LAW AND THE FAMILY

## "Imputed or Attributed Income"

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In Kay v. Kay [FN1] a pre-equitable distribution action for a divorce, the

Supreme Court granted a wife of 23 years a divorce and awarded her alimony

and child support of $18,000 a year. The Appellate Division increased that amount

to $31,000 finding that the award did not properly reflect the pre-separation

standard of living.

The husband, a salesman, owned real estate and securities estimated at almost

a million dollars, two thirds of it in IBM stock, from which he derived an

income of $10,000. Most of his real estate investments were financed by the IBM

stock. During the marriage he told his wife that his only income was earned as

a salesman. He denied her many basic household necessities because he "could

not afford them." At the trial the husband testified that his expenditures for

himself and his family were $28,000 a year. Evidence at the trial revealed that

his employer supplied him with a car, used by himself and his family. The

husband's testimony was that his net income was $28,000 per year after taxes,

his gross income being $67,000 for which he gave a confusing explanation by

saying it was spent for business needs. The husband's evidence was also

ambiguous as to $13,000 listed as a business expense for tax purposes but

described by the husband as necessary "gratuities" in connection with his job.

At that time the husband's income and the parties' "pre-separation standard of

living" was determinative in awarding alimony, and the wife (or husband, as the

case may be) was not usually entitled to greater support. A pre-separation

standard of living maintained by exhausting almost all of the husband's

capital, and borrowing as much as possible, was not controlling as to the

amount of support to which a wife was entitled. [FN2]

In Kay, the Court of Appeals noted that the evidence justified a finding that

the husband's true income was much higher than his reported $28,000 per year,

and while he was entitled to plead self incrimination when asked about

deductions he labeled gratuities, the Court was not required to allow the

deduction. It stated that, faced with evidence that tends to obscure rather

than clarify a husband's true financial status, a court is entitled to make an

award based upon the wife's proof of her needs.

Alimony vs. Child Support

The Court distinguished the criteria for fixing alimony from those for child

support, noting that child support is to be made "out of the property of either

or both of its parents" and "as, in the court's discretion, justice requires,

having regard to the circumstances of the case and of the respective parties

and to the best interests of the child." It stated that the father's resources,

rather than his net income, were the limit upon a child support award where he

can afford more than he earns, and the interests of the child justify it.

The court held that if it were necessary for the husband to utilize his

capital or other assets for alimony or child support, they would not be exempt,

because he voluntarily maintained his finances in a form that limited the

income they produced. In Hickland v. Hickland, [FN3] another pre-equitable

distribution case, the husband, an engineer, with annual earnings in excess of

$45,000 persuaded his wife to let him try full-time farming as an occupation.

This was an experiment and the wife agreed to it expecting that it would

provide them with a living. After putting the plan into effect, the parties

continued to live in the marital residence and the farming, which took place at

Argyle Farm, became a losing proposition. After a tractor accident, the husband

hired someone to run the farm and devoted himself to freelance management

consulting. The trial court was unable to ascertain the husband's exact

consulting income because he failed to file income tax returns for the last few

years of the marriage. However, his testimony established it at not less than

$35,000 net annually until the year in which separation proceedings, were

begun. During negotiations for a separation agreement the husband decided to

abandon an outgoing consulting assignment which would have paid him

approximately $20,000 for 10 weeks' work. He insisted that he had become a

full-time farmer and refused all offers of consulting employment ever since.

During the same time, the husband entered into a contract with his sister,

where he turned over to her title to all of his real estate, including the

marital residence and Argyle Farm, along with various stocks and bonds which he

then owned. In exchange, his sister forgave a small loan and guaranteed him the

use of a car and its related expenses, all the food he needed from the farm, a

remodeled house on it to live in rent free, $15,000 in benefits to each of his

children upon his death, a college education for his minor son, and a

percentage of any possible profits from the farm and the securities. He agreed

to manage the farm and the stock portfolio without salary. At trial he asserted

he was a subsistence farmer with no income from which to pay alimony to his

wife.

What the Appeals Court Said

The Court of Appeals found that the husband deliberately stripped himself of

income for reasons which went beyond the needs of a reasonable occupational

choice. It found that he was capable of earning a substantial income, and his

arrangement with his sister appeared to be an impermissible attempt to avoid

his obligation to his wife. The court held that the husband could not avoid his

obligations by relying on his wife's acquiescence in his plan to take up

farming, noting that he never actually put his plan into full practice while

the marriage was viable, but only after the parties had already separated.

The Court of Appeals held that :

It is the actual marital standard of living, realistically appraised, which

provides the basis for an award of alimony where the husband can afford to

maintain that standard, unless he can present genuine reasons, vocational or

otherwise, upon which the court could justify a lesser award (\*\*\*). So

measured, the husband's proof here fell far short of showing that his lack of

income was either unavoidable or the result of a plan to which the wife was

irrevocably committed. Under such circumstances, a husband is under an

obligation to use his assets and earning powers if these are required in

order to meet his obligation to maintain the marital standard of living....

In enacting the Equitable Distribution Law (EDL) in 1980 the Legislature

substituted "maintenance" for "alimony." The original objective of the

maintenance provision was to award the recipient spouse an opportunity to

achieve independence. However, the maintenance provisions of the statute

were amended in 1986, [FN4] and the prior standard of living again became the

objective that the Court should try to reach when awarding maintenance.

