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Imputing Income to Parents in Child Support Proceedings

John L. Saxon*

This *Family Law Bulletin* examines when and how a court lawfully may impute potential income to a child's parent in a legal proceeding to establish or modify a child support order.

Parental Income and Child Support

The amount of a parent's income is relevant in almost every legal proceeding involving the establishment, modification, or enforcement of a child support order.

When a court enters an order establishing or modifying a parent's child support obligation, North Carolina's child support guidelines generally require the court to determine the amount of each parent's income and to use the parents' combined incomes to determine the amount of the noncustodial parent's child support obligation.[1] And even when North Carolina's child support guidelines don't apply or when a court enters a child support order that "deviates" from the amount of a

*Mr. Saxon is a professor of public law and government on the faculty of the School of Government. He has written extensively on the subjects of child support and paternity. He may be contacted at 919.966.4289 or saxon@sog.unc.edu.

This bulletin generally will use the pronouns "he" and "she" singly and interchangeably, rather than "he or she", when referring to custodial and noncustodial parents regardless of a parent's gender.

1. Under North Carolina law, the amount a court may order a parent to pay for the financial support of his or her child generally must be determined in accordance with the child support guidelines adopted by the Conference of Chief District Court Judges pursuant to N.C. Gen. Stat. 50-13.4(c1) (hereinafter G.S.). *See* G.S. 50-13.4(c). The child support guidelines generally apply to all court orders that establish or modify a noncustodial parent's child support obligation. The amount of a noncustodial parent's child support obligation under the North Carolina child support guidelines generally is based on (1) the amount of the noncustodial parent's income; (2) the amount of income received by the child's custodial parent (except in certain cases involving noncustodial parents with low incomes); (3) the reasonable needs of the child or children for whom support is being ordered (as specified in a schedule of basic child support obligations); (4) the reasonable costs of child care related to the custodial parent's employment; (5) the reasonable costs of health care and health insurance for the child; (6) other extraordinary child-related expenses; and (7) the amount of either parent's financial responsibility for children other than the child for whom child support is being ordered.

parent's presumptive child support obligation under the child support guidelines, North Carolina law requires the court to consider the incomes of the child's parents (along with the child's reasonable needs for health, education, and maintenance, the child care and homemaker contributions of the child's parents, the estates, earnings, conditions, and accustomed living standards of the child and the child's parents, and other facts of the particular case) when determining the amount of a noncustodial parent's child support obligation.[2]

Issues regarding the amount of a parent's income, therefore, routinely arise whenever a court enters an order that

- initially establishes the amount of a noncustodial parent's child support obligation, or
- increases or decreases the amount of a noncustodial parent's child support obligation under an existing child support order.

State law also allows a court to modify (increase or decrease) the amount of a parent's court-ordered child support obligation if there has been a significant, involuntary decrease in the amount of a custodial or noncustodial parent's income since the date the existing child support order was entered.[3] And North Carolina's child support guidelines provide that a significant increase or decrease in the parents' combined incomes may constitute a substantial change of circumstances if the amount of child support payable under the guidelines based on the parents' current incomes is at least fifteen percent more or less than the noncustodial parent's current child support obligation under a child support order that is at least three years old.

So the amount of a parent's income also may be relevant when either parent files a motion seeking modification of the amount of a noncustodial parent's child support obligation and argues that a significant change in the amount of either parent's income constitutes a substantial change of circumstances under Section 50-13.7(a) of the North Carolina General Statutes (hereinafter G.S.).

Issues regarding a parent's income also may arise in proceedings involving the enforcement of child support orders. For example, in a civil contempt proceeding against a noncustodial parent based on his failure to pay court-ordered child support, the amount of the parent's income may be relevant with respect to the issue of the parent's present ability to purge his noncompliance with the order. The amount of a noncustodial parent's income is also relevant in cases involving the payment of child support through income withholding under G.S. 110-136.3 *et seq*.

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2. G.S. 50-13.4(c). State law allows a court to enter a child support order that "deviates" from the amount of child support required under the child support guidelines if, after hearing evidence and making findings regarding the reasonable needs of a child for support and the relative abilities of the child's parents to provide support, the court finds by the greater weight of the evidence that application of the guidelines would not meet, or would exceed, the child's reasonable needs considering the parents' abilities to provide support or would be unjust or inappropriate. G.S. 50-13.4(c); Sain v. Sain, 134 N.C. App. 460, 517 S.E.2d 921 (1999); State *ex rel*. Fisher v. Luckinoff, 131 N.C. App. 642, 507 S.E.2d 591 (1998); Buncombe County *ex rel.* Blair v. Jackson, 138 N.C. App. 284, 531 S.E.2d 240 (2000).

3. *See* G.S. 50-13.7(a); Pittman v. Pittman, 114 N.C. App. 808, 443 S.E.2d 96 (1994). A substantial *increase* or a *voluntary* decrease in either parent's income, however, does not constitute a change of circumstances that is sufficient, standing alone, to justify modification of a child support order that is less than three years old. *See* Thomas v. Thomas, 134 N.C. App. 591, 518 S.E.2d 513 (1999); Schroader v. Schroader, 120 N.C. App. 790, 463 S.E.2d 790 (1995).

What Is "Income"?

"Income" is commonly defined as "the money or other form of payment that one receives, usually periodically, from employment, business, investments, royalties, gifts, and the like."[4]

North Carolina's child support guidelines define "income" broadly as a parent's gross earned or unearned income received from any source (other than means-tested public assistance benefit payments[5] and alimony payments received from the parent of the child for whom support is being determined).[6]

Under North Carolina's child support guidelines, therefore, "income" includes, but is not limited to:

- salary, wages, and other compensation from employment (including overtime, bonuses, and severance pay);
- income from self-employment or ownership or operation of a business;[7]
- retirement benefits, pensions, annuities, disability pay, and insurance benefits;
- social security benefits, unemployment compensation benefits, and workers compensation benefits;
- capital gains from the sale of property;[8]
- rental income;
- interest and dividends;
- gifts and prizes;
- irregular or nonrecurring income;[9] and
- "in-kind" or noncash income.[10]

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4. Black's Law Dictionary (2004).

5. *See* Gaston County *ex rel*. Miller v. Miller, 168 N.C. App. 577, 608 S.E.2d 101 (2005) (adoption assistance payments received by parent); McKyer v. McKyer, 179 N.C. App. 132, 632 N.C. App. 828 (2006) (remanded to determine whether educational grants received by a parent constituted a means-tested public assistance benefit).

6. *See* Spicer v. Spicer, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (personal injury settlement received by parent). Contrary to Judge Tyson's concurring opinion in *McKyer*, the fact that income is or isn't taxable under federal or state income tax law does not determine, in and of itself, whether the income is or isn't included within the definition of "income" under North Carolina's child support guidelines. A parent's income under the child support guidelines may be more or less than the parent's taxable income under federal or state law. *See* Cauble v. Cauble, 133 N.C. App. 390, 515 S.E.2d 708 (1999); Barham v. Barham, 127 N.C. App. 20, 487 S.E.2d 774 (1997); Taylor v. Taylor, 118 N.C. App. 356, 455 S.E.2d 442 (1995).

7. In the case of income from self-employment or operation of a business, the guidelines define "income" as gross income minus ordinary and necessary business expenses required in connection with the parent's self-employment or business. *See* Kennedy v. Kennedy, 107 N.C. App. 695, 421 S.E.2d 795 (1992) (disallowing deduction of certain business expenses from parent's gross income); Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (disallowing deduction of accelerated depreciation and principal payments on mortgage loan); Cauble v. Cauble, 133 N.C. App. 390, 515 S.E.2d 708 (1999) (disallowing deduction for bad debts); Holland v. Holland, 169 N.C. App. 564, 610 S.E.2d 231 (2005).

8. *See* McKyer v. McKyer, 179 N.C. App. 132, 632 N.C. App. 828 (2006).

9. The child support guidelines allow a court (a) to average or "prorate" income that a parent receives on an irregular, nonrecurring, or one-time basis over a specified period of time when determining the amount of child support payable under the guidelines, or (b) to require a noncustodial parent to pay a specific portion of his irregular or nonrecurring income as child support.

10. *See* Leary v. Leary, 152 N.C. App. 438, 567 S.E.2d 834 (2002) (use of automobile owned by obligor's employer); Spicer v. Spicer, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (room and board provided by obligor's parents).

Current Income

Under North Carolina's child support guidelines, the amount of a parent's child support obligation generally must be "based on the parents' *current* incomes at the time the order is entered."[11]

A court, therefore, generally may not base a parent's child support obligation on the parent's anticipated or *future* income if the parent's receipt of that income is purely speculative.[12] Nor may a court base a parent's child support obligation on the amount of the parent's *past* income if the parent is no longer receiving that income at the time the order is entered.[13] On the other hand, though, a court may consider the amount of a parent's *past* income when entering a child support order against a noncustodial parent *if* the parent's past income provides a reasonable basis for determining the parent's *actual*, *current* income.[14]

Actual vs. Potential Income

In addition, North Carolina's child support guidelines and appellate case law generally require that the amount of a noncustodial parent's child support obligation be based on the amount of income he is *actually* receiving at the time a child support order is entered.[15]

North Carolina's child support guidelines and case law, however, allow a court to impute *potential* income to either parent and to use a parent's potential, rather than actual, income when determining a noncustodial parent's child support obligation if

1. the parent's actual income is less than his or her potential income, and
2. the difference between the parent's actual and potential income is the result of the parent's *bad faith* that reflects a *deliberate disregard* of the parent's financial responsibility to support his or her child.

