LJN LAW JOURNAL NEWSLETTERS

The Matrimonial Strategist®

An ALM Publication

Volume 28, Number 12 • December 2010

Shirking or Just Hard Times?

The Earning Capacity Of the Unemployed and Underemployed

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Various courts across the country have wrestled with the issue of earning capacity in child support cases. In bleak economic times, the ability to recover from unemployment or to improve one's underemployment is often hampered by factors beyond the parent's control. In a bad economy, a range of recent decisions can be cited successfully to overcome the opposing argument that an earning capacity in excess of current income should be attributed to a parent.

What Is 'Shirking'?

In a case from Wisconsin, the courts analyzed whether the wife in this instance was "shirking" when she chose to retire early, then sought re-employment but could not find work as a physician in her community. In *Chen v. Warner*, 280 Wis. 2d 344, 695 N.W.2d 758 (Wis. 2005), the Wisconsin Supreme Court analyzed whether a mother has shirked her child support obligation when she was unemployed and sought child support from her ex-husband. Dr. Jane Chen and Dr. John Warner divorced in 1999 after 18 years of marriage, during which they had three children who were eight, six and four years old. At the time of the divorce, both were working full time as physicians, earning about the same amount. They had agreed to no child support or maintenance between them, and had an equally shared custody placement schedule, following a week-on and week-off schedule.

After the divorce, Dr. Chen, who had accumulated over $1,100,000 in investment savings and believing that she could support herself and the children based on 10% return on her investments, ($110,000 per year), quit her job to focus full-time on parenting. She did not seek child support. Shortly thereafter, the stock market took a downturn and her annual income from investments dropped to $32,000. Dr. Chen could not find employment in her community or nearby to accommodate the custody schedule, alternating placement weeks. When she sought child support from Dr. Warner, he argued that she failed to meet her responsibility to earn the income of a physician. While Dr. Warner testified that an at-home parent was preferable to a full-time child care provider, he argued that Dr. Chen should have sought available employment in more remote communities to meet her support obligation. He asked the court to impute income to her, which would effectively reduce his support obligation.

The Appellate Issue

The appellate issue was whether Dr. Chen's choice not to seek employment beyond her immediate community so that she could be available to parent the children, not just on her weeks, but during Dr. Warner's weeks, was reasonable or rather amounted to shirking. The court engaged in a detailed analysis of the facts to determine whether her choice was reasonable in light of her child support obligation. It used a "shirking" analysis, even though it stated that shirking was perhaps an awkward term. The court explained shirking, based upon prior case law, as follows:

> A circuit court would consider a parent's earning capacity rather than the parent's actual earnings only if it has concluded that the parent has been "shirking" ... To conclude that a parent is shirking, a circuit court is not required to find that a former spouse deliberately reduced earnings to avoid support obligations or to gain some advantage over the other party. A circuit court need find only that a party's employment decisions to reduce or forgo income is voluntary and unreasonable under the circumstances.
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> *Id*. at ¶ 20

All parties agreed that Dr. Chen's decision to stop working had been voluntary.

Fifteen Factors

The Wisconsin Supreme Court listed over 15 factors to consider in making the reasonableness determination. The factors included, *inter alia*, the number of children at home and their needs, the availability of child care, any detrimental effect on the child's support, the earnings history and potential earnings of the parent who wishes to retire, the

job market status, and the hardship or burden on the payer.

Although shirking might be found when a parent intentionally avoids the payment of child support, nonetheless a good motive, such as Dr. Chen's desire to be more involved with the children, could be important. "Shirking can be found even when the party reducing his or her income acts with the best intentions." *Id*. at ¶ 54.

While Dr. Chen actively sought employment in her community, she admitted that she did not seek work farther away. Similarly, there was no dispute that Dr. Warner, who earned more than $500,000 annually, had the ability to pay increased monthly child support of $2,800 and the effect on his monthly financial picture was "negligible," since he had about $12,000 of monthly income in excess of his wife's needs. The court spent a great deal of time analyzing the benefit to the children of a stay-at-home mother who could be involved in the children's activities such as field trips and schoolwork, and knowing their friends. In analyzing the relevant factors to determine whether Dr. Chen was shirking, the court agreed with the benefit to the children in concluding that the choice to forego seeking work outside of the community was reasonable.