The General Rule

The general rule is that income will be imputed to a spouse for purposes of

awarding maintenance in an amount sufficient to meet the objective of the pre-

separation standard of living, based upon a finding of a past demonstrated

earnings potential; [FN5] past earnings, actual earning capacity and

educational background; [FN6] receipt of perquisites of cash and other company

benefits; [FN7] and where a spouse voluntarily maintains his/her assets in a

form which limits the income they produce. [FN8]

The Domestic Relations Law provide that in awarding child support, the Court,

in the exercise of its discretion, may attribute or impute income to either

parent - from any resources as may be available to the parent, including, but

not limited to:

1) Non-income-producing assets; [FN9]

2) Meals, lodging, memberships, automobiles, or other perquisites that are

provided as part of compensation for employment to the extent that such

perquisites constitute expenditures for personal use or which expenditures

directly or indirectly confer personal economic benefits;

3) Fringe benefits provided as part of compensation for employment;

4) Money, goods, or services provided by relatives and friends; [FN10] and

5) The parent's former resources or income, if the Court determines that a

parent has intentionally reduced resources or income in order to reduce or

avoid the parent's obligation for child support. [FN11]

The apparent reason for this specific provision is because the objectives of

maintenance and child support are different. The Child Support Standards Act

(CSSA), enacted in 1989, had among its objectives the assurance that both

parents would contribute to the support of the children, and that the children

would not "unfairly bear the economic burden of parental separation." The

emphasis was to shift "from a balancing of the expressed needs of the child and

the income available to the parents after expenses to the total income

available to the parents and the standard of living that should be shared with

the child." [FN12]

DRL 240 authorizes the court to impute income to a parent for purposes of

fixing child support, where the parent "receives money, goods or services from

a relative or a friend." An order increasing child support was affirmed by the

Appellate Division where it was established that the father received money,

good and services from his present wife. [FN13] It held that the increase was

proper, in light of his allegedly reduced income, his failure to supply

requested financial information regarding his businesses and discrepancies

between those financial records which he did supply and his income tax return.

However, in Huebscher v. Huebscher, [FN14] an action for divorce where

the wife was apparently honest with the court, the First Department held that

plaintiff's testimony that defendant wife's mother had provided the couple with

annual gifts during the course of their marriage, coupled with other evidence

of her past generosity, was an improper basis upon which to impute income to

the wife for purposes of establishing the proper level of child support, as it

assumed that the gift-giving by her mother would continue in futuro. The court

held that "since the mother had no legal obligation, this 'income' source

should not have been taken into account.''

Income may not be attributed to a spouse's former occupation or business where

the spouse's proof shows that his lack of income was either unavoidable or the

result of a plan to which the other spouse was irrevocably committed. [FN15]

Calculation: Law, Fact

The calculation of a party's earning potential must have some basis in law and

fact, and an award based on imputed or attributed income will be reversed

where there is no evidence or factual basis for it in the record. [FN16 ]Thus, in

Martusewicz v. Martusewicz, [FN17] the Appellate Division held that the trial

court erred in imputing income to the husband of $60,000 per year, where it

made no finding that he voluntarily reduced his income to avoid paying child

support and the wife did not present any proof concerning the husband's tax

returns or business practices.

In Marino v. Marino, [FN18] the Supreme Court determined that the husband's

annual income included at least $10,000 in unreported cash and $5,000 for the

use of a company vehicle provided by the family. Although there was evidence

that he received cash from his father, there was no proof regarding the amount.

The record contained no indication whether the money represented occasional

gifts to the husband from his father or regular compensation from his employer.

The Appellate Division held that absent proof of the nature or amount of the

cash received there was no basis for imputing the unreported cash income to the

husband. And, as there was no evidence that he used his company vehicle for his

personal needs, the trial court improperly imputed additional income to him.

FN(1) (1975) 37 NY2d 632.

FN(2) Winkler v Winkler (1960) 25 Misc 2d 938, 207 NYS2d 940, affd (1st

Dept) 13 App Div 2d 924, 216 NYS2d 307, affd 11 NY2d 693, 225 NYS2d 763,

180 NE2d 915 and affd (1st Dept) 19 App Div 2d 697, 242 NYS2d 603.

FN(3) 39 N.Y.2d 1,346 N.E.2d 243, 382 N.Y.S.2d 475 (1976)

FN(4) Laws of 1986, ch. 884, effective Aug. 2, 1986

FN(5) Rocanello v. Rocanello, 678 NYS2d 385 (AD 2nd Dept 1998)

FN(6) Junkins v. Junkins, 238 A.D.2d 480, 656 N.Y.S.2d 650 (2d Dep't,1997)

FN(7) Isaacs v. Isaacs, AD2d, 667 NYS2d 740 (AD 1st Dept. 1998); Brown v.

Brown, 239 A.D. 2d 535, 657 N.Y.S.2d 764 (2d Dep't, 1997)

FN(8) Kay v. Kay, supra.

FN(9) DRL 240(1-b)(b)(5)(iv)(A).

FN(10) Id.; See Tesler v. Tesler, 228 A.D.2d 491, 644 N.Y.S.2d 316 (2d Dep't

1996)

FN(11) DRL 240(1-b)(b)(5)(v). See Darling v. Darling, 220 A.D.2d 858, 632

N.Y.S.2d 252 (3d Dep't 1995).

FN(12) Cassano v. Cassano, 85 NY2d 649, 628 NYS2d 10 (1995)

FN(13) Ladd v. Suffolk County DSS, 199 A.D. 2d 393, 605 N.Y.S. 318 (2d

Dep't 1993)

FN(14) 206 A.D.2d 295, 614 N.Y.S.2d 524 (1st Dept.,1994)

FN(15) Hickland v. Hickland, supra

FN(16) Petek v. Petek, 239 A.D.2d 327, 657 N.Y.S.2d 738 (2d Dep't 1997)

FN(17) 217 A.D.2d 926, 630 N.Y.S.2d 156 (4th Dep't 1995)

FN(18) 229 A.D.2D 971, 645 N.Y.S.2D 252 (4TH DEP'T 1996)

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