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11. The guidelines require that the amount of a parent's current earnings be verified through pay stubs, employer statements, business receipts and expenses, or other suitable documentation covering a period of at least one full month, and that statements regarding a parent's income be supplemented by providing copies of the parent's most recent tax return or other documentation regarding his or her past income.

12. *See* Scotland County Dept. of Social Services obo Powell v. Powell, 155 N.C. App. 531, 573 S.E.2d 694 (2002).

13. *See* Hodges v. Hodges, 147 N.C. App. 478, 556 S.E.2d 7 (2001); Holland v. Holland, 169 N.C. App. 564, 610 S.E.2d 231 (2005).

14. *See* Holland v. Holland, 169 N.C. App. 564, 610 S.E.2d 231 (2005); Diehl v. Diehl, 177 N.C. App. 642, 630 S.E.2d 25 (2006) (holding that, because a parent failed to provide reliable evidence regarding his actual, current income, the trial court did not abuse its discretion in basing the parent's child support obligation on his average income during the two calendar years preceding the year before the year in which the child support order was entered). *Cf.* State obo Williams v. Williams, 179 N.C. App. 838, 635 S.E.2d 495 (2006) (holding that the trial court erred in basing a parent's child support obligation on the amount of his annual earnings reflected in a statement made eighteen months before the date the child support order was entered, despite the court's finding that the statement was the "most believable" evidence regarding the parent's actual, current income).

15. *See* Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991) (citing Goodhouse v. DeFravio, 57 N.C. App. 124, 290 S.E.2d 751 (1982) and Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976), both of which were decided prior to the adoption of North Carolina's child support guidelines). *See also* Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992); Ellis v. Ellis, 126 N.C. App. 362, 485 S.E.2d 82 (1997); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997), Hodges v. Hodges, 147 N.C. App. 478, 556 S.E.2d 7 (2001), and State obo Godwin v. Williams, 163 N.C. App. 353, 593 S.E.2d 123 (2004) (all decided after the adoption of North Carolina's child support guidelines).

What Is "Potential" Income?

A parent's *potential* income is the amount of income that a parent could reasonably be expected to receive if the parent more fully exercised his or her capacity to earn income from employment or to obtain income from other available sources.

A parent's potential income, therefore, is not the amount of income that the parent *actually* receives, but rather the amount of income that a parent *reasonably could be expected to receive* from employment or other sources if she took reasonable steps to do so.

When a court "imputes" potential income to a parent, the court considers the amount of the parent's potential income in determining that parent's child support obligation (or the child support obligation of the child's other parent) even though the income imputed to the parent is *not actually received* by that parent and, therefore, is not, strictly speaking, actually available to the parent to use for the child's support.[16] The rule allowing a court to impute potential income to a parent, therefore, can be said to be based on a "legal fiction" because the court treats income that is not actually received by a parent as if it were actually received by the parent.[17]

Potential Income and Earning Capacity

Issues involving potential income arise most commonly in cases in which a parent fails to exercise his capacity to earn income through employment. As a result, the rule allowing a court to impute potential income to a parent frequently is referred to as the "earning capacity" rule.[18] The potential income rule, however, also applies to cases in which a parent fails to exercise her capacity to obtain income from sources other than employment.

Potential Income and "In-Kind" Income

Although lawyers and judges sometimes confuse the concept of "in-kind" income with the concept of potential income in child support proceedings, these two concepts are completely distinct and unrelated.

"In-kind" income generally refers to noncash income that is *actually* received by a parent in the form of goods or services provided by an employer or other person.[19] A court, therefore, does not impute potential income to a parent, and the potential income rule does not apply, when the court

16. Potential income, therefore, is sometimes referred to as "imputed" income because it is imputed to a parent in determining the amount of his or her child support obligation.

17. Although the potential income rule is based on a "legal fiction" (that the parent actually has income that she doesn't *actually* have), application of the rule is justified by the court's finding, as a matter of fact, that the parent *could* actually receive the amount of income imputed to her if she took reasonable steps to exercise her capacity to obtain income through employment or other means.

18. This bulletin will use the term "potential income rule," rather than "imputed income rule" or "earning capacity rule," when referring to the rule allowing a court to impute potential income to a parent in a legal proceeding involving a parent's court-ordered child support obligation.

19. "In-kind" income includes, for example, the free use of an automobile provided by a parent's employer or the provision of free room or board by a person other than the parent's spouse. *See* Leary v. Leary, 152 N.C. App. 438, 567 S.E.2d 834 (2002) (use of automobile owned by obligor's employer); Spicer v. Spicer, 168 N.C. App. 283, 607 S.E.2d 678 (2005) (room and board provided by obligor's parents).

includes in the amount of the parent's income any "in-kind" or noncash income that the parent actually receives from an employer or another person.[20]

Evolution of North Carolina's Potential Income Rule

North Carolina's Pre-1990 Case Law

The North Carolina Supreme Court's 1960 decision in *Sguros v. Sguros* marked the first time that the state's highest court recognized a trial court's authority—and also the *limits* on a trial court's authority—to impute potential income to a parent in determining the amount of his child support obligation.[21]

In *Sguros*, the custodial parent of two children brought a civil action for child support against the children's father who, following the parties' separation, had quit his job as a laboratory technician in North Carolina (where he earned approximately $10,800 per year) and moved to Florida in order to accept a faculty appointment at the University of Miami (where he was earning approximately $8,000 per year at the time of the action). The trial court apparently based the amount of the father's child support obligation on the amount he had been earning from his former employment in North Carolina rather than the amount of income he was actually earning from his employment in Florida at the time the child support order was entered.

On appeal, the Supreme Court, noting that there was no evidence in the record to suggest that the father's relocation, change in employment, and reduction in income were unreasonable or not undertaken in good faith, held that the trial court should have based the father's child support obligation on his actual, current earnings ($8,000 per year) rather than his earnings from his former employment ($10,800 per year).

Over the following thirty years, North Carolina's appellate courts restated and applied the potential income rule in more than a dozen reported cases involving the establishment or modification of alimony or child support orders—though the precise definition, scope, and application of the rule appear to have varied somewhat from case to case.

Thus, in *Conrad v. Conrad*, the Supreme Court held that the potential income rule could not be applied absent evidence that a husband or father

> was failing to exercise his capacity to earn because of a disregard of his marital [or parental] obligation to provide reasonable support for his wife [or children].[22]

Fifteen years later, the Supreme Court elaborated the scope and application of the rule, holding, in *Bowes v. Bowes*, that potential income may be imputed to a parent if there is evidence of a

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20. *See* Spicer v. Spicer, 168 N.C. App. 283, 287-289, 607 S.E.2d 678, 682-683 (2005); *cf.* Leary v. Leary, 152 N.C. App. 438, 442, 567 S.E.2d 834, 837 (2002) (in which the trial court, appellant, and appellate court incorrectly speak of "imputing" in-kind income to the noncustodial parent). *See also* Burnett v. Wheeler, 128 N.C. App. 174, 177, 493 S.E.2d 804, 806 (1997) (holding that the trial court did not erroneously "impute" income to a parent based on the parent's past earnings).

21. Sguros v. Sguros, 252 N.C. 408, 114 S.E.2d 79 (1960). North Carolina's pre-1960 case law allowed a court to base a husband's *alimony* obligation on his earning capacity, rather than his actual income, if the husband was acting in "bad faith" by deliberately attempting to avoid his financial responsibilities to his former spouse. *See* Davidson v. Davidson, 189 N.C. 625, 127 S.E. 682 (1925).

22. *Conrad*, 252 N.C. 412, 418, 113 S.E.2d 912, 916 (1960).

> deliberate attempt on the part of [the parent] to avoid his financial [responsibility for his] family … by refusing to seek or to accept gainful employment; by wilfully [sic] refusing to secure or take a job; by deliberately not applying himself to his business; by intentionally depressing his income to an artificial low; or by intentionally leaving his employment to go into another business.[23]

And in its 1976 decision in the case of *Beall v. Beall*, the Supreme Court held that an award of alimony or child support may be based on a parent's or spouse's earnings capacity, rather than his actual income, if the court finds that the parent or spouse

> is deliberately depressing his income or indulging himself in excessive spending because of a *disregard* of his [parental or] marital obligation to provide reasonable support for his wife and children.[24]

Citing the Supreme Court's decision in Bowes, the North Carolina Court of Appeals held in 1978 that

> imposition of the earnings capacity rule must be based on evidence that tends to show [that a husband's or parent's] actions resulting in reduction of his income were *not taken in "good faith."*[25]

And in *Fischell v. Rosenberg*, the Court of Appeals held that the potential income rule may be applied only if the court finds that a parent is

> acting in *bad faith* by deliberately depressing his income or otherwise disregarding the obligation to pay child support.[26]

North Carolina's Post-1990 Case Law

Since the adoption of North Carolina's first child support guidelines in 1990, North Carolina's appellate courts have applied the potential income rule in dozens of cases involving the establishment or modification of child support orders. And, like the state's pre-1990 case law, North Carolina's post-1990 case law has consistently held that a court may not impute potential income to a parent unless the court finds, on the basis of competent evidence, that the parent to whom income is imputed has acted in "bad faith" by deliberately depressing her income for the purpose of avoiding or minimizing her responsibility to support her child.[27]

In 2003, North Carolina's Court of Appeals summarized the case law regarding the imputing of potential income in child support proceedings, stating, in *Mason v. Erwin*, that a court may not impute potential income to a parent unless the parent has disregarded his obligation to support his child by

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23. Bowes v. Bowes, 287 N.C. 163, 171-172, 214 S.E.2d 40, 45 (1975).
24. Beall v. Beall, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976).
25. Wachacha v. Wachacha, 28 N.C. App. 504, 509, 248 S.E.2d 375, 378 (1978) (emphasis added).
26. 90 N.C. App. 254, 256, 368 S.E.2d 11, 13 (1988) (emphasis added).
27. *See* Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd*. 359 N.C. 65, 602 S.E.2d 360 (2004), citing Bowers v. Bowers, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001); Sharpe v. Nobles, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997); King v. King, 153 N.C. App. 181, 185, 568 S.E.2d 864, 866 (2002); and Cook v. Cook, 159 N.C. App. 657, 583 S.E.2d 696 (2003).

