

Cheryl Howell

## DEFINING INCOME

1



### Self Test

- #1: Plaintiff's attorney offers affidavit of defendant stating income - signed 18 months before hearing; no other evidence of income offered.
- Is the affidavit sufficient to establish income?
- If not, should child support action be dismissed?

2



## Self Test

- #2: Obligor received \$50,000 personal injury settlement three months before child support hearing.
- Is the award income?

3



## Self Test

- #3: Grandparents provide housing to custodial parent and children.
- Is the rental value of housing counted as income of custodial parent?

4

## Income When?

- Order **MUST** contain finding of **PRESENT** actual income
  - "Parents' current income at time the order is entered"
    - Guidelines
  - Party's actual income at time order is made or modified"
    - *Armstrong v. Droessler*, 177 NC App 673 (2006)
    - *Holland*, 169 NC App 564 (2005)

5

## Proof of Income

- Who has burden of proof?????
  - Probably the judge ☺
- "Verified through documentation of both current and past incomes." Guidelines
  - One full month of pay stubs, employer statement, receipts, expenses
  - Most recent tax return "to verify earnings over longer period of time"

6

## Proof of Income

- ▣ Sanctions can be imposed for failure to comply. Guidelines
- Financial affidavit is binding
  - ▣ *Row v. Row*, NC App (2007): trial court correct to use obligor's affidavit rather than testimony of obligor's expert witness at trial
- ▣ Signed statement by employer is admissible to prove income
  - GS 110-139(c1) – both IV-D and non-IV-D

7

## Using Past Income to Find Present

- "Court must determine gross income at time the support order was originally entered, not as of the time of remand *nor on the basis of the parent's average monthly income over the years preceding the trial.*"
  - ▣ *Holland v. Holland*, 169 NC App 564 (2005)

8

## Using Past Income to Find Present

- “Legislature never contemplated the court would select the earnings for a single year in the past and use that as a basis for the award *when that year does not fairly represent defendant’s current nor the average of his earnings for several years.*”

- Conrad v. Conrad, 252 NC 412 (1960)

9

## Using Past Income to Find Present

- “While we believe the trial court could have used plaintiff’s 2001 income to determine his [2002] income, the order fails to support this approach with the necessary findings of fact.”

- *Holland*

10

????????

- Cannot use past to “impute” income or determine earning capacity
- But you can use past income to determine present “capacity to continue to earn” the same amount in the future
  - *Hartsell v. Hartsell*, NC App (March 4, 2008)

11

## Examples

- Problems on Appeal
  - *Hodges v. Hodges*, 147 NC App 478 (2001)
  - *Williams*, 635 SE2d 495 (2006)
  - *Glass*, 131 NC App 784 (1998)
  - *Gatlin*, NC App (unpublished Jan. 15, 2008)
- Upheld on Appeal
  - *Hartsell*, NC App (March 4, 2008)
  - *Diehl*, 177 NC App 642 (2006)
  - *Spicer*, 168 NC App 283 (2005)

12

## Self Test

- #1: Plaintiff's attorney offers affidavit of defendant stating income - signed 18 months before hearing; no other evidence of income offered.
- Can amount in affidavit alone support finding of present income?
- Not without more – *Williams*
- If not, should child support action be dismissed?
- No clear burden of proof; order parties to produce evidence

13

## What is Income?

- ▣ Use Gross Income
  - Before taxes, retirement, or any other withholding
- ▣ Includes "income from any source"
- ▣ Does not have to be income from employment
  - ▣ *Squires*, 178 NC App 251 (2006)(all investment income)
  - ▣ *But cf. Gatlin*, NC App (unpublished Jan. 15, 2008)
- ▣ Includes income from self-employment
  - Gross receipts minus ordinary and necessary business expenses

14

## Income From Any Source

- ▣ Long list in guidelines
- ▣ Income received on “irregular, non-recurring or one-time basis”
- ▣ Court may “average or pro-rate the income over a specified period”, or
- ▣ “Require obligor to pay a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.”
  - *See Spicer* (settlement proceeds)
  - *Cf. Glass* (bonuses)

15

## Income From Any Source

- Sale of a house?
  - ▣ No – not without evidence of gain
  - ▣ *McKyer v. McKyer*, 179 NC App 132 (2006)
- Sale of a truck?
  - ▣ Of course – must include “income from any source”
  - ▣ *Hartsell v. Hartsell*, NC App (March 4, 2008)

16



## Income from Any Source

- Gifts or maintenance from someone other than a party to the action
  - *Spicer*, 168 NC App 283 (\$300 included for rent-free housing provided by parents)
  - *Williams*, 179 NC App 838 (2006)(rent and utility payments paid by parent should be included)
  - *Cf. Easter v. Easter*, 344 NC 166 (1996)(payments from third parties should be factors to consider in deviation)
  - What about “maintenance” from new spouse?

