# Imputing Income: Voluntary Unemployment is Not Enough

Beware. A child support or alimony order should never contain the word “capacity” or the words “ability to earn” unless it also contains the words “bad faith.”

Maybe that statement is a little extreme, but it is intended to make a point. Alimony and child support obligations must be determined based on actual present income. Earning capacity rather than actual income can be used only when a party is intentionally depressing actual income in deliberate disregard of a support obligation. In other words, it is not appropriate for an order to be based on what a person should be earning- or on minimum wage - rather than on what that person actually is earning unless evidence shows the party is acting in bad faith and the court actually includes that conclusion of law in the order.

### The Bad Faith Rule

The Child Support Guidelines state:

"If the court finds that a parent’s voluntary unemployment or underemployment is the result of the parent’s bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent’s potential, rather than actual, income".

This bad faith rule was not created by the child support guidelines but instead is a rule established years ago in case law. *See e.g., O’Neal v. Wynn,* 64 NC App 149 (1983)(absent a finding that [parent] is acting in a deliberate disregard of his obligation to provide reasonable support for his child, his ability to pay child support is determined by his actual income at the time the award is modified).

Despite the fact that the law has been well-settled for a long time, the Court of Appeals frequently must remand cases to the trial courts because income is imputed without a determination of bad faith.

### Voluntary unemployment or underemployment

One of the most recent examples is Nicks v. Nicks, NC App (June 16, 2015). In that case, the trial court imputed income to mother when considering both her motion to modify child support due to her substantial reduction in income and her request for alimony. Evidence established that mom was a doctor who earned $8,000 per month working part-time at the time the original child support order was entered in 2011. After the original child support order was entered in 2011 but before the

trial court heard her request for alimony in 2013, mom became unemployed because the clinic where she worked closed. She was offered another full time position but declined it in order to stay home with the teenaged daughter of the parties who was experiencing severe emotional problems that required treatment though medication and counseling.

The trial court made findings that mom was voluntarily unemployed and had the capacity to earn at least $8,000 per month. After imputing income to mom, the trial court denied her motion to modify child support, concluding there had been no change in circumstances. Regarding alimony, the court concluded mom's reasonable expenses were approximately $11,000 but that she should be able to meet $8,000 of that total by working.

The court of appeals remanded both the child support and the alimony determination to the trial court after holding that the trial court erred by imputing income without finding that mom was depressing her income in bad faith. Citing the long-standing bad faith rule, the court in *Nicks* stated "the dispositive issue is whether the party is motivated by a desire to avoid her reasonable support obligations." Explaining the application of the rule to alimony cases, the court held:

In the context of alimony, bad faith means that the spouse is not living up to income potential in order to avoid or frustrate the support obligation. Bad faith for the dependent spouse means shirking the duty of self-support.

The court of appeals did not indicate whether evidence in this case was sufficient to support a finding of bad faith by the trial court, stating instead:

"We believe the trial court could find competent evidence to support a determination in either direction without abusing its discretion as long as its conclusion is supported by sufficient findings of fact."

**Even minimum wage is improper without bad faith**

When there is no evidence that a parent has any income at all, it is not uncommon for a court to enter an order, especially a child support order, imputing minimum wage. Case law is clear that this violates the bad faith rule as well.

A recent example is Ludlam v. Miller, 225 NC App 350 (2013). In that child support case, neither parent was employed at the time of the hearing. Both had been searching for employment without success. The trial court entered a child support order after imputing minimum wage to both parents and the court of appeals reversed. The trial court has no authority to enter an order based on earning capacity rather than actual income – even an order that imputes only minimum wage – unless the court making findings and reaches the conclusion that the parents are intentionally depressing income in deliberate disregard of their child support obligation. See also Godwin v. Williams, 179 NC App 838 (2006)(error to impute income to teenage father who left his job to

attend college full-time without finding bad faith).

**So what facts are sufficient to show bad faith?**

The trial court has a great deal of discretion in determining when a party has acted in bad faith. Some case examples will be the subject of my next post.