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully [sic] refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.[28]

Collectively, these or other factors indicating a deliberate and unreasonable disregard of a parent's obligation to provide adequate support for his or her child constitute the "bad faith" that is required to trigger application of North Carolina's potential income rule.[29]

The dispositive issue in determining whether potential income may be imputed to a parent, therefore, is whether the parent's failure to realize her potential earnings capacity or income is motivated by her desire or intent to avoid her legal obligation to provide adequate support for her child.[30]

Evidence of this proscribed intent, of course, may be (indeed, often must be) inferred from the parent's actions.[31] But evidence that a parent is *voluntarily* unemployed, is *voluntarily* underemployed, or has *voluntarily* reduced her income is insufficient, standing alone, to justify imposition of the potential income rule.[32]

North Carolina's Child Support Guidelines

North Carolina's first presumptive child support guidelines, adopted in 1990, generally required a court to impute income to a parent if the parent was unemployed or underemployed. In 1991, however, the guidelines were revised to allow a court to impute income to a parent if the parent was "voluntarily unemployed."[33]

In 2002, the "bad faith" or "deliberate disregard" standard established under North Carolina's appellate case law was incorporated into North Carolina's child support guidelines, and the state's current (2006) guidelines expressly allow a court to calculate a custodial or noncustodial parent's child support obligation based on the parent's potential, rather than actual, income if

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28. Mason v. Erwin, 157 N.C. App. 284, 289, 579 S.E.2d 120, 123 (2003), citing Wolf v. Wolf, 151 N.C. App. 523, 526-27, 566 S.E.2d 516, 518-19 (2002) and Bowes v. Bowes, 287 N.C. 163, 214 S.E.2d 40 (1975).

29. *See* Cook v. Cook, 159 N.C. App. 657, 663, 583 S.E.2d 696, 699 (2003). Conversely, though, actions or decisions by a parent that affect the amount of his or her income reflect a parent's "good faith" if "they were not engaged in for the primary purpose of eliminating or reducing [the parent's] support obligation." Lewis Becker, "Spousal and Child Support and the 'Voluntary Reduction of Income' Doctrine," 29 Conn. L. Rev. 647, 659 (1997) [hereafter Becker, "Voluntary Reduction of Income"].

30. *See* Pataky v. Pataky, 160 N.C. App. 289, 307, 585 S.E.2d 404, 416 (2003), citing Wolf v. Wolf, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002).

31. See Wachacha v. Wachacha, 38 N.C. App. 504, 509, 248 S.E.2d 375, 378 (1978).

32. *See* State *ex rel*. Godwin v. Williams, 163 N.C. App. 353, 357, 593 S.E.2d 123, 126 (2004); Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd*. 359 N.C. 65, 602 S.E.2d 360 (2004), citing King v. King, 153 N.C. App. 181, 185, 568 S.E.2d 864, 866 (2002); Bowers v. Bowers, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001); and Sharpe v. Nobles, 127 N.C. App. 705, 709, 493 S.E.2d 288, 290 (1997).

33. Although the potential income rule as stated in the 1991 child support guidelines was probably inconsistent with the "bad faith" standard established by North Carolina's appellate case law, it was not substantially changed under the 1994 and 1998 revisions to the child support guidelines and remained in effect until the guidelines were revised again in 2002.

1. the parent to whom potential income is imputed is voluntarily unemployed or underemployed, and
2. the 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.[34]

North Carolina's child support guidelines further provide that, if a court is allowed to imputed potential income to a parent, the *amount* of potential income imputed to the parent

> must be based on the parent's employment potential and probable earnings level based on the parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community.[35]

Purpose and Policies Underlying or Implicit in the Potential Income Rule

Because the potential income rule is an exception to the general rule that a parent's child support obligation must be based on the parent's actual income at the time a child support order is entered, the fundamental issue presented by the potential income rule is "under what circumstances *should* a [parent's potential income or] earning capacity … rather than the [parent's] actual income be considered by a court" in establishing or modifying a child support order.[36] And this question "is a pure (but certainly not a simple) *policy* question."[37]

In answering this policy question, state child support guidelines and court decisions generally

> follow one of three general approaches in determining whether [the potential income rule] applies to [a parent's] voluntary employment choices …: (i) a good faith test, which considers the actual earnings of a [parent] rather than his earning capacity, so long as he did not act primarily for the purpose of avoiding [his family] support obligation; (ii) a … "strict rule" which disregards any income reduction produced by voluntary conduct and therefore looks at the earning capacity of a [parent] in [determining] a support obligation; and (iii) an intermediate test, which looks at various factors in determining whether to use actual income or earning capacity in making a support determination.[38]

Any legal rule that allows a court to impute potential income to a parent when establishing or modifying a child support order reflects an implicit policy decision that, under at least some circumstances, a child's need for support (and society's interest in ensuring that parents provide adequate support for their children) should be based on a parent's potential income or earning capacity rather than the parent's actual income. But legal rules regarding the imputing of potential income to parents in child support proceedings are also shaped by social attitudes with respect to the extent of a parent's duty to provide support for her child and the extent of a parent's "right"

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34. From 1990 through 2002, North Carolina's child support guidelines discouraged, but didn't prohibit, imputing potential income to parents who were "physically or mentally incapacitated" or were caring for a child who was under the age of three years and to whom both parents owed a duty of support. Imputing potential income to these parents was prohibited by the 2002 and 2006 guidelines.

35. If a parent has no recent work history or vocational training, the guidelines suggest that the amount of income imputed to the parent should not be less than the minimum hourly wage for a forty-hour week.

36. Becker, "Voluntary Reduction of Income," 29 Conn. L. Rev. at 653.

37. *Id*. (emphasis added).

38. *Id*. at 658.

to make reasonable personal and family decisions regarding employment, education, relocation, retirement, and child care.

For example, a "strict" rule that allows or requires a court to impute income to a parent who is "voluntarily unemployed or underemployed" even when the parent has acted in "good faith" and is not "deliberately disregarding" his legal obligation to support his child reflects an implicit policy decision that the interests of the parent's child, the child's other parent, and society in ensuring that the child's needs are adequately met by the child's parents outweigh that parent's right to make personal decisions, such as changing employment, retiring, or staying home to care for a child, that limit his income and thus diminish his ability to support his child.[39]

On the other hand, a potential income rule that does not allow a court to impute potential income to a parent whose actual income is less than her potential income or earnings capacity as long as the parent is acting in "good faith" (or, conversely, has not acted in "bad faith") reflects an implicit policy decision that, as long as a parent has not acted for the primary purpose of avoiding her obligation to support her child, the parent's "right . . . to make fundamental employment choices which may reduce . . . [her] income . . . [trumps] society's interest in seeing that the financial needs of a former spouse or child are fairly and adequately met."[40]

Legal rules regarding potential income, therefore, reflect the inherent tension between the principle that courts should "not unduly interfere with the personal lives and career choices of individuals merely because they [are] involved in a divorce" or other legal proceeding involving spousal support, child support, or child custody, and the reality that whenever a spouse or parent files a lawsuit seeking spousal support, child support, or child custody, "the courts are thrust into the middle of the [spouses' or] parents' personal lives in order to protect the interest of the [other spouse] or minor children . . . ."[41]

Policy considerations underlying the legal rules regarding potential income are further complicated by the fact that different types of interests may be involved in different factual contexts in which the issue of imputing potential income may arise. For example, the personal and social interests involved in deciding whether potential income should be imputed to a spouse or parent almost certainly vary depending on whether the spouse or parent

- is retiring from his job at the age of sixty-five;
- has taken an "early" retirement;
- has quit a job or is unemployed because she is in school;
- is unemployed or earning less than she used to earn because she has relocated to a different city following remarriage;
- is not working or working only part-time because he has decided to stay home to care for a child;

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39. *Id.* at 648.

40. *Id.* "Decisions made for the purpose of avoiding a [family] support obligation do not pose the freedom of choice issues that make … issues [involving the imputing of potential income] difficult. Courts should not—and do not—view the freedom to deprive family members of support because of personal animosity or miserliness as one that deserves [judicial] consideration or [legal] protection." Becker, "Voluntary Reduction of Income," 29 Conn. L. Rev. at 658. Moreover, a rule that prohibits imputing income to a parent absent evidence of "bad faith" implicitly assumes that a parent will make personal and employment decisions that are in the interest of the children for whom he owes child support and not merely in his own interest—an assumption that may not have a sufficient basis in reality. Becker, "Voluntary Reduction of Income," 29 Conn. L. Rev. at 663.

