if the inheritance had been dissipated.

There is no case that mandates that maximum investment income be used in determining a support obligation on the part of the payor or the payee. It seems from a review of all the cases, that someone cannot leave themselves equity rich to avoid support obligations or to increase support obligations. The investments must be reasonable in light of the circumstances. Should investments for retirement be handled differently than other investments? How should a court handle a payee who imprudently retains the former marital home long after the children have become emancipated?

If a party is seeking to impute income to an asset that was already distributed by way of equitable distribution, you may want to have the court treat it differently. N.J.S.A. 2A-34-23 specifically provides that "when a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony." Should an asset that was distributed as an offset to a retirement benefit also enjoy the same immunity?

Practical Tip #7 When drafting a Property Settlement Agreement that provides for permanent alimony, include those assets or investments that shall not be considered in determining the income of either party in a modification application, based on the rationale that it was already distributed in exchange for an equal asset. In a post-judgment application, after a divorce of equal asset distribution, should the prudent investor be penalized for maintaining assets in excess of the spendthrift?

RETAINED EARNINGS AND CORPORATE ASSETS

Business income reflected on tax returns does not always accurately tell us the amount of income available to a party for purposes of support.

The closely-held corporation may hold "retained earnings" to keep salaries unrealistically low or to provide capital to the business to keep it running. Retained earnings are an asset of the corporation. If the retained earnings had been distributed, they would likely have become marital property or distributable income.

In a Subchapter S corporation, all corporate income is "passed through" to the shareholders in accordance with their percentage ownership interest on a federal tax return. However, the income does not necessarily reach the shareholder. Are we required to follow the tax return in determining support or should support be based upon the actual distributions made available to the parties?

In the case of a partnership or sole-proprietorship, all income is reported on federal tax returns even though it may not be distributed. How should this income be treated when establishing support?

There are no published cases in New Jersey that address this issue. Other jurisdictions, such as Louisiana, Minnesota and Florida, recognize that the amount of

income reflected on business tax returns is not the determining factor of income for purposes of support.[4] Should retained earnings be treated as an asset of the corporation or distributable income for support purposes? Appendix IX-B states that income from self-employment from income of a sole proprietorship, partnership or closely held corporation is gross receipts minus ordinary and necessary expenses required for self-employment or business operation. The court rules also provide that income sources should be considered if the income would have been available to pay expenses related to the family, had the family stayed intact. Should a court treat income differently based on the formation of the business entity?

Where the party has a minority interest in the business and no ability to force distribution of retained earnings, it appears to be an asset of the corporation with only the income distributable to the party to be considered for support. Where the party solely owns the business, regardless of the type of business ownership, we must examine the motivation for retaining earnings before it can be imputed to the party.

In the case of Zold v. Zold, State of Florida, Court of Appeal, filed June 25, 2004, the court specifically rejected the trial court's ruling that all of the "pass through" Subchapter S income was personally available to the husband – a 57% owner of the business. The court found that a shareholder has a fiduciary obligation to all shareholders. The business cannot be used personally as a piggy bank by one shareholder simply by virtue of holding a controlling interest. The shareholders must ensure that the business debts and liabilities are satisfied appropriately and the business retains sufficient working capital to keep it going. The court then remanded the matter to the trial court to make findings as to the amount of income available for support without considering any undistributed Subchapter S

[4] In this instance, we are not addressing the issue of establishing support based upon unreported income.

income unless it can be demonstrated that the business delayed distributions of cash for purposes other than corporate requirements.

How involved will or should a court become in deciding whether a business should or should not distribute its earnings? Should the standard be bad faith of the shareholder or something less severe such as imprudent investor? Is it the court's function to impose its own judgment on how the business should run? Is the easier task to simply classify the retained earnings of a business as a marital asset for purposes of equitable distribution? In light of the history in New Jersey of the courts imputing income, it seems likely that the court will strike a balancing test that require the advantages of retaining income to the owner-spouse's business, including motivation and timing, must substantially outweigh the disadvantages to the other spouse. The history of distributions and the amounts sufficient to maintain the parties' lifestyle will be significant considerations.

CONCLUSION

Imputation of income could potentially apply to almost each and every case we handle. The imputation of income can be applicable to both the obligors and obligees of support including imputation of income to assets. The mere fact that imputation may apply to a case is not a reason to raise the issue. The balancing tests associated with whether to impute income allows attorneys to creatively advocate for their clients. It is not only the attorney's job to strongly advocate their client's position, but to make sure the end result can be reasonably be attained. Always keep the goals in sight.

The most important balancing test the attorney must perform for his or her client is to make sure, that by raising the issue of imputation of income, the results to be achieved are cost-efficient and beneficial for the client.

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