17

## Excluded from Income

- “Means-tested public assistance programs”
  - Maybe educational loans: *McKyer*
- Alimony or maintenance received from party to action
- Child support received for another child
- Employer payments for SS, Medicare, Insurance
- Income of children
  - *Miller v. Miller*, 168 NC App 577 (2005) (adoption assistance payments are income of children)
  - *See Browne*, 101 NC App 617 (1991)(estates of children not considered)
- Income of any person who is not a parent of the child
  - *Kennedy*, 107 NC App 695 (1992)(rental income belonging to new spouse)

18

## Self Test

- #2: Obligor received \$50,000 personal injury settlement three months before child support hearing.
- Is entire award counted as income?
- Yes – probably
  - See *Spicer*, 168 NC App 283 (2005)(no exception for “pain and suffering” compensation)
  - See *Freeze*, 159 NC App 228 (unpublished 2003)(error not to include lump sum workers’ comp settlement)
    - No mention of when obligor received the payment)

19

## Self Test

- #3: Grandparents provide housing to custodial parent and children.
- Is rental value of housing included as income of custodial parent?
- Yes, according to *Williams*
- Consider deviation instead??? *Easter*

20

## Consider.....

- Child support enforcement attorney asks you to impute minimum wage to unemployed parent.
- Can you impute minimum wage?

21

## What Is Imputed Income?

Imputed income (earning capacity) is

- The amount of income that a parent
- Could reasonably be expected to receive
- If he or she took reasonable steps
- To fully exercise his or her capacity
- To earn income through employment/other

22

## Actual vs. Imputed Income

- Actual income
  - Income actually received at time of hearing
- Imputed income
  - Not actually received by parent
  - Imputed based on parent's capacity to earn
  - Based on work history, etc.
  - Treated as if actually received by parent

## The “Bad Faith” Rule

- Court may *not* impute potential income *unless*
  - Parent is *voluntarily* unemployed
    - Or *voluntarily* underemployed
- *and*
  - Parent is acting in “bad faith”
    - Failure to exercise earning capacity due to
    - “Deliberate disregard” of duty to support child

## The “Bad Faith” Rule

- Court must make *specific* finding of “bad faith”
  - Failure to make finding is reversible error
    - *Ford v. Wright*, 170 NC App 89 (2005)
- Evidence must support “bad faith” finding
  - Voluntary reduction in income insufficient
    - *Pataky v. Pataky*, 160 NC App 289 (2003)

25

## Determining Potential Income

Potential income must be supported with findings about parent’s “earning capacity”

- Parent’s employment potential & probable earnings
- Parent’s recent work history
- Parent’s occupational qualifications
- Prevailing job opportunities in the community
- Prevailing earning levels in the community