41. Rohloff v. Rohloff, 411 N.W.2d 484, 488 (Mich. Ct. App. 1987).

- has recently taken a different job that provides more stability, personal satisfaction, or long-term promise but pays a lower salary or wage than her former job;
- is unemployed because of her own fault; or
- is incarcerated.

In resolving these cases, courts often must consider the "reasonableness" of a spouse's or parent's actions or decisions, "the level of responsibility a party should bear for his action, [and] what is fair to both the obligor and the obligee of a support order."[42] Unfortunately, though, "courts [throughout the country] must often act with what is at best minimal legislative guidance" regarding whether and when income may be imputed to a parent in a child support case.[43] And, as a result, "judicial opinions vary widely regarding the test to be applied in resolving . . . cases" involving potential income and there is a significant amount of "inconsistency (both among the various states and within individual states) in resolving these issues [along with] a lack of clarity in analyzing them [and] a concomitant unpredictability in an area where a clear rule could be extremely useful in guiding and informing [a parent's] conduct regarding employment."[44]

Although North Carolina's potential income rule uses the term "bad faith," it is similar to the "good faith" test described above, and thus prohibits imputing potential income to a parent if the parent's actions or decisions resulting in a reduction or depression of actual income are not done or made with the intent to avoid, reduce, or minimize her responsibility for providing reasonable and adequate financial support for her children.

It may be argued, however, that such a "good faith test is fundamentally flawed"

- first, because, except in cases involving a demonstrable intent by a parent to avoid her family support obligation, it allows a parent's freedom of choice with respect to personal, family, or employment decisions to "trump" a child's right to receive adequate financial support, and
- second, because "a good faith test by its very nature has a built-in bias in favor of finding good faith to exist."[45]

On the other hand, though, a "strict rule" regarding the imputing of potential income is equally problematic because it focuses exclusively on a parent's obligation to support his or her child and disregards "all interests other than the immediate economic interest of the beneficiary of [a child] support order."[46]

Some states, therefore, have adopted an "intermediate test" for determining whether and when a court may impute income to a parent when it is establishing or modifying a child support order.[47] Unlike the good faith test and the strict rule regarding voluntary reductions in income, an intermediate test allows a court to balance a parent's obligation to support his family with the parent's freedom to make reasonable decisions regarding employment and other personal or family matters. Thus, under one version of the intermediate test, a court would be permitted to use its discretion in deciding whether to impute income to a parent in a child support case based upon its consideration of a number of specified factors, including:

42. Becker, "Voluntary Reduction of Income," 29 Conn. L. Rev. at 649.
43. *Id*.
44. *Id*. at 650–651.
45. *Id*. at 663–664.
46. *Id*. at 668–669.
47. *Id*. at 669–673.

> (i) the reasons asserted by the party whose conduct is at issue, (ii) the impact upon the obligee of considering the actual earnings of the obligor; (iii) where the obligee's conduct is at issue, the impact upon the obligor (and fairness to the obligor) of considering the actual earnings of the obligee and thereby reducing the obligee's financial contribution to the support order at issue; (iv) whether the party complaining of a voluntary reduction in income acquiesced in the conduct of the other party; (v) the timing of the action in question in relation to the entering of a decree or the execution of a written agreement between the parties.[48]

An intermediate test may strike some as a better way of resolving cases involving imputed income. But an intermediate test, however, "is necessarily less predictable" than either the good faith test or a "strict rule" regarding imputing potential income to parents and, therefore, may result in greater inconsistency in judicial decision-making in child support cases.[49] In addition, an intermediate test must, sooner or later, address and, ultimately, resolve a number of fundamental issues, including

- whether some types of reasons given for a reduction or depression of a parent's income (for example, retirement, returning to school, relocation, providing in-home care for a child, etc.) are "reasonable" or "legitimate,"
- how much weight should be given to each of these reasons or factors, and
- the extent to which a court should or should not defer to a parent's decisions or actions when those decisions or actions may adversely affect the parent's ability to support his or her child.[50]

Imputing Income in Child Support Proceedings

Imputing Potential Income When a Court Enters an Initial Child Support Order

When a court enters an initial order (either temporary or final) requiring a parent to pay child support, the court generally must calculate the parent's child support obligation by applying North Carolina's child support guidelines, which, in turn, require the court to determine the parents' incomes and use the parents' incomes in calculating their respective obligations to support their child. And, as noted above, when a court enters an initial child support order, North Carolina's child support guidelines and case law generally require the court to base the amount of the noncustodial parent's child support obligation, at least in part, on the amount of the noncustodial parent's *actual*, *current* income.

North Carolina's child support guidelines and case law, however, allow a court to use either parent's *potential*, rather than actual, income when entering an initial child support order and determining the amount of a parent's court-ordered child support obligation *if* the potential income rule applies and the court makes sufficient findings, supported by competent evidence, to support application of the potential income rule.[51]

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48. *Id*. at 675–676.

49. *Id*. at 673.

50. *Id*. at 676–713.

51. *See* McKyer v. McKyer, 179 N.C. App. 132, 632 S.E.2d 828 (2006); Roberts v. McAllister, 174 N.C. App. 369, 621 S.E.2d 191 (2005); Osborne v. Osborne, 129 N.C. App. 34, 497 S.E.2d 113 (1998); Stanley v. Stanley,

Imputing Potential Income When a Court Modifies a Child Support Order

G.S. 50-13.7(a) generally authorizes a North Carolina court to modify the amount of support payable under an existing North Carolina child support order "upon a showing of changed circumstances by either party . . . ."

It is important to note, though, that modification of a child support order under G.S. 50-13.7(a) is a two-step process.[52]

In the first step, the court must determine whether a "substantial change of circumstances" has occurred since the existing child support order was entered. If there has not been a substantial change of circumstances, the court must deny the motion to modify the existing child support order, and the existing order remains in effect.

If the court finds that there has been a substantial change of circumstances, the court proceeds to the second step of the process, which requires the court to determine the *amount* of each parent's modified (increased or decreased) child support obligation by applying (or deviating from) North Carolina's child support guidelines.

When a court finds that there has been a substantial change of circumstances and grants a motion to modify the amount of support payable under an existing child support order under G.S. 50-13.7, the potential income rule applies in exactly the same manner as in cases involving the issuance of an initial child support order that determines the amount of a parent's child support obligation.[53]

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51 N.C. App. 172, 275 S.E.2d 546 (1981); *In re* Register, 49 N.C. App. 65, 270 S.E.2d 507 (1980); Swink v. Swink, 6 N.C. App. 161, 169 S.E.2d 539 (1969). *See also* State *ex rel.* Godwin v. Williams, 163 N.C. App. 289, 593 S.E.2d 123 (2004); Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd*. 359 N.C. 65, 602 S.E.2d 360 (2004); Bowers v. Bowers, 141 N.C. App. 729, 541 S.E.2d 508 (2001); Lawrence v. Tise, 107 N.C. App. 140, 419 S.E.2d 176 (1992); McDonald v. Taylor, 106 N.C. App. 18, 415 S.E.2d 81 (1992); Cameron v. Cameron, 94 N.C. App. 168, 380 S.E.2d 121 (1989); Atwell v. Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985); Whitley v. Whitley, 46 N.C. App. 810, 266 S.E.2d 23 (1980); Holt v. Holt, 29 N.C. App. 124, 223 S.E.2d 542 (1976); Powell v. Powell, 25 N.C. App. 695, 214 S.E.2d 808 (1975); Sguros v. Sguros, 252 N.C. 408, 114 S.E.2d 79 (1969). North Carolina's appellate courts affirmed the trial court's refusal to impute potential income in one of the cases cited above (*Lawrence*), affirmed the trial court's decision to impute potential income in six of those cases, held that the trial court failed to make sufficient findings to impute potential income in six of those cases, and held that there was insufficient evidence to impute potential income in four of those cases.

52. *See* Davis v. Risley, 104 N.C. App. 798, 411 S.E.2d 171 (1991); McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995); Meehan v. Lawrence, 166 N.C. App. 369, 602 S.E.2d 21 (2004).

53. *See* Mason v. Erwin, 157 N.C. App. 284, 579 S.E.2d 120 (2003). *See also* Cook v. Cook, 159 N.C. App. 657, 583 S.E.2d 696 (2003); Chused v. Chused, 131 N.C. App. 668, 508 S.E.2d 559 (1998); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997); Ellis v. Ellis, 126 N.C. App. 362, 485 S.E.2d 82 (1997); Kennedy v. Kennedy, 107 N.C. App. 695, 421 S.E.2d 795 (1992); Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991); O'Neal v. Wynn, 64 N.C. App. 149, 306 S.E.2d 822 (1983), *aff'd*. 310 N.C. 621, 313 S.E.2d 159 (1984). The North Carolina Court of Appeals upheld the trial court's decision to impute potential income in one of the cases cited above (*Mason*), affirmed the trial court's decision not to impute potential income in one of those cases (*O'Neal*), and reversed the trial court's decision to impute income due to insufficient findings or evidence in six of those cases.

Denying Modification of a Child Support Order Based on a Parent's Potential Income

Under G.S. 50-13.7, a North Carolina court may not modify the amount, scope, or duration of an existing child support order unless it finds that there has been a "substantial change of circumstances" since the date the order was entered.

