

And They Said It Again: Never Use Earning Capacity Without Bad Faith

Last September, I began a blog post with the following statement; “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.’” [Imputing Income: Voluntary Unemployment is Not Enough](#). On April 5, 2016, the court of appeals once again reminded us that this overly dramatic generalization of the law frequently proves true. [Lasecki v. Lasecki](#) is a great opinion to read for a review of the law relating to establishing and enforcing child support when parents have an unincorporated separation agreement and it is yet another statement by the court that we should never consider a parent’s capacity to earn at any stage of a child support proceeding unless we first determine that the parent is intentionally depressing income in deliberate disregard of a support obligation.

What Happened in [Lasecki](#)?

The parties entered into a separation agreement in 2012 providing that plaintiff would pay child support in the amount of \$2,900 per month and alimony in the amount of \$3,600 per month. The agreement was not incorporated. In 2013, father filed a complaint asking the court to set child support pursuant to the guidelines, alleging that the amount set in the agreement was no longer reasonable because his income had substantially decreased due to his loss of employment. Defendant mother counterclaimed alleging breach of the agreement and asking for an order of specific performance.

Following trial, the court determined that father failed to rebut the *Pataky* presumption that the amount of child support set in the agreement was reasonable and refused to set a new support order pursuant to the Guidelines. In addition, the court ruled that father had breached both the child support and alimony provisions of the agreement and entered a money judgment for the arrearages established for each. The trial court also granted mother’s request for an order of specific performance for prospective payments, ordering specific performance of the full amount of child support (\$2,900) but only a portion of the alimony (\$1385) based on the court’s determination of father’s ability to pay.

The trial court order specifically found that defendant was unemployed at the time of the hearing. It also specifically stated that income was not being imputed to father and that the court was not concluding father was intentionally depressing his income in bad faith. Instead, the court explained that both the determination that the amount of support provided in the agreement of the parties was reasonable and the determination that father had the ability to comply with the order of specific performance was made in light of all of the circumstances of the case, including father’s earning capacity.

The *Pataky* Presumption

In *Pataky v. Pataky*, 160 NC App 289 (2003), the court of appeals held that while a parent can ask the court for a Guideline child support order even when there is an unincorporated separation agreement providing for child support in a different amount, the court cannot enter an order for Guideline support unless the parent first overcomes the presumption that the amount of support provided in the agreement is reasonable. The presumption of reasonableness is rebutted only when the court determines, by “taking into account the needs of the children existing at the time of the hearing and considering the factors enumerated in the first sentence of [GS 50-13.4\(c\)](#),” that the amount in the agreement is not reasonable.

The first sentence of [GS 50-13.4\(c\)](#) provides that child support should be an amount determined to meet the needs of the child “having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.”

The father’s contention that the agreement amount was not reasonable was based entirely on the fact that he no longer had income due to his loss of employment. To support the conclusion that father failed to rebut the presumption that the amount of support in the agreement was reasonable, the trial court made numerous findings of fact as to the expenses of the parties, the needs of the children, the present income of mom, the past income of the father and the accustomed standard of living of the parties during the marriage. Concluding that father generally had provided for 81% of the family’s income during the marriage, the court ruled that the agreement providing that father should pay an amount of support sufficient to meet approximately 81% of the present needs of the children was reasonable. The trial court held that in making this conclusion, the court was not imputing income to father but was instead, determining support in accordance with the standard set out in [GS 50-13.4\(c\)](#).

Specific Performance

To support the order for specific performance for the prospective support obligations in the agreement, the trial court made additional findings as to father’s past employment history and his present capacity to find employment. The trial court found that “[b]ased on his past experience, contacts in the industry and prior job performance, he has the ability to quickly find employment earning at least \$150,000 per year.” But again, the trial court stated that it was not imputing income to father and was not finding he was acting in bad faith. Instead, the trial court stated that the order of specific performance was supported by the court’s conclusion that father had the actual ability to pay, a conclusion based on findings regarding a number of factors, including father’s present capacity to go out and find a job earning an amount similar to what he had earned in the past.

Earning Capacity Means Imputed Income – At Least for Child Support

The court of appeals rejected the trial court’s assertion that it was not imputing income both when it determined the contract support was reasonable and when it determined father had the ability to

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comply with the order of specific performance. Stating that the rule that, absent a finding of bad faith, child support cannot be based upon a determination of what a parent should be earning as opposed to a parent's actual present income "applies throughout the entire child support determination," the court of appeals vacated the child support order.

The court of appeals also vacated the order of specific performance of the alimony provisions. But the topic of earning capacity in the context of alimony is a topic for another day.

