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DEFINING INCOME

Self Test

- #1: Plaintiff's attorney offers affidavit of defendant stating income - signed 18 months before hearing; no other evidence of income offered.
 - Can affidavit alone support finding of present income?
 - If not, should child support action be dismissed?

Self Test

- #2: Obligor received \$50,000 personal injury settlement three months before child support hearing.
 - Can entire award be counted as income?

Self Test

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

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)

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"

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

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)

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)

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*

????????

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

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)

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

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

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)

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)

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?

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)

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)

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*
 - Argue/consider deviation instead??? *Easter*

What Is Potential Income?

Potential income 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
 - Or obtain income from other sources

Actual vs. Potential Income

- Actual income
 - Income actually received at time of hearing
- Potential 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* (NC Ct. App. 2005)
- Evidence must support "bad faith" finding
 - Voluntary reduction in income insufficient
 - *Pataky v. Pataky* (NC Supreme Ct. 2004)

Determining Potential Income

Potential income generally must be based on

- 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

Determining Potential Income

Potential income generally shouldn't be less than

- Full-time minimum wage (approx. \$1,100 per month)
 - If parent is capable of working full-time
 - Has no recent work history or vocational training
 - And full-time minimum wage employment available

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

Everything You Wanted to Know ...

- Family Law Bulletin #23 (April 2008)
 - "Imputing Potential Income to Parents"
 - General School of Government publications link:
 - www.sog.unc.edu (click "publications" & search catalogue)
 - Direct web link & free download:
 - www.sog.unc.edu/pubs/electronicversions/pdfs/flb22.pdf

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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

Question 1

- **Choice 1:** Because he has lost his job and does not presently earn \$180,000, only use this amount if you impute income. Is going into private practice a deliberate disregard of child support obligation?
- **Choice 2:** \$2000 is the actual present income
- **Choice 3:** Would be within your discretion
- **Choice 4:** Can do it – what would you want?
- **Choice 5:** ????? Other ideas?

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

Question 2

- **Choice 1:** Correct present income if you are not completely convinced by expert
 - See *Hartsell* (NC App March 4, 2008)
- **Choice 2:** Correct present income if you are convinced by expert
 - See *Glass*, 131 NC App 784 (1998)
- **Choice 3:** Probably not correct, unless there is testimony or evidence to support it
- **Choice 4:** Other ideas ?????

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

Question 3

- Choice 1: Only if you impute – can you support finding deliberate disregard?
- Choice 2: Same as Choice 1 – can you impute? If so, is last full-time job more reflective of ability than income tax return? Need findings
- Choice 3: Maybe.
- Choice 4: Probably not. No clear burden of proof

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

Question 4

- Choice 1: probably not – no clear burden
- Choice 2: maybe – *see Ahern*, 63 NC App 728 (1983)(alimony case)
- Choice 3: Okay if have enough information to determine gross income and all reasonable expenses
- Choice 4: probably best choice
- Choice 5: Other ideas???