Under North Carolina's appellate case law, it is clear that *some* changes in a parent's income may constitute a substantial change of circumstances sufficient to modify (increase or decrease) the amount of child support payable under an existing child support order.

A significant *involuntary* reduction in a parent's income, for example, generally is sufficient to constitute a substantial change of circumstances under G.S. 50-13.7.[54] In addition, North Carolina's child support guidelines allow a court to presume that a substantial change of circumstances has occurred if a child support order is at least three years old and the amount of support payable under the child support guidelines based on the parents' *current* incomes is at least fifteen percent more or less than the amount of child support payable under the existing order.[55]

A court, therefore, may *deny* a motion to modify a child support order *if* the court determines that it is appropriate to impute potential income to a parent, *and*,

1. after comparing the parent's potential income with the parent's income at the time the existing child support order was entered, the court finds that there has *not* been a significant involuntary decrease in the parent's income; *or*
2. after using the parent's potential income to determine the amount of child support payable under the child support guidelines, the court finds that the noncustodial parent's child support obligation under the guidelines is not at least fifteen percent more or less than the amount of child support payable under the existing child support order.

Although some changes in a parent's income are legally sufficient to constitute a substantial change of circumstances under G.S. 50-13.7, it is also clear that some changes in a parent's income are legally insufficient to constitute a change of circumstances. It is clear, for example, that a significant *voluntary* reduction in a parent's income is insufficient, standing alone, to constitute a substantial change of circumstances that will justify modifying an existing child support order.[56] And North Carolina's appellate courts also have held that a significant *increase* in a parent's income is not legally sufficient, in and of itself, to constitute a substantial change of circumstances under G.S. 50-13.7.[57]

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54. *See* Pittman v. Pittman, 114 N.C. App. 808, 443 S.E.2d 96 (1994); McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995); Padilla v. Lusth, 118 N.C. App. 709, 456 S.E.2d 319 (1995); Chused v. Chused, 131 N.C. App. 668, 508 S.E.2d 559 (1998); Bishop v. Bishop, 345 N.C. 573, 96 S.E.2d 721 (1957). *Cf.* Wolf v. Wolf, 151 N.C. App. 523, 566 S.E.2d 516 (2002).

55. *See* Garrison *ex rel.* Williams v. Connor, 122 N.C. App. 702, 471 S.E.2d 644 (1996). Thus, a significant increase or decrease in a parent's income (regardless of whether the change in income was voluntary or involuntary) may constitute a substantial change of circumstances *if* an existing child support order is at least three years old and application of the child support guidelines using the parents' current incomes (actual or potential) would result in at least a fifteen percent increase or decrease in the amount of child support payable under the existing order.

56. *See* Mittendorff v. Mittendorff, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999); Schroader v. Schroader, 120 N.C. App. 790, 463 S.E.2d 790 (1995); Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988). *See also* Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995); King v. King, 144 N.C. App. 391, 547 S.E.2d 846 (2001); Mason v. Erwin, 157 N.C. App. 284, 579 S.E.2d 120 (2003).

57. *See* Thomas v Thomas, 134 N.C. App. 591, 518 S.E.2d 513 (1999).

A parent's *potential* income, therefore, generally is irrelevant when the sole basis for a motion to modify an existing child support order is a *voluntary decrease* in the amount of the parent's actual income *or* an *increase* in the parent's actual income.[58]

Nonetheless, several decisions by North Carolina's Court of Appeals have held that a court may deny a noncustodial parent's motion to decrease the amount of her court-ordered child support obligation if the court determines that

1. the sole basis for the noncustodial parent's motion is a reduction in the amount of her income; *and*
2. the reduction in the parent's income is voluntary; *and*
3. the reduction in the parent's income is the result of the parent's "bad faith" or deliberate disregard of her obligation to provide adequate financial support for her child.[59]

It is important to note, though, that all of these cases involved situations in which a noncustodial parent *voluntarily* reduced his income and that the trial court could have denied the parent's motion to modify his court-ordered child support obligation *without* imputing potential income to the parent or finding that the parent had acted in "bad faith," because, as noted above, a *voluntary* reduction in a parent's income is *not*, standing alone, a substantial change of circumstances under G.S. 50-13.7.[60]

In summary, then, issues involving a parent's potential income *sometimes* may arise when a court is determining whether there has been a substantial change of circumstances sufficient to modify an existing child support order (that is, in the first step of the two-step process for modification under G.S. 50-13.7), but evidence regarding a parent's potential income only *rarely* is relevant or necessary to a court's decision to *deny* a motion to modify a child support order under G.S. 50-13.7.

Imputing Income to Custodial Parents

Many, if not most, of the cases in which a court is asked to impute potential income to a parent involve situations in which the noncustodial parent's earning capacity or potential income is at issue.

North Carolina's child support guidelines, however, generally require a court to consider the incomes of *both* parents when establishing or modifying a parent's court-ordered child support obligation. And because a custodial parent's income generally is relevant in determining the amount of a noncustodial parent's child support obligation, North Carolina's Court of Appeals

58. *See* Armstrong v. Droessler, 177 N.C. App. 673, 677–678, 630 S.E.2d 19, 22 (2006) (holding that a parent's arguments with respect to application of the potential income rule were not on point when the issue was whether the trial court erred in finding that a reduction in the parent's income did not constitute a substantial change of circumstances under G.S. 50-13.7).

59. *See* King v. King, 153 N.C. App. 181, 568 S.E.2d 864 (2002); Wolf v. Wolf, 151 N.C. App. 523, 566 S.E.2d 516 (2002); Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995); Goodhouse v. DeFravio, 57 N.C. App. 124, 290 S.E.2d 751 (1982). *See also* Mittendorff v. Mittendorff, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999) (stating that if a parent's voluntary reduction in income is in "bad faith," a parent's *potential*, rather than actual, income may be used to determine whether the parent has sustained a substantial reduction in income).

60. Although these cases, like those in which a court imputes potential income to a parent, focus on a parent's "bad faith" or deliberate disregard of the parent's obligation to provide adequate support for his or her child, they do not, strictly speaking, involve *imputing* potential income to the parent.

has held that the potential income rule generally applies to *custodial*, as well as noncustodial, parents.[61]

Imputing Potential Income to a Parent Who Is Voluntarily Unemployed

Under North Carolina law, a finding that a parent is *voluntarily* unemployed is legally insufficient, in and of itself, to allow a court to impute income to that parent based on the parent's earning capacity.[62] In other words, the fact that a parent is voluntarily unemployed does not necessarily mean that her unemployment is the result of bad faith or a deliberate disregard of her responsibility to support her child.

This does not mean, however, that the voluntariness of a parent's unemployment is completely irrelevant to the issue of bad faith. Thus, a court may impute income to a parent who is voluntarily unemployed[63] based on the parent's earning capacity if the court finds, based on competent evidence, that

1. the parent is not physically or mentally incapacitated;
2. the parent is not caring for a child under the age of three years for whom support is being determined;
3. suitable job opportunities are available;[64] *and*
4. the parent's failure to seek or accept suitable employment constitutes bad faith or a deliberate disregard of the parent's responsibility to support his or her child.

North Carolina's Court of Appeals, therefore, has upheld a trial court's finding that an unemployed noncustodial parent's failure to seek suitable employment reflected "a deliberate disregard of her responsibility to provide reasonable support for her child" when the evidence in the record showed that she had a high school diploma, had attended college for one year, was in "good physical condition," had been unemployed for approximately seven years because she chose to stay at home to care for a child born during her second marriage, and did not feel that, given the costs of transportation and child care, it made economic sense for her to look for or accept employment that would supplement her second husband's earnings.[65]

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61. *See* Schroader v. Schroader, 120 N.C. App. 790, 463 S.E.2d 790 (1995); Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988). *See also* Hartley v. Hartley, 184 N.C. App. 121, 645 S.E.2d 408 (2007); Roberts v. McAllister, 174 N.C. App. 369, 621 S.E.2d 456 (2005); Bowers v. Bowers, 141 N.C. App. 729, 541 S.E.2d 508 (2001). The child support guidelines, however, limit the rule's applicability to a custodial parent who is caring for a child under the age of three years for whom support is being determined.

62. *See* State *ex rel.* Godwin v. Williams, 163 N.C. App. 353, 357, 593 S.E.2d 123, 126 (2004); Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd*. 359 N.C. 65, 602 S.E.2d 360 (2004), citing King v. King, 153 N.C. App. 181, 185, 568 S.E.2d 864, 866 (2002); Bowers v. Bowers, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001); and Sharpe v. Nobles, 127 N.C. App. 705, 709, 493 S.E.2d 288, 290 (1997).

63. A parent who chooses not to seek or accept suitable employment is voluntarily unemployed regardless of whether the termination of his or her prior employment was voluntary or involuntary. *See* Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546 (1981).

64. *See* McDonald v. Taylor, 106 N.C. App. 18, 415 S.E.2d 81 (1992) (reversing the trial court's decision to impute potential income to a noncustodial parent when there was no evidence in the record of suitable job opportunities available to the parent who was living with her new spouse on or near a military base in Italy).