Other Cases

In comparison, there have been two significant cases in Pennsylvania that have addressed underemployment. Not surprisingly, each case turns on its facts, and it appears there was a different result based on the particular family circumstances. In *Portugal v. Portugal*, 798 A.2d 246 (Pa.Super. 2002), the parties had married in 1987; the wife obtained her doctorate in veterinarian medicine in 1992; the parties' children were born in 1995 and 1997; and in 1997, the wife opened her own veterinary clinic. The husband moved to Washington State in January, 1999, for business purposes, which led to a marital separation, and a divorce complaint was filed in 2000.

The wife argued that her earning capacity should be based on her history of self-employment income as the owner of her own veterinary clinic. The husband argued that with her qualifications, the wife could earn much more as an associate veterinarian employed in an established clinic. The wife argued that recognition should be given to the fact that her husband had been supportive of her decision to open her own clinic. In addition, as a self-employed veterinarian, she would likely surpass the income of her colleagues in the future, notwithstanding the fact that her current income was less than half what an employee-veterinarian would earn. The trial court determined that the wife voluntarily assumed a lower-paying position, notwithstanding more lucrative opportunities, and she should be bound to the higher level of earnings. The superior court affirmed that decision, to avoid permitting the wife to subordinate the immediate financial needs of her children to her own professional aspirations.

A few years later, the Pennsylvania Superior Court appeared to be more sympathetic to the under-employed parent in *Grigoruk v. Grigoruk*, 912 A.2d 311 (Pa.Super. 2006). In this instance, the mother had enjoyed an annual income of $84,000 to $101,000 during her career in school administration. Thereafter, she became an administrator for the Girl Scouts, with an annual income of $90,000. In March, 2004, the mother left her position with the Girl Scouts. The father argued that the mother either voluntarily resigned, or was terminated for willful misconduct. The mother was unable to comment, as her severance agreement contained a confidentiality clause. For the purposes of determining child support, the Master in Support and the reviewing courts presumed that the mother was discharged due to willful misconduct. One year later, in March 2005, the mother filed to modify support. At trial, she proved that for over six months she had sought a position as a college professor, a school principal, or an educational position within the school districts. (Her Master's degree was in education and reading; her Doctorate was in education.) By September, 2004, the mother accepted a position as a reading specialist with an annual salary of $52,000, the only job offer she received. The Support Master determined that the mother's change in employment was not motivated by an attempt to minimize her support obligation. The court also found that the mother acted responsibly in seeking to mitigate her earning loss. The father argued that the mother should continue to make an effort to mitigate the lost earnings by pursuing a more lucrative position; the mother argued that to do so might trigger the loss of the job she nowhad.

Decline in Earning Capacity

If a parent voluntarily accepts a lower-paying job, he or she will not be allowed to circumvent a support obligation. In the instance where a parent is fired for cause, the court should consider child support if the parent establishes that he or she has sought to mitigate the lost income. The trial court adopted the Master's assessment of the mother's earning capacity based on current employment. The superior court affirmed the decision of the trial court, finding there was no abuse of

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discretion in declining to impose an on-going duty to mitigate.

A variety of jurisdictions have grappled with the issues of a decline in earning capacity. While many courts will assign imputed income, others have acknowledged facts and circumstances that warrant the decline in income. Based on facts presented in *In Re Marriage of Nielsen*, 759 N.W.2d 345, (Iowa Ct. App. 2008), the lower court would not impute income to a mother even though the father argued she was under-employed as she could move and get a better job. If the mother relocated, the parties' child, who had a heart condition and educational needs, could lose access to important medical care. The mother, a teacher, could not be blamed for local reduced student enrollment and the reduced number of teaching positions. Likewise, in *Missouri in Payne v. Payne*, 206 S.W.3d 379, (Mo. Ct. App. 2007), it was found that income should not be imputed to a father that would require relocation to another state; the court found that the father's relocation would not be in the child's best interest.

