Imputing Income: So What is Bad Faith?

In my last post, Imputing Income: Voluntary Unemployment is Not Enough, I wrote about the bad faith rule; the long-established rule that child support and alimony orders must be based on the actual present income of the parties unless there is cause to impute income. When income is imputed, a support order is based on earning capacity rather than actual income. The bad faith rule provides that earning capacity can be used only when a party is intentionally depressing actual income in deliberate disregard of a support obligation.

So what findings of fact are sufficient to establish bad faith?

General Bad Conduct

The court of appeals addressed this issue most recently in *Juhnn v. Juhnn*, NC App (July 7, 2015), when it affirmed the trial court decision to impute income to father in setting child support and alimony after concluding he had acted in bad faith. The findings of fact uncontested on appeal included findings that defendant:

- Intentionally shut down his brokerage business;
- Intentionally understated his brokerage business's corporate income;
- Prepared "spurious" tax returns that contained falsified and inaccurate information;
- Provided for his paramour and her children while refusing to provide support for his wife and children; and
- Engaged in voluntary unemployment or underemployment since wife filed her claim for divorce.

Quoting *Wolf v. Wolf*, 151 NC App 523 (2002), the court in Juhnn stated that in determining bad faith:

- [T]the dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent.

According to the court of appeals, the uncontested findings above were sufficient to support the trial court's conclusions of law that defendant:

- failed to exercise his reasonable capacity to earn;
- deliberately avoided family financial responsibilities;
- acted in deliberate disregard of his support obligations;
- refused to seek or keep gainful employment;
- willfully refused to secure or take a job;
- deliberately did not apply himself to his business;
- intentionally depressed income;
- intentionally left employment to go into another business
- intended to avoid his duty of support to Plaintiff and their children; and
- acted in bad faith such that income may be imputed to him.

It is clear from Juhnn and other cases that the court of appeals is willing to allow trial judges to infer "the proscribed intent" from a party's actions. As long as the court makes findings of fact and explicitly concludes that the party has acted in bad faith, the appellate court gives great deference to the trial court's decision to impute income.

Voluntarily Unemployed

Despite this deference however, the court of appeals has made it clear that a finding that a party is voluntarily unemployed or underemployed alone is insufficient to support a conclusion of bad faith. See *Nicks v. Nicks*, NC App (June 16, 2015)(error to impute income to doctor who decided to stay at home with child experiencing mental health issues); *Godwin v. Williams*, 179 NC App 838 (2006)(error to impute income to teenage father who left his job to attend college full-time); *Pataky v. Pataky*, 160 NC App 289 (2003)(error to impute income to father who quit work to return to school when father had made arrangements for the support of his children before leaving his job); *Cook v. Cook*, 159 NC App 657 (2003)(resigning from job is not alone an indication of bad faith).

However, when a few more facts are added to the voluntarily un- or underemployment, the court of appeals allows the trial court to make the call. For example, in *Roberts v. McAllister*, 174 NC App 369 (2005), the mom always had been a stay-at-home mom. She stayed home with the children who ended up living with their father when mom's first marriage ended and she stayed home with the child of her second marriage. The trial court imputed income to mom in setting her support obligation for the children of her first marriage after concluding that her continued voluntary unemployment in the face of the financial insecurity of those children and the high standard of living she enjoyed with her new husband illustrated a "naïve indifference" on her part to the needs of her children. The court of appeals affirmed the trial court decision that this naïve indifference supported the conclusion that her refusal to work was the result of her bad faith disregard of her support obligation.

Similarly, the court of appeals has upheld trial court decisions to impute income to parents who

voluntarily chose to retire. In two cases the court of appeals affirmed trial court conclusions that fathers acted in bad faith by taking early retirement and significantly reducing the amount of support available for young children when both fathers were middle-aged, able-bodied men who had the ability to earn significantly more than the amount of retirement income. See *Osborne v. Osborne*, 129 NC App 34 (1998)(51 year-old father took early retirement) and *Mason v. Erwin, 1*57 NC App 284 (2003)(52 year-old father who had been "reluctant" to support his young daughter in the past and retired after his second wife won the lottery. The trial court found "unpersuasive" his testimony that he retired for health reasons).

Involuntarily Unemployed

While being unemployed due to involuntary job loss generally is not an indication of bad faith, *see* *Ludlam v. Miller*, 225 NC App 350 (2013)(error to impute minimum wage to parents who lost their jobs and had been searching for employment without success), misconduct that leads to an involuntary job loss generally is a sufficient basis to impute income. *See Wolf v. Wolf*, 151 NC App 523 (2002)(father's actions at work which resulted in "an entirely predictable termination" of his employment were taken in conscious and reckless disregard of his support obligation), and *Metz v. Metz,* 212 NC App 494 (2011)(father's job loss was the foreseeable result of his criminal conduct outside of work).