65. *In re* Register, 49 N.C. App. 65, 270 S.E.2d 507 (1980). *Cf.* Bowers v. Bowers, 141 N.C. App. 729, 541 S.E.2d 508 (2001) (vacating and remanding trial court's decision to impute potential income to unemployed

Imputing Potential Income to an Unemployed Parent Who Quit His Job

Although a court may not impute potential income to a parent based solely on a finding that the parent voluntarily quit his most recent employment, a court generally may impute potential income to an unemployed parent who has voluntarily quit his job if the court finds that the parent's termination of employment, his failure to seek suitable employment, or both, constitutes bad faith or a deliberate disregard of the parent's responsibility to support his child.[66]

In *King v. King*,[67] for example, a noncustodial parent, who had been earning approximately $30,000 per year as a real estate agent at the time she was ordered to pay child support, voluntarily stopped working and was unemployed when the court heard her motion to reduce her child support obligation. The trial judge found that she was voluntarily unemployed, concluded that there was no good cause or justification for her decision to stop working, held that she was deliberately disregarding her legal responsibility to support her child, and denied her motion to decrease her court-ordered child support obligation. On appeal, the Court of Appeals affirmed the district court judge's ruling.

Imputing Potential Income to an Unemployed Parent Who Was Fired or Laid Off

A parent who is laid off or fired from her job is *voluntarily* unemployed if

1. she was at fault in connection with the termination of her employment, *or*
2. her continuing unemployment is voluntary.

A court, therefore, generally may impute potential earnings to a parent who has been fired or laid off from her employment if the court finds that the parent's continuing voluntary unemployment, the parent's fault in connection with the termination of his or her employment, or both, constitutes bad faith or a deliberate disregard of the parent's responsibility to support her child.[68]

For example, the case of *Wolf v. Wolf* involved a noncustodial parent who was fired from his job due to his unreasonable conduct and unwarranted demands as an employee.[69] Finding that the employer's decision to fire Mr. Wolf was "entirely predictable" and was the result of Mr. Wolf's own voluntary actions, the trial court denied Mr. Wolf's motion to reduce his court-ordered child support obligation and concluded that Mr. Wolf's child support obligation should be based on his earning capacity, rather than his actual income, despite the fact that he had been fired and was currently unemployed.

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parent); Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998) (remanding case for determination as to whether a noncustodial parent's failure to seek employment constituted a deliberate disregard of her responsibility to support her child); McDonald v. Taylor, 106 N.C. App. 18, 415 S.E.2d 81 (1992).

66. North Carolina's child support guidelines provide that a court may not impute potential earnings to a parent who voluntarily quit her previous employment if the parent is physically or mentally incapacitated, the parent is caring for a child under the age of three years for whom support is being determined, or suitable employment is not available to the parent.

67. *King*, 153 N.C. App. at 181, 568 S.E.2d at 864 (2002).

68. North Carolina's child support guidelines provide that a court may not impute potential earnings to a parent who voluntarily quit his previous employment if the parent is physically or mentally incapacitated, the parent is caring for a child under the age of three years for whom support is being determined, or suitable employment is not available to the parent.

69. *Wolf*, 151 N.C. App. at 523, 566 S.E.2d at 516 (2002).

Imputing Potential Income to a Parent Who is Voluntarily Underemployed

A parent is voluntarily *underemployed* if he or she is

1. employed at least part-time but could be employed full-time, or
2. working either part-time or full-time but could be earning more in a different job.

If a court finds that a custodial or noncustodial parent is voluntarily underemployed, the court generally may impute earnings to the parent if the court determines that the parent's voluntary underemployment is the result of the parent's bad faith or deliberate disregard of the parent's responsibility to provide adequate support for his or her child.[70]

Thus, in *McKyer v. McKyer*,[71] the North Carolina Court of Appeals upheld the trial court's finding that a noncustodial parent had deliberately suppressed his income and acted in deliberate disregard of his obligation to provide reasonable support for his children when the evidence showed that he worked only one day per week, that he had not sought additional work, and that there was no indication that he could not work full-time for his current employer.[72]

In *Ellis v. Ellis*, however, the Court of Appeals held that income could not be imputed to a parent who worked full-time as a school psychologist during the nine-month "school year" but did not work or look for work during the summer.[73]

Neither North Carolina's child support guidelines nor reported appellate court decisions (other than the decision in *Ellis*), though, have expressly addressed whether income may be imputed to a "voluntarily underemployed" parent who is working full-time but refuses to work overtime or to look for or accept a second job to supplement his earnings.[74]

Imputing Income to a Parent Who Has Changed Employment

Some courts consider a parent to be "voluntarily underemployed" if she is working full-time but has recently changed jobs and is earning less than she did in her previous job. In these cases, as in other cases in which a court is asked to impute potential income to a parent, a court generally may impute potential income to a parent based on the parent's earning capacity if the court determines that the parent's change in employment and reduction in earnings are reflective of the parent's bad faith or deliberate disregard of her responsibility to support her child. And in these cases, the

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70. North Carolina's child support guidelines provide that a court may not impute potential earnings to a voluntarily underemployed parent if she is physically or mentally incapacitated, she is caring for a child under the age of three years for whom support is being determined, or suitable employment is not available to the parent.

71. *McKyer*, 179 N.C. App. at 132, 632 S.E.2d at 828 (2006).

72. *Cf.* Cameron v. Cameron, 94 N.C. App. 168, 380 S.E.2d 121(1989) (reversing a trial court's decision to impute income to a parent who was working as a part-time mail carrier).

73. *Ellis*, 126 N.C. App. at 362, 485 S.E.2d at 92 (1997).

74. *See* In re Marriage of Simpson, 841 P.2d 931, 935-937 (Cal. 1992); Cochran v. Cochran, 419 S.E.2d 419, 421 (Va. Ct. App. 1992). It is important to note that the issue of whether income should be imputed to a parent who does not work overtime or at a second job is different from the issue of whether earnings that are *actually* received by a parent from a second job or overtime work may be considered in determining the amount of his child support obligation. All income that is actually received by a parent must be considered in determining a parent's child support obligation unless the income is excluded from the definition of "income" under North Carolina's child support guidelines.

issue of the parent's good or bad faith often turns on the reason that the parent changed jobs or accepted a job that paid less than her previous job.[75]

In *Sguros v. Sguros*,[76] for example, a noncustodial parent quit his job as a laboratory technician with a tobacco company (where he earned approximately $10,800 per year) in order to accept a faculty appointment at a university in another state (where he earned only $8,000 per year). At trial, the parent testified that he changed jobs because his opportunities for advancement as a bacteriologist were greater as a university professor than as a laboratory technician. On appeal, the Supreme Court held that, absent any evidence suggesting that the parent had failed to act in good faith in changing his employment, "he had the *right* … to accept the professorship … [despite the] reduction in salary," and that the trial court therefore should have based the parent's support obligation on his actual, current income, not his earnings capacity or the amount of income he had received in his former employment.[77]

Similarly, in its 2003 decision in the case of *Cook v. Cook*,[78] North Carolina's Court of Appeals held that a district court judge erred in imputing income to a noncustodial parent who, after obtaining his certification as a public school teacher and experiencing unspecified problems in his work as an aquatics instructor with the YMCA, quit his job at the YMCA (where he had been earning $24,500 per year), unsuccessfully looked for full-time work as a public school teacher, and accepted a part-time, substitute teaching position (earning approximately $1,000 to $1,700 per month).[79]

And in *Sharpe v. Nobles*,[80] the Court of Appeals held that the trial court erred in imputing potential income to a noncustodial parent who transferred from one job (earning $46,540 per year) to another job (earning $40,000 per year) with his employer, noting that although the parent's change in employment was voluntary, there was no evidence that he had deliberately suppressed his income in order to minimize his support obligation or otherwise had acted in bad faith.[81]

On the other hand, though, the Court of Appeals upheld a trial court's decision to impute potential income in the case of a noncustodial parent who quit his job as a salesperson with an insurance company (earning approximately $3,323 per month) in order to start his own business as an independent insurance agent (earning approximately $800 per month).[82]

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75. A parent's decision to change jobs may be based on his decision to relocate from one community to another for personal, family, or employment reasons, the parent's dissatisfaction with the working conditions at his former job, the parent's hope or need for greater job stability or security, increased opportunities for promotion, career advancement, or personal satisfaction, or a host of other factors.

76. *Sguros*, 252 N.C. at 408, 114 S.E.2d at 79 (1960).

77. Sguros v. Sguros, 252 N.C. 408, 411, 114 S.E.2d 79, 82 (1960) (emphasis added).

78. Cook v. Cook, 159 N.C. App. 657, 583 S.E.2d 696 (2003).

79. In imputing income to the parent, the trial court found that Mr. Cook had the capacity to earn at least $24,500 per year and that his change in employment was entirely voluntary. However, the trial court also found that Mr. Cook had *not* acted in bad faith in quitting his job at the YMCA and accepting work at a lower salary as a part-time, substitute school teacher. And without such a finding, the appellate court held that the imputed income rule could not be applied.

80. *Sharpe*, 127 N.C. App. at 705, 493 S.E.2d 288 at (1997).

81. *See also* Mittendorff v. Mittendorff, 133 N.C. App. 343, 515 S.E.2d 464 (1999); Chused v. Chused, 131 N.C. App. 668, 508 S.E.2d 559 (1998); Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998); Wachacha v. Wachacha, 38 N.C. App. 504, 248 S.E.2d 375 (1978).

82. Askew v. Askew, 119 N.C. App. 242, 458 S.E.2d 217 (1995). Although the trial court found that the parent had voluntarily left his former employment and that he had willfully and intentionally reduced his

Imputing Potential Income to a Parent Who Has Retired

In some cases involving the "voluntary unemployment" of a child's parent, the parent is unemployed because he has retired voluntarily from his former employment and is receiving a retirement pension that is less than the amount he earned when he was working.