26

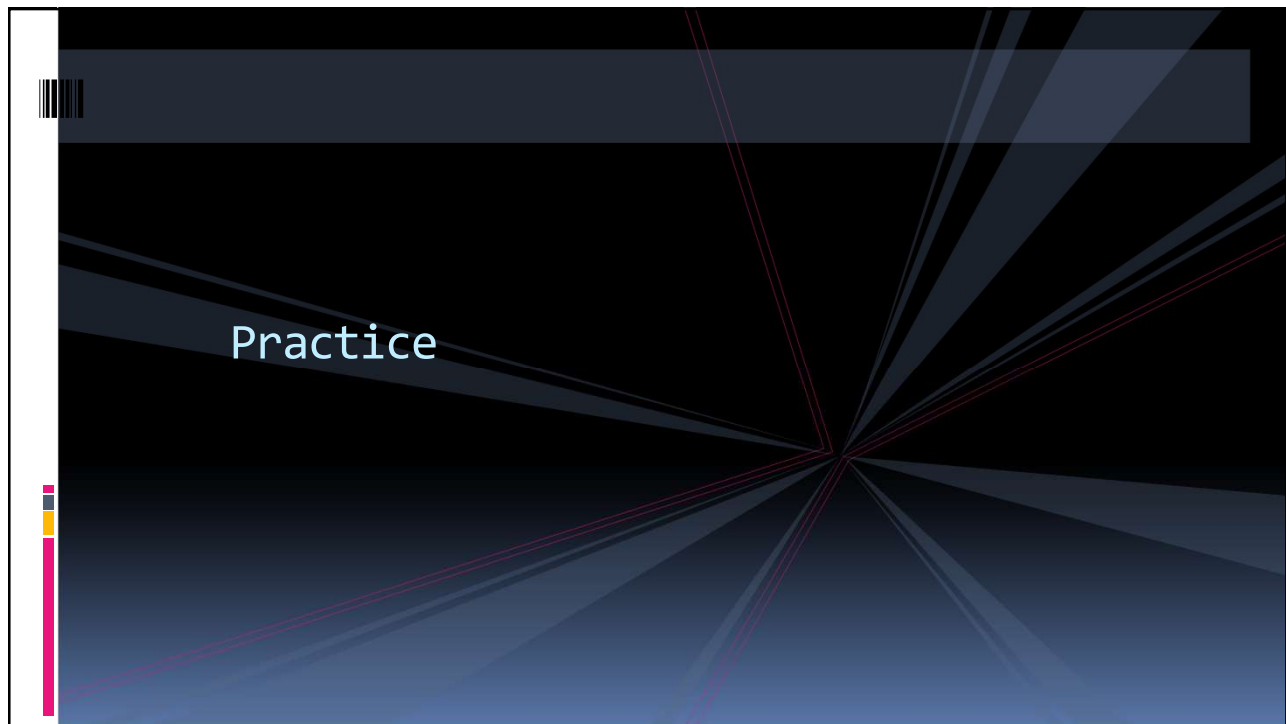
## Determining Potential Income

Potential income generally shouldn't be less than

- 35-hour work week minimum wage
  - If parent is capable of working full-time (and is acting in bad faith)
  - Has no recent work history or vocational training
  - And full-time minimum wage employment available
  - *See Roberts v. McAllister*, 174 NC App 369 (2005)

## Determining Potential Income

- Court must make *specific* findings of fact
  - Regarding *amount* of potential income
    - *McKyer v. McKyer* (NC Ct. App. 2006)
- Findings supported by evidence in record
  - Can't *assume* parent's potential earnings
    - Based solely on parent's prior earnings




29

## Question 1

- Oligor testifies he has no income except unemployment of \$2000 per month
- He lost his job as accountant for SAS one year ago
- He has decided to go into private practice
- Custodial parent offers last two income tax returns showing gross income of \$180,000 each year

30



## Question 1 – options?

1. Find annual income of \$180,000
2. Find income of \$2000 per month
3. Enter temporary order based on unemployment income; bring parties back in 6 to 8 months
4. Ask for more evidence
5. None of the above

31



## Question 2

- Obligor earned \$60,000 during year immediately preceding hearing from a landscaping business
- Earned average of \$60,000 each of five previous years
- Expert says drought will hurt business – obligor “will be lucky” to pay expenses
- Expert’s “best guess” is he’ll earn \$30,000 this year

32



## Question 2 – options?

1. Find present income of \$60,000
2. Find present income of \$30,000
3. Find present income of \$45,000 (split the difference)
4. None of the above

33

## Question 3

- 30 year-old obligor testifies to sporadic work history; presently unemployed
- Obligor is “able-bodied” but has low skill
- Tax return shows income from last year of \$15,000
- Obligor testifies she is looking for work but has no car

34

### Question 3 – options?


- Find present income of \$15,000
- Impute income in amount of last full-time job
- Continue case and order her to look for work
- Dismiss case for failure to show present income
- None of the above

35

### Question 4

- Obligor is tobacco farmer
- Tax returns for last 5 years show net losses
- Obligor testifies he has nothing but debt
- Custodial parent shows expenses of parties while living together (separated 6 months)
- Expenses show very comfortable lifestyle and new farm equipment each year

36



## Question 4 – options?

1. Find no income and dismiss case
2. Find income based on expenses shown by custodial parent
3. Examine tax return to determine reasonable business expenses
4. A combination of choice 2 and 3 to determine present income
5. None of the above