In a New Jersey case, *Ibrahim v. Aziz*, 953 A.2d 508, (N.J. Super. Ct. App. Div. 2008), the court found it inappropriate to assign to the father an earning capacity when he was a citizen, resident, and employed in a foreign country. The mother was not allowed to argue that his salary in America would have been higher. His actual earnings were considered appropriate under his circumstances. And in South Dakota, in *Hollinsworth v. Hollinsworth*, 757 N.W.2d 422 (S.D. 2008), the father had sought a deviation from the child support guidelines on the basis that the mother was only working part-time. The court determined that the mother had consistently worked part-time before the divorce, and no deviation was warranted when she continued to work on a part-time basis post-divorce. In *North Dakota, in Verhey v. McKenzie*, 763 N.W.2d 113 (N.D. 2009), the lower court was reversed when it found that the unemployed mother's earning capacity should be based on her monthly lifestyle, (spending $10,000), while she was draining her assets. Support should have been calculated based on the mother's income as an unemployed parent, and spending habits alone would not warrant deviation from the support guidelines.

Reasons for Unemployment

In many cases, the courts inquire as to how unemployment or underemployment came about. In New Jersey, in *Strahan v. Strahan*, 953 A.2d 1219, (N.J. Super. Ct. App. Div. 2008), it was noted that specific findings of fact must be made to determine if a spouse is voluntarily unemployed or under-employed. From that will flow the decision whether to impute earning capacity. In *Wyoming in Opitz v. Opitz*, 173 P.3d 405, (Wyo. 2007), the father voluntarily chose an occupation with a lower income, and the court imputed higher income on the basis that the children should not suffer from that decision. In a Florida case, *Brown v. Cannady-Brown*, 954 So. 2d 1206 (Fla. Dist. Ct. App. 2007), the husband had voluntarily terminated his position as a commercial pilot. On appeal, the court reversed the use of imputed income because the trial court had failed to make findings that the husband was either willfully unemployed or had failed to use his best efforts to obtain employment. In a Connecticut case, *Gentile v. Carnerio*, 946 A.2d 871 (Conn. App. Ct. 2008), assignment of earning capacity was allowed based on background and prior earnings where the underemployed party had made no good-faith efforts to find full-time employment. In an Indiana case, *Kondamuri v. Kondamuri*, 852 N.E.2d 939 (Ind. Ct. App. 2006), the appellate court found that the trial court had erred by determining that father's reduced income should be considered voluntary unemployment. On the contrary, the husband was paid through insurance reimbursements, and the decrease in those reimbursements was not a voluntary action that should increase his earning capacity above his earnings.

Conclusion

During lean times, many parties can ill-afford to litigate these child support cases extensively. These cases present difficult issues for Support Masters, trial courts and eventually appellate courts on review. Many parents cannot afford sophisticated vocational experts. The lower-budget technique of asking a job placement expert to testify as to available employment becomes difficult, since jobs are so hard to come by. More often, placement representatives refuse to testify "under oath" that jobs are available. A few years ago, relocation was quite prevalent, but now the cost-effectiveness is being questioned, particularly when the next job may well fail to provide long-term security.

Due to the current economic conditions, these cases are becoming even more relevant. Parents, including highly compensated professionals, have become underemployed due to cutbacks or downsizing. If such a party chooses to forego employment or seeks less lucrative employment to remain available for the children, is that choice made more reasonable by the lack of employment available in the community? How far must a parent seek work if the distance will have a detrimental effect on his or her ability to parent the children as he or she had before? What consideration should be given to the other parent who probably faces a heavier support burden? The decisions cited show that arguments that may have been unpersuasive in a robust economy could find a sympathetic ear from courts. The prospect of the next job on the horizon has dimmed for so many that the underemployed parent may not need to face the burden of support based on earning capacity. This means less despair for that parent, but surely belt-tightening for the entire family.

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