The mere fact that a parent has voluntarily retired, however, does not necessarily mean that her decision to retire is indicative of bad faith or a deliberate disregard of her responsibility to support her child. To the contrary, a court generally should *not* impute potential earnings to a parent who has voluntarily retired from her former employment due to poor health or upon reaching "normal" retirement age.[83]

A court, however, generally may impute income to a retired parent *if* the court finds that the reduction in income as a result of the parent's "early" retirement is the result of the parent's bad faith or deliberate disregard of his obligation to provide adequate support for his child.[84]

The case of *Mason v. Erwin*, for example, involved a noncustodial parent who retired from his job at the age of 52 years and after having worked for 25 years with his employer.[85] Although Mr. Erwin claimed that he had retired due to health concerns and accidents on the job, the trial court found his testimony incredible, noted that his retirement occurred shortly after his second wife won $4.4 million in the Canadian lottery, concluded that his decision to retire constituted a deliberate disregard of his obligation to provide reasonable support for his child, and determined that his child support obligation should be based on his earning capacity rather than his actual income. The Court of Appeals affirmed the trial court's decision.

Similarly, in *Osborne v. Osborne*, the Court of Appeal upheld a trial court's decision to impute income to a parent who worked for 25 years, retired when he was 51 years old, was receiving a local government retirement pension, was healthy, and could have accepted new employment or reemployment without significantly affecting his continued eligibility for retirement benefits.[86]

Imputing Potential Income to a Parent Who Is Caring for a Child at Home

North Carolina's child support guidelines expressly provide that potential income may *not* be imputed to an unemployed or underemployed custodial parent who "is caring for a child who is under the age of three years and for whom child support is being determined."

Except as noted above, however, a court generally may impute income to a parent whose voluntary unemployment or underemployment is due to her choice to care for a child if the court finds that the parent's decision to stay at home and care for the child is indicative of bad faith or

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earnings, the appellate court did not cite any evidence that suggested that the parent's change in employment was motivated by a desire to avoid his obligation to support his child or was the result of bad faith. *Cf.* Kinne v. Kinne, 599 So.2d 191, 194–195 (Fla. Dist. Ct. App. 1992) (holding that, absent evidence suggesting that the parent had acted in "bad faith," income could not be imputed to a parent who had recently started his own business but could make more money "flipping hamburgers").

83. *See* Pimm v. Pimm, 601 So.2d 534, 537 (Fla. 1992); Deegan v. Deegan, 603 A.2d 542 (N.J. Super. Ct. App. Div. 1992); Stubblebine v. Stubblebine, 466 S.E.2d 764, 767 (Va. Ct. App. 1996).

84. Under North Carolina's child support guidelines, a court may not impute potential earnings to a retired parent if she is physically or mentally incapacitated or is caring for a child under the age of three years for whom support is being determined, or if suitable employment is not available to the parent.

85. *Mason*, 157 N.C. App. at 284, 579 S.E.2d at 120 (2003). As a result of Mr. Erwin's retirement, his income decreased from $3350 to $1500 per month.

86. *Osborne*, 129 N.C. App. at 34, 497 S.E.2d at 113 (1998).

a deliberate disregard of her obligation to provide support to the child for whom support is being determined.[87]

Thus, in *Roberts v. McAllister*,[88] the Court of Appeals affirmed a trial court's decision to impute potential earnings to an unemployed parent who chose to remain at home to care for her three-month-old child by her second marriage, even though the trial court found that the parent had not worked for ten years, had also chosen (with her first husband's consent) not to work outside the home following the births of the children from her first marriage (the children for whom support was being determined), and was not refusing to work in order to hurt or punish the children or deprive them of support.[89]

Imputing Potential Income to a Parent Who Is Attending School

A court may base a parent's child support obligation on her earning capacity rather than her actual income if the parent is not working, or is not working full-time, because she is attending school and the court finds that her decision to attend school rather than work is indicative of bad faith or a deliberate disregard of her responsibility to provide adequate support for her child.

North Carolina's Court of Appeals has considered a number of child support cases involving parents who are not working, or are not working full-time, because they are enrolled in and attending school, college, or university to pursue a certificate or an undergraduate, graduate, or professional degree. And, in almost all of these cases, the appellate court has concluded that the trial court erred in imputing income to a parent who was attending school rather than working to support his children.

In *Pataky v. Pataky*, a noncustodial parent voluntarily quit his job as a computer programmer (earning approximately $65,000 per year) in order to enroll in a full-time, two-year graduate program that would give him the education he would need in order to work as a school counselor.[90] Concluding that Mr. Pataky was "unemployed by choice" and had "deliberately suppressed his income and acted in deliberate disregard of his obligation to provide reasonable support" for his children, the trial court based Mr. Pataky's court-ordered child support obligation on the amount of income he had been earning as a computer programmer.[91] The Court of Appeals reversed the trial court's decision, noting that Mr. Pataky had, in fact, made arrangements to provide the amount of support for his children that he owed under the parties' separation agreement during the time that he would be attending graduate school and that there was no evidence that his

87. North Carolina's child support guidelines provide that a court may not impute potential earnings to a parent if the parent is physically or mentally incapacitated or suitable employment is not available.

88. *Roberts*, 174 N.C. App. at 369, 621 S.E.2d at 191 (2005). *See also In re* Register, 49 N.C. App. 65, 270 S.E.2d 507 (1980).

89. The North Carolina Court of Appeals held that Ms. Roberts was "voluntarily unemployed" and that her decision to stay at home to care for her child, rather than seeking and obtaining employment that would enable her to provide financial support for the children of her first marriage, reflected a "naïve indifference" to her children's need that was equivalent to an "intentional an willful avoidance" or "deliberate disregard of her responsibility to support her children." Roberts v. McAllister, 174 N.C. App. 369, 379, 621 S.E.2d 191, 198 (2005).

90. *Pataky*, 160 N.C. App. at 289, 585 S.E.2d at 404 (2003).

91. Pataky v. Pataky, 160 N.C. App. 289, 292, 585 S.E.2d 404, 407 (2003).

decision to quit his job and enroll in graduate school constituted bad faith or a deliberate disregard of his responsibility to provide adequate support for his children.[92]

Similarly, in *State ex rel. Godwin v Williams*, the North Carolina Court of Appeals reversed a district court judge's decision to impute income to an eighteen-year-old noncustodial parent who was enrolled as a full-time college student and was unemployed but seeking part-time employment.[93] Because the trial court failed to find that the parent's decision to attend college was reflective of bad faith or a deliberate disregard of his responsibility to provide adequate support for his child, the appellate court held that imputing earnings to the parent was legally erroneous.[94]

Imputing Potential Income to an Incarcerated Parent

The North Carolina Court of Appeals has not issued a reported decision involving whether, or under what circumstances, potential earnings or income may be imputed to a parent who is incarcerated in jail or prison at the time a child support order for the parent's child is entered or modified.[95]

In most cases, however, the issue of whether a court may impute income to an incarcerated parent is practically irrelevant because, regardless of whether a court bases an incarcerated parent's child support obligation on his potential, rather than actual, income, North Carolina law expressly provides that a child support obligation owed by an incarcerated parent does not accrue "during any period when the supporting party is incarcerated, is not on work release, and has no resources with which to make the payment."[96] The child support obligation of an incarcerated parent, therefore, generally is limited by his *actual* ability to pay child support through his earnings from participation in a work release program or other available resources.

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92. The Court of Appeals' decision was subsequently affirmed by the Supreme Court. Pataky v. Pataky, 359 N.C. 65, 602 S.E.2d 360 (2004). *Cf.* Goodhouse v. DeFravio, 57 N.C. App. 124, 290 S.E.2d 751 (1982) (affirming the trial court's application of the potential income rule when a parent sold his prosperous business, enrolled as a full-time college student, and had the "means, even upon his decision to forego all employment and become a full-time student, to provide adequately" for his child as required by an existing child support order).

93. *Godwin*, 163 N.C. App. at 353, 593 S.E.2d at 123 (2004). The trial court concluded that because the student had worked full-time at a minimum-wage job during the summer following his high school graduation, his child support obligation should be based on his capacity to work full-time at a minimum-wage job.

94. The Court of Appeals reached a similar decision in two other cases: Schroader v. Schroader, 120 N.C. App. 790, 463 S.E.2d 790 (1995) and Fischell v. Rosenberg, 90 N.C. App. 254, 368 S.E.2d 11 (1988).

95. "A considerable amount of case law [from other states] deals with whether a support order can be modified where the obligor's income has been reduced or eliminated because the obligor is incarcerated as the result of criminal conduct. Courts tend to treat the ultimate question presented by these cases as being whether the reduction in income was a *voluntary* action, thereby subjecting it to the voluntary reduction of income doctrine [or potential income rule]. Decisions which have found a voluntary reduction of income have stressed the voluntariness of the conduct leading to the incarceration and have held that a person convicted of a criminal offense should not get a reprieve when a voluntarily unemployed person would not. Courts which have refused to find a voluntary reduction of income have stressed the involuntary nature of the incarceration, and have also reasoned that the intention to commit a crime does not automatically translate into intention to limit income." Becker, "Voluntary Reduction of Income," 29 Conn. L. Rev. at 713–714.

