

## DEFINING INCOME

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## 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?

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## Self Test

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

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## Self Test

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

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## 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)

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## 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"

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## 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

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## 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)

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## 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)

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## 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*

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- 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)

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## 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)

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## 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

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## 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

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## 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)

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## 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)

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## 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?

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## 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 (1993)(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)

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## 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)

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## 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*

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## What Is Potential Income?

Potential 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

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## 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

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## 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

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## 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)

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## 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

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## Determining Potential Income

Potential income generally shouldn't be less than

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

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## 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

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## Everything You Wanted to Know ...

- Family Law Bulletin #23 (April 2008)
  - "Imputing Potential Income to Parents"
    - Direct web link & free download:
      - <https://www.sog.unc.edu/publications/bulletins/imputing-income-parents-child-support-proceedings>

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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

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## 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?

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### 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

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### 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 ?????

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### 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

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### 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

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### 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

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### 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???

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