96. G.S. 50-13.10(d)(4).

Imputing Potential Income to a Disabled Parent

If a parent's unemployment or underemployment is due to a mental or physical impairment or disability that prevents the parent from working, North Carolina's child support guidelines expressly prohibit a court from imputing income to the parent based on the parent's capacity to earn income from employment or self-employment.

Despite this general prohibition, however, a court may impute income to a mentally or physically disabled parent based upon the parent's potential eligibility to receive disability benefits from the Social Security Administration, the U.S. Department of Veterans Affairs, or another source, if

1. the parent fails to do apply for disability benefits for which she is eligible, *and*
2. the court finds that her failure to do so is indicative of bad faith or a deliberate disregard of her obligation to provide reasonable support for her child.

Evidence, Findings, and Burden of Proof Regarding Bad Faith

It is clear that North Carolina law prohibits a court from imputing potential income to a parent in a proceeding to establish or modify a child support order unless the court determines that the parent's failure to exercise his capacity to obtain income through employment or other sources is due to the parent's "bad faith,"[97] or more specifically, is motivated by the parent's desire or intent to depress or minimize his income in order to avoid his legal obligation to provide adequate support for his child.[98]

As noted above, however, a parent's "bad faith" or proscribed intent may (and usually must) be inferred from her actions.[99] And while evidence that a parent is voluntarily unemployed, is voluntarily underemployed, or has voluntarily reduced her income is insufficient, standing alone, to justify imposition of the potential income rule,[100] evidence that a parent is failing to exercise fully her capacity to earn income, a parent's deliberate disregard of her financial responsibility for her children, a parent's unreasonable refusal to seek or accept gainful employment, a parent's decision to voluntarily quit her job or change employment, and other actions or decisions that result in a reduction or depression of a parent's income *may* be sufficient to support a court's finding of "bad faith" and, thus, justify imputing potential income to the parent. [101]

It is also clear that a court may not impute income to a parent in a proceeding to establish or modify a child support order unless the court's order includes an express finding that the parent

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97. *See* Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd*. 359 N.C. 65, 602 S.E.2d 360 (2004), citing Bowers v. Bowers, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001); Sharpe v. Nobles, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997); King v. King, 153 N.C. App. 181, 185, 568 S.E.2d 864, 866 (2002); and Cook v. Cook, 159 N.C. App. 657, 583 S.E.2d 696 (2003).

98. *See* Pataky v. Pataky, 160 N.C. App. 289, 307, 585 S.E.2d at 404, 416 (2003), citing Wolf v. Wolf, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002).

99. Wachacha v. Wachacha, 38 N.C. App. 504, 509, 248 S.E.2d 375, 378 (1978).

100. *See* State *ex rel*. Godwin v. Williams, 163 N.C. App. 353, 357, 593 S.E.2d 123, 126 (2004); Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd*. 359 N.C. 65, 602 S.E.2d 360 (2004), citing King v. King, 153 N.C. App. 181, 185, 568 S.E.2d 864, 866 (2002); Bowers v. Bowers, 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001); and Sharpe v. Nobles, 127 N.C. App. 705, 709, 493 S.E.2d 288, 290 (1997).

101. Mason v. Erwin, 157 N.C. App. 284, 289, 579 S.E.2d 120, 123 (2003), citing Wolf v. Wolf, 151 N.C. App. 523, 526-27, 566 S.E.2d 516, 518-19 (2002) and Bowes v. Bowes, 287 N.C. 163, 214 S.E.2d 40 (1975); Cook v. Cook, 159 N.C. App. 657, 663, 583 S.E.2d 696, 699 (2003).

has acted in "bad faith," and a court's failure to do so constitutes reversible error.[102] If, however, a trial court makes such a finding as the basis for imputing potential income to a parent, the court's decision will not be reversed on appeal if its finding of bad faith is supported by competent evidence in the record.[103]

North Carolina law, though, is less clear with respect to the burden of proof on this issue. At least one appellate decision, *Mittendorff v. Mittendorff*, suggests that if the issue of a parent's earning capacity is raised in a child support case, the parent whose earning capacity is at issue has the burden of proving that he is not voluntarily unemployed or underemployed or has not acted in bad faith by deliberately disregarding his obligation to support his child.[104] It is important to note, though, that the *Mittendorff* case arose in the context of a parent's motion to modify an existing child support order, that a parent who files a motion to modify a child support order has the burden of proving, by a preponderance of the evidence, that a substantial change of circumstances has occurred since the order was entered,[105] and that the issue before the court was whether the reduction in moving parent's income constituted a substantial change of circumstances. When issues involving imputed income arise in connection with the entry of an initial child support order or in the second step of a proceeding to modify a child support order, the answer to the question as to which party has the burden of proof with respect to application of the potential income rule is far less clear.[106]

Determining a Parent's Earnings Capacity and Potential Income

When a court imputes potential income to a parent, the court also must determine, based on competent evidence, the amount of potential income that will be imputed to the parent and make findings with respect thereto.

In doing so, judges generally must determine the amount of a parent's potential income in accordance with North Carolina's child support guidelines, which state that the

> amount of potential income imputed to a parent must be based on the parent's employment potential and probable earnings based on the parent's recent work history,

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102. *See* McKyer v. McKyer, 179 N.C. App. 132, 147, 632 S.E.2d 828, 837 (2006). Most of the reported appellate decisions reversing a district court's decision to impute income in connection with the establishment or modification of a child support order have involved the trial court's failure to make sufficient *findings* regarding a parent's bad faith, not insufficient *evidence* regarding bad faith. *See* Ford v. Wright, 170 N.C. App. 89, 611 S.E.2d 456 (2005); State *ex rel.* Godwin v. Williams, 163 N.C. App. 353, 593 S.E.2d 123 (2004); Bowers v. Bowers, 141 N.C. App. 729, 541 S.E.2d 508 (2001); Chused v. Chused, 131 N.C. App. 668, 508 S.E.2d 559 (1998); Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998); Atwell v Atwell, 74 N.C. App. 231, 328 S.E.2d 47 (1985); Powell v. Powell, 25 N.C. app. 695, 214 S.E.2d 808 (1975).

103. *See* Pataky v. Pataky, 160 N.C. App. 289, 585 S.E.2d 404 (2003); Sharpe v. Nobles, 127 N.C. App. 705, 493 S.E.2d 288 (1997).

104. *Mittendorff*, 133 N.C. App. at 343, 344, 515 S.E.2d at 464, 466 (1999).

105. Allen v. Allen, 7 N.C. App. 555, 557, 173 S.E.2d 10, 12 (1970).

106. *See* Becker, "Voluntary Reduction of Income," 29 Conn. L. Rev. at 665 (suggesting that the normal rules regarding burden of proof in cases involving the establishment or modification of child support orders should be modified so that, if the issue of a parent's earning capacity is raised, the "burden of proving good faith [should] always [be] placed on the party asserting good faith").

> occupational qualifications and prevailing job opportunities and earning levels in the community.[107]

The guidelines, therefore, expressly allow a court to consider the amount of a parent's actual income from past employment in determining the amount of his potential income. But it is also important to remember that the amount of a parent's potential income generally must be based on the parent's *current* earning capacity or potential and prevailing job opportunities. A court, therefore, may not simply *assume* that a voluntarily unemployed or underemployed parent could earn the same amount she earned from her previous employment. Nor may a court simply *assume* that any able-bodied parent can find full-time work in which he can earn at least the minimum wage.

Instead, when a court is authorized to impute income to a parent in a child support case, the court must make specific findings of fact, based on competent evidence in the record, that are sufficient to support the "court's determination of the *amount* of income that should be imputed" to a parent as well as the court's determination that income should be imputed to the parent.[108]

Conclusion

North Carolina's potential income rule is easy to state, but is often difficult to apply and has been the source of dozens of reported appellate decisions that cannot be reconciled even through detailed, thorough, and systematic legal analysis.[109]

Some of the problems involving application of North Carolina's potential income rule arise because of a mistaken conflation of "bad faith" with "voluntariness," confusion with respect to whether or how the rule applies to the first step of the two-step process for modifying a child support order, the necessity of inferring "bad faith" from a parent's actions or decisions, and the difficulty of applying a general rule in a variety of different factual situations.

Other problems with respect to imputing potential income in child support cases, however, may arise because of the potential income rule itself. It may be that a potential income rule that is based on a "good faith" test is inherently flawed, that the rule's focus on the voluntariness of a parent's unemployment or underemployment leads to confusion in analysis, or that the rule reflects implicit policy choices that are inconsistent with other personal, social, and legal interests involved in the determination of the child support obligations of parents.

Unless or until the potential income rule is changed, however, it must be followed by North Carolina's courts when they establish or modify child support orders. And to do so, lawyers and judges first must understand the rule as it is stated in North Carolina's child support guidelines and as it is interpreted and applied by North Carolina's appellate courts. This bulletin provides a starting point for that admittedly difficult task.

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107. The guidelines suggest that the amount of a parent's potential income should not be less than the minimum hourly wage for a forty-hour work week when a parent has no recent work history or vocational training. *See* Roberts v. McAllister, 174 N.C. App. 369, 621 S.E.2d 191 (2005).

108. McKyer v. McKyer, 179 N.C. App. 132, 147-148, 632 S.E.2d 828, 837 (2006).

109. It has been suggested that some of the confusion regarding the imputation of income in child support cases is due to "what appears to be an increase in the number of reported decisions dealing with the issue, each with a new set of facts to suggest interpretations of the existing guidelines." Becker, "Voluntary Reduction of Income," 29 Conn. L. Rev. at 724.

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